THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 2

Case No. 565 — Case No. 1194

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BOOK 2

ARTHUR—BEATAUGH

Case No. 565—Case No. 1,194

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FEDERAL CASES.

BOOK 2.

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

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

Case No. 565.

ARTHUR v. NEW ENGLAND MUT. LIFE INS. CO.

[7 Reporter, 329; 6 Wkly. Notes Cas. 403.]

Circuit Court, E. D. Pennsylvania. Jan. 25, 1879.

REMOVAL OF CAUSES — RECORD — FILING BY ADVERSE PARTY—ACT MARCH 3, 1875.

[1. The filing of the petition of removal and bond, as provided in Act March 3, 1875, § 3, (18 Stat. 471,) ipso facto deprives the state court of jurisdiction, and from that time the case is in the federal court. Taylor v. Rockefeller, Case No. 13,802, followed.]

[2. Under Act March 3, 1875, § 3, (18 Stat. 471,) a copy of the record in the state court may be filed before the first day of the "then next session" of the federal circuit court; and, if the party removing the cause fails to file a copy before that time, his opponent may do so.]

[At law. Action of debt on a policy of life insurance in the court of common pleas No. 4, Philadelphia county, Pa., by Arthur's administrators against the New England Mutual Life Insurance Company. The defendant removed the cause to this court. Heard on defendant's motion to extend the time of pleading, or to strike from the record the copy of the record in the state court which has been filed by plaintiffs. Motion denied.

[The summons in this case was returnable in the state court on the first Monday in August, 1878. The defendant's petition and bond for the removal of the cause to the federal circuit court was filed in due form October 16, 1878, before any pleadings had been filed. In accordance with Act March 3, 1875, § 3, (18 Stat. 471,) the bond was conditioned for the defendant's "entering in such circuit court, on the first day of its then next session, a copy of the record in such suit." The then next session of the circuit court was that beginning on the first Monday in April, 1879. As the defendant took no further steps, the plaintiffs filed a copy of the record in the state court; then filed their declaration, and took a rule to plead.]

S. C. Perkins, for the motion.

[The act provides for a filing of a copy of the record by the party petitioning for removal, and his opponent should not be allowed to succeed to the petitioner's rights. The plaintiffs might have brought the case originally here, and by so doing they could have avoided all delay. But they have first brought the action in the state court, and now seek to deprive the defendant of its right, viz. to delay the filing of the record until the time fixed in the act,—"the first day of the then next session," which in this case is the first Monday in April, 1879.]

McKENNAN, Circuit Judge, here said that to file on the first day means on or before. Defendant would not contend that he had no right to file the copy of the record and rule the plaintiffs to declare before the day named in the act. The language of the statute meant merely to impose a limit of time within which the copy of the record must be filed, not to forbid speedier action.

[S. C. Perkins, continuing, said: The act was intended to give the petitioner for removal the option to file on or before the day named. It was intended for his benefit. The judiciary act of 1789, § 12, (1 Stat. 79,) uses the same language; yet no case can be found in which the nonpetitioning party attempted to file the copy of the record. The intention of the act of 1789, and that of 1875, was that the cause should be begun anew in the federal circuit court. The established usage under the statute is proof of its meaning. The argument of inconven-

lence should not be allowed to prevail over the words of the statute. Plaintiffs could not sue defendant on its bond if it filed a copy on the first Monday of next April, and this proves its right to delay the filing until that time.]

[A. Sidney Biddle, (and with him William Darlington,) against the motion. As soon as the petition and bond have been rightly filed, the state court loses jurisdiction, and any further proceedings by it are void. Taylor v. Rockefeller, Case No. 13,802. Where, then, is the cause from that time, if not in this court? If here, then the nonpetitioning party can perform the ministerial act of filing a copy of the record which enables this court to deal with the cause. Otherwise in the case of a motion for a preliminary injunction, or for a receiver in the state court, a respondent could delay the cause six months by filing his petition and bond, and refusing to file a copy of the record,—a construction which would make the act destructive of the most important rights.]

McKENNAN, Circuit Judge, (orally.) No statute is to be read in the way contended for by the defendant's counsel. Such a contention could only be supported by the most unambiguous enactment, and I fail to find anything of the sort in the act of congress in question. It never could have been intended by the national legislature to destroy the parties' rights by an act which professedly extended their right of litigation in this court; and the illustration used in argument shows how completely the complainant in any suit would be at the mercy of his opponent if such were to be its construction. We recently decided in Taylor v. Rockefeller, [Case No. 13,802,] that the state court ceased to have jurisdiction upon the proper filing of the petition and bond in cases where the act of congress gave jurisdiction in the cause to the court. The result is, that the cause from that time is, in theory, in this court, and the only question is, whether, where the party who has the right neglects to file the copy to the detriment of the other party, the latter cannot do it for him. I have no doubt that he can, and therefore the motion must be denied. Motion denied.

ARTHUR, (POTT v.) See Case No. 11,319.
ARTHUR, (ROGERS v.) See Cases Nos. 12,006 and 12,007.
ARTHUR, (VON STADE v.) See Case No. 16,998.
ARTHUR, (WEIHENMYER v.) See Case No. 17,360.
ARTHUR, (WHITNEY v.) See Case No. 17,582.
ARCTIC, The. See Case No. 6,392.

Case No. 566.

The ARTISAN.

[Nowhere reported; opinion not now accessible.]

Case No. 567.

The ARTISAN.

[8 Ben. 538.][1]

District Court, S. D. New York. Nov., 1876.

SEAMAN'S WAGES—STALE CLAIM.

In 1872, W. shipped at Sag Harbor, N. Y., as mate on the steamboat A. When he left her in November, 1872, there was a balance of $40 due him for wages. In March, 1876, he filed a libel against the A. to recover that balance. One-half of the vessel was sold in June, 1875, and the other half in February, 1876, to a bona fide purchaser without notice of the libellant's claim. During all the time before the filing of the libel the vessel was running or laid up in the waters about New York. She was in Sag Harbor twice a week from February to April, 1873. In 1875, she was in custody of the marshal of the eastern district, in which Sag Harbor is situated, for 125 days, and was then bonded. The libellant resided all the time in Sag Harbor. He did not know what had become of the vessel, but he made no effort to find her till the fall of 1874, when he put the claim in the hands of the proctor who afterwards filed this libel: *Held*, that the libellant had lost his lien, by his laches in seeking to enforce it, the rights of bona fide purchasers having intervened.

[Cited in The Wexford, 7 Fed. 680; The Bristol, 11 Fed. 163.]

[In admiralty. Libel in rem by Dominick White against the steamboat Artisan for wages. Libel dismissed without costs.]

S. L. Gardiner, for libellant.
Beach & Brown, for claimants.

BLATCHFORD, District Judge. This is a libel for seamen's wages. The libellant, Dominick White, shipped on board of the steamboat Artisan, as mate, at Sag Harbor, N. Y., in the summer of 1872, and served on her for 5 months, at $40 a month, leaving her in November, 1872. She ran between Bridgeport and New York. A balance of $80, or two months' wages, is claimed to be due. The claimants purchased one-half of the vessel in June, 1875, and the other half of her in February, 1876, and had no notice of the libellant's claim until this suit was brought. The libellant, during the interval between his service and the bringing of this suit, resided in Sag Harbor. This suit was commenced in March, 1876. Sag Harbor is in the eastern district of New York. From February, 1873, to April, 1873, the vessel ran twice a week between Sag Harbor and New York. From December, 1873, to March, 1874, she was laid up at Jersey City, New Jersey. From March, 1874, to June, 1874, she ran three times a week between New York and Newburgh. From June, 1874, for four months, she ran between New York and Sandy Hook, New Jersey. From the fall of 1874 to June, 1875, she lay at a wharf in Jersey City, in the Hudson river. From June, 1875, for 4 months, she ran between New York and Sandy Hook. The libellant did not know

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

what had become of the vessel, but he made no efforts to find her until the fall of 1874, when he put the matter into the hands of the proctor who filed this libel. Some time in 1875 the vessel appears to have been libelled in the district court for the eastern district of New York, for a large number of claims. Under process in those suits she lay at a pier in the Hudson river, at the city of New York, in charge of the United States marshal for said eastern district, for 125 days, at the end of which time she was bonded. Subsequently to such bonding, the proctor in this suit enquired at the office of the clerk of the district court for said eastern district, in Brooklyn, and learned that the vessel had been libelled and bonded. No evidence is given showing that any other effort was made to find the vessel.

Not only did the vessel ply between New York and Sag Harbor in the spring of 1873, but, during the years 1874 and 1875 she was, for long periods, in waters within the jurisdiction of this court and of the district court for the eastern district of New York. This suit was brought more than three years after the termination of the libellant's service. By the act of February 25, 1865, (13 Stat. 438, § 2, now section 542, Rev. St.,) the district courts of the southern and eastern districts of New York have concurrent jurisdiction over the waters within the counties of New York, King's, Queen's and Suffolk, and over all seizures made and all matters done in said waters, and all processes or orders issued out of either of said courts, or by any judge thereof, may run and be executed in any part of the said waters. The defence set up to the libellant's claim is that the libellant has, by laches, lost his lien. I think the delay in enforcing the lien constitutes, under the circumstances of this case, a valid defence. The libellant had a reasonable opportunity to enforce his lien, but he waited until after the rights of the claimants as bona fide purchasers intervened, and I do not think his delay is excused. 2 Pars. Mar. Law, 663; The Admiral, [Case No. 84;] The Louisa, [Id. 10,652;] The Buckeye State, [Id. 13,445;] The Lillie Mills, [Id. 8,352;] The General Jackson, [Id. 5,314;] The Key City, 14 Wall. [81 U. S.] 653; The Favorite, [Case No. 4,696;] The Harriet Ann, [Id. 6,101.] The libel is dismissed, but without costs.

Case No. 568.

The ARTISAN.

[9 Ben. 106.][1]

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

SEAMEN'S WAGES—CHARTERED VESSEL—LIABILITY OF OWNERS.

1. Where seamen were hired by a master of a steamer, who was put in charge by the charterers of the vessel, under their contract with the owners, and after fifteen days labor in getting the vessel ready for sea, were discharged without pay, the voyage being given up: *Held*, That the seamen had a lien on the vessel for their wages, notwithstanding the charterers by the contract were to pay the crew;

[Cited in The International, 30 Fed. 376.]

[See The Samuel Ober, 15 Fed. 621; Hart v. The Enterprise, Case No. 6,151.]

2. The main duty of seamen being in ship's work, an incidental condition of their contract to do work on shore, does not deprive them of a lien upon the ship.

[Cited in The L. L. Lamb, 31 Fed. 34; The International, 30 Fed. 376.]

In admiralty.

Wm. G. Wilson, for libellants.

Owen & Gray, for claimants.

BENEDICT, District Judge. This action is brought by the crew of the steamer Artisan, to recover wages for services performed on board that steamer, in the port of New York. It appears that the steamer had been chartered by Howes & Cushing, for a period of six months, to be used in transporting a circus company intending to exhibit in various parts of South America. By the charter, the charterers were to furnish the master and crew. Accordingly a master was appointed by the charterer, who took command of the vessel and shipped the libellants as the crew. The libellants went on board and worked some fifteen days in ship's work, getting the ship ready for sea, when the adventure was abandoned and the crew was discharged without any payment whatever. Whereupon they instituted this action against the vessel to recover for labor actually performed by them on board the vessel, and for their expenses for board during that period.

The owners of the vessel have intervened and contest the demand, first, upon the ground that inasmuch as between them and the charterers, the wages of the crew were to be borne by the charterer, no lien attached to the vessel. This ground is untenable. There may be cases where a lien is created upon a ship without any personal liability attaching to the owners of the ship. This is such a case. This crew was hired by one permitted by the owners to be on board and in command of the vessel, as the master thereof, with apparent and actual authority to hire the ship's crew. Sailors employed in the ordinary method by the master of a vessel and working on board thereof in ship's work, have a lien upon the vessel, whoever may be liable as owner of the vessel. The credit of the ship is presumably an element in every mariner's contract, and strong evidence should be required to prove its absence. No such evidence is here presented.

A second ground of objection is that it was part of the contract of the crew to work on shore for the circus company when the vessel should be in port, and their serv-

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ices be required. The testimony does not very clearly show such a feature of the contract, but if it were shown no defence to the demand would be made out.

The main and principal duty provided for by the contract, was that of navigating the ship. Any labor on shore when the vessel was in port would be merely incidental and not sufficient to deprive the contract of its maritime character. See The Canton, [Case No. 2,388;] The Brookline, [Id. 1,937;] The Charles F. Perry, [Id. 2,616.]

The libellants are entitled to a decree for the amounts they have respectively shown by their depositions to be due.

ARTISANS' INS. CO., (WASHBURN v.) See Case No. 17,212.

ARTMAN, (COMMONWEALTH OF PENNSYLVANIA v.) See Case No. 10,952.

Case No. 569.

The A. R. WETMORE.

The EPSILON.

[5 Ben. 147.][1]

District Court, E. D. New York. May, 1871.

COLLISION AT PIER—PLEADING—TOWBOAT AND TOW.

1. A steamboat was lying, properly moored, at a pier in the North river, in the harbor of New York. A schooner, in tow of a tug, was towed by the pier, when the tow-line parted, and the schooner, by force of the wind and tide, was carried against the steamboat. The owners of the steamboat filed a libel against both the schooner and the tug to recover the damage occasioned by the collision. The libel alleged no other facts than as above stated. The answer of the schooner admitted that the accident arose from the parting of the line, and that the schooner furnished the line, and averred that the line broke because it was not sufficient for towing the schooner stern foremost, and charged as a fault on the tug, the omission to take a second line. The answer of the tug denied that the breakage of the line arose from any act or neglect of the tug. The libellant proved only the facts alleged in his libel. Neither the schooner nor the tug offered any evidence whatever. *Held*, that, as the steamboat was lying moored at a pier, and unable to move or to do anything to prevent the collision, it was sufficient, as against the schooner, to aver that she ran into the steamboat.

[Cited in The Chickasaw, 38 Fed. 363.]

2. That, under the answer of the schooner, and in the absence of any evidence to the contrary, the schooner must be presumed to have been adrift by her own act, and must be held liable for the damage which she did by drifting against the steamboat.

3. That, as the schooner was not connected with the tug at the time of the collision, and the power which drove her into the steamboat was that of wind and tide, there was no presumption of responsibility for that act, against the tug; and that on the evidence there was no careless action shown to have been committed on her part.

[Cited in The Chickasaw, 38 Fed. 361.]

4. That the libel, therefore, must be dismissed as against the tug, and a decree rendered against the schooner.

In admiralty.

T. E. Stillman, for libellant.
R. D. Benedict, for The Epsilon.
C. Donohue, for The A. R. Wetmore.

BENEDICT, District Judge. On the 24th day of March, 1870, the steamboat Thomas P. Way, while lying properly moored at pier 27, in the Hudson river, inside the pier and on the upper side thereof, was run into by the schooner A. R. Wetmore, and sustained damages, to recover which this action is brought against the schooner, and also against the steamtug Epsilon.

The accident occurred in the day time, and on an ebb tide, when there was no current, or wind or ice, a fog, or other vessels, which in any way prevented or interfered with the proper navigation of the vessels proceeded against. The only material facts alleged in the libel are that the Thomas P. Way, when properly moored, as above stated, was run into and damaged by the schooner A. R. Wetmore, in consequence of the breaking of a hawser by which the schooner was being towed by the tug Epsilon. And upon these facts a decree is sought against the schooner, or the tug, or both.

In a case like this, where the injured vessel, owing to the fact that she was moored at a pier, was under no obligation to move, and unable to do anything to prevent or to cause the collision, it is doubtless sufficient, as against the schooner, to aver that she ran into the vessel so moored, (The Bothnia, 1 Lush. 52;) and where the circumstance, charged as occasioning the accident, is of such a nature as to render it impossible for the injured vessel to know which of two vessels is responsible for its occurrence, it may be permitted to state the case in the manner here adopted. In cases of this description, a decree may be rendered against one or both of the vessels proceeded against, as the evidence shall locate the fault causing the accident.

The answer of the schooner is meagre and uncertain. It seemingly concedes that the collision arose from the circumstance that the towing line parted, and it expressly admits that the schooner furnished the line. But it avers that the line broke because one line was not sufficient to tow the schooner stern foremost, and charges upon the tug, as a fault, the omission to take a second line. Under this answer there must be a decree against the schooner, unless she show negligence on the part of the tug, in towing the schooner stern foremost with a single line; and for this purpose she may resort to any evidence in the cause, and to any averment in the libel or in the answer of the tug. Neither the libel nor the answer of the tug states that it was improper to tow the schooner stern foremost, or that such a

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method of towing required a stronger line than the one used, or that the tug was responsible for the employment of the line that was used. The defence of the schooner must, therefore, be sought for in the evidence. But no evidence whatever was introduced by either the schooner or the tug, and the evidence of the libellant is as silent as the libel in respect to any matter of defence set up by the schooner.

In the absence of any evidence to the contrary, the schooner must be presumed to have been adrift by her own act—and here there is no evidence tending to prove the matters which the schooner has set up in her answer, and nothing in the evidence or the pleadings to rebut that presumption. It follows, therefore, that the schooner must be held liable to pay for the damage which she admits having done by drifting into a vessel properly moored at a pier.

The case against the tug is different, and she has put in a separate defence. The libel admits, and the evidence proves, that the damage sued for was done by the schooner, which was at the time unconnected with the tug, and that the power, which drove the schooner into the libellant's vessel, was that of the wind and tide, and not power derived from the tug. No presumption of responsibility for the act of the schooner can therefore arise against the tug, and, to render her liable, some neglect on her part, which placed the schooner adrift, must be shown. The answer of the tug admits her employment to tow the schooner, and that, while so employed, the schooner became detached from her by the breaking of the line—but it denies that the same arose from any act or neglect of the tug, and it contains no admission which will serve to fasten upon the tug a responsibility either for the breaking of the line or for its condition. In the evidence there is nothing tending to show any careless action or undue strain which would break a line.

Upon these pleadings and proofs I am unable to see how the libellant can ask a decree against the tug. The only ground put forth on the argument was that the answer of the tug admits the insufficiency of the line. Assuming this admission to be contained in the answer, or conceding that on the evidence the fact appears that the schooner became adrift by reason of the insufficiency of the line, still, in order to charge the tug, it must appear that she was responsible for that insufficiency.

The evidence discloses no strain put upon the line which a sound line would not bear; nor does any witness say that the mode adopted for towing the schooner called for a stronger line than would have been required to tow her bow first. The fair inference from the evidence is that the schooner became adrift because of the unsoundness of the line; but whether the line was unsound or was too light for the work, the responsibility is the same upon these proofs, inasmuch as the schooner admits that the line was hers, furnished by her for the purpose of being towed by it. I am of the opinion, therefore, that no case is made out against the tug, and that the libellant is entitled to a decree against the schooner alone for the amount of his damage.

ASA R. SWIFT, The, (RUSSEL v.) See Case No. 12,144.

Case No. 570.

ASBESTOS FELTING CO. v. UNITED STATES & F. S. FELTING CO.

[13 Blatchf. 453;[1] 2 Ban. & A. 369; 10 O. G. 828.]

Circuit Court, S. D. New York. July 11, 1876.

PATENTS FOR INVENTIONS — INTERFERENCE — ENJOINING SUITS FOR INFRINGEMENT — CANCELLATION OF JUNIOR PATENT.

1. A junior patent was issued after an interference had been declared by the patent office between the application for it and a senior patent, and a decision in favor of the subsequent applicant. The owner of the senior patent then filed a bill against the owner of the junior patent, alleging the conflict of the patents, and that the invention covered by the senior patent was prior in time, and that the defendant had brought suits for the infringement of his patent, and praying that the junior patent might be cancelled, and that, pendente lite, such suits on it might be enjoined. A preliminary injunction to that effect being applied for: *Held*, that it could not be granted.

[Cited in Kelley v. Ypsilanti Dress-Stay Manuf'g Co., 44 Fed. 22.]

2. The fact of the decision on the interference is sufficient ground for refusing the application.

[Cited in Kelley v. Ypsilanti Dress-Stay Manuf'g Co., 44 Fed. 22.]

3. The defendant ought not to be restrained from bringing suits on his patent, before that patent is adjudged to be invalid.

[Cited in Strait v. National Harrow Co., 51 Fed. 820.]

[Compare Birdsell v. Hagerstown Agr. Imp. Manuf'g Co., Case No. 1,437.]

[In equity. Bill by the Asbestos Felting Company, owners of a patent, against the United States & Foreign Salamander Felting Company, owners of a junior patent, for the cancellation of such junior patent, and for an injunction restraining the prosecution of suits on such patent. Injunction denied.]

Jonathan Marshall, for plaintiff.

George E. Betton, for defendant.

BLATCHFORD, District Judge. The plaintiffs, owners of a senior patent, allege, in their bill, that the defendants are owners of a junior patent, which was issued after an interference had been declared, and testi-

[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 2 Ban. & A. 369; and here republished by permission.]

mony had been taken, and the patent office had decided in favor of the subsequent applicant. The bill further alleges that the patents are in conflict; that the later patent was obtained through fraud, but in what manner is not set forth; and that the defendants have brought suits in Massachusetts for the infringement of their patent. It also alleges the priority in time of the invention covered by the senior patent, and prays that the junior patent may be cancelled, and that, until an adjudication in this suit, the defendants may be enjoined from bringing suits for the infringement of the junior patent. An application is now made for such injunction.

It ought, probably, to be a sufficient reason for denying this application, that the defendants' patent was granted after a full hearing before the patent office, on testimony taken in an interference declared between the application for such patent and the plaintiffs' patent. But, in addition to this, I have examined such testimony, and it shows plainly that the defendants' patent was properly granted, and that, as between it and the plaintiffs' patent, the latter cannot prevail.

Independently of the foregoing considerations, I am not aware of any principle which would authorize the court, in a suit of this character, to restrain a defendant from bringing suits on his patent, before that patent is adjudged to be invalid. The granting of the patent to the defendants confers the right to bring suits thereon for its infringement. Especially is this so as between the parties to this suit, in view of the interference and its result. There is no evidence to sustain the charge of fraud, even if the plaintiffs could be heard to make it. The application for an injunction is denied.

ASBESTOS FELTING CO., (UNITED STATES & F. S. FELTING CO v.) See Case No. 16,787.

ASBURY, (YORK BANK v.) See Case No. 18,142.

Case No. 571.

In re ASH.

[17 N. B. R. 19.]

District Court, S. D. New York. Jan. 7, 1878.

BANKRUPTCY—COMPOSITION—EXAMINATION OF BANKRUPT.

[A bankrupt may be compelled to present himself and produce his books before the register for examination on the question whether a composition entered into in his case is for the best interest of all concerned.]

In bankruptcy.

Chamberlain, Carter & Eaton, for opposing creditor.

Richard S. Newcombe, for alleged bankrupt.

I, James F. Dwight, one of the registers of the said court in bankruptcy, do hereby certify, that in the course of proceedings in said cause before me, and at the second meeting in composition held before me on the 3d day of January, 1878, pursuant to an order of this court dated the 24th day of December, 1877, the following questions arose pertinent to the said proceedings, and were stated and agreed by the counsel for the opposing parties, to wit: Mr. Richard S. Newcombe, who appeared for the alleged bankrupt, and Messrs. Chamberlain, Carter & Eaton, who appeared for Strauss, Kupfer & Co., one of the creditors of said alleged bankrupt, opposing the composition.

Mr. Eaton of counsel for said creditor made the following motion: First.—That he may be allowed to examine the alleged bankrupt touching the question of "best interest of the creditors." Second.—That the register direct the alleged bankrupt to produce his books and papers to be used upon such examination; and Third.—That he be allowed to examine the said alleged bankrupt and the said books at once. Mr. Eaton, in support of said motion, said that he expected to show that the proposed composition was not for the best interest of the creditors, by showing, first, that the alleged bankrupt had cancelled assets which did not appear in his statement; and, second, that several of the claims upon which proofs of debt have been made and which have been counted in favor of the composition are fictitious; and third, that if such claims are fictitious the resolution in said composition had not been properly adopted and confirmed. Mr. Eaton stated that one of his clients, to wit, Mr. Kupfer, a member of the firm of Strauss, Kupfer & Co., the opposing creditors, was present and would make affidavit to these charges if desired.

Mr. Newcombe, the attorney for [Michael Ash] the alleged bankrupt, opposed such motion upon the following grounds: First, that the time for such examination by the creditors had elapsed; second, that such examination can only be had at or during the first meeting; third, that this is the second meeting in composition, and is held for the limited purpose stated in the order of reference, and that such purpose does not require or demand the examination of the alleged bankrupt by a creditor. That no excuse is offered by the opposing creditors for not moving for the examination of the alleged bankrupt at the first meeting of creditors. The alleged bankrupt was present in person at a portion of the second meeting, but did not answer when called for examination, and Strauss, Kupfer & Co., the opposing creditors, were not present at the beginning of the first meeting, but their claim was proved during the first meeting.

I decided that Mr. Eaton had made out a prima facie case for such examination, and granted the motion, holding that the opposing creditor should be allowed to examine the alleged bankrupt touching the question of best interest of the creditors, and that the al-

leged bankrupt should attend and should produce his books and papers for the purpose of such examination. To this ruling the attorney for the alleged bankrupt excepted, on grounds identical with those given in connection with his opposition to the motion, and requested that my ruling should be certified to the judge for his opinion thereon. Mr. Eaton desired me to certify that he wishes to be heard by the court upon the exception thus taken; Mr. Newcombe expressed no desire to be heard unless Mr. Eaton's request to be heard is granted. James F. Dwight,
Register in Bankruptcy.

In my opinion, inasmuch as I am directed by the order of reference to inquire, and upon hearing to report the results of my inquiries whether it is for the best interests of all concerned that the composition should be confirmed, etc., it is my duty to take all the information I can upon the subject, and if a contesting creditor desires to examine the debtor and his books, to develop facts showing that it would not be for the best interests of all concerned, the debtor must present himself for such examination.

James F. Dwight, Register.

BLATCHFORD, District Judge. I concur in the ruling of the register.

Case No. 572.

ASH v. HAYMAN.

[2 Cranch, C. C. 452.][1]

Circuit Court, District of Columbia. April Term, 1824.

LIMITATION OF ACTIONS—ACKNOWLEDGMENT—OFFER TO COMPROMISE.

Terms offered by way of compromise cannot be given in evidence to rebut the statute of limitations.

[See Rhodes v. Hadfield, Case No. 11,748; Hamilton v. Carnes, Id. 5,977; Nicholls v. Warfield, Id. 10,234; Bank of Columbia v. Sweeney, Id. 882.]

At law.

Assumpsit, upon the defendant's promissory note due in 1806. The defendant pleaded the statute of limitations. To take the case out of the statute, the plaintiff offered in evidence a letter from the defendant to the witness in which he says, "I am desirous that Mr. Ash's claim should be settled;" and offers to pay $150, which was half of the amount of the note without interest. This evidence was objected to by Mr. Marbury, for the defendant, on the ground that it was a mere offer to compromise; and he relied upon the case of Neil v. Abbott, in this court, at December term, 1819, [Case No. 10,088.]

The COURT (THRUSTON, Circuit Judge, contra) rejected the evidence.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 573.

ASH v. WILLIAMS.

[5 Cranch, C. C. 674.][1]

Circuit Court, District of Columbia. March Term, 1840.[2]

SLAVERY—CONDITIONAL BEQUEST OF SLAVES—FREEDOM.

In the will of Maria T. Greenfield is the following clause: "I also give and bequeath to my nephew, Gerard T. Greenfield, all my negro slaves, namely Ben, Mansa, James, &c., (naming seventeen slaves,) provided he shall not carry them out of the state of Maryland, or sell them to any one; in either of which events I will and desire the said negroes to be free for life." The legatee sold one of them (the petitioner) to the defendant. *Held*, that the petitioner thereby became entitled to his freedom.

[See note at end of case.]

The petitioner claimed his freedom under the clause of the will recited in the margin. Upon the death of the testatrix, the legatee, who was also executor, took possession of the petitioner and the other slaves bequeathed to him by the will and held them until he sold the petitioner to the defendant.

Mr. Bradley, for the petitioner, contended that it was a bequest of freedom to the slaves, upon the occurrence of the event of removal or sale. This is a limitation over, in the event of the sale or removal of the negroes by the legatee. Although they are personal property, yet they are also recognized as persons, and are so called in the constitution of the United States; and are capable of receiving a bequest of freedom; even an implied bequest. Dolly Mullin's Case, [Hall v. Mullin,] 5 Har. & J. 190; Wheeler, Slavery, 183, 252; Fitzhugh v. Foote, 3 Call, 13; Le Grand v. Darnell, 2 Pet. [27 U. S.] 664; Wallingsford v. Allen, 10 Pet. [35 U. S.] 583; Menard v. Aspasia, 5 Pet. [30 U. S.] 505; Lee v. Lee, 8 Pet. [33 U. S.] 44; Boyce v. Anderson, 2 Pet. [27 U. S.] 154, 155; McCutchen v. Marshall, 8 Pet. [33 U. S.] 220. This is a question of intention. The testatrix had a right to dispose of her property absolutely, or sub modo. She had a right to bequeath freedom, conditionally, or in a certain event; and when the event occurs, the right to freedom becomes absolute. Dommett v. Bedford, 6 Term R. 684; Gill v. Pearson, 6 East, 173; Pow. Dev. 265; Smith v. Bell, 6 Pet. [31 U. S.] 74; Gulliver v. Poyntz, 3 Wils. 141; Bradley v. Peixoto, 3 Ves. 324; Brandon v. Robinson, 18 Ves. 429; [Yarnold v. Moorhouse,] 1 Russ. & M. 364; Hall v. Smith, 14 Ves. 429.

Mr. Marbury and Mr. Jones, contra, contended that the prohibition to sell or remove the slaves is repugnant to the bequest and therefore void; and that the be-

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Affirmed by supreme court in Williams v. Ash, 1 How. (42 U. S.) 1.]

quest vested an absolute right to the slaves in the legatee. There is no difference in the decision of cases of freedom, and other cases; nor in the construction of wills. Mima Queen v. Hepburne, 7 Cranch, [11 U. S.] 290; Corcoran v. Jones, in this court at last term, [Case No. 3,229;] Bradley v. Peixoto, 3 Ves. 324; Newkerk v. Newkerk, 2 Caines, 345.

THE COURT, (CRANCH, Chief Judge, and MORSELL, Circuit Judge, doubting,) at the prayer of the petitioner's counsel, instructed the jury, that by the fact of the sale of the petitioner the estate or property in the petitioner so bequeathed to the said Gerard T. Greenfield, ceased and determined; and the petitioner, thereupon, became entitled to freedom as claimed in his petition.

CRANCH, Chief Judge, delivered the following opinion. The petitioner claims his freedom under the following bequest in the will of Maria Anna T. Greenfield, dated September 16th, 1824. "I also give and bequeathe to my nephew Gerard T. Greenfield, all my negro slaves, namely, Ben, &c., (naming seventeen); provided he shall not carry them out of the state of Maryland, or sell them to any one; in either of which events I will and desire the negroes to be free for life." Here is a clear bequest of freedom to the slaves upon the happening of a certain event, which has happened; for it is admitted that the said Gerard T. Greenfield, sold the petitioner to the defendant. The condition, in the bequest, that the legatee should not sell the slaves may be repugnant to the bequest of the slaves to the legatee, and may therefore be void as a condition, and the bequest may be absolute to him; but that does not prevent the happening of the event upon which the bequest of freedom to the slaves also became absolute. Here then are two absolute bequests inconsistent with each other; in which case the last of the bequests must prevail, as being the last will of the testatrix. But the bequest of freedom to the slaves is not a condition annexed to the bequest of the slaves to Gerard T. Briscoe. It is an independent bequest which has become absolute upon the happening of a certain event; and the circumstance, that that event consisted of an act done in the supposed violation of a condition which is void, as being repugnant to the legacy to G. T. Greenfield, does not affect the truth of the fact, that that event has happened; to wit, the sale of the petitioner, by which his title to freedom became absolute. There is another view of the subject. The owner of property has a right to dispose of it as he pleases, either absolutely, or sub modo; or to grant or bequeathe a temporary use of it, reserving to himself an ultimate right of property. It is true that if he parts with his whole interest in the thing to his legatee, with condition that the legatee shall not alienate it, such condition is void, and the bequest is absolute. But if any right or interest in the thing remains in the testator, and not bequeathed to that legatee, he may annex such condition, for it is not repugnant to that bequest. This remaining right or interest may be bequeathed over, or pass to the next of kin, as being undisposed of by the will. The intention of the testator is the rule of construction of the will. In the present case the question is, whether the testatrix intended to devise to G. T. Greenfield such an estate in, or right over, these slaves, as would enable him to carry them out of the state of Maryland, or to sell them. It is very clear that she did not, for she has plainly declared her will that he should not sell or remove them, by giving them their freedom, if he did.

The words of the legacy to G. T. Greenfield, therefore, which, without the proviso, and bequest of freedom to the slaves, would have given him an absolute right to them, are restrained by that proviso, and that subsequent legacy of freedom, which operate upon the supposed absolute legacy to G. T. Greenfield, exactly as the devise of the remainder to the son in the case of Smith v. Bell, 6 Pet. [31 U. S.] 74, operated upon the absolute devise to his mother; namely, by limiting and restraining the supposed absolute bequest to G. T. Greenfield, and show that she did not intend to give him an absolute estate in the slaves. See Prest. Est. 38, 42, 43, 45, 46. If she had said, I give and bequeathe all my slaves to G. T. Greenfield, provided they shall be free at his death; according to the case of Smith v. Bell, the estate, under such a bequest, to the said G. T. Greenfield, would be only an estate for life; and, a fortiori, if she had restrained him from selling or removing them. There is only this difference; that the death of G. T. Greenfield was an event which must certainly happen, and his sale of the slaves might never happen; but although his death would be certain, yet it would be uncertain whether he would die before the slaves. There would, therefore, be an uncertainty in both cases; and the uncertainty of the event cannot deprive the slaves of the benefit of it, if it should happen. It is a mere question of construction of the will, which construction must be governed by the intent of the testatrix, derived from a view of the whole will. If she had said, in her will, that her slaves should be free at the death of her nephew, and that, in the meantime, he should not remove nor sell them, but should be entitled to their labor and services, I can see no reason why this should not be a good bequest of freedom to the slaves who should be alive at his death; and I think that a similar construction should be given to this will upon the event of a sale. The law of Maryland which authorizes the owner to manumit his slaves by his last will, makes them capable of taking their freedom under

such a bequest, although the manumission should be intended to take effect at a future time or upon a contingent event. If it should be said that these slaves may be taken in execution against G. T. Greenfield, and sold as his property, the same may be said of any other bequest of slaves subject to a contingent right, to freedom at a future day; but I apprehend nothing more could be sold under the execution than the right, title, and interest of the legatee. If the sale should be by collusion with the creditor to defeat the right of freedom, I suppose it might be set aside on the ground of fraud. But it has been said, in argument, that this bequest of freedom to the slaves is void because it is upon an unlawful condition. The condition of this bequest, (if it be a condition,) is, that G. T. Greenfield should remove or sell the slaves. But it is contended by the defendant that such removal or sale is not unlawful; and, if so, the bequest is not upon an unlawful condition. But the sale is not the condition of the bequest; it is only the event, or fact, upon the happening of which the bequest is to take effect; and whether that sale be lawful or unlawful the effect upon the petitioner's right to freedom is the same. Verdict for the petitioner. Bill of exceptions taken by the defendant.

[NOTE. The judgment in this case was affirmed by the supreme court. Williams v. Ash, 1 How. (42 U. S.) 1.]

Case No. 573a.

ASHBAHS et al. v. The TRUSTY.

[Betts' Scr. Bk. 554.]

District Court, S. D. New York. May 18, 1857

SALVAGE—DERELICT—DISTRIBUTION.

[A vessel, totally abandoned and partly stripped, was manned and worked into port when the position of such vessel, the state of the weather, and season of the year were all unfavorable to saving her. *Held*, that the salvors should be allowed one moiety of the proceeds of the wreck, after payment of taxable costs, which is the largest allowance ordinarily made for salvage in case of derelict.]

[In admiralty. Libel by John Ashbahs and others against the sloop Trusty and cargo for salvage. Decree for libellants. Motion by libellants for an order of distribution. Granted.]

Mr. Sandford, for libellants.
Mr. Jenness, for claimant.

BETTS, District Judge. This is a motion for an order of distribution of the proceeds of salved property among the respective salvors. No party appeared to contest the suit for salvage, and a decree was therefore rendered by default. The salvors demand the allotment of the entire property to them as compensation for bringing it in. This is against the general principles of salvage rewards, which contemplates a division of the property saved between its owner and those who have preserved it and restored it to him. It may, however, happen that the expense of rescuing and restoring the property equals its entire value, or so nearly so that the surplus is an inadequate reward to the salvors for their risk and labor. In that case, it is competent to the court to devote the whole property to the satisfaction of the charges incurred in rescuing it. The misfortune of the owner, however, is never to be lost sight of, in the anxiety to do full justice to the merits of the salvors.

The owners of the Trusty and her cargo bought her in at an auction sale under the decree of condemnation in this cause, at the sum of $1,800, and the net proceeds deposited in court were $1,468.80. The schooner, William A. Spofford, which was employed in making the salvage, was worth at the time $8,000, and her cargo $12,000. Her owner expended in making the salvage and keeping the wreck after it was brought in $115.75. She was manned by a crew of nine men and a master, bound from Florida to New York, with a full cargo of cedar wood on board. She fell in with the Trusty Dec. 28, 1856, some three hundred miles from New York, totally abandoned and partly stripped. The weather was rough and the sea bad. The wreck was manned and worked into New York, arriving on Jan. 1, 1857. The position of the wreck, the state of the weather and the season of the year were all unfavorable to saving her, but she was worked in by judicious exertions without any special hazard other than supplying some equipments from the salving vessel and two men to navigate the wreck, and being exposed to extra labor on both vessels.

I think the largest allowance ordinarily made for salvage in case of derelict is the proper sum to be awarded in this instance. I shall decree that the libellants recover one moiety of the net proceeds of the wreck, after payment of the taxable costs. I accept the plan of distribution among the salvors proposed by the libellants, and direct the sum in court, after deducting the costs of suit, to be divided into fourteen equal parts, one half of which is to be paid to the owner of the Spofford, three parts to the mate who took charge of the wreck, and two parts to the seamen who went on board with him, and aided in navigating her into New York, one part to the master of the Spofford, and a moiety of one part to each of the remainder of the crew.

Case No. 574.

ASHBROOK et al. v. The GOLDEN GATE.

Newb. 296;[1] 5 Amer. Law Reg. 148; 36 Hunt, Mer. Mag. 61.]

District Court, D. Missouri. Sept., 1856.

STATE AND FEDERAL COURTS — CONCURRENT ADMIRALTY JURISDICTION — MARITIME LIENS — ENFORCEMENT.

1. Under the judiciary act of 1789, the courts of the United States have cognizance of all civil cases of admiralty and maritime jurisdiction, exclusive of the state courts, except as to the common law remedy.

2. The common law remedy existed before the constitution and act of 1789, and is by the latter saved, not given.

3. A common law remedy is a remedy by action at common law, and is not a proceeding in rem or against the vessel.

4. A proceeding in rem is not a common law remedy.

5. The admiralty and maritime jurisdiction of the United States in rem, is exclusively in the United States courts.

6. There is no concurrent jurisdiction in rem in admiralty cases between the courts of the United States and of the several states.

[Cited in McAllister v. The Sam Kirkman, Case No. 8,658. Approved in Hill v. The Golden Gate, Id. 6,491.]

7. The proceedings under the statute of Missouri, entitled "An act concerning boats and vessels," are not strictly proceedings in rem.

8. Where, as in this case, a material man has a lien upon a vessel under the general maritime law of the United States, he has a right to enforce that lien by a suit in the United States court, although the vessel may have been subsequently seized and sold under the Missouri act concerning boats and vessels.

[Cited in McAllister v. The Sam Kirkman, Case No. 8,658.]

[See The Skylark, Case No. 12,928.]

9. Where a material man has no lien under the general maritime law, but has a lien under the state law, and the same law provides certain proceedings by which that lien may be divested, if those proceedings are had, his lien is divested, and he cannot sue in the United States court.

[In admiralty. Libels by Ashbrook and others against the steamer Golden Gate. Decree for respondent.]

John H. Rankin, for libelants.

Hudson & Thomas, for respondent.

WELLS, District Judge. In this case certain of the libelants had liens under the general maritime law of the United States; and others had liens under the statute of Missouri, entitled "An act concerning boats and vessels." Dig. Laws Mo. [Rev. St.] 1845, p. 180. Those having liens under the general maritime law, furnished supplies in Cincinnati, Ohio, where they resided at the time, and whilst the boat was owned in Missouri; others resided in Missouri, and furnished supplies whilst the boat was owned in Ohio. Those having liens under the state law resided in Missouri and furnished the supplies there, the boat at that time being also owned in Missouri. After the supplies were furnished, the boat was sold under the provisions of the above cited statute of Missouri; and the question now raised for the consideration of the court is, were these material men divested of their several liens by not intervening in the state court, or by the proceedings in the state court? It is a question of delicacy, as the decision of it may conflict with state laws; but I am compelled to decide it.

The provisions of the statute of Missouri make no distinction in terms between vessels owned by citizens or subjects of foreign nations, or citizens of other states of the Union, and those owned by citizens of Missouri. They apply to "every boat or vessel navigating the waters of this state," (see the act, [Rev. St. Mo. p. 181,] § 1,) and to "contracts made within this state with boats used in navigating the waters of this state." See the case of James v. The Pawnee, 19 Mo. 517. If I understand correctly the language of Judge Story, he entertained the opinion that similar provisions in the statutes of the state of New York could not properly be construed to apply to any but domestic boats or vessels—that is, those owned in New York. The Chusan, [Case No. 2,717.] But the supreme court of Missouri makes no distinction between foreign and domestic vessels. James v. The Pawnee, supra. The case now under consideration differs from that of The Henrietta, [Case No. 6,121.] In that case the boat was owned in Missouri, and the supplies were furnished in Illinois. I held that the case did not come within the provisions of the steamboat law of Missouri, because the vessel was not, at the time the contract was made for the supplies, "navigating the waters of this state;" nor was the contract made or supplies furnished "within this state," and, therefore, the lien obtained in Illinois under the general maritime law, was not divested by the sale in Missouri. But much of the reasoning in that case is applicable to this case, and will not be here repeated.

Is the admiralty and maritime jurisdiction in rem, exclusively in the United States courts? When I wrote the opinion in the case of The Henrietta, I had never known it questioned; but in a recent decision by the supreme court of Ohio, it is questioned and denied. See Thompson v. The J. D. Morton, 2 Warden, 26. That court appears to think that the provisions of the ninth section of the judiciary act of congress makes the jurisdiction of the district courts exclusive only as relates to the circuit courts of the United States. In that opinion I cannot concur. The ninth section of the judiciary act, 1789, [1 Stat. 76,] declares that the district courts

[1] [Reported by John S. Newberry, Esq.]

of the United States shall have, in certain cases specified, first: Jurisdiction or cognizance exclusive of the courts of the several states. Second: In other cases jurisdiction concurrent with the courts of the several states, or the circuit courts of the United States, as the case may be. Third: And in other cases, exclusive original cognizance, without mentioning any other courts, either federal or state; and this last includes all civil causes of admiralty and maritime jurisdiction, including certain seizures on water, "saving to suitors, in all cases, a common law remedy, where the common law is competent to give it;" and a like cognizance in other cases of seizure without any saving.

In the first class of cases, as I have arranged them, the jurisdiction is not declared to be exclusive except as to the state courts; and there is, therefore, an implied exception as to the jurisdiction of the circuit courts of the United States. In the second class, the grant is not declared to be exclusive, but concurrent, and the jurisdiction both of the courts of the several states and the circuit courts of the United States is excepted. In the third class there is no exception of the exclusiveness as to either the courts of the several states or the circuit courts of the United States, except as to the common law remedy in the first branch of that class, and without that exception as to the other branch. So that, in the third class, which includes the admiralty and maritime jurisdiction, there is no exception except that of the common law remedy, as to the exclusiveness of the original jurisdiction in the district courts. It is absolute, unconditional and exclusive. But the grant of exclusive original jurisdiction to the district courts, does not exclude the appellate jurisdiction of the circuit courts, which is also provided for in the twenty-first section of the same act. This seems to me conclusive. Again: As to all other matters mentioned in the third class, there never has been any doubt as to the jurisdiction being exclusive as to the state courts. Why then is it not exclusive as to the admiralty and maritime jurisdiction? The same language is used as to all.

The supreme court of the United States, Judge Marshall delivering the opinion, in the case of Slocum v. Mayberry, 2 Wheat. [15 U. S.] 9, expressly decided that the jurisdiction of the United States courts, as to seizures on land and water, is exclusive of the courts of the several states. This is embraced in the second branch of the third class above. In the case of Gelston v. Hoyt, 3 Wheat. [16 U. S.] 246, the question in the supreme court of the United States is put beyond all dispute. The court is discussing the question of the exclusive jurisdiction of the United States courts as it regards the state courts, and declares that "By the judiciary act of 1789, c. 20, § 9, [1 Stat. 76,] the district courts are invested with exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, and all seizures on land and water, and of all suits for penalties and forfeitures incurred under the laws of the United States." Similar phraseology is used in the eleventh section of the judiciary act, which gives the circuit court "exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct," without mentioning the state courts; yet no one has ever doubted that the jurisdiction here given, was exclusive of the state courts. See, also, 1 Conk. Adm. 349. The opinion (excepting so much as regards the effect of the 9th section of the judiciary act) given by the supreme court of the state of Ohio, in the case above cited, and the opinion expressed by that court in the case of Keating v. Spink, 3 Warden & S. 105, do not apply to the case I am considering, although they deny exclusive jurisdiction in rem to the United States courts in admiralty causes. The cases in which those opinions were delivered, arose and had to be decided under the act of congress of the 26th February, 1845, [5 Stat. 726,] which applies only to the lakes and their connecting rivers, and which not only saves the common law remedy, but also "any concurrent remedy which may be given by the state laws."

1st. Let us now see how the matter stands. The courts of the United States have cognizance of all civil causes of admiralty and maritime jurisdiction, and have it exclusive of the courts of the several states, except as to the common law remedy.

2d. This is a civil cause of admiralty and maritime jurisdiction.

3d. The libelant has a lien given by the general maritime law of the United States; it is as much a vested right as that of a mortgage. It is a contract which the legislature of a state can pass no law to impair. Bronson v. Kinzie, 1 How. [42 U. S.] 311.

4th. The party having this lien is entitled to sue in the United States court, in admiralty, to enforce it. This right is given by the laws of the United States.

5th. The laws of the United States are supreme over state laws.

6th. A state law comes in and declares that the party having this lien shall either sue in the state courts (under the "act concerning boats and vessels,") or lose his lien.

Can it be possible such state law is valid? The United States law, and the state law cannot both be enforced. The first gives the party a right to sue in the United States courts, and there to establish his claim and obtain the enforcement of his lien; the second declares that if he does not sue in the state court, that is, if he sues in the United States court, he shall get nothing. I refer to the case of Shelby v. Bacon, 10 How. [51 U. S.] 69, 70, 71, to show that where a person has the right to sue in the courts of the United States, no state law, and the proceed-

ings of no state tribunal, can deprive him of that right. It is substantially as follows: The Bank of the United States, after obtaining a charter from the state of Pennsylvania, failed. It made assignments of its assets under the laws of that state. The assignees, according to those laws, were to receive and collect the assets and allow debts and pay creditors; all under the control and jurisdiction of the court of common pleas of that state. If creditors did not exhibit their claims and get them allowed, they obtained no part of the assets of the bank. A creditor who resided in Kentucky, brought suit in the circuit court of the United States. The assignees pleaded to the jurisdiction of the court. The case went to the supreme court of the United States. That court held that the plaintiff, as a citizen of another state, had a right to sue in the courts of the United States, and the state law could not deprive him of that right. The court says: "To establish this claim as against the assignees, the complainant has a right to sue in the circuit court of the United States which was established chiefly for the benefit of non-residents." "On the most liberal construction favorable to the exercise of the special jurisdiction, the rights of the plaintiff, in this respect, could not, against his consent, be drawn into it." "Citizens residing, perhaps, in a majority of the states of the Union, are debtors or creditors of the bank. It is difficult to perceive by what mode of procedure the state of Pennsylvania can obtain and exercise an exclusive jurisdiction over the rights of persons thus situated."

It appears to me that if a person having a lien under the general maritime law, cannot resort to this court—a court of exclusive jurisdiction in admiralty cases—because of the provisions of the state laws and proceedings under them, then the whole subject is reversed, and the state courts have the exclusive jurisdiction; and in that way the entire jurisdiction, in all cases, of the courts of the United States, might be absorbed by the state courts. I am speaking of the effect of such laws, not of the motives or intentions of the legislature in passing them; for, to do the legislature of Missouri justice, the steamboat laws were enacted some sixteen years before it was understood that the United States courts had jurisdiction of cases arising out of our inland navigation upon the public rivers of the United States.

The act of congress, section 9, above referred to, saves to suitors the right of a common law remedy, when the common law is competent to give it. It is a common law remedy, as distinguished from a remedy in the admiralty, or in chancery. This common law remedy existed before the constitution and act of 1789, and is, by the latter, saved, not given. 2 Brown, Civil Law, 111, 112. But a common law remedy is a remedy by action at common law, and is not a proceeding in rem, or against the vessel itself. Id., and note 53 to page 111. Courts of common law do not proceed in rem. Percival v. Hickey, 18 Johns. 292; Waring v. Clarke, 5 How. [46 U. S.] 461; Clarke v. New Jersey Steam Nav. Co., [Case No. 2,859;] 1 Kent, Comm. (2d Ed.) 378. Opinion of Mr. Justice Catron, in Waring v. Clarke, supra. And therefore a proceeding in rem cannot be a common law remedy.

The common law is competent to give a remedy in many cases, which are cases of admiralty and maritime jurisdiction. Thus a material man may proceed in admiralty either against the vessel in rem, or against the owners in personam, or against the master in personam. He has also his remedy at common law, which would be an action of debt or assumpsit against the owners, or a like action against the master for the value of the supplies furnished. In some, if not all cases of collision, where a party injured could maintain a suit in rem in the admiralty, he could also maintain an action of trespass at common law. Percival v. Hickey, supra. So an action of trover will lie in many cases of a wrongful dispossession of vessels, although there is a remedy also in the admiralty. Why are suitors, not suing in the admiralty, but in the state courts, limited to a common law remedy, and are not authorized to proceed in rem? The proceedings against ships and vessels affect the citizens and subjects of foreign nations, as well as the citizens of the several states; and it is important that the principles and rules for determining rights and injuries, and the courts to administer them, should be those known to the law of nations; and those principles and rules should be uniform throughout the United States, so also of the remedies.

If the courts and officers, including justices of the peace and constables, of the several states, can proceed in rem, against the vessels of other states, so they can against foreign ships and vessels, and thus ships would be seized, voyages would be broken up, the United States involved in difficulties and reclamations with foreign nations; a multiplicity of laws, rules and proceedings, contradictory and inconsistent with each other in the several states, be introduced; and thus the exclusive right and jurisdiction of the United States over our foreign relations, and over the commerce and navigation of the United States, both foreign and domestic, would be interfered with and rendered impracticable. And the states themselves would soon get into conflicts of jurisdiction and laws, and resort to laws retaliatory and vexatious upon the shipping of each other, as was the case before the adoption of the federal constitution. It must be remembered, also, that the navigable rivers of the United States are not the exclusive property of any state or states, but are common to all. Ben. Adm. 114. And that vessels navigating those rivers are enrolled and licensed by the

United States, and that such license imports full power and authority to navigate them; and no other authority is necessary.

In relation to the authority of the United States courts and the state courts in admiralty cases, see The Spartan, [Case No. 4,085;] Certain Logs of Mahogany, [Id. 2,559;] Wall v. The Royal Saxon, [Id. 17,093;] [The Flora,] 1 Hagg. Adm. 298; The Flora v. The Globe, [Case No. 4,879.] I do not find any reported case in which is satisfactorily discussed and decided the question how far, under the 9th section of the judiciary act, the courts of the several states have jurisdiction to proceed in rem against ships and other vessels enrolled or registered and licensed under the laws of the United States. I find cases decided, which arose under the act of 1845, extending a quasi admiralty jurisdiction to the lakes and their connecting rivers; which are, as already shown, not applicable to the commerce and navigation on other rivers. Some other cases speak of a concurrent remedy at common law, and say that the jurisdiction of the courts of the United States is not exclusive. This is all true, because the common law remedies are saved; but they do not discuss the legality of a proceeding in the state courts in rem, and how far it is affected by the 9th section of the judiciary act. It was said in the case of The Robert Fulton, [Case No. 11,890,] that under the law of New York, [1 Rev. Laws N. Y. p. 130, as amended Laws N. Y. 1817, p. 49; 2 Rev. St. N. Y. (1st Ed.) p. 180,] a somewhat similar statute to that of Missouri, the state courts proceeded in rem, and have a concurrent jurisdiction. After a most careful, and I may say, laborious investigation of the subject, I cannot discover on what principle that opinion can be maintained. The court merely says, "that the state tribunals had authority also to enforce the lien (given by the statute of New York), in the present case, is very certain, from the express provisions of the law of New York. There was, then, a concurrent jurisdiction in the two courts, and the proceedings under the state authority were in the nature of proceedings in rem." Now, with the greatest respect for the opinions of the learned judge who delivered the above opinion, it appears to me that the concurrent jurisdiction in rem, of the United States and state courts cannot depend on the statutes of the state, but on those of the United States.

Let us examine carefully and critically the language used in the constitution of the United States, and also that used in the 9th section of the judiciary act; it will aid us in the investigation. The constitution declares that, "The judicial power shall extend to all cases of admiralty and maritime jurisdiction." The 9th section of the act declares that, "The district courts of the United States shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." "Saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." It has been said that, perhaps there has never been in the United States, a law more carefully and ably digested, than that of 1789. In this opinion I fully concur. It has remained almost untouched for sixty-seven years; it originated in the senate, which then possessed men of eminent ability, several of whom were distinguished members of the federal convention. Oliver Ellsworth, afterwards chief justice of the supreme court of the United States, was chairman of the committee to whom the subject was referred, and who is said to have prepared the bill. Observe, the only exception to the exclusive cognizance is, not a remedy in the common law courts, but a common law remedy. The remedy is to be the common law remedy, no matter in what state court it may be sought or what may be the system under which the court may proceed. There is also a qualification of this saving of a common law remedy; it can be only in a case "where the common law is competent to give it." This qualification was, doubtless, intended to cut off new remedies which might be devised, but which were unknown to the common law; for, if the common law was not competent to give the remedy sought, then the party could not resort to any other, but must sue in the United States court in admiralty. A suitor cannot therefore say "a common law remedy is saved to me, and if there be none to effect my object (the seizure of a vessel), I can use any the legislature may have devised for my case." What, then, is the common law remedy spoken of in the ninth section? In my judgment, it can be only common law actions, actions of debt, assumpsit, case, trespass, trover, &c., as known and practiced at the common law. Such are the only common law remedies then, or indeed now known; and these, in many cases, are proper remedies, and such as the common law is competent to give. But a proceeding by bill in equity is unknown as a common law remedy; and a proceeding in rem is unknown as a common law remedy. What lawyer ever knew or heard of a proceeding in rem as a common law remedy? Even the actions of detinue and replevin have in them nothing of the nature of proceedings in rem. Each requires a plaintiff and defendant who are persons, and the judgments bind no one but parties and privies. True, a proceeding in rem may be used in common law courts of the states, but in all such cases it is given by statute, or is a proceeding under the civil law. And the fact that it is given by statute and did not exist before the statute which gave it, in states where the common law prevails, shows that it had no existence as a remedy at the common law. I do not speak of modifications and improvements of actions at common law, which may doubtless be made by the legislatures, and still be

within the meaning of the ninth section, but the proceeding in rem is given originally and entirely by statutes where it exists in common law courts, and is not merely modified and improved.

When a court has jurisdiction to proceed in rem, and does so proceed, its judgments are binding and conclusive on the whole world, and this is so, whether the tribunal be foreign or domestic. The Mary, 9 Cranch, [13 U. S.] 126. Not so with judgments at common law: they bind only parties and privies. If the state courts can have jurisdiction in admiralty cases conferred on them by state statutes, to proceed in rem, so they can to proceed in equity, and this would constitute them, to all intents and purposes, courts of admiralty; and this jurisdiction can be, and in many cases is given by the state laws to justices of the peace, and to constables, as their ministerial officers. If there is an average of fifty counties to each state, and twenty justices of the peace to each county, we should then have in these United States, thirty-one thousand courts of admiralty and maritime jurisdiction, to say nothing of the courts of record. These courts proceeding against, and seizing and selling vessels of foreign nations, and those of sister states, although they would have all the powers of courts of admiralty, yet they would, in but few instances, proceed according to the maritime law, which is part of the law of nations, nor according to acts of congress (for congress can pass no law regulating proceedings in the state courts); but they would proceed according to the statutes of the several states, and usages that would there prevail: each state having a different system. The effect of this must be, it appears to me, to embroil the United States with foreign nations, and the several states with each other, and to produce retaliatory laws and proceedings, and endless conflict, uncertainty and mischief. And this, I repeat, would render nugatory the provisions of the 9th section of the judiciary act of 1789, and the power of congress to regulate commerce and (navigation as incident thereto) with foreign nations and among the several states. If I am right in the views above expressed, there can be no concurrent jurisdiction in rem in admiralty cases between the United States courts and the courts of the several states. I do not, however, consider the proceeding in the state courts of Missouri against boats and vessels as strictly a proceeding in rem. It is, it appears to me, a proceeding devised for suing the owners; but instead of using the name of the owner, it uses that of the boat. In some cases, arising under the act, a judgment is rendered against the boat for the demand of the plaintiff only, execution thereupon issues, and only enough is collected to pay the plaintiff's judgment and costs; and there is consequently nothing to distribute among other creditors or claimants. In no case can creditors, material men and others, although having valid liens, intervene and have their claims adjudicated and get any part of the proceeds, unless the contract for supplies, &c., was made within this state, and the boat at the time navigating this state. James v. The Pawnee, 19 Mo. 517. So I presume it would be as to the other contracts, and as to injuries specified in the act. Such proceedings do not look much like proceedings in admiralty, or proceedings in rem. See the opinion of this court in the case of The Henrietta [Case No. 6,121.] Be this as it may, I could not give to those proceedings the effect which is given to the proceedings strictly in rem. I am, therefore, of opinion that the material man, who has a lien under the general maritime law of the United States, has a right to enforce that lien by a suit in the United States court; and that the state law, and proceedings under it, given in evidence in this case, do not deprive him of that right. The Chusan, [Id. 2,717;] Certain Logs of Mahogany, [Id. 2,559.] But how is it with the material man who has no lien under the general maritime law, but has a lien under the state law?

The subject is not without its difficulties; but I think that as the lien is given by the state law, the state law may divest it. If he takes under the state law, he must hold under the state law. He takes his lien subject to all the provisions for divesting it contained in state laws passed anterior to his lien. He takes it cum onere. Bronson v. Kinzie, 1 How. [42 U. S.] 311; The Chusan, [supra.] The statute which gives the lien—and which is the only law which gives him a lien—provides for certain judicial proceedings by which the vessel may be sold and the lien divested. The 13th section of the "act concerning boats and vessels" (Dig. Laws [Rev. St.] Mo. 1845, p. 183,) declares that, "when any boat or vessel shall be sold under the 11th section of this act, the officer making the sale shall execute to the purchaser a bill of sale therefor, and such boat or vessel shall, in the hands of the purchaser and his assigns, be free and discharged from all previous liens and claims under this act." What the law gave, the law hath taken away. The libelant cannot complain, his lien is divested by the same law and the same authority which gave it.

Case No. 575.

The ASHBURTON.

ADAMS et al. v. The ASHBURTON.

[5 Adm. Rec. 432.]

District Court, S. D. Florida. Jan. 5, 1856.

SALVAGE—COMPENSATION—DUTIES OF WRECKERS.

[1. Where six large wrecking vessels and two small boats, carrying in all 85 men, are employed in lightening and floating a stranded

ship, when not more than three or four of the vessels and their crews are necessary, no increased compensation can be given on account of the employment of the supernumeraries.]

[2. Where the gross value of the ship and her cargo of 1,608 bales of cotton was $73,000, and wreckers carried out three anchors, and lightened the ship of 350 bales of cotton, but omitted to sound around the vessel and to ascertain the channel and shoals, so that she was heaved off one shoal and onto another, of which the wreckers were ignorant, and which caused considerable damage, and obliged her to discharge, a reasonable salvage award of 15 per cent. of the net value should be reduced to 11 per cent. of the net value, because of the error and omission on the part of the wreckers.]

[In admiralty. Libel by Thomas Adams and others against the ship Ashburton and cargo for salvage. Decree for libelants.]

William R. Hackley, proctor for libelants.
S. J. Douglas, proctor for respondent.

MARVIN, District Judge. This ship, laden with 1,608 bales of cotton, and bound from New Orleans to Liverpool, ran ashore upon the American shoal, where she lay in twelve feet of water drawing fifteen feet. Six of the largest wrecking vessels and two small boats, carrying in all eighty-five men, were employed in lightening and getting the ship off. No more than three of these vessels and crews, or at the most four, were necessary, and no increased compensation can be given on account of the employment of the supernumeraries.

The wreckers carried out three anchors, and lightened the ship of three hundred and fifty bales of cotton, and heaved her off. The particulars of the service are detailed in the libel. The gross value of the ship and cargo may be estimated at $73,000. And I should think fifteen per cent. upon the net value would be a reasonable salvage, but for the fact, that the wreckers omitted to sound around the vessel, and ascertain the channel and shoals, as was their duty to do. And the ship, after being heaved off from one reef, was heaved on to another, of which the wreckers were ignorant, and of which it was their duty to be informed. The ship suffered considerable damage, and has been obliged to discharge in consequence of this error and mistake on the part of the wreckers. They acted in good faith, but neglected to inform themselves of the soundings about the ship. The anchors were placed right, and in sufficient water, but the shoal lay between them and the ship. I think that this shoal might have been avoided if its existence had been known to the wreckers. Under these circumstances, I think eleven per cent. upon the net value is a reasonable compensation. The difference to the salvors, in their salvage, owing to their omission to make the proper soundings, will be not far from $4,000 growing out of the difference in the value of the ship, the increased charges, and the difference in the rate per cent.

Case No. 576.

ASHBY v. STEERE.

[2 Woodb. & M. 347.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1846.

BANKRUPTCY—PREFERENCES—INSOLVENCY—BURDEN OF PROOF.

1. Under the bankrupt law, a sale of property to a creditor, more than thirteen months before the debtor applied for the benefit of the law, if bona fide, and without knowing that the debtor contemplated going into bankruptcy, is valid.

[See note at end of case.]

2. Such a sale, if done as a preference of one creditor over another, when the debtor contemplated going into bankruptcy, might prevent him from getting his discharge, and might be in him an act of bankruptcy, but still be valid in regard to the creditor.

[Cited in Whetmore v. Murdock, Case No. 17,510.]

[See note at end of case.]

3. In England, the contemplation of bankruptcy means the benefit of the bankrupt act, but here it has been construed to mean insolvency.

[See Morse v. Godfrey, Case No. 9,856; McLean v. Lafayette Bank, Id. 8,888; Atkinson v. Farmers' Bank, Id. 609; Everett v. Stone, Id. 4,577.]

4. The preference of a creditor is not the payment of one in the ordinary course of business, or under threats or suits, but selecting one, as a relation or friend, or settling with him before due, or on the eve of bankruptcy, when not pushed by him.

[Cited in Whetmore v. Murdock, Case No. 17,510; Grow v. Ballard, Id. 5,848.]

5. The burden of proof, and duty to offer facts which tend to impeach or annul a sale, lie on the party who attempts to avoid it.

[6. Cited in Carr v. Gale, Case No. 2,435, to the point that an assignee in bankruptcy can sue fraudulent grantees in order to regain possession of the bankrupt's property.]

At law. This was an action of trover for a conversion, alleged to have been committed Dec. 21st, 1841. The plaintiff claimed as assignee of a bankrupt, R. R. Ricker, and it appeared in evidence that R. R. Ricker was one of a firm of traders, for whom the defendant had become indorser, and to whom he had loaned money; and, at the time of the alleged conversion, pressing for payment, R. R. Ricker, the acting partner, conveyed to him in discharge of his debts and responsibilities their stock of goods, at an agreed price. Upon this, he entered into possession of them, and employed R. R. Ricker as his salesman. The firm had then due to them nominally nearly $10,000 in notes and accounts, and were sued soon after as well as previously by some of their creditors, a portion of whom, but not all, they were able to pay. R. R. Ricker did not file a petition for the benefit of the bankrupt act till Jan. 23, 1843. Doing it then, the plaintiffs were appointed his assignees, and brought this action Feb. 18, 1843, for the goods sold to the defendant

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

in December, 1841. The plea was not guilty, and on the evidence in the case, the court instructed the jury, that after the great lapse of time between the sale of the goods to the defendant, and the application for the benefit of the bankrupt act, being nearly fourteen months, if they believed the sale was bona fide and for a valuable consideration, the defendant was entitled to retain the property; and that it was not proof the sale was made mala fide, if the vendor knew the vendee would probably obtain the payment of his debt, when others would not; unless the debtor made the sale in contemplation of bankruptcy, and one of his leading objects was to contravene the policy of the bankrupt act, by giving a preference to the defendant, and the defendant was probably aware of that fact. The jury returned a verdict for the defendant.

The plaintiff filed a motion for a new trial, a copy of which is annexed. "And now on this seventh day of the term, after verdict and before judgment, the plaintiff in said cause moves that said verdict should be set aside and a new trial be had, for the following reasons:—

"Because the court declined to charge the jury as requested by the plaintiff's counsel; 1. That a conveyance by a person in insolvent circumstances of the whole of his property, or that visible portion of it with which he was carrying on business, with the intent thereby to give a preference, was an act of bankruptcy under the bankrupt act, and void; and therefore was not within the exception of the first proviso of the second section. 2. That the circumstances of such a transfer, as above stated, of the whole or a large portion of his property by the debtor, was sufficient notice of contemplation of bankruptcy in him to the creditor receiving the payment or transfer for the purpose of preference as aforesaid. 3. That a payment or transfer of property made by a person in insolvent circumstances to a creditor or indorser, with the intention of giving a preference to that creditor or indorser over the rest of the creditors, was (if the jury should so find the facts) absolutely void under the second section of the bankrupt act, and not within the exception in the first proviso. And also, for that the court charged the jury, that such payment or conveyance by way of preference was a bona fide transaction, and within the first proviso of the second section, provided the jury should find that the transaction took place more than two months before the petition in bankruptcy, and that an adequate consideration was given for the property, instead of charging that said proviso of the second section did not protect any conveyances made in contemplation of bankruptcy by way of preference, which are declared fraudulent in the enacting part of the section. Wherefore, because of the misdirections in law above stated, the plaintiff prays the court that said verdict may be set aside, and a new trial be granted in the premises." [New trial refused.]

Jencks, counsel for plaintiffs.
R. Greene and Steere, for defendant.

Before WOODBURY, Circuit Justice, and PITMAN, District Judge.

WOODBURY, Circuit Justice. A copy of the motion in this case for a new trial has not been brought to my attention till the present term; nor has any argument been presented till now. The facts and the law, as they appeared at the trial, are not so fresh in my recollection, therefore, nor are they so full in my minutes as could be wished. The bankrupt law, under the provisions of which this dispute arises, having long since been dead, it is not of so much public importance how its leading enactments are to be construed. But these particular parties have their rights under it; and hence it is necessary to dispose of them in conformity to that law. Consequently I shall proceed to do it in a manner as true to its spirit and design as the time allowed for investigation will permit, and without longer and injurious delay.

Some of the difficulty here and in previous cases under the bankrupt act has arisen by not discriminating well between the different objects of different parts of the act, in regard to subject matters, as well as persons. Some clauses are severe if not penal against the bankrupt in certain events, but do not impair the rights of third persons, such as purchasers, unless they co-operated in his misconduct. Thus the objects of the first and second sections of the bankrupt law, under which the questions arise here, were threefold. One was to define, to some extent, what conduct of the bankrupt himself should constitute an act of bankruptcy, so as to justify his creditors to have him proceeded against under the law, and his property divided equally among them. The other was to define some of the misbehavior, which should prevent a trader, when becoming a bankrupt, from getting his discharge, and this as a penalty for such misbehavior. And another, and the only one material in the present case, was to declare what conveyances by a person becoming bankrupt should be void, or annulled as to third persons, no less than himself, so as to require, under the policy of the bankrupt law, that the property be restored to the general assets of the bankrupt, and to be apportioned equally among his creditors. Thus for instance, it may be an act of bankruptcy, so as to justify proceedings in bankruptcy against the debtor, if he secrete himself, or abscond, or make any fraudulent conveyance. And it may prevent him from getting a discharge, if he does that or makes any preferences among his creditors, considered by that act unlawful, or any material concealment of his estate.

But what, as a matter of public policy,

shall justify the avoidance of sales to third persons, or sales and payments to creditors, and after what length of time, or under what defects and misbehavior, such sales should be disturbed, or overturned, is entirely a different question, depends in part on the conduct of the creditor as well as the debtor, and in some degree rests on different principles and provisions in the law. No titles would be safe where a bankrupt system prevails, if, after one or two years, some of the parties to them should choose to go into bankruptcy, and those titles are all then to be destroyed, on account of some secret, unrecorded taint, though the purchaser acted bona fide, gave a full and valuable consideration, and had no notice of any prior act of bankruptcy, or intent of the vendor to go into bankruptcy. Hence the second section does not avoid any sales of that character, if made more than "two months before the petition filed against him or by him;" viz. the vendor and debtor.

The present case exhibits a sale made more than a year previous, so that the only remaining considerations are, whether it was bona fide and without any "notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act." Now the jury have found that it was bona fide and for a valuable consideration; and there was, in truth, little controversy on that point at the trial. Next, there was no evidence except inferential, that the bankrupt then, at the sale, contemplated taking the benefit of the act, or if he did, that his intention was known to the defendant. This last is the essential condition precedent for annulling the sale, and though the bankrupt was on the stand as a witness, and knew whether he then notified the defendant of such an intent. and whether he even entertained such an intent, yet the plaintiffs, whose business and duty it is to show the facts, which invalidate a sale, put no such questions to him, to draw out those decisive facts. He was asked if the defendant knew his embarrassments, and he replied, that the defendant probably suspected them, but that was all. And the bankrupt afterwards paid some other debts, and attempted a compromise with all his creditors.

In Gorham v. Stearns, 1 Metc. [Mass.] 366, an assignment was made to a creditor to pay him, in choses in action, only two days before he went into insolvency, and after goods had been attached. But when he conveyed them, he did not contemplate going into insolvency, and the transfer was held not to be void as to other creditors. That statute and the bankrupt act use similar language on this. The burden and duty lie on assignees to show that the transfer was with a view to give a preference. and in contemplation of bankruptcy. Id. 367. It was admitted in the case in Metcalf, that the debtor was insolvent, which is the chief fact here, from which it is argued, that the creditor should have inferred he was looking to the insolvent system, and meant to violate its spirit. Id. 368. But almost the whole facts here tended to rebut such an intent at that time, as the bankrupt law was not then in operation, and he did not apply for the benefit of it for more than a year afterwards; and sought in the mean time to effect a compromise with his creditors. So most of the circumstances here actually put in tended chiefly the other way, rather than to support this objection. Had the debtor then contemplated taking the benefit of the act, he would probably have applied for it in the February after, when the act went into effect. But he delayed it for more than a year; he delayed it, too, under suits and inconveniences, which would have probably hastened his application, had he intended in the December previous to have made one. The only other evidence at all relied on to justify a different conclusion, is the naked fact of the sale of most of his tangible property. But he retained some of that and a large amount of notes, and postponing, so long after, to go into bankruptcy, looks more like an original design not to do it at all; because, in that event, he would be obliged to surrender all his notes as well as other estate. The existence of such an intent being therefore doubtful, and not attempted to be proved by the best testimony, the bankrupt himself; and these remarks applying still more strongly to the evidence on the next point, the most important one, whether a notice was given to the defendant of such an intent; there is nothing left to avoid the sale, unless some prior act of bankruptcy had occurred, of which Steere was apprised. But nothing of that kind is pretended. These being the facts and the law, was there any direct or incidental ruling by the court, on any of these questions, which was erroneous?

It is said that the jury were instructed that a preference of one creditor over another, by a bankrupt, would not alone avoid such a sale, and that in this there was a misdirection. I have no doubt that the bankrupt law intended to prevent a bankrupt from having his discharge, if, "in contemplation of bankruptcy," he made a preference of one creditor over another; yet I never supposed that either of these would alone be sufficient to avoid the sale. Not only both must be made out distinctly, i. e. a preference and a contemplation of bankruptcy, in order to punish or disfranchise the bankrupt as a species of criminal; but the creditor was not to suffer penally likewise, by having his purchases destroyed, unless he had knowingly co-operated in what was wrong. This question, of a punishable preference by a debtor, involved two inquiries; 1. Did the bankrupt make a payment or conveyance in contemplation of bankruptcy? and, 2. Did he do it for the purpose of giving a preference? In relation to the first question, the

rule in England was, that the phrase "in contemplation of bankruptcy," implied that the debtor must have had the bankrupt law in his mind, at the time of the payment or conveyance. Cooke, Bankr. Law, 147; Hopkins v. Grey, 7 Mod. 139; [Morgan v. Brundrett,] 5 Barn. & Adol. 289; [Fidgeon v. Sharpe,] 5 Taunt. 539; McLean v. Lafayette Bank, [Case No. 8,888.] But in this country the phrase had been construed to mean, "in contemplation of becoming insolvent, and being compelled to wind up business." 5 Law Rep. 289, 296, 310; [Hutchins v. Taylor, Case No. 6,953; Arnold v. Maynard, Id. 561; Wakeman v. Hoyt, Id. 17,051;] 6 Law Rep. 16, [Dennett v. Mitchell, Case No. 3,789;] Morse v. Godfrey, [Case No. 9,856.]

These decisions, it is true, were not made under this section, but were given in cases where the question was, whether an act of bankruptcy had been committed or not. But, for the purposes of the trial, the court ruled that the same construction applied to the present case. The jury, in order to find the bankrupt guilty of this, must find that, at the time of making the conveyance or transfer, he was conscious of his insolvent condition, and expected to be compelled to wind up his business. It was not enough that he knew he had not then property enough to pay his debts, if he should be obliged to stop immediately; for a person who was indebted more than the amount which he possessed might, if a portion of his debts were not yet due, believe he should be able, before the time came round, to earn enough to meet them. If at the time, therefore, he did not contemplate becoming insolvent, he was not within the meaning of this clause of the second section. But if he did, so far as regards himself, perhaps bankruptcy was contemplated.

But the greatest error has been in considering almost every sale or payment, just before stopping payment, as an illegal preference. The payment or conveyance must be for the purpose of preferring a creditor. There had been numerous decisions upon this point; and a number of instances might be mentioned, as illustrating the question of intent. Thus, if a debtor went to a particular creditor, hunted him up, picked him out from the rest, and paid him more in proportion than he could pay the others; if he elected to pay a relative to whom he was indebted; if the transfer or conveyance was done secretly; if it was out of the usual course of business, in a new, extraordinary, or unusual manner; if it was just in the hurry of going into insolvency, a day or two or an hour or two before making the petition; if payment of a debt was made before it became due; or if a debtor should convey away the whole of his property on the eve of bankruptcy. Wakeman v. Hoyt, [Case No. 17,051.] Any of these circumstances would tend to show his intention to prefer the creditor to whom the payment or transfer was made. On the other hand, if the creditor had pressed hard for his debt; if payment was made under the pressure of importunity, or threats of legal process; if it was in the ordinary course of dealing between the parties; these would be circumstances tending to show that some other motive actuated the debtor, rather than the intention to prefer a creditor. And where the consequences of an act are penal, and a fair and honest motive is as consistent with the act as a fraudulent one, the former is of course to be presumed to have been the real and true one.

In England a sale of part of his effects by one insolvent is not fraudulent and void, if for a valuable consideration, or if it be to secure a surety or creditor, unless seeking as an object to give a preference, and to deprive others of an equal dividend. [Devon v. Watts,] 1 Doug. 86; Linton v. Bartlet, 3 Wils. 47; [Worseley v. Demattos,] 1 Burrows, 474, 477. It was of all his goods and property only two days before a bankruptcy, and to a brother conveyed, and still good. [Harman v. Fishar,] Cowp. 124; Hooper v. Smith, 1 W. Bl. 441; [Wheaton v. Sexton's Lessee,] 4 Wheat. [17 U. S.] 503. If the transfer is in the ordinary way, and is completed before an act of bankruptcy, the title passes. Cowp. 123. Or if it is a payment on legal process, though the night before one becomes a bankrupt; or if right to be done, and not a mere design to prefer; or if in pursuance of a previous agreement, as there it is not a mere preference. Here the conveyance was urged by the creditor; he was a surety also. It was right he should have been paid; and the bankrupt act was not resorted to for more than a year after; and, as a matter of fact, it probably was not a preference made from favor, and in contemplation and in fraud of that act.

It is bona fide, if done by means of acts of the creditor, his threats or persuasions, and it then has a good consideration. [Ogden v. Jackson,] 1 Johns. 370; [Phoenix v. Ingraham,] 5 Johns. 412; [Fulton Bank v. Benedict,] 1 Hall, 503; [President, etc., of Phoenix Bank,] Id. 575. It is never bad, if the debtor did not mean to prefer. [Worseley v. Demattos,] 1 Burrows, 478, 481; [Wheelwright v. Jackson,] 5 Taunt. 109; [Manton v. Moore,] 7 Durn. & E. [7 Term R.] 67. Beyond all this, a preference alone is not a void act at common law or in many states; neither is it under the bankrupt law itself, unless looking to that law, and meaning, by the preference, to thwart its policy. Hence, though a bankrupt is punished for making a preference, if made in contemplation of bankruptcy, as he then forfeits his discharge, because he thus attempts to thwart the law which he is about to resort to; yet such a preference by a debtor is no fault or crime in him, if not contemplating bankruptcy. Nor is the creditor ever punished, unless such motive existed and was known to him,

and certainly he is not at common law; nor is he under the bankrupt act to be punished, except so far as to carry out its policy against such knowing misconduct by those about to seek its aid, and others co-operating with them. If made here then by the debtor, without contemplating a subsequent resort to the law, the sale and preference are not void at all. Nor if made with such contemplation, though culpable in the debtor, it is not invalid as to the creditor, unless he took the property with notice of what was contemplated; and thus designedly co-operated against the act, and did it within the short period of two months prior to the debtor's application for the benefit of the act.

The purchaser as well as seller must have intended fraud, else being preferred by the debtor does not make the act void under 13 Eliz. Magniac v. Thompson, [Case No. 8,956;] [Sexton v. Wheaton,] 8 Wheat. [21 U. S.] 238. The debtor has a right to prefer, and, if the creditor does nothing improper, it is valid. 2 McLean, 44, [Findlay's Ex'rs v. Bank of U. S., Case No. 4,791;] [Holbrook v. Union Bank of Alexandria,] 7 Wheat. [20 U. S.] 556; Brooks v. Marbury, 11 Wheat. [24 U. S.] 78; The Experiment, 8 Wheat. [21 U. S.] 268; 4 Wash. C. C. 232, [Pearpoint v. Graham, Case No. 10,877;] Magniac v. Thompson, 7 Pet. [32 U. S.] 348. A bankrupt was originally defined to be one who concealed his property, or fraudulently evaded payment, and hence his bank for trade was broken up, and his assets divided. 2 Bl. Comm. 471, 472, c. 31. It was for a wrong act of his, and he was made to feel the penalties; so he is to feel them, if he tries to evade the law. But not innocent purchasers or innocent creditors, whom he had paid. The law wisely considers it is better that a preference of this kind which is good at common law, and when the creditor does not know of the design of the debtor to go into bankruptcy, and does not thus co-operate to defeat the policy of that law, should not be disturbed as to the public, after two months, as before named, than that such assets should go into a common fund for all creditors. See more cases, Com. Dig. "Bankrupt," C 9.

The limitations on the doctrine are safe, and I see no sufficient reason to change my views, that this is the true construction of the law. The cases chiefly relied on in support of the motion were, first, Peckham v. Burrows, [Case No. 10,897.] But there the court say it decided no law, but merely the fact, that a conveyance of most of one's estate, on the eve of the bankrupt law coming into effect, was in their opinion as a fact, "in contemplation of the" act, and a preference of one creditor over others. This impugns no rule now laid down as law for this case. When the court afterwards say, that the creditor need not know, though they think he had sufficient grounds to know the debtor contemplated going into bankruptcy, the court chiefly went on its own decision of this fact; and so far as the remark goes beyond that into a question of law, it is not sustained by the records, or by the general policy of the bankrupt act. Next, in Hutchins v. Taylor, [Id. 6,953,] the court merely decided what was an act of bankruptcy, and that in contemplation of bankruptcy meant a state of insolvency, as stated in the trial of the pending case. So in Arnold v. Maynard, [supra,] the court merely settled what was an act of bankruptcy, and that in contemplation of bankruptcy must mean a state of insolvency. So in Wakeman v. Hoyt, [supra,] the decision was as to what constitutes an act of bankruptcy, and not what avoids a conveyance. So, Albany Ex. Bank v. Johnson, [Case No. 133.]

In Dennet v. Mitchell, [Id. 3,789,] the opinion goes to show, that it is not in contemplation of bankruptcy unless the debtor appeared to regard himself as insolvent. None of these cases in respect to the law, seem to contravene the substance of what was ruled here; and most of them relate to questions connected with the bankrupt and his discharge, rather than his creditors or purchasers. There were several other questions started in the trial of this cause as to the validity of the proceedings in bankruptcy, on account of the partnership, the competency of the bankrupt as a witness, &c. But as they have not been relied on in argument, I refrain from going into them.

[NOTE. In discussing prohibited sales in contemplation of insolvency under the bankrupt act, Mr. Justice Davis, speaking for the supreme court of the United States, said: "It is for the interest of the community that every one should continue his business, and avoid, if possible, going into bankruptcy; and yet how could this result be obtained if the privilege were denied a person who was unable to command ready money to meet his debts as they fell due, of making a fair disposition of his property in order to accomplish this object? It is true he may fail, notwithstanding all his efforts, in keeping out of bankruptcy, and in that case any sale he has made within six months of that event is subject to examination. If it shall turn out on that examination that it was made in good faith, for the honest purpose of discharging his indebtedness, and in the confident expectation that by so doing he could continue his business, it will be upheld. On the contrary, if he made it to evade the provisions of the bankrupt act, and to withdraw his property from its control, and his vendee either knew, or had reasonable cause to believe, that his intention was of this character, it will be avoided. Two things must concur to bring the sale within the prohibition of the law,—the fraudulent design of the bankrupt, and the knowledge of it on the part of the vendee, or reasonable cause to believe that it existed." Tiffany v. Lucas, 15 Wall. (82 U. S.) 410. For instances in which a sale has been set aside because the vendee had reasonable cause to believe the vendor to be insolvent, etc., see Babbitt v. Walbrun, Case No. 694; Brooks v. D'Orville, Id. 1951.]

Case No. 577.

ASHCROFT v. BOSTON & L. R. CO.

[1 Holmes, 366;[1] 1 Ban. & A. 215; 5 O. G. 725.]

Circuit Court, D. Massachusetts. May, 1874.[2]

PATENTS FOR INVENTIONS — WHAT CONSTITUTES INFRINGEMENT—PRIOR PATENT—DISCLAIMER.

1. In view of the prior state of the art, the reissue patent granted E. H. Ashcroft, assignee of William Naylor, Nov. 9, 1869, for a steam safety-valve having an overhanging downward-curved lip surrounding an annular recess into which the steam passes as it issues from under the valve, if valid, must be limited to the combination of the other elements of the device with an annular recess of the precise form described.

[Cited in Consolidated Safety-Valve Co. v. Crosby Steam-Gauge & V. Co., 7 Fed. 769.]

[See note at end of case.]

2. So limited, the patent is not infringed by the use of a steam safety-valve substantially the same as that described and shown in the patent granted George W. Richardson Sept. 25, 1866, although that valve has an overhanging downward-curved lip and an annular recess surrounding the valve-seat, into which a portion of the issuing steam is deflected; the lip and recess being, in construction and mode of operation, substantially different from the lip and recess described in the Naylor patent.

[Cited in Consolidated Safety-Valve Co. v. Crosby Steam-Gauge & V. Co., 7 Fed. 769; Same v. Kunkle, 14 Fed. 733; Same v. Crosby Steam-Gauge & V. Co., 113 U. S. 162, 5 Sup. Ct. 513.]

[See note at end of case.]

[In equity. Bill by Edward H. Ashcroft against the Boston & Lowell Railroad Company to restrain the infringement of patent No. 58,962. Bill dismissed. An appeal was subsequently taken to the supreme court, where this decree was affirmed. 97 U. S. 189.]

James B. Robb, for complainant.

J. G. Abbott and Benjamin Dean, for defendant.

SHEPLEY, Circuit Judge. The bill in this case charges the defendant with infringement of letters-patent of the United States, reissued Nov. 9, 1869, [No. 58,962,] to the complainant, as assignee of William Naylor, of the county of Middlesex, England, for an improvement in steam safety-valves. The answer of the defendant sets up in defence: First, that the reissued letters-patent are not for the same invention described in the original letters-patent. Second, that William Naylor was not the original and first inventor of the improvements specified in said reissued patent, but that the same were known to others and used by them, as stated specifically in the answer, prior to the alleged invention thereof by Naylor. Third, that the reissued patent does not cover and embrace the valve used by the defendant. Fourth, that the valve used by defendant is described and contained in letters-patent of prior date to complainant's invention, granted by the British government to Thomas Green, also to Charles Beyers, and by the United States to Henry Waterman, and also to George W. Richardson, and that the invention of George W. Richardson, described in his patent, was made prior to the invention of Naylor set out in the bill. The invention relates to spring safety-valves for use on locomotive, stationary, and marine engine boilers. As the spring on common safety-valves was compressed by the lifting of the valve, the force of the spring became stronger by tension, while, inversely, from other causes, the tendency of the valve to rise became weaker. The spring safety-valve, therefore, failed to relieve the boiler; for, as the spring was compressed by the lifting of the valve, its power to resist was largely increased, and if steam was rapidly generated, the pressure in the boiler continued to increase while steam was escaping at the valve. Various attempts have been made, as shown by the various patents in evidence, to obviate this defect in the operation of the common spring safety-valve.

William Naylor, in his specification filed in the great seal patent office of Great Britain, on the twenty-first day of January, 1864, described two methods of obviating this difficulty. One of these methods claimed by him as his invention, he says, "consists, when using a spring for resisting the valve from opening, in the employment of a lever of the first order, one end resting by a suitable pin upon the safety-valve, and the other end of the lever resting upon the spring being bent downward to an angle of about forty-five degrees from the fulcrum, so that, when the valve is raised by the steam, the other end of the lever is depressed upon the spring downward, and at the same time is moved inward toward the fulcrum, thus virtually shortening that end of the lever, and thereby counteracting the additional load upon the valve as it is raised from its seat by the greater amount of compression put upon the spring." This method he claimed as his invention in the specifications of his English patent. These specifications also described another method of obviating the difficulty. This consisted of the following contrivance: A lateral branch or escape-passage was provided for a portion of the steam after it passed the valve, the valve was made to project over the edges of the exit-passage for the steam, and the projecting edges of the valve were curved slightly downward, so that the steam, on issuing between the valve and its seat, would impinge against the curved projecting portion of the valve, and a portion of it would be directed downward into the annular chamber which surrounded the central passage for the steam, which chamber communicated with the exit-pipe, while the other portion of the steam ascended past the edges of the valve. "By this

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

[2] [Affirmed by supreme court in Ashcroft v. Boston & L. R. Co., 97 U. S. 189.]

means," he states, "I am enabled to avail myself of the recoil action of the steam against the valve, for the purpose of facilitating the further lifting of such valve when once opened; but I wish it to be understood that I lay no claim to such recoil action, nor to the extension of the valve laterally beyond its seat." And in the claims, at the close of his specifications, he made no claim for any such extension of the valve, or any device for effecting any recoil action of the steam. In fact, Charles Beyer, in his English patent, dated Oct. 21, 1863, before the date of Naylor's patent, had fully described a valve made to project over the edges of the exit-passage for the steam, and the projecting edges of the valve were curved slightly downward, so that the steam, on issuing between the valve and its seat, would impinge against the curved projecting portion of the valve. The description is as follows: "This invention consists in forming a flange round the valve, commencing at the outer edge of the valve-facing, which flange is undercut and concave in shape, and the concave side is toward the seating of the valve, which has also a flange upon it, commencing at the outer edge of the valve-seating, but the upper surface of the flange is convex, and corresponds nearly to the concave surface of the flange upon the valve. There is a slight space between the concave and convex surfaces of the two flanges, which diminishes toward the outer edge of the flanges. When the steam begins to escape from between the surfaces of the valve, it gets between the concave and convex surfaces of the two flanges, and its force thus acts upon a larger area, and reacts upon the concave surface of the valve, and causes it to open to a greater extent than the ordinary safety-valve." It will be seen from this description that the Beyers safety-valve had "an overhanging downward-curved lip or periphery and an annular recess," into which the steam will be directed downward on issuing between the valve and its seat, while a portion of the steam will also impinge against the curved projecting portion of the valve.

Without adverting to the patents of Henry Waterman and other devices older than Naylor's, we have seen that Naylor could not, with propriety, claim to have been the inventor of the combination, in a spring safety-valve, of every form of projecting overhanging downward-curved lip or periphery, with an annular recess surrounding the valve-seat, into which a portion of the steam is directed as it issues between the valve and its seat. Neither of the attempts to overcome the objections to the spring safety-valve in common use appears to have been so far successful as to have introduced either of the inventions into common or general use. Letters-patent of the United States, issued Sept. 25, 1866, [No. 58,294,] to George W. Richardson, of Troy, N. Y., for an improvement in safety-valves. The purpose of a safety-valve being to open and relieve the boiler, and then to close again at a pressure as near as possible to that at which the valve opened, Richardson accomplished it so far as to invent a valve which would open at the given pressure to which the valve was adjusted, and relieve the boiler, and then close again when the pressure was reduced about two and one-half pounds to the inch when the pressure in the generator was one hundred pounds to the inch. This practically answered the required conditions for a useful spring safety-valve. It went very soon into general use. The complainant, who is a manufacturer in this country of safety-valves, then, as appears from the evidence in the record, endeavored to find something to anticipate the invention of Richardson. Finding in the patent office a model of the Naylor valve, with an overhanging lip and an annular chamber surrounding the valve-seat, he goes to England and purchases the right to the Naylor invention; and although Naylor himself had disclaimed the recoil action of the steam consequent on the passage of a portion of the steam downward into the annular chamber surrounding the central chamber, while the other portion of the steam ascends past the edges of the valve, and had also disclaimed the extension of the valve laterally beyond its seat, the complainant caused the patent to be reissued to him, as assignee of Naylor, with the following claims, which were not in the original patent:

"2. The safety-valve, C, with its overhanging downward-curved lip or periphery and annular recess, D, substantially as herein shown and described, and for the purpose set forth.

"3. The annular recess, D, surrounding the valve-seat, substantially as herein set forth.

"4. The combination of the valve, C, and the annular recess, as herein set forth, and for the purpose described."

From the history of the art as previously given, and from a comparison of the original with the reissued Naylor patent, as well as from the language of the claims in the reissued patent, it is manifest that if these claims can be sustained, it can only be for the combination of the described valve with its overhanging downward-curved lip, with precisely such an annular recess surrounding the central chamber as he describes. Naylor did not invent the overhanging downward-curved lip or periphery, nor was he the first to use an annular chamber surrounding the valve-seat into which a portion of the steam is deflected as it issues between the valve and its seat. His claims must, therefore, be limited to the combination of the other elements, with precisely such an annular recess as he has described, and operating in the described manner so far as such recess, separately or in combination, differed in construction and operation (if it did materially differ in those respects) from those which had preceded it. The claims cannot be made to cover a safety-

valve like the Richardson valve, which, in its construction and mode of operation, is substantially different from the valve described in the Naylor patent, simply because the Richardson valve, in common with the Naylor valve, has the overhanging downward-curved lip or periphery, and an annular recess surrounding the valve-seat, into which a portion of the steam issuing from between the valve and its seat is deflected. The differences between the Richardson and Naylor valves in construction are apparent upon an inspection of the drawings in the respective patents. The difference in the mode of operation is most clearly proved by the testimony of the experts in the case. In the Naylor valve it appears that it was the intention of the inventor to use the impact of the issuing steam upon the concave lip of the valve to assist in lifting it, and only this, except so far as it was aided by the diminution of atmospheric pressure on the top of the valve, consequent upon the issuing of a portion of the steam in an upward direction around the periphery of the valve, the annular chamber into which the steam is discharged on leaving the valve serving no other purpose than that of a conduit for the steam when the valve is constructed in accordance with the drawings in the original patent. In the Richardson valve, when the valve opens, the steam expands and flows into the annular space around the ground joint. Its free escape is prevented by a stricture or narrow space formed by the outer edge of the lip and the valve-seat. Thus the steam escaping from the valve is made to act by its expansive force upon an additional area outside of the valve proper to assist in raising the valve, this stricture being enlarged as the valve is considerably lifted from its seat, and varying in size as the quantity varies of the issuing steam. There would be no such variable stricture in the Naylor valve, and, in fact, there would be no stricture in it without substituting a diaphragm or some equivalent device for the radial bars which, in the drawings in the original patent, connected the inner and outer cylinders; and if Naylor's annular chamber had been intended to be closed, or partially closed, at the bottom by substituting a diaphragm for the radial bars shown in the drawing, or by substituting a small outlet, not shown, for the large one shown in the drawing, for the exit of the steam from the annular cylindrical chamber, then his device of a bent lever would not only have been useless, but injurious, in its operation; and this last device is the only one which he claimed in his original patent. The Richardson valve is the one used by the defendant; there is added an extension-cup and upward-curved flange to give an upward direction to the issuing steam and keep it away from the cab of the engine. This is an old device, and does not affect the principles or mode of operation of the valve proper.

There is a substantial difference between the Richardson valve and the valve in the specifications and drawings of the Naylor patent, not merely in degree. The increased practical utility of the Richardson valve results from a substantial difference in construction and mode of operation. Bill dismissed.

[NOTE. On appeal, this decree was affirmed by the supreme court. Mr. Justice Clifford, in delivering the opinion, said: "Throughout, the steam valve used by the respondents is the valve patented to George W. Richardson, whose patent makes a part of the record. He obtained his patent September 25, 1866, nearly a month earlier than the date of the original American patent granted to Naylor. His invention, as he describes it, consists in increasing the area of the head of the common safety valve outside of its ground joint, and terminating it in such a way as to form an increased resisting surface, against which the steam escaping from the generator shall act with additional force after lifting the valve from its seat at the ground joint, and so, by overcoming the rapidly increasing resistance of the spring or scales, will insure the lifting of the valve still higher, thus affording so certain and free a passage for the steam to escape as effectually to prevent the bursting of the boiler or generator, even when the steam is shut off and the damper left open." After duly considering the evidence, the steam valve used by respondents was held not to be an infringement of that described in the specification of either of the three patents representing the invention claimed by complainant. Ashcroft v. Boston & L. R. Co., 97 U. S. 189. Richardson's patent (No. 58,294) was construed in Consolidated Safety-Valve Co. v. Crosby Steam-Gauge & V. Co., 7 Fed. 768; Same v. Kunkle, 14 Fed. 732; Same v. Crosby Steam-Gauge & V. Co., 113 U. S. 157, 5 Sup. Ct. 513.]

Case No. 578.

ASHCROFT v. CUTTER et al.

[6 Blatchf. 511.][1]

Circuit Court, S. D. New York. July, 1869.

PATENTS FOR INVENTIONS—INFRINGEMENT—ANTICIPATION—BURDEN OF PROOF.

1. In an action for the infringement of a patent, the burden of showing, as a defence, that the patentee was a joint inventor, with some other person, of the thing patented, is on the defendant.

2. Where the oath of such alleged joint inventor was contradicted by that of the patentee, and the patentee was corroborated by the circumstances that he was a draughtsman and had taken out patents for several inventions made by him, and that the other person was not a draughtsman, or a designer, or an inventor, and had neglected, although eight years had elapsed since he knew of the patent, to apply for a patent himself for the invention, or to assert his right in the premises in any legal form, this court sustained the patent.

At law.

This was an action on the case, for the infringement of letters patent, granted to Arthur Neill, as inventor, January 22d, 1861, [No. 31,187,] for an "improvement in moulds for shaping india-rubber pencil holders," and

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

assigned to the plaintiff. By a stipulation in writing, it was tried before the court without a jury. The stipulation further provided, that, if the plaintiff had judgment, it should be for the sum of $10,000, and costs.

Albert Van Wagner, for plaintiff.
Williams, Bates & Bonney, for defendants.

BLATCHFORD, District Judge. If the patent is valid, the infringement is admitted. The novelty, utility and patentability of the invention are, also, admitted, and the only question at issue in the case is, whether Neill was the original and sole inventor of the improvement, or whether one Francis P. Hale was a joint inventor of it with Neill. The burden of proof is on the defendants, to overthrow the prima facie title conferred by the patent. The testimony of Hale is directly contradicted by that of Neill, in all its material points, while the surrounding circumstances, that Hale was not a draughtsman, or a designer, or an inventor, and that Neill was a draughtsman, and had taken out patents for several inventions made by him, and that Hale has always neglected, it being nearly eight years since he knew that Neill had taken out a patent for the invention in question, to apply for a patent himself therefor, or to assert his rights in the premises in any legal form, corroborate the oath of Neill.

I find for the plaintiff, for the sum of $10,000.

[NOTE. Patent No. 31,187, so far as known, has not been involved in any other cases reported prior to 1880.]

Case No. 579.

ASHCROFT v. HOLLINGS.

[11 O. G. 879.]

Circuit Court, D. Massachusetts. April 13, 1877.

PATENTS FOR INVENTIONS—INFRINGEMENT—EXTENT OF CLAIM.

1. The patent for a lamp, can, or barrel, packed in part with an absorbent or finely granulated material, and over them a body of wire-gauze or perforated thin plate, either rolled up like paper scrolls or put flat together like book-leaves, is not infringed by the use of a lamp containing cotton covered with a layer of asbestus or porous fire-proof cement, and covered with one thickness of wire-gauze.

2. The invention patented to Wm. Beschke, August 14, 1866, includes as a necessary ingredient wire-gauze or perforated thin plate in the form of scrolls or of layers like the leaves of a book.

[In equity. Bill by Charles E. Ashcroft against William Hollings to enjoin infringement of letters patent No. 57,245. Bill dismissed.]

SHEPLEY, Circuit Judge. The defense in this case is based upon the alleged want of novelty in the invention described in the letters patent granted to William Beschke and others, August 14, 1866, No. 57,245, "for an improved method of using explosive fluids for the production of light and heat," and also upon a denial of any infringement of the Beschke patent. The question of infringement depends upon the construction to be given to the Beschke patent. In view of the state of the art at the date of the patent, as well as upon what is clearly described in his specification and claimed in his claims, it appears to be clear that the invention of Beschke is described and claimed as consisting in a lamp, or can, or barrel, packed in part with an absorbent or finely granulated material, (excluding sand and including saw-dust, cotton, beads, shot, gravel, asbestus, and their equivalents,) and over them "a body of wire-gauze or perforated thin plate, either rolled up like paper scrolls or put flat together like book-leaves." The defendant sells a lamp for heating purposes, manufactured under letters patent issued to Thomas W. Houchin, May 4, 1875, called Houchin's patent pocket cook-stove. The lamp is made of metal, and is filled with cotton covered with a layer of asbestus, or of porous fire-proof cement of which asbestus is an ingredient. The upper opening is covered with one thickness of wire-gauze. There is no tube as distinguished from the body of the lamp, and there is no "body of wire-gauze or perforated thin plate, either rolled up like paper scrolls or put flat together like book-leaves." Wherever in the Beschke patent wire-gauze or perforated thin plate is alluded to, it is in the form of a scroll or of layers, like the leaves of a book, and after constantly repeating this description throughout the patent, and never using the words without some description of a scroll or layers, except in one instance, and then "wire-gauze combined and shaped as mentioned," the patentee adds, "I disclaim also the simple use of mere wire-gauze or perforated thin plate not rolled up like paper scrolls or put flat together like book-leaves." The wire-gauze or perforated thin plate, described in the claim of the Beschke patent, must be construed as referring to wire-gauze or perforated thin plate rolled up like paper scrolls, or put flat together like book-leaves, as described in the specification, and upon this construction of the claim in the patent the defendant does not infringe. Bill dismissed with costs.

ASHCROFT, (RICHARDSON v.) See Case No. 11,779.

Case No. 580.

ASHCROFT v. WALWORTH et al.

[Holmes, 152;[1] 5 Fish. Pat. Cas. 528; 2 O. G. 546.]

Circuit Court, D. Massachusetts. May 6, 1872.

PATENTS FOR INVENTIONS — ASSIGNMENT OF PATENT BY COURT—RECORDATION—BONA FIDE PURCHASER.

1. The title of an insolvent debtor to, or his interest in, letters-patent of the United States for an invention, does not pass to his assignee in insolvency by an assignment of his property, made by a judge of probate and insolvency under the insolvency law of Massachusetts.

[Cited in Gordon v. Anthony, Case No. 5,605.]

[2. Cited in Ager v. Murray, 105 U. S. 131, as containing an intimation that the state court might compel an insolvent debtor to execute a conveyance of such title for the benefit of his creditors.]

3. An assignment of all the grantor's right, title, and interest, in and to a certain patent, carries only the existing interest of the grantor at the time of the assignment.

4. An unrecorded assignment of all the grantor's right, title, and interest, in and to a certain patent, is good as against a subsequent recorded assignment by the same grantor to a purchaser having notice of the previous assignment.

[See Continental Windmill Co. v. Empire Windmill Co., Case No. 3,142.]

In equity. Bill in equity for an injunction to restrain alleged infringement of letters-patent for an improvement in pipe-tongs, granted to James R. Brown Nov. 30, 1858, [No. 22,157,] and for an account of profits. The defendants claimed the right to make and sell the patented article under several assignments. Among these was an assignment of the property of the patentee, then an insolvent debtor, duly made to one Kingsbury, his assignee in insolvency, by a judge of probate and insolvency, according to the insolvency law of Massachusetts; and a subsequent assignment by Kingsbury of all his right, title, and interest in and to the letters-patent. The defendants also claimed the right to make and sell the patented article under conveyances of Richard A. Brown to one Norton. It appeared that, on the 12th of October, 1860, Richard A. Brown was the owner, by the patentee's assignment, of an exclusive right to manufacture the patented article, and on that date assigned back to the patentee all his right, title, and interest, in and to the patent. Subsequently he conveyed all his right, title, and interest, to Norton. His conveyances to Norton were recorded in the patent office before his assignment to the patentee was; but Norton took them with knowledge of that assignment.

James B. Robb, for complainant.

Chauncey Smith and W. W. Swan, for defendants.

SHEPLEY, Circuit Judge. -The patent in this case was granted to James R. Brown Nov. 30, 1858. Previously to this time, Nov. 6, 1858, Brown had conveyed to one William Freedly one-half of his interest in the invention, and any patent which might be granted therefor. On the 31st of March, 1859, Freedly conveyed his interest to Silas B. Goldthwait. The title stood one-half in James R. Brown and one-half apparently in Goldthwait on the sixteenth day of June, 1860, at which time James R. Brown went into insolvency under the law of Massachusetts. It is claimed by the defendants, that, by virtue of the proceedings in insolvency, all the interest which James R. Brown then had in the patent passed to George H. Kingsbury, his assignee. The insolvent law of Massachusetts authorized the judge, "by an instrument under his hand, to assign and convey to the assignee all the estate, real and personal, of the debtor, except such as is by law exempt from attachment, with all his deeds, books, and papers relating thereto;" and it provided that "the assignment shall vest in the assignee all the property of the debtor, real and personal, which he could lawfully have sold, assigned, or conveyed, or which might have been taken on execution upon a judgment against him," &c., * * * "and shall be effectual to pass all said estate," &c. Under this statute, it has been decided that the property vests in the assignee by force of the statute rather than by virtue of the terms of the assignment. Clarke v. Minot, 4 Metc. [Mass.] 346, 348.

The act of congress of 1836, c. 357, § 11, [5 Stat. 121,] provides that every patent shall be assignable at law, either as to the whole interest or any undivided part thereof, by an instrument in writing; which assignment shall be recorded in the patent office within three months from the execution thereof. This act clearly contemplates a written instrument, signed by the owner of the patent and duly recorded in the patent office, as necessary to vest the legal title in the purchaser. The insolvent law of Massachusetts provides further, for confirming the assignment made by the judge, by making it the duty of the debtor "to execute all such deeds and writings, and do all such other lawful acts and things, as may be necessary or useful for confirming the assignment so made by the judge, and to enable the assignee to receive or become possessed of all the estate and effects assigned as aforesaid, especially such part thereof as may be without the commonwealth." This is an express recognition of the fact that there may be property so situated in other countries or states or territories, that the assignment itself would be ineffectual to pass it and transfer the title to the assignee without an instrument of conveyance from the debtor. Especially is this the case with patent-rights; for, in the language of Mr. Justice Curtis, "these incorporeal rights (copy-rights and letters-patent) do not exist in any particular state or district: they are coexten-

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

sive with the United States. There is nothing in the act of congress or in the nature of the rights themselves to give them locality anywhere so as to subject them to the process of courts having jurisdiction limited by the lines of states and districts." Stevens v. Gladding, 17 How. [58 U. S.] 451.

It might have been competent for the court under the insolvent law to have compelled the debtor to execute such an instrument in writing as, in accordance with the provisions of the patent act, would have been effectual to transfer the title in the patent to the assignee. If a right in a patent was such property as did not come within the exceptions of the insolvent law, as property not liable to attachment, or if it is of such a nature that it is subject to the operation of state insolvent laws, this would seem to have been the only proper and effectual mode to have made it available for the benefit of the creditors. Without such a conveyance as the statute of the United States contemplates, we do not think the assignee acquires any legal title to any interest the debtor may have in any letters-patent. To invest the assignee with the legal title, the court must compel a transfer in conformity with the requirements of the patent act. Stephens v. Cady, 14 How. [55 U. S.] 530, 531. No title, therefore, vested in Kingsbury, the assignee, no such instrument in writing assigning the debtor's interest to him ever having been made and recorded in conformity with the requirements of the act of congress.

The defendants did not acquire any title through the conveyances to Richard A. Brown, and from him to Norton. Before the conveyances from Richard A. Brown to Norton, he had reconveyed to his father, James R. Brown; and although that conveyance was not recorded, it was good as against Norton, for Richard A. Brown only undertook to convey whatever right, title, or interest he had under the patent to manufacture the thing patented; not the patent itself, or any undivided interest therein. Nothing passed but the actual interest the grantor had at the time. Brown v. Jackson, 3 Wheat. [16 U. S.] 449. Norton was not a bona fide purchaser, but took the conveyances with full knowledge of the previous conveyance from Richard A. Brown to James R. Brown. Complainant is entitled to a decree for an account of the patented pipe tongs made, used, or sold by the defendants since the conveyance to the complainant; and to an injunction, according to the prayer in the bill.

[Decree for complainant for account and injunction as prayed for—decree to be drawn up and submitted to the court.][1]

[NOTE. There are no other cases involving this patent reported prior to 1880.]

[1][From 2 O. G. 546, and 5 Fish. Pat. Cas. 528.]

Case No. 581.

In re ASHLEY.

[19 N. B. R. 237.]

District Court, D. Vermont. July 8, 1879.

ATTACHMENT—LEVY—LIEN—SUBSEQUENT BANKRUPTCY.

[To constitute an attachment of personal property, the officer must actually take it into his custody and control; the mere taking of a receipt for certain property, followed by a return that he had attached it more than four months before the bankruptcy proceedings, though it would estop the receiptors from denying that there was an attachment, is not enough to create a lien as against the assignee in bankruptcy.]

[In bankruptcy. Petition by John Boothe, a deputy sheriff, against the assignee in bankruptcy of Ashley, to enforce a prior lien created by an alleged attachment. Dismissed.]

Park Davis and W. L. Burnap, for assignee.

C. W. Witters, for petitioner.

WHEELER, District Judge. The petitioner, John H. Boothe, a deputy sheriff, having writs of attachment in his hands against the bankrupt, without taking possession of any property, took a receipt for certain specified property, signed by the bankrupt and another, and made return that he had attached it more than four months before the bankruptcy proceedings. The assignee found the property in possession of the bankrupt, and took it. This petition is brought to enforce a lien upon the property by force of these proceedings.

The bankrupt law leaves attachments in force when made a sufficient length of time before the commencement of the bankruptcy proceedings. To constitute an attachment of personal property, the officer must actually take it into his custody or control. Lyon v. Rood, 12 Vt. 233; Soule v. Austin, 35 Vt. 519. This was not done here. The officer took a receipt which conclusively estopped the receiptors from denying that there was an attachment. This did not make an attachment in fact; it only affected the personal liability of the receiptors. Their liability rested wholly in contract. Soule v. Austin, 35 Vt. 519. The officer accepted their personal liability in place of taking the property. This left no lien upon any property as against bankruptcy proceedings. Zollar v. Janvrin, 49 N. H. 114; Carpenter v. Farrell, 100 Mass. 450. This is just, too. If the property had been taken into the custody of the officer, other creditors might, and probably would, have found it out, and commenced proceedings in season to cut the attachment off. If the mere giving a receipt would answer, they might be deceived into letting it run too long.

Petition dismissed.

ASHLEY, (BERNARD v.) See Case No. 1,346.

ASHLEY, (BLIGHT v.) See Case No. 1,541.
ASHLEY, (BOURNE v.) See Case No. 1,699.
ASHLEY, (COLUMBIAN INS. CO. OF ALEXANDRIA v.) See Case No. 3,038.
ASHLEY, The, (ELDRIDGE v.) See Case No. 4,333.
ASHLEY, (RUSSELL v.) See Case No. 12,150.

Case No. 582.

ASHTON v. BURBANK et al.

[2 Dill. 435;[1] 4 Bigelow Ins. Cas. 149.]

Circuit Court, D. Minnesota. 1873.

STOCKHOLDER'S LIABILITY — POWER TO FORFEIT STOCK — EFFECT OF FORFEITURE — RADICAL CHANGE OF CHARTER.

1. An incorporated company which exercises its power to forfeit the stock of the subscriber for the non-payment of a call, cannot afterwards recover upon a note given to it by such subscriber for a previous unpaid assessment on his stock.

2. The change in the charter of a "life and accident" insurance company, whereby such company is also authorized to transact the business of "fire, marine, and inland insurance," is of such a radical character as to discharge previous subscribers, who do not assent to the change, from liability to pay future assessments on their stock.

At law. This is an action on a promissory note, dated August 19, 1867, for $3,000, made by the defendants to the Provident Life Insurance and Investment Company. The defendants were subscribers of that company, and the note in suit was given for an assessment upon their stock. The original charter of said company authorized it to transact a "life and accident insurance" business. After the defendants' subscription to the stock, the charter was amended, and the name of the company changed to the Eagle Insurance Company, and it was also authorized, by the amended charter, to transact the business of "fire, marine, and inland insurance." The amended charter was accepted, but, in point of fact, the company took no risks during the short period it afterwards did business, except such as were authorized by its original charter. Subsequently, the company, being then in possession of the note in suit, forfeited, under authority given in its charter, the stock of the defendants therein. The note in suit, when long past due, was transferred by the company to the plaintiff. Based upon these facts, two special defenses are made to the note, the facts relating to which appear in the special verdict, and the question on the special verdict is whether either of these defenses is sufficient in law to defeat a recovery on the note. The special verdict is in these words:

"The note was executed by the defendants, and is now the property of the plaintiff by assignment and purchase from the payee after due, and the plaintiff is entitled to recover thereon the full amount thereof, less the credit indorsed on the same, of $157.50, October 10, 1868, unless the following facts, which we state in the form of a special verdict, constitute a defense:—

"First Special Defense.—We find the following facts: The Provident Life Insurance and Investment Company, the payee of the note in suit, was chartered by the legislature of the state of Illinois, February 13, 1865 (Laws of 1865, p. 761, made a part of this verdict), 'to carry on the business of life and accidents insurance' at Chicago, with power to establish a branch at Peoria, Illinois. The defendants, living in Minnesota, subscribed to the stock of said company, each in the sum of $5,000, and paid, in cash, at the time of the subscription, ten per cent thereon. Some months afterwards, the company made an assessment of fifteen per cent on said stock, and it was for, or in payment of, this assessment, that the note in suit was given. That is, the consideration of said note in suit is the aforesaid assessment of fifteen per cent upon the defendants' said subscription to the said stock of said company. Two days after the note in suit was given, the defendants received from the said company certificates of stock, which recite that twenty-five dollars on each share had been paid. Each certificate is as follows:—

" 'Capital, $1,000,000. Shares, $100 each. Provident Life Insurance and Investment Company, Chicago, Illinois. No. 417. 50 Shares. Be it known, that J. C. Burbank, Esq., is entitled to fifty shares of the capital stock of the Provident Life Insurance and Investment Company, on which has been paid twenty-five dollars on each share, and holds the same subject to the conditions and stipulations contained in the act of incorporation of said company; which shares are transferable on the books of the company, at its office, in Chicago, by the said Burbank or his attorney, on the surrender of this certificate and payment of all installments then due, and when such transfer shall be sanctioned and approved by the transfer agent. [Seal.] Witness the signature of the president and secretary, and the seal of the company, attached. Chicago, August 21, 1867. I. Y. Munn, President. C. Holland, Secretary.

" 'This certificate to be surrendered on payment of the next installment, when a new one will be given.'

"This amount was made up as follows, viz: the ten per cent paid at the time of the subscription, and the said fifteen per cent for which the note in suit was executed as aforesaid. On the 10th of October, 1868, the defendants paid the payee $157.50 as interest, being the amount indorsed thereon.

"Subsequently, to-wit, on the 3d day of March, 1869, the legislative assembly of Illinois passed an act as follows: 'An act to amend an act to incorporate the Provident Life Insurance and Investment Company,' approved February 13, 1865. Sec. 1. Be it enacted by the people of the state of Illinois, represented in the general assembly,

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

That so much of section 1 of said act, to which this is amendatory, as relates to the name and style of the corporation, and sections 5 and 15 of the said act, to which this is amendatory, be, and the same are hereby, repealed. Sec. 2. The name and style of the company shall be and is Eagle Insurance Company, and the said company may transact fire, marine, and inland insurance; and may hold an annual meeting of the shareholders on the first Tuesday of July, for the election of thirteen directors, to serve until their successors be chosen. Approved March 3, 1869.'

"The defendants neither procured nor assented to said last mentioned act, nor did they know of it until after its passage, and thereupon they protested against it, and refused to pay the note in suit on this ground. Subsequently the said Eagle Insurance Company ceased to do business, and this note, among other assets, was sold to the plaintiff in the year 1871, in payment of a debt due from the Eagle Insurance Company to him. After the said amendment of the charter of March 3, 1869, the Eagle Insurance Company did not, in fact, transact any fire, marine, or inland insurance business, or do any other business than such as was authorized by the original charter.

"Second Special Defense.—We find all the foregoing facts, and also the following, to-wit: Under the second section of the charter of the Provident Life Insurance and Investment Company, calls were made upon the defendants in September, 1869, for the payment of an additional assessment of twenty per cent upon their stock, payable October 25, 1869, which they neglected and refused to pay, and that the board of directors of the Eagle Insurance Company, on the 2d day of December, 1869, declared all the stock on which said assessment had not been paid, including defendants' said stock, forfeited; and soon after new stock subscriptions were received from new subscribers, and the old directors went out, and new directors, elected by the new stockholders, came in; and the Eagle Insurance Company ceased to do active business or issue new policies after January, 1870."

The provision in the charter of the company in relation to the forfeiture of stock is, that if any shareholder or subscriber shall neglect to pay a call for a specified number of days, "it shall be lawful for the directors to declare the shares forfeited to the company, and all previous payments made thereon."

Gilman, Clough, & Wilde, for plaintiff.

E. C. Palmer, for defendants.

Before DILLON, Circuit Judge, and NELSON, District Judge.

DILLON, Circuit Judge. We hold the following propositions:

1. The plaintiff taking the note in suit directly from the company, long after it was due, and after the change in the charter, and after the action of the company forfeiting the defendants' stock therein, stands precisely in the place of the company, and cannot recover on the note unless the company could have recovered, had the action been brought by it.

2. The note being given for an unpaid stock assessment, represents, for all the purposes of this action, that assessment, and the note not having been paid, it follows that the defendants have not paid the stock assessment for which the note was given. Under its charter, the company had the power, if any assessment upon stock subscribed was not paid, to forfeit the stock and all previous payments thereon; or, at its election, the company would have the right to sue for such assessment. But the two courses are inconsistent, and it must elect whether to sue for and recover the stock subscription, or to forfeit the stock. It cannot do both. Having elected, in this case, to forfeit the defendants' stock, it cannot afterwards recover for a prior unpaid assessment; and this doctrine, which was conceded in argument, is not, in our judgment, varied, as the plaintiff's counsel contends, by the circumstance that the company, at the time of the forfeiture of the stock, held the defendants' note for such prior unpaid assessment. Small v. Herkimer Manuf'g Co., 2 Comst. [2 N. Y.] 330.

3. The change in the charter, by which a life and accident company was authorized to transact fire, marine, and inland insurance, is an organic change of such a radical character as to discharge previous subscribers to the stock of the company from any obligation to pay their subscription, unless the change is expressly or impliedly assented to by them. Here there was no such assent, and no acquiescence in the structural change made in the charter of the company. The company could not, against such a subscriber, maintain a suit to collect his subscription, and take the money and use it as capital for the transaction of business under the charter as altered. We think, in such a case, the subscriber is not bound to enjoin action under the amended charter, but may, if he elects, defend against an action to recover on his subscription to the stock.

If the company accepted the amended charter, as it did by adopting the new name, it is not essential to such a defense to show that at the time of the trial the corporation had actually exercised the enlarged powers conferred upon it. The defendants are not bound, on their subscription, to pay to the company money which, if paid, may be used as capital to carry on the business authorized by the amended charter.

Judgment for the defendants.

NELSON, District Judge, concurs.

NOTE, [from original report.] Liability of stockholders to creditors. Haskins v. Harding, [Case No. 6,196;] Payson v. Stoever, [Id. 10,863.]

ASHTON, (DURHAM v.) See Case No. 4,192.

Case No. 583.

ASHTON v. FITZHUGH et al.

[1 Cranch, C. C. 218.] [1]

Circuit Court, District of Columbia. Dec. Term, 1804.

PLEADING—DECLARATIONS—NOT FOR SPECIFIC SUM—DEMURRER.

A declaration in debt for "$103⅓, or 31 pounds Virginia," is bad on special demurrer. It must be for a sum certain.

At law. Special demurrer; because the declaration is that defendants render to plaintiff $103⅓, or 31 pounds of Virginia, which they owe and detain; which is uncertain, not being positive, nor certain what pounds are meant, whether of tobacco or anything else. It was also suggested by Mr. Caldwell, that it was uncertain because it stated that the defendants were bound, &c., and there are no defendants until after plea or defence taken. The writ was against Philip and McCarthy Fitzhugh, to answer to Henry Alexander Ashton, in a plea that they render to him "one hundred three dollars, thirty-three one third cents, or thirty-one pounds of Virginia, which they owe and detain." The declaration was that H. A. Ashton complains of Philip Fitzhugh and McCarthy Fitzhugh, late of the district and county, aforesaid, yeomen, who were summoned to anwer in this behalf of a plea that the said defendants render the said plaintiff one hundred three dollars, thirty-three one third cents, or thirty-one pounds of Virginia, which they owe and detain; for that the defendants, on 20th March, 1797, at &c., by their certain writing obligatory of that date, sealed with their seals, and now here exhibited, promised to pay the plaintiff on or before the 25th of December thereafter, sixteen pounds ten shillings of Virginia, equivalent to fifty-five dollars, for the hire of negro Charles, with suitable clothing, victuals and taxes, to the payment whereof they bound themselves in the penal sum of thirty-one pounds of Virginia, equivalent to one hundred three dollars, thirty-three one third cents; and the plaintiff avers they did not pay the said sixteen pounds ten shillings, or fifty-five dollars, according to the tenor of the said writing, whereby action accrued to have the said penal sum; yet though often requested, the defendants have refused and still refuse to pay the said thirty-one pounds, or one hundred three dollars, thirty-three one third cents, to the damage of the plaintiffs five hundred dollars, wherefore they sue, &c.

Mr. Woodward, for plaintiff.

Mr. Caldwell, for defendants.

[1] [Reported by Hon. William Cranch, Chief Judge.]

THE COURT was of opinion that the declaration is too uncertain, but gave leave to amend on payment of costs of the term and a continuance if required by defendant.

ASHTON, (LYNCH v.) See Case No. 8,636.

Case No. 584.

ASHTON v. McKIM et al.

[4 Cranch, C. C. 19.] [1]

Circuit Court, District of Columbia. May Term, 1830.

SET-OFF — NEGOTIABLE INSTRUMENT — PAROL AGREEMENT TO ACCEPT SERVICES IN PAYMENT.

At the time of the complainant's giving the single bill, it was expected and understood by both parties, that the whole amount might be satisfied by the services of the complainant, and that such services, as far as they should be actually rendered, should be set off against the bill. Services, to an indefinite extent, the value of which was not ascertained, were admitted to have been performed; and it was not denied that the complainant was always ready and willing to perform all that should be required of him. Held, that the complainant had a right, under the original contract, to have the value of those services ascertained and set off against the bill. Injunction continued till final hearing.

In equity. Bill for an injunction to stay proceedings upon a judgment at law upon a single bill for $766.65 given by the complainant to J. & P. Turner, and by them assigned to the defendant McKim. Upon the coming in of the answers of the defendants,

Mr. Lear, for the defendants, moved to dissolve the injunction, and Mr. Tabbs, for the complainant, filed exceptions to the answer of the defendants J. & P. Turner.

THE COURT (nem. con.) overruled the exceptions; and as to the matter of equity in the bill,

CRANCH, Chief Judge, delivered the opinion of the court. The next questions are, 1st. Whether there is equity in the bill; and 2d. Whether the matter of that equity is denied by the answer. It is no equity that the complainant has an off-set at law to the defendants' action at law against him. Nor is it any matter of equity that the complainant has a claim for unliquidated damages, for breach of contract, against these defendants which could not be set off at law, unless it be accompanied by an allegation of the insolvency of these defendants, or some other impediment to the complainant's maintaining an action at law for such unliquidated damages; neither of which is averred in the bill. If there be any equity in the bill, it grows out of the true nature

[1] [Reported by Hon. William Cranch, Chief Judge.]

of the contract between the parties. Apparently it is a single bill acknowledging an absolute debt under hand and seal. According to the allegations of the bill, the debt is admitted, but it is said that it was not intended to be paid in the ordinary mode, by money, but by services, and that therefore it is inequitable in the defendants to avail themselves of the legal advantage which the form of the instrument has given them to enforce payment in money, the complainant having been always ready to perform the services which might be required.

The form of the instrument is certainly such as to throw the burden of proof upon the complainant to show that the contract was different from that which it purports to be. Neither fraud, nor imposition, nor mistake is alleged. The bill avers that the single bill for $766.65, was executed and delivered by the complainant, to the said Turners, "upon the express understanding that the said Turners were to give him all their law business;" "and that he should never be called upon to pay the said note, but that the whole amount was to be taken out in professional services; and expressly charges that the said Josiah did, for himself, and in the name of the said firm, proffer and make those terms." That "the Turners did not employ him in all their law business, as agreed as aforesaid," "although he was ready and willing to transact any that they offered to him." In the answer of J. & P. Turner, they deny that they or either of them, at the time of taking the note, or at any time thereafter, ever did agree to take it all out in law, unconditionally. They deny that it was executed and delivered to Josiah Turner, with any express agreement that the complainant never was to pay the same, or that he was never to be called on for payment thereof, as charged in the complainant's bill; but they admit that Josiah Turner said, that, if he would come to St. Mary's to reside, he would give him all his business, with that also of the firm of Josiah Turner & Co.; and that, in such case, the payment of the note would come easy to him; and that the greater part of it, on such conditions, would be taken out in law; and promised, at the same time, that if the complainant would determine on it then, this defendant would set him to all the cases of the firm; and might have said, "provided the complainant came to St. Mary's to reside, and took charge of their business, that he might never be called on for payment." The defendant Josiah also denies, that, at the time of taking the note, or at any time since, he promised the complainant to give him the individual and private law business of Philip. And the defendants aver that the whole of the said conversations and conditional promises grew out of the complainant's stating, at the time they were about to take his note, that he thought of coming to St. Mary's to reside, which conditions were never complied with by the complainant.

It is evident, then, from the bill and answer, that, at the time the single bill was given, it was expected and understood, by both parties, that the whole amount might be satisfied by the services of the complainant; and that such services, as far as they should be actually rendered, should be set off against the obligation. Services, to an indefinite extent, the value of which is not ascertained, are admitted to have been performed, and it is not denied that the complainant was always ready and willing to perform all that should be required of him. The complainant, then, has a right, under the original contract, to have the value of those services ascertained and set off against the bill; and if it shall appear, upon final hearing, that the promise to give him the whole law business of the firm was not upon a condition not performed by the complainant, and that he was always ready to give his services and that the business has been given to another, it may possibly happen that equity will relieve him entirely from the obligation. We think, therefore, that the injunction ought to be continued until final hearing.

ASHTON, (UNITED STATES v.) See Case No. 14,470.

Case No. 585.

In re ASKEW.

[3 N. B. R. (1870,) 575, (Quarto, 142.)]

District Court, N. D. Georgia.

BANKRUPTCY—EXEMPTIONS—STATE LAWS—HOMESTEAD.

[The bankrupt act of 1867 expressly limits the exemptions to be allowed to bankrupts to those allowed by the state laws in force in 1864. The law of Georgia then in force (Irwin's Rev. Code, § 2013) allowed the head of a family 50 acres of land. Laws Ga. 1868, allows a debtor to set apart land to the value of $2,000, and, in case of his failure in that respect, empowers the wife to do so, provided that no debtor who has claimed an exemption under said section 2013 shall take any benefit under the later act. *Held*, that a debtor by filing his petition in bankruptcy elected to take the exemption allowed by the bankrupt act, namely that of section 2013, and that a setting apart by the wife of his tract of 510 acres of land as a homestead, of the value of $2,000, was illegal and void.]

[In bankruptcy. The Georgia homestead law, passed October 3, 1868, provides that any head of a family who may be indebted beyond his ability to pay, may, by application to the ordinary of his county, have surveyed and set apart as a homestead $2,000 specie value in realty, and $1,000 specie value in personalty, which shall be exempt from levy and sale by virtue of the process of any

court; that, in case the husband shall neglect or refuse to apply for the setting apart such homestead, the wife may apply to the ordinary, and have the same set apart; that the passage of the law shall not preclude a debtor from choosing the exemptions allowed by Irwin's Rev. Code, § 2013; and that a debtor who chooses the exemptions allowed by one of these laws shall have none of the benefits of the other.]

By the Register: The question here presented for consideration and decision is this: "Can a married woman, under the law, claim a homestead under the new constitution and laws of Georgia, out of the property of her husband, at the same time that the husband seeks relief and a discharge from his debts in a court of bankruptcy, he returning the property in his schedule of assets, out of which he claims a homestead?"

David R. Askew filed his voluntary petition in bankruptcy on the 30th day of December, 1868, and on the same day, Mrs. Eliza A. Askew, his wife, filed her application before the ordinary of Spalding county for the setting apart and valuation of homestead. Mr. Askew returned in his schedule of assets five hundred and ten acres of land. This same land, under the order of the ordinary, was surveyed and platted by the county surveyor on the 8th day of January, 1869, and the whole set apart as a homestead, which action of the county surveyor was approved by the ordinary on the 11th January, 1869, and on the next day, January 12th, 1869, Mr. Askew was adjudged a bankrupt by the court of bankruptcy. It is admitted that Mr. Askew knew of his wife's application to the ordinary, and no one can reasonably doubt that she knew of his application in bankruptcy; so it seems to have been a concerted arrangement between husband and wife—he to get a discharge from his debts in bankruptcy, and she to cover all the property by a homestead under the state exemption law of October 3d, 1868.

The bankrupt law, § 14, [14 Stat. 523,] expressly limits the exemptions to be allowed a bankrupt in bankruptcy to the state exemption laws of force in 1864. The state exemption law that was of force in 1864, in Georgia, is found in Irwin's Revised Code, § 2013. This exempts to each head of a family but fifty acres of land and five acres additional for each child under sixteen years of age. Mr. and Mrs. Askew have three children under sixteen, and under the said 2013th section, would be allowed sixty-five acres as exempt; but under the law of October 3, 1868, Mr. Askew claims the whole five hundred and ten acres. Mr. Askew, being fully cognizant of the action his wife was taking, and offering no objection thereto, thereby showing consent on his part, is in the same condition as if he had made a transfer of the property to his wife, and she, being fully cognizant of his bankruptcy and accepting such transfer by the action she took, is in the same condition as if she had accepted a deed to the property from him. All such transfers are declared void by the 35th section of the bankrupt act.

The act of 1868, [14 Stat. 523,] under which the homestead is now claimed, provides, in the 14th section thereof, that a debtor may take his choice and choose the exemptions allowed by the 2013th section of Irwin's Revised Code, instead of those allowed by this act, and adds: "But no person who shall be allowed the exemptions under those laws, shall take any benefit under this act." Mr. Askew, by filing his petition with the schedules annexed, in bankruptcy, on the 30th day of December, 1868, then elected to take the exemptions allowed by the bankrupt law (the striking from his schedule B 5, the sixty-five acres allowed by the 2013th section, Irwin's Code, can make no difference). The bankrupt law allows that exemption, and the law gives it to him whether he claims it or not. Having elected to go into bankruptcy, he is bound by the provisions of the bankrupt law; and having thus elected to take the exemptions allowed by the 2013th section of Irwin's Code, he is not entitled to any benefit under the state exemption act of 1868.

This is evidently a case wherein the husband and wife are acting in concert, and attempting to dispose of the debts under the bankrupt laws and the assets under the state law. Such a proceeding cannot be tolerated in bankruptcy: because, when a court of bankruptcy takes jurisdiction at all, it assumes the entire jurisdiction of both the person and property of the bankrupt. When a proper case is made, the bankruptcy court takes jurisdiction, and such jurisdiction is exclusive. A proper case was made when Mr. Askew filed his petition in bankruptcy. The bankruptcy court took jurisdiction of Mr. Askew and his property on the filing of his voluntary petition on the 30th December, 1868; hence all his property was in the legal custody of the bankruptcy court from that time, and the action of the court of ordinary of the 8th and 11th January, 1869, is null and void, because then that court had no legal jurisdiction; the property then being in the legal custody of the bankruptcy court. A question may be made as to the time when a court of bankruptcy assumes jurisdiction of the property of a bankrupt. The rule is different in case of voluntary bankruptcy from that in involuntary bankruptcy. In a case of involuntary bankruptcy the bankruptcy is disputed, and the question is not determined until the judgment of the court is pronounced. The adjudication of bankruptcy, in that case, transfers the custody of the property to the court. But in a case of voluntary bankruptcy, the filing of the petition is an acknowledgment under oath of the bankruptcy. The filing of the petition is a surrender of the property named in the schedule to the court for the benefit of

the creditors. On this point Judge Blatchford, of the southern district of New York, in Re Vogel, [Case No. 16,983,] after quoting the several provisions of the bankrupt act relating thereto, uses the following language: "It is manifest from these provisions that when a voluntary petitioner in bankruptcy files his petition, in due form, he becomes eo instanti a bankrupt, so far as any interference with the property named in his schedule is concerned, and that such property is thereby brought into the bankruptcy court, and placed in its custody and under its protection, as fully as if actually brought into the visible presence of the court. Being in the custody of the bankruptcy court, no other court, and no person acting under any process from any other court, can, without the permission of the bankruptcy court, interfere with it, and to so interfere is a contempt of the bankruptcy court." Peck v. Jenness, 7 How. [48 U. S.] 612, 625; Williams v. Benedict, 8 How. [49 U. S.] 107; Wiswall v. Sampson, 14 How. [55 U. S.] 52, 66; Peale v. Phipps, Id. 368, 374; Taylor v. Carryl, 20 How. [61 U. S.] 583, 594–597; Freeman v. Howe, 24 How. [65 U. S.] 450; Buck v. Colbath, 3 Wall. [70 U. S.] 334.

This is a case of voluntary bankruptcy. David R. Askew filed his voluntary petition in bankruptcy, on the 30th day of December, 1868, and eo instanti he was a bankrupt, so far as any interference with the property named in his schedule is concerned; and hence the survey and valuation of property, and setting apart the homestead under the process of the court of ordinary on the 8th of January, 1869, and its approval by the ordinary on the 11th, were unauthorized by law, and are null and void. The five hundred and ten acres of land and other property named in the schedule, filed with his petition in bankruptcy, by David R. Askew, on the 30th day of December, 1868, except such portion thereof as is exempt by the bankrupt law, and the state exemption laws of force in the year 1864, must pass to the assignee in bankruptcy, for the benefit of the bankrupt's creditors.

Alexander G. Murray, Register.

ERSKINE, District Judge. I have read and carefully considered the arguments of the respective counsel in this matter, and I approve the opinion of the register, and affirm his clear and able decision. The clerk will certify this affirmation to the register.

Case No. 586.

ASKEW v. ODENHEIMER.

Circuit Court, E. D. Pennsylvania. 1845.

[Cited in Union Mut. Life Ins. Co. v. Kellogg, Case No. 14,373. Nowhere reported; opinion not now accessible.]

Case No. 587.

ASKEW v. ODENHEIMER.

[Baldw. 380.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1831.

TRUSTS—COMPENSATION OF TRUSTEES — PARTNERSHIP—FRAUD BY COPARTNER — DESTRUCTION OF BOOKS AND PAPERS—EVIDENCE.

1. In Pennsylvania all trustees are entitled to a commission on moneys passing through their hands; the usual rate is five per cent, any departure therefrom is under special circumstances.

[See Burr v. McEwen, Case No. 2,193.]

2. If a partner who has committed frauds on the firm agrees to indemnify the injured party to his satisfaction, by an assignment of all the partnership effects for his indemnity, such assignment will be construed liberally in his favour, and will be reformed in equity so as to meet the intention of the parties in conformity with their agreement.

3. But the injured party will not be allowed to be the judge of his indemnity.

4. As a trustee he will be confined to such satisfaction as a court of equity deem reasonable.

5. If the books and papers of the firm have been destroyed or suppressed, false entries made in them, or no entries made by the partner who has charge of them to his debit, with a view to fraud, the injured partner may support a specific charge by his own affidavit, but not by one which specifies no amount under any particular item.

6. On a bill by the fraudulent partner for an account, the master may charge him on any evidence which is competent or admissible as proof of the item; he cannot hold the injured partner to such degree of proof, as would justify a charge under ordinary circstances, against a customer or partner; there must however be some proof.

7. The general rules on which courts of equity act in odium spoliatoris.

[Cited in Hanson v. Lessee of Eustace, 2 How. (43 U. S.) 704.]

In equity. The bill set forth a partnership between the parties commencing in 1822, and terminating in March, 1829, when the following assignment was made by the complainant:

"Whereas, there is reason to believe, that in keeping the books of the firm of Askew & Odenheimer, errors and misentries have occurred, of which the amount cannot be ascertained, but which errors are injurious to the interests of John W. Odenheimer, one of the partners of said firm, and it is just and proper that he should be secured against any loss resulting from these errors and misentries, which have been made by his partner Joseph Askew: Now, therefore, be it known, that the said Joseph Askew, in order to secure to his partner, the said John W. Odenheimer, his full and just and undiminished share in the stock and profits of said firm, and in consideration of the sum of 10 dollars to him in hand paid by the said John; has granted, bargained, sold, assigned, trans-

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

ferred, and set over, and by these presents, does grant, bargain, sell, assign, and transfer unto the said John, all the right, title, interest, property, claim, and demand whatsoever of him, the said Joseph, in law, in equity, or otherwise, in and to the moneys, goods, chattels, rights, credits, and effects, and in and to all the property, real and mixed, in which they the said Joseph and John are jointly at this time interested as partners in the above firm, or may be, to have and to hold to the said John, his heirs, executors, and administrators, to his and their use for ever: Provided always, however, that when an entire adjustment of the accounts of the firm be made, and debts due by the firm paid, all the deficiencies, losses and injuries resulting to the said John W. Odenheimer, shall be made up to him, to his reasonable satisfaction, this conveyance and transfer shall then cease to be operative; and the said John shall re-transfer the same to said Joseph. And it is further agreed between the parties hereto, that the business of the concern shall go on as usual, unless the said John W. Odenheimer shall find it necessary to stop the further progress, in which case, he is at full liberty to do so. And it is further agreed that the said John may proceed to collect the debts due, and wind up the said firm without any hindrance on the part of the said Joseph. In testimony whereof the said Joseph Askew, hath hereunto set his hand and seal this 25th day of April, A. D. 1829. Joseph Askew. Sealed and delivered in presence of Richard Paxson, Thomas Folwell. Proved before an alderman, by the oaths of the two subscribing witnesses on the 22d of May, 1829, and recorded on that day."

The complainant alleges that the errors and misentries were such as he thought himself entitled to make, without any injustice to his partner, in order to compensate himself for extra services to the firm, the amount of which did not exceed the sum saved in clerk hire, and was set forth in a schedule annexed to the bill. It then alleged, that the amount of errors and misentries had been ascertained, that all the objects of the assignment had been effected, that a large balance remained in the hands of the respondent, due to the complainant, which the former was applying to his own use. The prayer was for an account of what had been received since the assignment, of the amount of his claim on the complainant, for a re-transfer of his share of the partnership effects, and the payment of the balance of money on hand.

The answer admits the partnership, by the terms of which the defendant was to do the out of door business, and complainant to attend to the books and in door business of the firm; it averred that there was great mismanagement by the complainant for some years, which he concealed by false entries in the books. That when called on to explain them, he promised to do so, but before this was done, a number of the books and papers of the firm were destroyed by fire, so that it became impossible to ascertain the extent of the frauds thus committed. That the respondent believed that he had sustained losses to the amount of 5000 dollars, exclusive of damages for breaking up the business of the firm, which was profitable, that he was not able to specify the extent with precision, but that they far exceeded the amount of damages stated in the bill, or in any account which had been made out. He therefore claimed to retain out of complainant's share of the partnership effects, a sum sufficient to cover the estimated amount of his losses by the misconduct of his partner. A great mass of testimony was taken, by which it clearly appeared that the complainant had been for some time in the habit of committing frauds on the firm, in the manner recited in the assignment and otherwise. The evidence of the destruction of some of the books and papers of the firm by fire, was very clear, and very strong to prove that it was wilfully done by complainant, to conceal the frauds he had committed. The case was referred to a master, who reported misentries to the amount of 889 dollars, and goods taken to the amount of 250 dollars, for which the complainant had not charged himself; the master reported a balance due to complainants of 5619 dollars and returned the depositions to the court. Both parties filed exceptions to the report, which were argued at length by counsel on both sides on the evidence and law, the latter of which only will be noticed.

Mr. Cadwalader and Mr. Binney, for complainant.

The suppression or destruction of books and papers by complainant, does not dispense with the production of evidence on part of respondent, though it will help slight or defective proof of a charge; every presumption is against the party who is guilty of suppression or spoliation, but there must be some prima facie evidence, sufficient to raise ground for the presumption, such as would authorize a jury to infer the fact. The court will not impose a penalty on complainant arbitrary in its amount, but will supply the defect and ascertain the truth as far as they can. Though by the terms of the assignment the correction of errors was to be ascertained to the satisfaction of respondent, it is not submitted to his arbitrary discretion to judge for himself; he must be reasonably satisfied, and the court will compel him to be satisfied when he is compensated to the full extent of the proof he makes of specific losses. Pandects, b. 2, §§ 6, 7; Poth. Obl. No. 48. So where a party covenanted that if a title was good, he would pay 60 pounds in three months after he was satisfied he held the land by an undisputed title. It was held incumbent on the defendant to-

state a lawful claim adverse to, and better than the one conveyed. Folliard v. Wallace, 2 Johns. 395, 401. The respondent has not insisted on the right to claim, according to his own conscience; he has offered and gone into proof before the master, to ascertain the extent of the fraud, as a matter of account, which is a waiver of the right now assumed, by which he is bound. The assignment embraces only misentries, it was not intended to extend to the goods taken by respondent and not charged, this was never set up till the answer was put in, errors and misentries in the books refer to the face of the books, the meaning of the assignment is, that there shall be an accounting—an adjustment of the accounts of the company, when that is done the trust is terminated; the adjustment must be to the reasonable satisfaction of the trustee, but the measure of the reason of a trustee, is the rule of reason prescribed by a court of equity. Jones v. Nabbs, Gilb. Ch. 146; Webb v. Shaftesbury, 7 Ves. 480. When a party insists on proof of a matter alleged against him, the degree of proof required depends on his position; if an allegation is made that a party has been deprived of evidence, it is answered when evidence is produced; here there is evidence as to the uncharged goods, to which the party will be confined, unless he will show that goods have been taken, which cannot be traced, or their amount ascertained. Respondent has not sworn to the particular losses he has sustained, he is bound by the thirty-fifth rule of this court to specify his exceptions to the master's report, and the court will sustain none which are not made according to its rules, unless for special cause shown. The question before the court is, whether the master acted correctly on the evidence before him, or if he was wrong, what he ought to have done. No evidence will be received but what was before the master, if one general exception is taken, which includes several matters, and one is right, the whole exception fails. 2 Madd. Ch. [Pr.] 510. The master is a judge, no evidence is admissible after the report is settled, and the facts he finds are presumed to be true. Id. 511, 516. Exceptions are in the nature of special demurrers, the party must put his finger on the matters excepted to, [Wilkes v. Rogers,] 6 Johns. 592,—and references to a master have the same effect, whether they are made by agreement of parties, or the order of the court.

Mr. Kittera, for the respondent.

In making the assignment, it was not the intention of the parties to put the respondent to legal proof of the items of fraud by which he had been injured, but to have him satisfied to the amount which in his conscience he believed he had suffered; the object of the assignment was full and perfect indemnity to him, for all the consequences of the fraud, as clearly appears by the preamble and recitals. Their extent was known to complainant, but by his conduct, he has put it out of the power of respondent to ascertain it; in such a case the court will not control his conscience, when he swears to a certain sum, by putting him to the proof of items. The parties have made a standard, by which the trustee is authorized to settle the accounts, without any provision for any appeal from his judgment, as to what is a reasonable satisfaction. The court will not undertake to correct his judgment and oath, merely because there is a defect of proof as to items or amount; unless there is clear evidence that he has abused his discretion, or has fixed an amount unjust at the first blush, the complainant must disprove it clearly. If any other rule is adopted, the parties will be put in the same position, as if their conduct had been fair on both sides, the account between them will be a mere adjustment of balances, appearing on the books, or by legal evidence of charges and credits. The position into which complainant seeks to force us is this, he destroys our means of accounting, and then calls on us for a strict account by the rules of legal evidence; but he has placed us in a position from which no court of equity can remove us. By the assignment, the legal right to all the partnership effects is fully vested in the respondent, the court can take from him only so much, as the complainant can show is retained against equity and good conscience. His position is also a fixed one, he admits fraud in his bill, states the misentries, in addition to which we have proved the suppression and spoliation of the books, accounts and papers of the firm, in which position every presumption is against him. Courts of equity go further than courts of law, in odium spoliatoris, the oath of the party injured will support a charge. [Childrens v. Saxby,] 1 Vern. 207; Childrens v. Saxby, 12 Vin. Abr. 10, 15 Vin. Abr. 312, 16 Vin. Abr. 356. So where a will is destroyed, it will be presumed that it gave the opposite party a right to recover. 2 Poth. 336; [Cowper v. Cowper,] 2 P. Wms. 720; Cowper v. Cowper, 1 Bridg. Eq. Index, 456, pl. 225. The same rule is applied to deeds, books, papers, accounts, &c.; their suppression raises the presumption that they contained what was against the party suppressing, and in favour of the other party, whose oath as to their contents must be admitted from necessity. The court will construe the assignment liberally in favour of the respondent, it was avowedly made for his benefit, its objects were fair and just; and though in terms it extends only to errors and misentries, it will embrace all errors to his injury arising from whatever cause. He must have complete indemnity, and if the words used to afford it are not broad enough to comprehend each item of loss, the court will reform it according to the manifest declared intention of the parties. As the complainant was conusant of his own acts, and the re-

spondent ignorant, except so far as they had become known to him, he shall not be prejudiced by an omission in the preamble and recitals, which was the language of the complainant.

In his answer, respondent averred his losses to amount to 5000 dollars, he claimed this amount before the master, and yet claims it; he has a right to produce all the evidence in his power in favour of his claim, either by proof of items or of undefined injuries, not choosing to stand on his oath alone. But this cannot be deemed an implied waiver of any right which his position gave him, and it is not pretended that he made any express waiver. His first, second, third and fifth exceptions meet the objections of the complainant's counsel, pointing to errors of the master, in confining himself to credits specifically proved by items and in amount, and disallowing any claim for the injury sustained by loss of the credit of the firm, and its consequent premature dissolution, while its business was highly profitable. An allowance for this was expressly claimed in the answer, and ought to have been made by the master. The court may not be bound by the oath of the respondent as to any precise amount, but must make some reasonable allowance for an injury which is apparent. As reported by the master, our credits are such only as are sustained by strict proof.

Before BALDWIN, Circuit Justice, and HOPKINSON, District Judge.

BALDWIN, Circuit Justice. This case comes before the court on exceptions to the report of the master, to whom this cause was referred on the 10th of June last, for an account by the defendant. The account exhibited a balance of partnership effects in the hands of the defendant of 25,498 dollars 91 cents, to which both parties agreed. They likewise agreed on the sum on which a commission should be charged by defendant for his services, being 69,726 dollars 55 cents, but they differed on the amount of commission, the defendant claiming five per cent, the plaintiff willing to allow two and a half, the master allowed four, to which both parties except.

In the case of Burr v. M'Ewen, [Case No. 2,193,] Hale and Davidson, at April term 1830, this court gave their views on the subject of commissions to trustees, and are satisfied that they are in accordance with the settled judicial opinion and usage of the state. In Pusey v. Clemson, 9 Serg. & R. 209, and in the case of Walker's Estate, Id. 225, the supreme court declare, that common opinion and understanding have fixed on five per cent as a reasonable allowance, and that cases in which the court may fix on a higher or lower rate, are to be considered as exceptions arising under the particular circumstances of the case. We think this a reasonable and safe rule, which will prevent much litigation if so understood and adhered to, and in this case we perceive no such circumstances as to induce us to depart from it.

The complainant comes into a court of equity demanding a retransfer of his part of partnership effects, included in the assignment, alleging that the defendant has in his hands a balance of money justly due to the plaintiff, or his stock in the firm, which he cannot retain in good conscience, and withholds in bad faith. In such a case the court is not governed by the technical and strict legal construction of the words of the assignment, but the real meaning and intention of the parties in relation to the subject matter and object for which it was made. Though they were satisfied that the words were not broad enough to include all the errors and misconduct of the plaintiff which had been injurious to the defendant, we would not decree of course for the complainant as to those items, but adopt the principles of equity which the supreme court lay down as incontrovertible. Hunt v. Rousmanier, 1 Pet. [26 U. S.] 13: "Where an instrument is drawn and executed, which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which by mistake of the draftsman, either as to fact or law, does not fulfil or violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement." They will compel "the delinquent party fully to perform his agreement, according to the terms of it and the manifest intention of the parties; so if the mistake exists, not in the instrument which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a court of equity will in general grant relief according to the nature of the particular case in which it is sought."

Deciding this question by these principles, we feel bound to consider the agreement and assignment as embracing all errors and misentries, whether of cash on the cash books, errors in not charging the plaintiff with goods taken by himself, or receiving money from customers and not accounting for it, and any other errors or misentries in keeping the books which would be injurious to the interest of the defendant. We do not think it important to examine minutely whether Mr. Odenheimer knew of the omission to charge the goods taken by plaintiff, or of any other misentries than such as relate to those in the cash book; if he was ignorant of the existence of any others, it would be a good reason for our reforming the assignment, especially when their existence was known to plaintiff. His concealment of them from his partner, when about executing a paper intended to be a complete indemnity against all errors and misentries in keeping the books of the firm, would be a complete bar to any equitable relief, when we had before us abundant proof of errors and misconduct on his part highly injurious

to defendant. We would not take from him the security of a fund given to him for an indemnity, until it had been made effectual for all the objects intended, and for which the plaintiff was in equity bound to make a provision. If the defendant had a knowledge of all the errors committed by plaintiff, it would not alter the case, the words of the assignment are broad enough to cover them; the plaintiff knew of them, and agreed that defendant should retain the stock assigned till all losses, deficiencies and injuries resulting from them should be made up to his reasonable satisfaction.

We do not mean to decide, that the defendant is to be the judge of the amount which he shall retain out of the fund assigned; he holds it in trust, subject to the supervision of this court; for his own use, so far as he can reasonably satisfy us, that any alleged errors exist which operate to his injury, and for the plaintiffs for the residue. The cases cited by the plaintiffs' counsel, fully support their position in this respect, and we think it the fair and equitable construction of the assignment. Thus far the case is attended with no difficulty, but a very serious one has occurred in ascertaining the sum which we shall decide, on all the circumstances of this case, to be a reasonable satisfaction to the defendant for the errors and misconduct of the plaintiff. The reference to the master was a general one for an account, and his report does not find facts, on the legal result of which we are to pronounce an opinion as on a special verdict or case stated. 2 Madd. Ch. [Pr.] 506. In stating the account between the parties, he makes specific allowances to the defendant, on account of errors and misentries, and returns the whole evidence for our consideration on the propriety of these allowances, which are the subject of exception by both parties. That errors and misentries, to a considerable amount, have been made by the complainant, is admitted in the bill and the assignment, it is also abundantly proved by all the witnesses. The burning of the books has not been conclusively brought home to the plaintiff, but the evidence is of that strong and convincing nature, as leaves no doubt on our mind that the act was committed by the complainant, and so we consider the fact to be.

Under these circumstances, he calls for the interposition of this court, to compel the plaintiff to account, to pay the balance in his hand, and retransfer what remains of his share of the fund assigned without producing any statement of the errors or misentries, giving no information which could tend to ascertain the amount, putting no estimate on the sum he thought himself entitled to for extra service, or what he had taken under such pretext, when he could have done it from his own knowledge. He does not swear to his bill, or even positively aver, that he had made no other errors or misentries to the injury of his partner than are referred to in his bill, or were proved before the master. Where papers are destroyed or suppressed by a party with a deliberate design to defraud or injure another, the presumptions of law are very strong against him, and there cannot well be a case more strong against a complainant in equity than this. Courts of law are very severe in punishing fraud, but when it is aggravated by the destruction or suppression of papers or books which would, if produced, be the means of detecting it, courts of equity will go beyond, and even contrary to the rules of law, and presume most liberally, in odium spoliatoris. [Philips v. Philips,] 1 Ch. Cas. 293; [Cowper v. Cowper,] 2 P. Wms. 748; [Cookes v. Hellier,] 1 Ves. Sr. 235; [Garth v. Cotton,] 3 Atk. 755, 756; [Bowles v. Stewart,] 1 Schoales & L. 222; 5 Brown, Parl. Cas. 300, 324; [Childrens v. Saxby,] 1 Vern. 207.

A court of equity will entertain jurisdiction of a trespass, where it is done secretly, so that it cannot be proved easily, as where on his own ground a man digs under ground to another's mineral. East India Co. v. Sandys, 1 Vern. 127, 130. So where an interloper trades to the East Indies, he shall admit his trading, and to some certain amount, because it is difficult of proof. Id. 130; [East India Co. v. Evans,] Id. 307. So where a bailiff took a sum of money under an execution issued in breach of an injunction in odium spoliatoris, "the oath of the party injured is a good charge on him who hath done the wrong." Childrens v. Saxby, 1 Vern. 207; 1 Eq. Cas. Abr. p. 11, pl. 2; Id. p. 229, pl. 11. So where a man ran away with a casket of jewels, the oath of the party injured was allowed as evidence, (East India Co. v. Evans, 1 Vern. 308;) but not to conclude the party committing the fraud, (Plampin v. Betts, Id. 272.) Where a plaintiff in equity has been guilty of fraud, and his bill is dismissed, the court will decree costs to the defendant, to be taxed on his oath. Dorrington v. Jackson, Id. 449, 450. So as to the plaintiff where a bill of exchange was obtained by fraud and the oath of defendant was falsified. Dyer v. Tymewell, 2 Vern. 122, 123.

These cases fully establish the principle, that in cases of fraud, suppression and spoliation, the oath of the party injured is evidence, but not conclusive; the court must judge of the weight it is entitled to, under all the circumstances of the case. The mere circumstance of a party having destroyed or suppressed a deed, book or paper, will not induce a court of equity to decree a penalty against him to deprive him of what may be his just right, to dispense with such secondary proof of the existence and contents of the paper which has been so suppressed or destroyed as may be in the power of the party injured to produce, or to give a decree in his favour, without some proof. [Cowper v. Cowper,] 2 P. Wms. 738, 748; [Saltern v. Melhuish,] Amb. 247, 249; Saltern v. Mel-

hulgh, [Bowles v. Stewart,] 1 Schoales & L. 222.

It is difficult to define precisely what will be deemed some proof, as much must necessarily depend on the particular case; but there can be little danger in laying it down as a general rule, that where there is the least positive proof of the existence of a paper, or where it may be supposed or inferred from appearances out of which such supposition or inference necessarily or naturally arises, proof of spoliation would entitle the opposite party to a decree. Cowper v. Cowper, 1 P. Wms. 750. If there has been actual spoliation by a party, every thing would be presumed against him in favour of those setting up a prima facie title; and though there is no actual spoliation proved, yet a complete suppression would, for the purposes of the suit, be equal to a spoliation. Bowles v. Stewart, 1 Schoales & L. 222. Where a widow made a deed of the greatest part of her estate, to the value of 800 pounds, to trustees for her children by the first husband, which the second husband destroyed, he was decreed to pay the amount without any account of the estate. Hunt v. Matthews, 1 Vern. 408. So where a defendant swore that he had burnt a deed, and afterwards produced it, he was compelled to admit the deed as laid in the bill. Sanson v. Rumsey, 2 Vern. 561. Where a defendant in a bill in equity swore that she had delivered a will to the plaintiff, which he did not produce, she was held not to be bound to answer till the will was produced by plaintiff; on a final hearing, it was decreed, that having suppressed the will, it ought to be presumed most strongly against him, and to be taken as set forth by the party claiming under it. Hampden v. Hampden, 3 Brown, Parl. Cas. 250, 252. Where a deed limiting a term was burnt by the defendant, who contended that the limitation was void, the court decided, that since a term might be limited in such a manner as to take effect, they would intend it to have been so limited in that case, and decreed a conveyance accordingly. Dalston v. Coatsworth, 1 P. Wms. 731, 732, &c. So where title deeds are suppressed, the court will decree possession to the party claiming under them till produced. King v. Hounsdon, [Arundel,] Hob. 109; [Tucker v. Phipps,] 3 Atk. 360. Where on an account being decreed, the master reported that defendant had suppressed and embezzled some pages of accounts in a bundle, or that it had been done with his privity, the court disallowed his whole accounts for diet, &c., on account of embezzlement. Wardour v. Berisford, 1 Vern. 452; [Cowper v. Cowper,] 2 P. Wms. 749. Where a will is suppressed by the executor or heir, he shall be compelled to pay a legacy bequeathed by it before probate, and without a citation in the spiritual court; equity interferes on the head of spoliation and suppression. [Tucker v. Phipps,] 3 Atk. 360.

From these cases we may take the rules of equity to be well established, that where a deed, a will or other paper is proved to be destroyed or suppressed, or there is vehement suspicion of its having been done, the presumption in odium spoliatoris applies in favour of the party who claims under such paper, though the contents are not proved. The fact of spoliation, suppression or embezzlement may be proved by the answer or oath of the opposite party, so may the contents of the paper; the same rule applies to matters of account; the mere embezzlement of books or accounts is sufficient to authorize a rejection of claims by the spoiler though supported by evidence, or the party spoiled may rebut the claim by his oath. But where he comes to charge the spoiler in account, in order to raise a debt against him, he must give some evidence beyond the fact of spoliation, his oath would be admissible evidence, its effect depending on the circumstances of the case. If he relies on other evidence he must make out a prima facie case, by proof competent for a court of equity to presume, a court of law to give a judgment on a demurrer to the evidence, or a jury to find a verdict in favor of the charge set up. This is what is understood by some evidence, it may be slight, yet if it conduces to prove the charge it is legally sufficient, its weight or credibility is a matter of discretion and circumstance. No specific sum can be charged against the spoiler on proof of the mere fact of spoliation, herein the rule differs from that which applies to a claim of property under a deed or will on which the right depends, and the thing claimed is ascertained.

The circumstances of this case would justify the utmost latitude of presumption in a court, jury, master or auditors; the fraud was premeditated, the spoliation wilfully made to conceal it, and we would not disturb a verdict or report which did not at the first blush appear to have debited the complainant with items, in support of which there was no evidence, conducing to make out the charge.

So far as the master has debited the complainant, his report is confirmed; but from the evidence returned with his report he seems to have held the defendant to proof not required by any rule, and to have withheld all credits not definitely proved, or at least to have allowed none which were not supported by such evidence as would have supported charges in an ordinary case between partners or merchant and customer. Were we to confirm this report, on a consideration of the evidence which accompanies it, it would confound all distinction between the spoiler and the despoiled, and tend to encourage rather than to suppress spoliation by throwing on the innocent party the burthen of supplying the evidence which the other had destroyed.

The master has overlooked entirely one

powerful item of evidence, the admissions in the bill of the complainant, which are conclusive on him, as well as on a master, a jury or a court, who can approve of nothing in contradiction or opposition to such admissions. East India Co. v. Keighley, in the house of lords, 4 Madd. 15, 21. These admissions must be carried into every act of fraud, in taking money or goods furtively, the amount of which may be presumed to be equal to the object for which they were taken; that is, to the saving of clerk hire for the services performed. We should forget the first principles of justice in confining the respondent to the rules by which the master has acted. One of the clerks testified to repeated acts of the complainant in taking goods not charged, of which he kept a memorandum, amounting to 570 dollars, exclusive of what was allowed by the master; though the proof was not specific, we think it reasonably sufficient to justify giving the defendant credit to this amount, and direct it accordingly.

We have not thought it proper to direct any credits on the general averment in the answer that the injuries sustained amounted to 5000 dollars; it is too vague to act upon satisfactorily. Had it been definite as to any particular fact, or the amount of injury sustained under any defined item, we might have directed a further allowance to the defendant, but it would be acting too much on vague conjecture for us to specify any particular amount. Though we should not have disturbed the report if the master had done it, we cannot feel justified in decreeing any particular charge under this general allegation.

We have allowed no damages for breaking up the business of the firm, no sum was specified in the answer as applicable to this item, and no evidence is before us which enables us to ascertain what may be just; there is therefore no prima facie case, either by the oath of the respondent or the evidence, for the allowance of any specific sum on this ground.

Case No. 588.

ASKEW v. SMITH.

[1 Cranch, C. C. 159.][1]

Circuit Court, District of Columbia. March 26, 1804.

JUDGMENT BY CONFESSION—BEFORE RETURN OF THE WRIT.

A defendant, arrested to appear at the next term, cannot come in and confess judgment at this term; the writ being returnable to the next term.

[See Hoden v. Perry, Case No. 5,893.]

Rule to show cause why the defendant should not come in and confess judgment.

Mr. Youngs, for the defendant. Although the writ is not returnable to this, but to the next term, yet a confession of judgment cures all errors.

Rule discharged—THE COURT being of opinion that such judgment could not, at this time, be regularly entered, so as to avail the plaintiff.

[1] [Reported by Hon. William Cranch, Chief Judge.]

ASKINS, (UNITED STATES v.) See Case No. 14,471.

Case No. 589.

ASPDEN'S ESTATE.

[2 Wall. Jr. 368.][1]

Circuit Court, E. D. Pennsylvania. April, 1853.

IMPLIED REPEAL OF STATUTE — HEIR AT LAW — STATUTORY HEIR AND COMMON LAW HEIR—PAROL EVIDENCE TO EXPLAIN WILL—COMMON LAW CANONS OF DESCENT — HEIRS EX PARTE PATERNA—AND HEIRS EX PARTE MATERNA.

1. The implied repeal of statutes not being readily to be inferred, a section of an old law containing a short but important expression, was held not to be repealed by a section in a new act which legislated generally on the same subject, omitting only the short expression; the later act being declared to be 'supplemental' to the old one: referring to it as 'incomplete,' and repealing, in terms, another section.

[Cited in U. S. v. The Cuba, Case No. 14,898.]

2. The term 'heir-at-law,' especially when found in context with the term 'lawful heir' as a synonyme, means, in Pennsylvania, the person on whom the law of the commonwealth casts the real estate of an intestate, at the time of his death; and it does not mean the person on whom the common law of England, as distinguished from the law of Pennsylvania, casts such estate.

3. A devise to one's 'heir-at-law,' or 'lawful heir,' passes the estate to such persons as, at the time of the testator's death, answer by the then existing law that description; and contemplates not only changes from death in the persons designated by the term, but changes also by legislation in the laws regulating successions and descent. Thus where a testator domiciled technically in Pennsylvania, though resident most of his life in England, devised estates to his 'heir-at-law,' or 'lawful heir,' those terms, as the law stood when he made his will, indicating the heir at the common law of England, but, at the time of the testator's death, indicating wholly different persons—st. whole classes, who were absolutely incapable of inheriting, as the law stood when the will was made—it was held that these last persons, and not the former person, were the 'heir-at-law,' or 'lawful heir,' and the parties, therefore, to take.

4. The terms 'heir-at-law,' or 'lawful heir,' mean so clearly and fixedly, in Pennsylvania, heir by the law of that state, whatever it may be, statutory or other, that its meaning is not easily controlled or shaped into the common law signification, when differing from it. Thus where a testator, domiciled technically in Pennsylvania, though resident most of his life in England, devised his estates to his 'heir-at-law,'

[1] [Reported by John William Wallace, Esq.]

or 'lawful heir,' he first paying certain legacies to A. B. & C.; it was held, that A. B. & C., being the Pennsylvania statutory heirs, should take the estates, notwithstanding the provision by which they would have first to pay themselves the legacies; and that the estates should not go to D., a different person, the heir at common law, who could more properly first pay the legacies to A. B. & C. while subject to, or after such payment, he took the estates himself.

5. Though the expression 'heir-at-law,' has been often used in professional and judicial parlance in Pennsylvania, as meaning heir at the common law of England, yet it is not rightly and with legal exactness so used. And especially when explained by the term 'lawful heir,' used as a synonyme with it, it presents no such ambiguity as to let in parol evidence, of any kind, as to the sense in which a testator technically domiciled in Pennsylvania, though resident most of his life in England, used it; or more particularly to show that such a testator used it in the sense of the English common law, i. e. to mean the person who should, at the time of his death, be nearest in blood and descent from a common ancestor of the full blood, by his father's side, and did not use it in its general legal sense, i. e. to mean the person or persons on whom the law of his domicil would cast his real estate, on his death intestate.

6. A general testamentary disposition of all one's 'estate real and personal,' to his 'heir-at-law,' or 'lawful heir,' by one who had no real estate, either when his will was made, or afterwards, is not a disposition of it to the next of kin; the term 'heir' being capable of an abstract sense as well as of a concrete one; and not being true in legal any more than in popular sense, that there can be no heir, unless there is property strictly heritable.

7. A general testamentary disposition of all one's 'estate real and personal,' to his 'heir-at-law,' or 'lawful heir,' by one who, neither in law nor in fact, had any real estate, either when his will was made or afterwards, but who, some years prior to the time his will was made, received by devise from his father such estate, which he himself occupied for some time, and never aliened, but which had been confiscated by the commonwealth for his alleged treason, and had been, in law and in fact, irrecoverably taken from him by legislative acts, whose legality, validity, and moral justice he ever strenuously denied, and which estate he always pertinaciously, though absurdly, claimed during a term of more than forty years, and until the day of his death, to own and dispose of as his own, entertaining a hope or pretence of hope, though an absurd hope, that his heir if not himself, would some day gain it; it being a thing, as the testator warmly, though absurdly said, in which his heir had rights, and which "he could not lose:"—does not carry the personal estate into the channel of heirship ex parte paterna, as distinguished from heirs general.

8. Nor can evidence extrinsic to his will, of the testator's mistaken and absurd belief, be received to narrow the construction of terms of law so clear, unrestricted, and general as 'heir-at-law,' or 'lawful heir,' which terms, including heirs ex parte materna, as much as heirs ex parte paterna, pass the personal estate to the heirs of both sides jointly.

[9. Cited in Allen v. Allen's Ex'r, Case No. 211, to the point that although, in Pennsylvania, the orphans' court of the county, as a special court of equity, has jurisdiction of the accounts of executors, etc., it is no bar to the federal courts' exercising jurisdiction over exactly the same subjects, other things allowing, and the orphans' court not having at the time actual possession of the case or parties.]

In equity. By the eleventh section of a Pennsylvania statute of 1794, directing the descents of intestates' real estate in that commonwealth, it is enacted, as set forth in the left hand column below; and by the seventh section of an act of 1797, entitled an act supplementary to the former one,—the preamble to one section of which says, "And whereas the provisions of the act to which this act is a supplement, appear to be incomplete,"—it is enacted as set forth in the right hand column below. The two acts form a scheme of descents. The latter act nowhere in terms repeals any part of the former act, except a second section of it, which it does repeal in express terms.

Act 1794, § 11: "Where any person shall die seised as aforesaid, leaving no children, or lawful issue, father or mother, brothers or sisters, or their lawful issue, of the whole blood, then brothers and sisters of the half blood, and their lawful issue, shall inherit the same as aforesaid, in preference to the more remote kindred of the whole blood, unless where such inheritance came to the said person so seised by descent, devise, or gift, of some one of his or her ancestors, in which case, all those who are not of the blood of such ancestor shall be excluded from such inheritance."

Act 1797, § 7: "If the intestate shall die seised or possessed of real or personal estate as aforesaid, leaving neither widow nor lawful issue, father or mother, but brothers and sisters, of the whole and half blood, or their representatives, the brothers and sisters of the whole blood, and the legal representatives of such of the whole blood as are dead, shall inherit the real estate in fee simple, and the personal estate shall be distributed equally between the brothers and sisters of both the whole and half blood, or their representatives; but if there are no lawful issue, widow, father or mother, brothers or sisters, or their representatives, of the whole blood, then brothers and sisters of the half blood, shall inherit the said real estate in fee-simple, and the personal estate absolutely, the estate both real and personal to be held by them, as tenants in common, in equal parts, except such parts of the real estate as came to such intestate by descent, devise, or gift, of some one of his or her successors, in which case, all those who are not of the blood of such ancestor shall be excluded from such inheritance and such part of the real estate."

This act omits the provision of the former one "and their lawful issue."

The former of these acts—the one passed in 1794—was the first ever passed in Pennsylvania, which let in half blood as heirs to realty; and prior to the date of it, 'the heir-at-law,' under the statute laws of Pennsylvania, of a person situated as was the testator hereafter mentioned, would have been the same person as 'the heir,' according to the common law of England; it hav-

ing been established in Pennsylvania, until 1833,—when it was enacted by a statute of the Revised Code, that the heir at common law should not take, in any case, to the exclusion of other heirs and kindred standing in the same degree of consanguinity with him—that the common law here takes in all cases not provided for by statute.

Before either of the laws was in existence, st., in December, 1791, Mathias Aspden, a person born in Pennsylvania, and who, according to evidence ordered by the court to be taken, extrinsic to his will, was found by a verdict on a feigned issue ordered by this court, to have been domiciled there also, —White v. Brown, [Case No. 17,538,]—but who, as was shown by the same testimony, left this country at the beginning of the Revolution, and lived nearly all his life afterwards in England, and died there in 1824—made his will, a short and informal instrument, penned by himself. He gives "my estate, real and personal to my heir-at-law; first paying all my just debts and funeral expenses," and certain pecuniary legacies hereinafter mentioned. And in a postscript, referring to some doubts,—which he remarks were ill founded—as to his legitimacy, says, "It is my will that my estate, real and personal, to the party who would be my lawful heir in case there might arise no doubt on that head." The pecuniary legacies above referred to, were small legacies to each of the children of his half brother, Benjamin, and his half sister, Ann, living at the time of his death; to his half sister, Beersheba, and to his half brother, Roger. At the time he made his will, he had, besides these, as was proved by testimony extrinsic to the instrument, and received subject to exception, a half sister, Rebecca, and a half brother, James, neither of whom he mentions. This evidence showed that he had long maintained feelings of great animosity to this brother; that Rebecca was living in 1791, when he made his will, but died in 1814, leaving seven children; that Benjamin was dead prior to the date of the will; that Beersheba was married in 1761, and died about 1817, leaving five children; that Roger died between 1802 and 1814, leaving twelve children; and that Ann had died in 1769, leaving four children. None of these dates or items are specially important.

The will was made in Pennsylvania, and executed so as to pass real estate in that commonwealth, but not so as to pass such estate elsewhere. It had Pennsylvania executors; one of whom was to be the president "at the time being" of a bank in Pennsylvania; and it remained in Pennsylvania from its date in 1791, till the testator's death in England in 1824.

A very particular account is given of the testator in another case,—White v. Brown, [supra,]—where the question of his domicil was in issue; and it will perhaps make the comprehension of the present case more perfect, if the reader will refer to it. He was a strange, disordered and unhappy individual; a monomaniac, in short, and a fool in everything but amassing money. As already stated, he left this country in 1776, and died abroad in 1824. He was never married, and left neither father nor mother; brothers nor sisters of the whole blood, nor any descendant of them; nor brother nor sister of the half blood. He did however leave descendants of these last, and between them and his heir at the common law, this suit was raised about his estate, which, from the time of his death in 1824, had now grown, under the care of an American chancery, from its original amount of $250,000 to about three times that sum. The relatives whom he left were, as proved by extrinsic evidence: I. Nephews and nieces, named Harrison, the descendants of a half sister on his mother's side. II. Nephews and nieces, named Hartley, &c., the descendants of half brothers and sisters on his father's side. III. His heir at the common law of England, John Aspden, of that country; the oldest son of his paternal first cousin, the latter person having been alive at the date of the will, 1791, but not alive at the testator's death in 1824. The first and second parties stood, therefore, in equal nearness with each other, being each the issue of half blood brother and sisters; and both in greater nearness than the third party, John Aspden, whose superiority to them consisted in his being of the whole blood. The two former parties were also the testator's next of kin.

The whole of the large estate above spoken of was personal. The history of the testator's real estate, as it was proved by evidence extrinsic to the will, and which the court, directed to be taken, was peculiar. Neither at the date of his will, nor afterwards, did he hold or claim any real estate acquired by purchase; nor any which came to him by descent from his maternal ancestors; but in the year 1765 he became by devise from his father, the owner, in fee, of a house and lot in Philadelphia, and of a farm in Chester county, which he never aliened. He continued in possession of this paternal real estate till 1781, when, he having fled the country, and gone to Great Britain, it was seized and confiscated under an attainder for an alleged treason. The legality and moral justice of this attainder, the testator always afterwards vehemently denied; maintaining that he had done nothing whatever to justify it, and that it was void. In a will made nine years after the confiscation, and long after every chance of recovering practically either estate had passed away forever, and within a few months of making the present will, he devised both these estates specifically, one to one person, and the other to another; speaking of each of them as my estate, &c., "which has been unjustly seized and confiscated, under pretence of high treason." These pre-

tensions and claim of legal ownership and control of these estates, though palpably absurd, to all practical objects, were always pertinaciously maintained by the testator, who seemed to consider this confiscation as the great event, and the greatest wrong of his life. And he ever entertained the hope —or at least so said—that his heir, if not himself, would gain it; it being a thing, as he said in 1796, "which interests the public, and also my heir at law, who has his right in this case, and cannot lose it."

Aspden's paternal grandmother bore the distinguished English name of Scroop; a matter of which he boasted; having, as he said, "a right to seal with a feather." And his English feelings were supposed to be proved by a letter to the Hon. Thomas Willing, of Philadelphia, in which he speaks of an heir at law to an estate to bear the port of a gentleman. In a petition for redress to the legislature of Pennsylvania, asking relief about his confiscated property, he says that "his heir at law in England" is entitled to £5,000 damages for the chance he has lost of getting his estate. Among the few books which he ever owned was Blackstone's Commentaries, in which the term 'heir-at-law,' in the chapter on 'Descents,' (volume 2,) is explained to be the heir by the common law of England. All these facts, as well as his belief and pretensions of ownership of the real estate, were proved of course by evidence extrinsic to the will, which the court had not ordered to be taken, and which was therefore taken subject to exception. Upon this state of facts, the two parties of the half blood, st. the Harrisons, ex parte paterna, and the Hartleys, ex parte materna, united to contest the right of the heir at common law, John Aspden, of England; and having defeated his claim, then contested the case with one another; the Harrisons, heirs ex parte paterna, claiming the whole estate as being the persons to whom the testator's real estate would have descended had he owned it; while the Hartleys, heirs ex parte materna, claimed to share the estate with them; because, in point of fact, there was no real estate ex parte paterna, to change the direction from heirs general to heirs on the father's side.

In the course of these contests, which occupied the court for many weeks, the following questions arose: The first five questions arising between the heir at common law, in opposition to both the parties of the half blood; and the sixth arising only after the claim of the heir at law was disposed of against him; and therefore arising between the two parties of the half blood alone.

I. Whether the 11th section of the act of 1794 was repealed by the 7th section of the act of 1797? for if it was, then there being no heir fixed by statute (the parties claiming here being but the issue not mentioned in the act of 1797 of brothers and sisters of the half blood), John Aspden, as heir at the common law, came in under the term 'heir-at-law;' the case being an omitted one, and there being no other law to provide for him.

II. Supposing this 11th section not so repealed, and that by the statute law of Pennsylvania, the issue of the brothers and sisters of the half blood would succeed, what, in Pennsylvania, is meant by 'heir-at-law?' Does it mean heir at the common law, or does it mean heir by the statute law of Pennsylvania? If it mean the former, John Aspden would still take in preference to the Harrisons and Hartleys.

III. Supposing this 11th section of the act of 1794, unrepealed, and that since the passage of that act, the term 'heir-at-law,' strictly and in its most accurate sense, means statutory heir, and so includes half blood; yet as the will was made before the passage of that act, and when, confessedly, the term had a different signification, and meant, both by the law of Pennsylvania and that of England, heir at the common law, Is the term to be taken according to the sense it had at the time of making the will, or does it attract to itself that new sense which the statute would give it?

IV. Conceding that this 11th section was repealed, and that 'heir-at-law,' unexplained, means heir by statute law, and so includes half blood; and finally, that the will must be taken to speak at the testator's death, Does the fact that by the will the 'heir-at-law,' to whom the bulk of the estate was devised, was first to pay legacies to certain relatives, or the fact of a provision for them at all, show that these relatives, who were of the half blood, were not meant to be included in the term 'heir-at-law,' and so to show that the term was used in the common law sense, which does not include the half blood; and not in the Pennsylvania statutory sense, which does?

V. Making all the previous concessions, and conceding in addition that the expression 'first paying,' is not enough to control the legal meaning of the term 'heir-at-law,' Does this term present a case of such ambiguity, as to its meaning in Pennsylvania, as that extrinsic evidence might be resorted to, to show that the testator used the term in the English common law, and not in the Pennsylvania statutory sense?

VI. Conceding that the term 'heir-at-law,' as used in the will, means heir by the statute law of the state, and not heir at the common law of England; by which concession the right of John Aspden is disposed of, and the two parties, Harrisons and Hartleys, on opposite sides of the half blood, let in; Is the legal operation in favour of heirs general of the phrase 'giving and bequeathing all my real and personal estate to my heir at law,' changed so as to operate in favour of heirs ex parte paterna, by the fact that the testator, some years prior to the date of his will, received by devise from his father real estate, which he himself never aliened, but which

had been, in fact and in law, confiscated by the state for his alleged acts of treason, the legality, validity, and moral justice of which attainder the testator ever strenuously denied; and which estate he always pertinaciously, though absurdly, claimed till the day of his death, to own and dispose of as his own; entertaining a hope, though an absurd hope, that his heir, if not himself, would some day gain it; it being a thing, as the testator warmly though absurdly said, in which his heir had 'rights,' and which "he could not lose."

VII. Can evidence extrinsic to the will be received, to show his mistaken and absurd belief?

The case was elaborately argued on the respective points, by Mr. Randall, Mr. Budd, and Mr. W. B. Reed, for the heir at common law, (Mr. W. L. Hirst represented certain Packers as next of kin of the whole blood, who originated the suit, but on the appearance of nearer heirs, the court considered their pretensions as palpably without foundation. Much of Mr. Hirst's argument supported the case of the heir-at-law, and is incorporated with the argument on that side;) and by Mr. J. M. Read, Mr. Newbold, Mr. Meredith, Mr. H. D. Gilpin, and Mr. W. M. Tilghman, for the statute heirs. Mr. Read and Mr. Newbold, after the heir at common law had been disposed of, arguing for the heirs ex parte paterna, the Hartleys, against their former colleagues, the remaining gentlemen, who claimed the whole estate for their particular clients, the Harrisons; heirs ex parte materna.

I. The seventh section of the act of 1797 repeals the eleventh section of the act of 1794.

In the attempt of the act of 1794 to provide for the issue of half blood, the first law which let in half blood at all, the legislature adopted a rule of preference over the more remote kindred of the whole, productive of great embarrassment in its application, and calculated to make titles dependent on facts often difficult to be ascertained. In this new canon of descents, what rule was to determine the remoteness of degree? See Christian's note to 2 Bl. Comm. c. 14, p. 240. The merit of the issue of brothers and sisters of the half blood might not be so apparent; the sympathy which justified a provision for the one did not operate so strongly in favour of the other; and there was evidently no good reason for giving the preference an indefinite extent. The language of the 11th section of the act of 1794 was too loose for correct legislation, and accordingly, in the enactment in the 7th section of the act of 1797, the objectionable clause giving the estate to the issue of brothers and sisters of the half blood, in preference to more remote kindred of the whole blood, is omitted. The new section is skilfully drawn. The word 'representatives' occurs twice in the context. The omission to insert it in the giving clause in an act designed to perfect a code proved not satisfactory by experience, is pregnant with exclusion. The legislature, in so remote a case, might well mean to admit its inability to provide any rule always satisfactory, and to let in again the heir at common law, as a person as good as any. The common law was our possession and our glory; and except in the preference of the eldest son, and the exclusion of daughters, its canons of descent have never been odious.

A subsequent statute revising generally the subject-matter of a former one, impliedly repeals it. A 'supplemental' act may supply an act in toto, as well as in part. A 'supplemental' act, punishing a crime by imprisonment for ten years, would repeal one punishing the same offence by imprisonment for five years and fine. In a Massachusetts case, —Bartlet v. King, 12 Mass. 536, 545; and see Weatherford v. Weatherford, 8 Port. (Ala.) 171; Carter v. Hawley, Wright, 74; Mackey v. Hodgson, 9 Pa. St. 470,—a former act having provided for a case, its subject-matter was provided for again by a new act, which omitted some of the restrictions and limitations of the former act; yet the court considered that the old act was repealed in toto. Here the act of 1797 does legislate upon the identical particulars provided for by the act of 1794. Up to a late point in the new section, it re-enacts the provisions of the old one; an omission easily accounted for, and restoring the ancient law in that particular alone. Can the omitted words thus left out, be hunted up from the context of obsolete enactments, and be brought up in their dismembered state to have the force of law? But even if this eleventh section of the act of 1794, is not repealed, still John Aspden, of England, takes, for—

II. 'Heir-at-law' means in Pennsylvania. 'Heir at the common law.' In Johnson v. Haines' Lessee, 4 Dall. [4 U. S.] 64, in 1799, a question arose between certain brothers and sisters, and a party who was heir at the common law. The counsel or reporter speak of this latter person as "heir at the common law." The opinion of the supreme court came up on error to the high court of errors and appeals; a tribunal still higher, then existing, now abolished. It was the most solemn and august judicature ever known in Pennsylvania. The chief justice of Pennsylvania, M'Kean, delivered its unanimous opinion, and notwithstanding the technical language of counsel, as already given, was yet sounding in his ears, twice speaks of that same party as the "heir-at-law," and speaks of him in no other way. In Jenks v. Backhouse, 1 Bin. 91, in 1803, a party similarly situated, is styled by reporter, one counsel and the court, "heir at the common law." And the counsel, quoting an English case, speaks of "the heir-at-law." In Cresoe v. Laidley, 2 Bin. 279, in 1810, the reporter styles him in one place, "heir at common

law," and in another, "heir-at-law." Mr. Rawle and Mr. Lewis, counsel of the party, call him once "heir-at-law," once "common law heir," and once "the heir." Mr. Binney and Mr. Hopkinson replying, call him once the "heir-at-law," and once the "common law heir." Chief Justice Tilghman in delivering the opinion, calls him three times "heir at common law," and once "heir-at-law." In Bevan v. Taylor, 7 Serg. & R. 397, in 1821, Judge Duncan styles him once "heir at common law," and once, apparently, "heir-at-law." This convertible language is also the language of legislation. In one section of an act of assembly of 1705, (3 Smith's Laws, p. 158, § 8,) the phrase "next heir, according to the course of the common law," is used; and also, "heir-at-law, according to the course aforesaid." In another, (Id. § 11,) younger children being spoken of, the oldest son—being in reference to them truly heir at the common law—is spoken of as "the heir-at-law;" and the term is used several times in the same way, in a supplemental act of 1764, (Id. p. 160, § 4.)

There is no doubt that until the statute of 1833 was passed, the heir at common law occupied in Pennsylvania a prominent and favoured position, and that he was recognized by the courts as the person always to take, except in every case where the statute has stripped him of his rights. "It must be remembered," says Chief Justice M'Kean, —Johnson v. Haines' Lessee, [supra,]—"that the system of distributing real estate in cases of intestacy, is an encroachment on the common law; and whenever such an encroachment takes away a right, which would otherwise be vested in the heir-at-law, the operation of the statute should not be extended further than the very words of the legislature."

In England there is descent in gavelkind, to all the sons, and descent in borough English, to the youngest son; and these inherit there by the law of special custom, just as all the children do here by special statute. Yet the term 'heir-at-law,' which is not more correct, by strict language, in England than it is here, runs throughout books common to both countries, as a phrase commonly and rightly used to indicate the "heir at common law." 2 Bl. Comm. 201; [Denn v. Gaskin,] Cowp. 661; [Doe v. Bower,] 3 Barn. & Adol. 453; [Carne v. Roch,] 4 Moore & P. 862. The common law being the general law, must generally be referred to, just as it generally governs. It is the nursing mother of us all. "In Pennsylvania," says the court in Hileman v. Bouslaugh, 13 Pa. St. 344, "a testator is to be considered as speaking in reference to the common law system of descents." Nor is the force of this expression 'heir-at-law,' qualified by the expression 'lawful heir,' in another part of the will. If there be any want of precision in the phrase "lawful heir," when applied to a devise of real estate, it cannot qualify or obscure the meaning of the better defined term, "heir-at-law." An ambiguous phrase cannot be used to explain, but must itself be explained by one free from ambiguity. But standing alone, 'lawful heir' means heir jure haereditatis, right heir, own heir, or heir-at-law. In Davies v. Lowndes, 4 Bing. N. C. 478, which will be much relied on by the other side, when they divide and come to a contest between themselves, the testator uses the terms convertibly; meaning to indicate heir by the common law. The term, however, is used by Aspden in connexion with a doubt about his own legitimacy; just as a man speaks of his lawful child, in opposition to one not lawful, or illegitimate, or his lawful wife, in contrast with a woman to whom he may have been allied by ties less regular. What he meant, was 'the party who would be my heir in case I was lawfully born.' But he has confused his ideas, and therefore misuses his words; as is obvious from the sentence, which expresses no idea with correctness of language.

III. Conceding that the argument on neither of the preceding points is well founded, still the heir at common law takes; for, confessedly, he was 'heir-at-law' when the will was made. And the will must refer to the law as it then was, and not to the law as it might thereafter be changed. In this point of view the domicil is not material; for the laws of England and Pennsylvania were on this point the same in 1791, when the will was made. The testator has not given any reason to believe that he intended to leave his estate to such person as the laws of Pennsylvania from time to time might, could or would direct, to be the party or parties to whom the estate of an intestate should go. We cannot interpolate into the will an intention that during thirty-three years, in which it remained unchanged, the disposition of the testator's property should depend on these varying laws. In 1791, he declared his last will to be, that his estate should go to his 'heir-at-law.' The will was never revoked. The heir-at-law was a person perfectly defined. He was the person who should, at the time of the testator's death, be nearest in blood and descent from a common ancestor, of the full blood, by his father's side. John Aspden, heir at the common law, now claiming, answers that description. No one else does. This declaration made in 1791, the law repeats for the testator in articulo mortis.

In Martindale v. Warner, 15 Pa. St. 479, the supreme court of Pensylvania has authoritatively settled this point. Between the making of the will and the death of the testator, the law in 1844 was changed, and the court determined that the law in existence at the time of the execution of the will must govern, without regard to the kind of property. "Though a will, it is true," says Judge Rogers, "does not take effect until after the testator's death, yet it is inchoate, though not consummate from the execution of it,

and for many purposes in law of which this is one, it relates to the time of the making." "I do not put the case," he says, "on the actual intention of the testator, but on his legal intention, which is the only safe rule. That the testator permitted his will to stand without alteration for several years, or that he may have known of the act of 1844, is nothing. It is a question of construction, depending on certain fixed principles, which ought not to be varied by forced speculation as to the knowledge or ignorance of testators, some of whom may, or others may not know of the statute and its legal construction." So in another Pennsylvania case, (Mullock v. Souder, 5 Watts & S. 198,) it was held that a statute "which provides that real estate acquired by the testator after the date of his will, shall pass by a general devise, does not apply to a will dated before its passage." The court says it could only be so applied "by giving the act a retroactive effect, which will never be done, where such does not expressly appear to be the design of the legislature; but the act will be left to operate on wills made and executed after the act comes into operation. A devise of real estate," it continues, "is in the nature of a conveyance; and a statute will not be considered as altering the effect of a conveyance already made, so as to pass more than it purported to pass when made. A retroactive effect will not be given to a statute so as to affect contracts or property. In the case of Ashburnham v. Bradshaw," 2 Atk. 36, it says, "a devise to charitable uses was made by a will dated in 1734. The testator lived till July, 1736, a month after the mortmain act had been passed, and upon a case, the judges certified that the devise was good. And to the same effect are Attorney-General v. Lloyd, 3 Atk. 551, and Same v. Andrews, 1 Ves. Sr. 225. There the application of the statute would have abridged the rights of the devisee; here it would abridge the right of the heirs; and there seems no difference in the principle."

The English authorities also adopt the same law. Lord C. J. Willes says, (Doe v. Underdown, Willes, 297,) that it is an established rule "that the intent of the testator ought always to be taken as things stood at the time of making his will, and is not to be collected from subsequent accidents, which the testator could not then foresee." In a much later case, (Doe v. Perratt, 5 Barn. & C. 69,) Holroyd, J., says that "it is laid down by Willes, C. J., in delivering the judgment of the court of common pleas, to be one of the certain and established rules for the construction of wills, that the intent of the testator ought always to be taken as things stood at the time of the making of his will. This rule had been before laid down by Lord C. J. King, in Wright v. Hall, [Fortes. 182,] and has been since confirmed by Lord Ellenborough, in delivering the judgment of the court of king's bench in Doe v. Scott," 3 Maule & S. 306, (and see Winter v. Perratt, 9 Clark & F. 606.) Lord Ellenborough, quoting and adopting the opinion of Lord King and Lord Willes, says, "though the will is not complete until the death of the testator, so as to vest anything in the devisee, yet the intent of the testator is to be taken to be as things stood at the making of his will; for the testator makes his will as if he were to die that moment." 3 Maule & S. 306.

"It is the intention of testator," says Mr. Ram, (on Wills, pages 107, 108,) "at the time he makes his will, which alone the law will carry into effect. Events which have happened since the publication of a will, are unavailable to introduce an intention into it." Again—"It has been said by Lord Hardwicke, and it is often repeated, that a will must be made to speak from the testator's death, and be looked upon, not only as his last will, but his last words. It is true, that a will speaks from the death of the testator; but what does it speak? Does it say more than what the testator said when he made his will? Were it permitted to say more, clearly the law would fulfil an intention which is not expressed in it." If the testator, after making his will, should become insane, and continue so to the time of his death, could a change of intention, arising out of a change of law, which he had no capacity to counteract, be imputed to him? If A. devises £10 to the parish where he lives, and afterwards removes his habitation to another parish; the parish where he lived at the time of the will, shall have the legacy. 2 Com. Dig. tit. "Chancery," (3 Y. 16,) p. 679.

IV. But conceding the arguments on all the foregoing points to be ill founded, the direction of "first paying to the testator's half brothers and half sisters certain pecuniary legacies," controls the otherwise settled meaning of the term "heir-at-law," and gives it a common law as distinguished from a statutory sense. Using the term "heir-at-law," to mean heir at the common law, that person could very well first pay pecuniary legacies to persons of the half blood; for no person of the half blood could be "heir-at-law," in the common law sense. But using the term in the Pennsylvania statute sense, which, violating the rule of common law, prefers nearer half blood to more distant whole blood, an estate of half a million is divided between, or at least includes, parties who are first to pay themselves a few dollars as a specific legacy. The construction of the other side defeats this plain and positive direction. If the half blood inherits, there can of course be no previous payment, nor any payment. If the heir at common law inherits, there can be. One construction carries out a plain direction; the other directly defeats it, by rendering it impossible. Independently of the expression "first paying," &c., these provisions in favour of half brothers and sisters, &c., are forcible to show that even if naturally or by force of terms they are included, they are not in-

cluded by the testator's meaning. The authoritative case of Finlay v. King, 3 Pet. [28 U. S.] 377, (and see Darbison v. Beaumont, 1 P. Wms. 229; Spring v. Biles, 1 Term R. 435, note; and Doe v. Perratt, 5 Barn. & C. 48,) is much in point. Delivering the opinion in that case, Chief Justice Marshall, quoting the terms of the devise, which were very stiff and difficult to manage, says: "These words (the devise) certainly import that the whole estate should vest in possession at the same time, and mark with precision when that time shall be. This express provision can be contracted only by a strong and manifest intent to be collected from the whole will. But the intent of the testator is the codicil rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule, often it must prevail; although in giving effect to it, some words should be rejected, or so restrained in their application, as materially to change the literal meaning of the particular sentence." And that strict lawyer, whose mind was itself law, went on to infer a particular meaning from exactly such indications as we seek to infer it from; to wit, that having already made a provision for certain parties, he did not mean to provide for them again by operation of law.

"The father," he says, "who was the presumptive heir when the will was made, died during the life of the testator. This event is supposed not to affect the construction of the will. But were it otherwise, were it supposed that he might look forward to that event, and contemplate his brothers and sisters as his probable heirs, the will furnishes arguments of great weight in support of the opinion that he did not intend them to take anything not expressly devised to them. The heirs of the testator, at the time of his death, were, a brother of the whole blood, a sister of the whole blood, the daughters of a sister of the whole blood, a brother of the half blood, and a sister of the half blood. Each of these persons is named in the will. For some of them ample provision is made. To others less favour is shown. The legacies to his brothers and sisters of the half blood are inconsiderable, while the bequests to those of the whole blood are large. No one of them is omitted. The circumstance that his mind was clearly directed to each, and that he has carefully measured out his bounty to each, discriminating between them so as to show great inequality of affection, operate powerfully against the opinion that he intended to leave a very large property to descend upon them by the silent operation of law."

V. Conceding, 1. That the 11th section in question is not repealed; 2. That in a strict legal and correct Pennsylvania sense, 'heir-at-law' does not mean heir at common law; 3. That the will must refer to the meaning of the term at the testator's death in 1824, and not at the date of the will in 1791; and finally, that there is nothing in the will itself which controls the statutory meaning, still have we not shown that the expression was so capable of being used, and was in fact so often and so generally used in the common law sense also, that we may now resort to the extrinsic evidence of the testator's situation and circumstances, to show in what sense he used it? We seek to show no more than that Mr. Aspden has used a law term in the identical sense in which Chief Justice M'Kean and Chief Justice Tilghman, on the bench, and Mr. Rawle, Mr. William Lewis, Mr. Binney, and Mr. Hopkinson, at the bar, all of them speaking on a law subject, also used it. Admit that he might have meant heir by some statute law not then existing, but which might be enacted any time before his death; still, as the most eminent lawyers in this state have used it in another sense, may we not prove that Aspden fell into the same error, negligence, inaccurateness of style, or whatever else you choose to call it, the question being on a will, and a question of intention merely? Independently of the question of domicil, and admitting a technical domicil in Pennsylvania, cannot we show, in construing a word of such doubtful meaning, that in fact he lived all his life in England or in an English colony; that he had highly aristocratic feelings, boasting of his descent from the Scroops; speaking, as in his letter to Mr. Willing, of an heir at law to bear the port of a gentleman; that among the very few books he ever had was Blackstone's Commentaries, in which heir-at-law is used in one sense, and had no book in which it is used in another; that he always lived in hostility with the person to whom one construction of the term would give his estate, and always manifested vanity and pride in another person, whoever he might be, that would get it by another? That he discriminated among his step-brothers and sisters and their families, bestowing legacies with clear indications of difference, and excluding the one through whom some of these parties now claim. To enlarge upon these last facts as explanatory of the sense in which he used the doubtful term heir-at-law.

The testator excluded his step-sister Rebecca, then living, but who died about 1814 leaving seven children. He also excluded his step-brother James Hartley, because he was on bad terms with him. He included the children of his step-brother Benjamin, who had previously died leaving seven children. He included his step-sister Beersheba previously married and now having children, none of whom did he include. He included his step-brother Roger, who died between 1802 and 1814, leaving twelve children, none of whom did he include. He included the children of his step-sister Ann, who had died in 1769, leaving four children; but as to her children, and as to the children of Benjamin,

he limited the legacies expressly to such of these children "as should be living at the time of his death." In view of this discrimination and these limitations, can we not show that the testator did not intend to bequeath the mass of his fortune to his step-brothers and sisters and their children, under the description of my heir at law?"

But without so much detail. A domicil merely technical, unaccompanied by actual residence, cannot furnish a satisfactory explanation of the testator's intentions. It was in the place of his residence that he acquired ideas and language. The presumption is, that he used words in the sense in which they were there understood. Cannot we show that the testator was educated in England, and lived there the greater part of his life, and so infer that the term 'heir-at-law' was used in an English sense. The authorities, which give to the law of the domicil the supremacy, relate to the execution of wills, and to the transmission of property, in cases of intestacy, or when, in consequence of some positive law, the provisions of a will fail to take effect. They do not relate to the interpretation of wills, except where residence is combined with the technical domicil. Mr. Burge, (4 Confl. Laws, 590, 591,) in speaking of the rule, that the law of the domicil affords the rule of construction of wills, says, "The ground on which this rule rests is, that, as it becomes necessary to ascertain the sense in which the testator has used the expression, and what law of succession he contemplated, it is presumed that they were those of the country in which he was domiciled, because, it must be supposed, he was familiar with those laws. There are grounds for presuming he was acquainted with them, but there exist no grounds for presuming him to be acquainted with any other laws of succession. In affixing the sense in which he has used certain words, terms, or phrases, he is presumed to have adopted that which prevailed in the place of his domicil. It has been sometimes said, that they ought to be understood in the sense in which they are accustomed to be used in the place where the will or contract was made. But it would be impossible to consider this as a general rule, for the residence of the party in the place may have been for so short a time as to negative the presumption, that he was even acquainted with that sense." Story (Confl. Laws, § 479f) says that the will is to be construed according to the "law of the place of his actual domicil," evidently excluding the mere technical domicil, without residence, like that which the circuit court imposed on Mr. Aspden. Courts having in view, therefore, not a technical but an actual domicil, of which residence is the essential feature, with a view to ascertain the sense in which the testator used the language of the will, cannot we point to his education and long residence in England, as furnishing evidence that the words of the will were used in the English sense?

VI. Argument for the paternal half-blood. —Supposing all the foregoing points to be decided against the heir at common law; that his pretensions are thus finally disposed of, and the half-blood let in as 'heir-at-law,' a new question arises, one between the half-blood itself. To which side of the half-blood, or how amongst it, does the estate go? Does it go to the paternal side alone; or to the maternal, in common with it? We contend for the paternal. By blending the personal estate with the real, the testator bequeathed both to the heir of the real estate. In order to ascertain the heir to whom the real estate is devised, it is necessary to know what real estate is referred to in the will, and extrinsic evidence is admissible and has been directed to prove that fact. Such evidence shows that the real estate referred to in the will, was the testator's paternal estate, and the will is therefore to be read as containing a specific devise of that estate. So reading the will—and in the absence of proof, that the testator owned or claimed any other real estate, at or after the date of the will—its true construction is, that the heir described is the party who at the testator's death intestate, would be capable of inheriting the real estate referred to in the will. The Harrisons alone, were so capable of inheriting that real estate, and, as the heir described, are alone entitled to the personal estate.

The fact that the testator was out of possession of his real estate at the date of his will and afterwards, has no bearing upon the case; inasmuch as the term "heir" is used in the will merely to describe the legatee of the personal estate, and that description is rendered just as certain by a reference to the course of descent of an estate of which the testator was out of possession, as it would have been by a reference to the course of descent of an estate of which the testator was in possession. Neither the state of the possession of that real estate, nor the condition of its title, at or after the date of the will, affect in any way the description of the heir of that estate, contained in the will; and as the condition of that real estate, in so far as regards the acts of the testator himself, was the same at his death as at the date of the will, there is no ground for any inference that the kind of heir to which the description pointed, at the date of the will (to wit, the party upon whom the law at the testator's death, intestate, would cast the inheritance of that land, as his heir,) at the date of the death no longer answered that description. In a word: By the devise of his real estate to his heir, the testator at his death described the heir of his estate, and did not describe a party who by no possibility could ever inherit that estate. This is the strict legal construction of the will, and all the extrinsic facts having a legal bearing upon the subject,

strengthen that construction: it being clear that it was the testator's idea that the heir of his confiscated real estate, as heir, had rights to that estate which he "could not lose;" and as the restitution of those rights was the absorbing object of the testator's life, at and after the date of the will, the bequest of the personal estate to that heir, would under such circumstances, be a disposition much more in accordance with the testator's views, than would a bequest of it to a party who never could be such heir.

These positions we fortify by authorities.

1st. By blending the personal estate with the real, the testator devised and bequeathed both to the heir of the real estate. In Gwynne v. Muddock, 14 Ves. 488, a testator gives "all my real and personal estate" to A. W. for life, "and my nighest heir-at-law to enjoy the same after her death." Upon the death of A. W., the next of kin of the testator claimed the personal estate, on the ground that the description "heir-at-law" must be considered with reference to the nature of the property; and therefore applied to personal estate, must mean the next of kin; according to the opinion expressed by Sir R. P. Arden, master of the rolls, (though not a decision) in Holloway v. Holloway, 5 Ves. 399. The master of the roll (Sir Wm. Grant,) after taking time to consider the case, gave his decision as follows: "I have not found any case directly applicable: but there is no doubt the heir-at-law, properly and technically speaking, may take personal property bequeathed to him by that description. It is always a question of intention what the testator means by the use of such a description. Where two descriptions of property are given together in one mass, then the difficulty arises, who is meant; for both the next of kin and the heir cannot take; unless this construction can be made reddendo singula singulis, that the next of kin shall take the personal estate; and the heir-at-law the real estate. But in this case the testator could not mean that; for he blends all the real and personal estate together; and after the death of Ann Williams, directs that his nighest heir-at-law shall enjoy the same. As both are to be enjoyed together, it is absolutely necessary for the court to say who shall enjoy both. It would be contrary to the intention to divide them; and it would be contrary to the words to give the whole to the next of kin. Therefore, the court has no alternative, but to adhere to the words of the will, and permit the person who answers the description of heir-at-law, to enjoy the whole." The decree accordingly declared the heirs-at-law were entitled to the capital, and the accumulation since the death of the tenant for life, Ann Williams.

In Mounsey v. Blamire, 4 Russ. 384, the language was, "to my heir £4000," and three co-heiresses of the testator were held to be entitled, Sir J. Leach, master of rolls, observing, "where the word is used not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, there it seems to me to be a substitution of conjecture in the place of clear expression, if I am to depart from the natural and ordinary sense of the word heir." And see Davies v. Lowndes, 4 Bing. N. C. 478.

2nd. In order to ascertain the heir described, it is necessary to know what real estate the testator referred to in his will, and extrinsic evidence is admissible to prove that fact. It is an elementary rule, that extrinsic evidence is always admissible "in order to ascertain what is comprehended in the terms of a given description, referring to an extrinsic fact." 1 Jarm. Wills, 367, 370, and cases. It will be contended, that the terms of description here used ("my estate real,") are only applicable to real estate of which the testator was actually seised, or to which he had an indefeasible title; and that although evidence to identify such real estate may be admissible, yet no evidence can be received to show that the words used refer to real estate of which the testator had been disseised, or his title divested, but of which he still asserted himself the rightful owner. Now it is well settled in Pennsylvania, that land of which a testator is disseised at the date of the will, is still devisable. "Of the right of a testator to devise land of which he has been disseised," (Humes v. McFarlane, 4 Serg. & R. 435,) says Chief Justice Tilghman, in a Pennsylvania case, "I think there can be no question. The tenures attached to the feudal system never having prevailed in Pennsylvania, we have paid no regard to that principle of the English law, which requires seisin in order to authorize the alienation of land by deed or will. Our statute of wills, made in 1705, enacts that "all wills in writing whereby any lands, tenements, or hereditaments within this province have been, or shall be devised, being proved by two or more credible witnesses, &c., &c., shall be good and available in law for the granting, conveying, and assuring of the lands or tenements thereby given or devised." In another case, (Stoever v. Whitman, 6 Bin. 416,) it was made a question whether one out of possession could convey land by deed, and decided in the affirmative. The following is an extract of the opinion delivered by the court. "When deeds and devises of land have been considered by our courts, it has never been made a question whether the grantor or devisor was in or out of possession; and to make it now would be to disturb what has been looked upon as settled." In the case first cited, (Humes v. McFarlane,) the testator had devised in these words. "I also give and bequeath to my sons John and Alexander, all that my messuage or tenement wherein I now live," &c. It appeared that the

tract on which the testator lived had originally contained 200 acres, but that he had been dispossessed of part of it, containing 44 acres, under a recovery in ejectment by an adverse claimant, four years before the date of the will. The point was made, whether the testator's title to these 44 acres passed under the devise—and the court said, "The testator having devised 'all that messuage and tenement wherein he lived,' if the 44 acres now in dispute were at that time separated from the plantation on which he lived, and he did not keep up his claim, they would not pass by the will; but if he did keep up his claim they might pass. It was a question of intention, involving a fact on which the jury might decide. Whether an estate passes, is matter of law, but where that estate lies, or what is the extent of it, is fact." But again: The objection to the admissibility of this evidence rests wholly upon the assumption that the word "my," when used as a term of reference or description, is always to be construed in its strict and primary sense.

The answer to it is in the following extract from Mr. Wigram's Treatise on the Interpretation of Wills, (page 42:) "Proposition III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, a court of law may look at the extrinsic evidence of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable." This proposition is proved by the cases incidentally referred to in considering the second proposition. The most striking examples, perhaps, are those in which a popular or secondary interpretation has been put on the words child, son, my estate, and other similar cases. Thus the word child, though in strict construction it means a legitimate offspring, may be applied to an illegitimate offspring where the circumstances of the case make it impossible that the testator (who must have had some meaning) used it in such a strict and primary sense. Wilkinson v. Adam, 1 Ves. & B. 422; Woodhouselee v. Dalrymple, 2 Mer. 419; Beachcroft v. Beachcroft, 1 Mad. 430; Bayley v. Snelham, 1 Sim. & S. 78. So, son means an immediate descendant; where however, with reference to extrinsic facts, it is impossible that the word can have been used in such its proper sense, that construction of the word is of absolute necessity excluded; and the necessary inference that the testator used the word in some improper or inaccurate sense, lets in the inquiry in what sense the testator used it. Steede v. Berrier, 1 Freem. 292, 477; 8 Vin. Abr. p. 310, pl. 9. So, property subject to a power, is not, strictly speaking, his by whom the power is to be exercised. Now, suppose a testator having no real estate at the time of making his will, but having a power over the real estate of another, to devise his real estate over to A. Every devise of real estate being specific, the facts of such a case would exclude the presumption that the testator had used the word his in its proper sense, and would let in the secondary and only other interpretation of which the word under the circumstances is capable. Lewis v. Lewellyn, 1 Turn. & R. 104; Napier v. Napier, 1 Sim. 28; Sugd. Powers, c. 5, § 56, note.

3rd. The evidence shows that the real estate referred to in the will, was the testator's paternal estate. That real estate then, being that referred to in the will, it follows that we are to read the will as containing a specific devise of that real estate.

4th. Thus reading the will, and in the absence of proof, that the testator owned or claimed any other real estate at or after the date of the will, its true construction is, that the heir described is the party who, at the testator's death intestate, would be capable of inheriting the real estate referred to in the will. As a general rule, in every limitation of an estate of inheritance by a grantor or devisor to his own right heirs, heir-at-law, or lawful heir, the law construes those terms with reference to the descendible quality of the estate limited, and considers them as designating the heirs of the estate limited, in contradistinction to the heir general. Thus in limitations by deed by an heir ex parte materna, where the ultimate remainder is to the "right heirs" of the settlor, the term is construed to mean heirs ex parte materna. In an English case, Godbold v. Freestone, 3 Lev. 406, "A man seised of lands by descent ex parte materna, makes a feoffment of them to uses, viz., of Blackacre to the use of himself for life, the remainder to his wife for her life, the remainder to the heirs of his body on his wife begotten, the remainder to his right heirs. And of Whiteacre, to the use of himself for 99 years, if he so long lived, the remainder to trustees for his life, remainder to his wife for her life, remainder to his first, and so to his tenth son in tail, remainder to him and his heirs; the husband and wife are both dead without issue; and if the heirs ex parte paterna or ex parte materna should have the lands, was the question." Held that the remainder descended to the heirs of the feoffor ex parte materna, because the ancient fee remained in him. "'Tis all one, be the use expressed or not; the word heirs shall be heirs of the same quality as before." In another English case, (Abbot v. Burton, 11 Mod. 181; 2 Cruise, Dig. 402,) A. being seised in right of his wife of lands which she had by descent on the part of her mother, the husband and wife by deed covenanted to levy a fine, which was thereby declared should be to the use of the conusees and their heirs, to make them tenants to the praecipe, in order to suf-

fer a common recovery; and afterwards such recovery was had accordingly; which, by the same deed, was declared should be to the use of the said A. for his life, and to his said wife for her life, and then to the first and every other son of their two bodies in tail male, remainder to the right heirs of the wife. A. and his wife died without issue; and the question was, whether the lands should descend to the heir of the wife on the part of the mother, or to her heir on the part of the father. Judgment was given in favour of the heir on the part of the mother. In a third English case, (Hutcheson v. Hammond, 3 Brown, Ch. 128,) F. W. having an estate by descent ex parte materna, on her marriage conveyed the same to trustees to such uses as she should by deed or will appoint: and in default of such appointment "to the only proper use of the right heirs of the said F. W., forever." By will, F. W. directed the estate to be sold, and inter alia, a legacy of £1000 to G. P., to be paid out of the proceeds. This legacy having lapsed by the death of G. P. during the life of the testatrix, it was held that it resulted as land unsold, and should go to the heir ex parte materna—per Buller, J. "The next question is, who is the heir-at-law entitled to take, the heir ex parte paterna, or ex parte materna. It is admitted the estate came to Frances Weeks, by descent from her mother; and the question is, whether the settlement upon her marriage, by giving the ultimate remainder to her right heirs, gave them a new estate as purchasers, or the old uses remain. I think it was the old use." On a rehearing before Lord Thurlow, he "gave a clear and decisive opinion against the claim of the heir ex parte paterna to the £1000." And see Harris v. Bishop of Lincoln, 2 P. Wms. 135; Watk. Des. p. 174.

That in a devise to the testator's own "heir-at-law," or "lawful heir," the heir described is the party who, but for the will, would have taken by descent the land devised, is one of the main points decided in the great case of Davies v. Lowndes, 4 Bing. N. C. 478, a case very similar to this. The testator, Selby, devised thus: "Next I give and devise to my right and lawful heir at law all my manors, &c., to hold the aforesaid manors to my heir-at-law," chargeable with certain legacies, to be paid by his said "heir-at-law," within twelve months after his decease. "But should it so happen that no heir-at-law is found, I then do hereby constitute and appoint William Lowndes, Esq., my lawful heir, on condition he change his name to Selby. And I give the estates and all the manors beforementioned, &c., to the said William Lowndes"—chargeable with the legacies. A part of the real estate thus devised had been purchased by the testator; part by his father, and part by his paternal grandfather.

It was held by the judges in the exchequer chamber, that the term right and lawful heir-at-law meant, "not any one who should be heir-at-law, but such heir-at-law as but for the will would have inherited the whole of the testator's property, whether purchased by himself, his father, or grandfather, and that no one can claim under the devise, who has not this qualification." Lord Mansfield in 1780, Lord Loughborough in 1782, and C. J. Tindal in 1835, had all taken this view of the subject, but had all gone one step further. Relying upon some expressions in the context of the will, they all expressed the opinion that the heir described must not only be able to take by descent all the property devised, but that he must also be of the blood of the Selbys. The point did not arise, and was not decided, in either of the cases before Lord Mansfield and Lord Loughborough. But it did arise, and was decided in the case tried before C. J. Tindal. That part of his decision (that the heir must be of the blood of the Selbys) was reversed in the exchequer chamber. But the doctrine, that the heir described must be capable of taking by descent all the property devised, was admitted by the distinguished counsel for the defendant (Sir W. Follett), and most strongly affirmed by the court. "The judgments of Lord Mansfield and Lord Loughborough, on the same will," says Sir W. Follett, "were relied on by the court below; but those judgments were given in cases in which neither of the claimants could be heir to the whole property. The reasoning of those judges only goes to show what is now admitted, that the heir whom the testator intended, was an heir who could take the whole; that he might be of the blood of the Selbys, but not that he must." "The cases of Doe v. Lowndes, [1 Bing. N. C. 620, 622,] in K. B. and C. P. (says Baron Parke, in delivering the opinion of the court), in the time of Lord Mansfield and Lord Loughborough, were naturally pressed on us in the argument. We entirely concur in the decisions then pronounced, and in the general reasoning on which they proceeded; but it was unnecessary there to decide the point now presented for judgment. The lessors of the plaintiff, in neither case satisfied the necessary requisites of the devise. They could not have inherited all the property. Upon a careful perusal of the language used by those distinguished judges, it will appear that the capability of taking all the property as heir was the leading principle on which they proceeded; and any expressions importing beyond this, that the heir must be of the Selby blood, were either used somewhat loosely, as being of equivalent import, or certainly they were extrajudicial." To apply this case to the one now under consideration. Suppose the whole estate devised by Mr. Selby had been derived by descent ex parte materna—and the plaintiff had been his heir general—but not of the blood of testator's mother, and therefore not capable of taking by inheritance the land devised? Accord-

ing to this decision, he would not have been the heir described—because the term right and lawful heir-at-law meant, "not any one who should be heir-at-law, but such heir-at-law as, but for the will, would have inherited the whole of the property" devised. "No one can claim under the devise who has not this qualification." This case therefore fully establishes the position, that when a testator devises his real estate to his right and lawful heir-at-law, the heir described must be able to take by descent the land devised—he must be of the blood of the purchasing ancestor—and otherwise will not take, even although he be heir general. There, the heir general would have taken by descent the lands which the testator had purchased; but inasmuch as he could not take by descent the other lands—as he could not make himself heir to the two other purchasers, testator's father and grandfather—he was excluded from the one estate which he could have inherited. So that instead of his character of heir general enabling him to take as a purchaser lands which he could not take by descent the mere possibility that there might be an heir who could take all three estates by descent, was sufficient to prevent his taking what he otherwise would have been entitled to by descent.

It is an elementary rule that "an heir-at-law is not to be disinherited without an express devise, or necessary implication." Yet by the construction contended for, the doubt, if there could be one, as to which of the senses the term heir is used in this will—heir general, or heir of the land devised—would be resolved so as to disinherit the heir. Apart from authority, the reason of the thing is wholly opposed to the construction claimed for the heir general. By such a construction, the testator is presumed, when in the act of devising his inheritance to his heir, not only to have no reference to the rules regulating the descent of the inheritance devised, but he is presumed to refer to the very opposite,—to the rules regulating the descent of some other inheritance, which he has not and does not devise. He gives his land to his heir; but by the construction contended for, the heir of that land shall not take it: he shall be excluded, in order that the heir general, who by law can by no possibility take the land devised, by inheritance, shall yet take it as heir!

5th. This exclusion of those not of the blood of the purchasing ancestor, has ever been a governing principle in the legislation of Pennsylvania. In the language of Mr. Justice Duncan, (Bevan v. Taylor, 7 Serg. & R. 400,) "it was the manifest and declared intention of the legislature to preserve the line of descent in the blood of the ancestor from whom the estate came, for ever and for ever." "To me it is clear intention written in capital letters in the act of 1794, and the explanatory act of 1797, that all who are not of the blood of the ancestor from whom the estate came, are excluded from the inheritance; however remote in degree the descent may be, the lines in which the estate came, are preserved ad infinitum, and the blood of the ancestor runs through every clause of these acts." "In this and other parts of the act" says Yeates, J., (Shippen v. Izard, 1 Serg. & R. 226,) referring to the 7th section of the act of 1794, "sedulous attention is shown that the property shall not go out of the line of the father or mother who acquired it respectively."

6th. It now only remains to consider whether the fact that the testator was out of possession of his real estate, or that his title to it was defective, at, or after, the date of the will, has any bearing upon the construction which the law would otherwise give to the description of the legatee of the personal estate contained in this will. Neither of these facts has any bearing upon its construction. In every bequest of personal estate to the testator's "heir," the word heir is necessarily a mere term of description. Whatever may be the kind of heir described, whether heir general, or heir of particular lands, the legatee cannot take personalty as heir, for "a man by the common law cannot be heir to goods or chattels, for haeres dicitur ab haereditate." The question then arises, whether, when a legatee of personal estate is described in the will by terms which point either to the heir general, or to the heir of particular lands, as the case may be, it is of the essence of such description that the party referred to should actually inherit from the ancestor that real estate, his capacity for inheriting which, in ordinary parlance, constitutes him its heir? Now it is not true, either in legal or popular parlance, that there can be no heir when there is nothing to be inherited. A man's children and other kindred may be described or designated as heirs, whether they take anything from their ancestor or not. The principle upon which this rests is, that where the term heir is used to describe a legatee of personalty, the description is by reference, expressed or implied, to the course of descent, of some real estate, and not to its actual descent. Actual descent of the real estate so referred to, is not a condition implied in such description. The description is just as certain, and identifies the party referred to just as well, whether there is an actual descent or not.

Now if this be true where the terms of the description point to the heir general, upon what principle is it, that it is not true where the description points to the heir of particular lands?

The descriptions in both cases rest upon the same foundation. They in both cases refer to the course of a descent, not to an actual descent. In both cases the description remains the same, whether an actual descent takes place or not. If a testator should devise purchased lands and his personal estate to his heir, and before the date of the will,

should have been, or afterwards should be, divested by legal process both of the title and the possession of those lands, the heir of those lands would still take the personal estate, because he still answered the description. He is still the party referred to, although he has not actually inherited, either as regards possession or valid title, the real estate of which, had the testator died seised, he would have been the actual heir. So, if instead of being purchased lands, they had been derived by descent ex parte materna. The description points as certainly to the maternal heir in the one case, as to the heir general in the other. It is clear, therefore, that the law does not make the actual descent of the real estate which the testator has devised to his heir, a condition precedent, which must happen in order to enable such heir to take personal estate bequeathed to him by the description of heir of the real estate devised. It is admitted, however, that the testator may, if he chooses, make such actual descent of the essence of the description of the heir to whom he refers, and it now remains to consider whether he has done so in this case. And first it is to be observed, that if he has done so, then no one can under this will take the personal estate in controversy, because the actual descent has not occurred. The testator has, in such event, described a kind of heir who never had any existence, and who never could have any existence, unless the testator died seised of the land devised. It is next to be remarked, that the description in this will, is given with express reference to the course of descent of an estate of which the testator was then disseised. When, therefore, the testator directs that the course of descent of his estate, of which he is then disseised, shall designate his heir, is it not a most strained inference to presume that he intends that description shall be operative only in the event of his dying seised of that estate? His description had a meaning when it was given. That meaning was intended to have an operation the moment after the will was executed, if the testator had died at such moment; yet by the construction contended for, the testator is declared to have expressed a meaning which he knew was utterly insensible at the time he stated it—to have given a description of a legatee which he knew could have no operation if he died the next day, and which, although he retained it to the day of his death, he must all the while have known to be still inoperative?

To avoid the conclusions which thus result, the line of argument will have to be changed, and the position taken that this description must be construed as having been at the outset contingent. That it was intended to apply to the heir of the land devised, provided the testator recovered and died seised of that land, or at least, maintained a good title to it; but that otherwise, it was intended to apply to the heir general. This proposition is not only unsupported by anything appearing on the face of the will, but is essentially opposed to the whole frame of it. Nothing can be more absolute and unconditional than the terms the testator has used. "My estate real and personal to my heir," twice repeated. The very basis of the whole devise, is an unqualified assertion of ownership of the real estate referred to. This assertion is made with full knowledge of the fact that that estate has been for ten years seized and confiscated—and it is made in distinct and utter disregard of that fact. The estate, he asserts, is still his. He will make it his for the purposes of his will. It is his estate, and all contingencies aside, it shall go to his heir—and not only so, but that heir shall have his personal estate. If the testator had been seised of the estate at the date of the will, and was afterwards disseised, there would have been even more foundation for the idea that the description was contingent, on the event of his dying so seised, than there is now. The very fact of his devising as he has done, the estate which had been torn away from him, is the fact of all others which shows the strength of his intention to make his assertion of his ownership to that estate, for all the purposes of his will, and free from all contingencies, equivalent to actual ownership. It is wholly immaterial therefore, what was the condition of the title of the testator, to the real estate devised, either at the date of the will, or at his death. All, perhaps, that is necessary to be known upon that subject is, that he never aliened it. He continued pertinaciously to claim it till the day of his death, and entertained the hope that his heirs, if not himself would some day regain it. But if it were not so the result would be the same. The testator's description remains unchanged: the law repeats it for him in articulo mortis: and its effect, at his death, in identifying the heir of his land, is precisely that which it was originally framed to accomplish.

Finally: The situation of the testator before, at, and after the date of the will, with reference to the real estate devised, shows that his actual intention in this will was to make the party who at his death would be the heir of his paternal real estate, the legatee of his personal estate. The evidence upon the question of domicil given in the case of White v. Brown, [Case No. 17,538,] exhibits the whole story of the testator's life, as told by himself, with a minuteness of detail seldom met with. In his estimation the greatest event of his life was the wrong he had suffered by the confiscation of his real estate. He always entertained the most firm conviction of the absolute illegality as well as gross injustice of that confiscation; and he appears to have been impressed with the idea that the heir of that estate had rights to that real estate which he "could not lose." Under such circumstances this will was

made; and it is probably to some such notion as to the superior right, or chance of success, that the heir of his real estate might have to its recovery, coupled with his own determination to leave no means in his power unused, to enable that heir to enforce his rights to that estate, that the present will owes its existence. It is clear from the whole frame of it, that the testator personally cared not who was to enjoy his large personal estate; otherwise he never would have designated his legatee by a description which, under every possible construction of it, left the particular individuals who were to take under it, of necessity a matter of uncertainty until the day of his death. He cared not even as to the class of persons to which that description would apply at his death; for that class was changed by the intestate act of 1794, and yet he made no change in his will in consequence of it. What he did care for was, that the party who would be the lawful heir of his real estate—that confiscated estate which was still his—should have the means to enforce those rights to it which as heir "he could not lose"—that such heir after the testator's death should be enabled to carry out the one absorbing idea of the testator's life. This was his intention at the date of the will; and as the foundation of it—the sense of the injustice he had suffered by the confiscation—became stronger by lapse of time —there is every reason to believe that such intention remained in full force at his death. There is every probability, therefore, that from first to last the testator actually intended to describe the kind of heir which the law says he has described; that his intention and his words both point in the same direction. Both are satisfied by the construction which gives his personal estate to the heir of his land—both are violated by that which gives it to a party who is not, and never could be, such heir.

In reply. I. The repeal of the 11th section of the act of 1794. There is nothing in the section of the new act contrary, either in terms or in spirit, to what is provided in the omitted clause of the old act. The new act declares itself to be supplemental to the old act, and remedial of defects in it; and where it means to repeal a section, it repeals it expressly. In the well-argued and well-considered Pennsylvania case of Bevan v. Taylor, 7 Serg. & R. 403, the court held the two acts as forming "a scheme of descents" in Pennsylvania; and a declaration in the 7th section and the 11th section of the last act, I incorporate, said the judge who gave the opinion of the court, into the whole system; for different statutes made at different times, are to be explanatory of and construed into each other; as in the construction of the statute of distributions 22 & 23 Car. II. c. 14; and St. 1 Jac. II. c. 16.

II. Supposing the 11th section unrepealed, what is meant in the will by "heir-at-law?" It means heir by statute law. The question of domicil is unimportant, as the testator had the laws of Pennsylvania in view, when using the terms "heir-at-law," and "lawful heir." For the real estate referred to in the will—if any is referred to anywhere—is situate in Pennsylvania; since, at and after the date of the will, the testator neither owned nor claimed any other, and always did claim that. By his devise of that real estate to his heir-at-law, the testator necessarily referred to the law which, at his death intestate, would regulate the descent of that real estate; and the only law which could so regulate that descent, was the law of Pennsylvania, where the estate was situate. By blending the personal estate with the devise of the real, he designed it also to go to the heir of that real estate; and therefore in the bequest of the personal estate, the testator referred expressly to the law of Pennsylvania, which, at his death intestate, would designate the heir of his real estate, as designating also the legatee of his personal estate. In this case, therefore, while the testator's domicil, at and after the date of the will, was in Pennsylvania, we are yet relieved from the necessity of relying exclusively upon that position, by the facts that the will was made in Pennsylvania,—by a native of Pennsylvania,—devising real estate in Pennsylvania and not elsewhere,—and bequeathing personal estate to the heir of that real estate; that the will was executed so as to pass only real estate in Pennsylvania, with Pennsylvania executors, one of whom was to be the president, at "the time being," of the testator's death, of a bank in Pennsylvania; and that the will, from its date to the testator's death, was deposited in Pennsylvania; all of which circumstances render it manifest that whatever might be the testator's domicil, at or after the date of the will, he yet had in his view, when he made the will, only the laws of Pennsylvania.

The words "heir-at-law," as used in this will, are not in Pennsylvania a technical expression, meaning "heir at common law." No authority has been cited which in any degree sustains the position that the words in question ever had in Pennsylvania, when used as in this will, the technical signification claimed for them. If there is any word in the language of the law, whose precise meaning should be considered as fixed, it is the term "heir;" and just in proportion to the precision heretofore attached to its signification should be the strength of the authority adduced to show that the signification has changed. A brief examination of the references cited on the other side, will show that that position cannot be sustained. The point they have to prove is, that in a naked devise to a testator's own "heir-at-law," those words, in Pennsylvania, mean "heir at common law." The proof they adduce is, That from the date of this will, until after the testator's

death, the canons of descent, established by the common law of England, were adopted in Pennsylvania, in all cases where they were not abrogated by statute, so that in such cases there was an heir, who was "heir at common law." That this heir at common law was sometimes, in the language of legislators, judges, and lawyers, termed "heir-at-law, and that, therefore, those words when used nakedly in a will, must mean "heir at common law."

1st. Let us examine the language of the legislation cited. The words of the act of 1705 relied on, are as follows: "But if the intestate leaves a widow and no child, then such widow or relict shall inherit one moiety or half part of the said lands and tenements, and the other moiety shall descend and come to the intestate's next heir according to the course of the common law. But if the intestate leaves no widow nor child living at the time of his death, or if the children all die in their minority, without issue, then the said lands and tenements shall descend and come to the intestate's heir-at-law, according to the course aforesaid." It will be perceived that the language of this act, instead of supporting the position in question, is directly opposed to it. Instead of deeming the phrase "heir-at-law" sufficiently precise to designate the heir at common law, the legislature first describe him by the words "next heir, according to the course of the common law," and afterwards when they do use the words "heir-at-law," carefully subjoin the words "according to the course aforesaid." The words of the supplemental act of 1764, also cited, are as follows: "But where the wife is living, and the whole premises shall be adjudged and ordered to the heir at law or any other of the children, the wife of the person so deceased shall not be entitled to the sum at which the purpart or share of her estate, so as aforesaid ordered to her heir at law or any of the children, shall be valued, but the same, together with the interest thereof, shall be and remain charged upon the premises, and the interest thereof shall be regularly and annually paid by the heir at law or such other child to whom the same shall be adjudged," &c. "And at the decease of the said mother the said principal sum, so as aforesaid valued and adjudged shall be paid by the said heir at law or other child aforesaid, to whom the same shall be adjudged," &c. In this act, the words "heir-at-law" are throughout used as synonymous with eldest son. They do not refer to the heir at common law, taking as such heir, but are loosely and inaccurately used to distinguish the eldest son from his brothers and sisters. [Walton v. Willis,] 1 Dall. [1 U. S.] 265, 353. If such inaccurate phraseology proved anything in relation to the meaning of the words "heir-at-law," considered as a technical term, it would prove that they meant eldest son, and nothing else. A nephew of the intestate, although he might be heir at common law, does not come under the description of "heir-at-law," as the words are used in this act. They are, therefore, clearly not synonymous with "heir at common law."'

2. The language of judicial opinions is next to be considered. In Johnson v. Haines' Lessee, 4 Dall. [4 U. S.] 65, the question was, whether a particular case of intestacy was a casus omissus in the intestate laws of Pennsylvania. The reporter, and Chief Justice M'Kean, when speaking of the plaintiff, use the terms "heir-at-law," and "heir at common law," indiscriminately. It is to be remarked, however, that in every instance where the term "heir-at-law" is used in this case, the context shows clearly that the heir at common law is referred to; whence it is evident that the term "heir-at-law" is used merely as an abbreviation of the term "heir at common law," where, from the context, there is no possibility of mistaking the meaning of the term. In Walton v. Willis, 1 Dall. [1 U. S.] 353, Chief Justice M'Kean, when speaking of the intestate acts then in force, says, "The main intent of these acts appears to have been, that real estates should be divided among the children, or representatives in the descending line of an intestate; and not descend to the heir at common law:" thus describing such heir in terms which are unmistakable. So, in an anonymous case, decided in 1774, reported in 3 Smith's Laws, 160, [note.] "Question, whether his heirs at common law shall take, or it shall divide among his other brothers and sisters under the supplemental intestate law?" Opposed to the casual expressions, loosely used and always in association with such precise language as prevents their misinterpretation, is Ruston v. Ruston, 2 Yeates, 54, an authority in point to show that the term "heir-at-law," has no such technical signification attached to it, as is here contended for. A question in that case was, whether a proviso, in a devise of land (by a will dated in 1784) to the eldest son, directing the payment of a sum of money, was a condition. M'Kean, C. J., said, "The defendant could not be considered in this case as heir-at-law in Pennsylvania, where, if at that time a person had died intestate, leaving divers children, his real estate would have descended to all his children equally, the eldest son having only a double portion or share, and therefore the devise may even be considered as a condition." Yeates, J., "But it is objected that the proviso in the will does not form such a condition as will warrant an entry on its breach, the defendant being the eldest son and heir-at-law under English ideas." And Smith, J., "When an ancestor leaves more children than one, the term 'heir-at-law' conveys no idea with us; they are all his co-heirs. All are equally entitled, if he dies intestate." See, also, French v. McIlhenny, 2 Bin. 20; Crosby v. Davis, 4 Pa. Law J. 193.

If the term "heir-at-law" had the technical meaning claimed, in 1791, it has it at this day. The intestate act of 1833 in no way affects the meaning of the words "heir-at-law," as used in a will. It merely excludes the heir at common law in cases of intestacy, where there are nearer of kin. No one will contend, that if a testator in Pennsylvania were now to devise his real estate to his "next heir according to the course of the common law of England," the devise would fail because of the exclusion of such heir in a case of intestacy by the act of 1833. The devisee would still take, under the description given by reference to an ascertained course of descent; and if the heir at common law, as the party described, would take under such description, so also would he take under any other description which identified him equally well. By the argument submitted on behalf of the Aspdens, in this case, the term "heir-at-law" is such a description. It means "heir at common law," in a will in 1852, just as much as it did in 1791. Yet will any one contend that if a testator in Pennsylvania should, at this day, devise all his estate, real and personal, to his "heir-at-law," and should die leaving many children, the eldest son alone would take, to the exclusion of his brothers and sisters? The argument, to be worth anything, must go to that extent. It must go to the extent of saying, that if the testator, Matthias Aspden, had, after the date of this will, married and had numerous children, and had then republished this will, his eldest son alone, as "heir-at-law," that is, it is said, "heir according to the course of the common law," would have taken everything, and his brothers and sisters nothing; and that such a will made at this day, would have a similar operation. It is said, however, that the words here used must be construed to mean heir at common law, because "the testator did not intend his estate to be divided: it was to go to one person, hence he uses the singular number." To this, the answer is conclusive, that it is perfectly well settled, the term heir is "nomen collectivum." Gwynne v. Muddock, 14 Ves. 488; Mounsey v. Blamire, 4 Russ. 384; George v. Morgan, 4 Harris, [16 Pa. St.] 108. In this case, if the party claiming as heir at common law, John Aspden, had died before the testator, leaving daughters only: no one will say that the daughters, however numerous they might be, would not collectively be the heir at common law. Co-parceners are but one heir, "They be but one heir, and yet several persons." Again, no person can take under this will unless he is clothed with the character of heir-at-law; and if he takes in that character, he must take in that quality, as the heir of the testator, by lawful descent to his real estate, as the person whom he has designated as the heir to whom his whole estate shall go as one entire fund. The rules of law put it out of the power of a testator to make his own right heir, or his heir-at-law, a word of purchase to break the course of descent; not because he may not do it by words denoting such intention, but because such intention cannot be legally inferred from the mere use of the term. Yet by the doctrine contended for, the heir at common law shall take as a purchaser, under the description of "heir-at-law," although he is unable to take by descent. He takes by force of the "technical expression," alleged to designate him; and as "heir-at-law" is to take away the inheritance devised, from the only party who by the law of the land is capable of taking that inheritance as heir.

An isolated extract from the opinion of the court in the Pennsylvania case of George v. Morgan, [supra,] has been cited as authority for the general proposition that "in Pennsylvania a testator is to be considered as speaking in reference to the common law system of descents." But the extract in connection with its context, shows that the expression used has no such unlimited application as appears to be attributed to it. In that case, the testator, in 1744, devised an estate to his son Mordecai, "to hold to him for and during his natural life, and after his decease to the heirs of his body lawfully begotten, and to their heirs forever, and in default of such issue then to the heirs of my son Samuel and their heirs forever," and the question was whether Mordecai took an estate tail under the rule in Shelley's case. The passage in the opinion of Bell, J. above referred to, is as follows: "But it is urged upon us that as, in England, an intention to change the line of descent is sufficiently manifested wherever the superadded words import eventual distribution of the estate among several, as if it be limited over as a tenancy in common, or to be divided equally among all the heirs of the first taker,—in Pennsylvania since the abolition of the rights of primogeniture, such a devise as we have here must be taken as changing the descent; the superadded words and 'to their heirs forever,' necessarily importing not the heir in tail, who is generally the right heir in England, but all the lineal descendants of the praepositus, who take as parceners with us under the general title of heir. I confess, I was much struck with the view when it was first presented, and very much inclined to adopt it as consistent with reason. But further reflection has satisfied us that it is inadmissible. In the first place, it frequently happens that, even in England, the right heirs of a devisor may be of persons entirely different from him who would alone take as heir in tail, and yet it has always been there held as essential, that to withdraw the devise from the power of the rule, distribution must be expressly contemplated, and shown to be so by some precise direction. Secondly, though in Findlay v. Riddle, 3 Binn. 139, Yeates, J., seemed much inclined to adopt the idea that, with us, a limitation

to heirs general always imports distribution, and is therefore repugnant to the rule in Shelley's case, it was not received in our subsequent cases, though expressly urged upon the attention of the court, where full scope was afforded for its operation, had it been thought tenable. In the last case of Hileman v. Bouslaugh, [13 Pa. St. 344,] the reasoning of the chief justice is in direct repudiation of it. All this is conclusive that, in this state, a testator is to be regarded as speaking in reference to the common law system of descent."

Thus far the case has been considered as if it turned solely upon the construction of the term "heir at law." The testator however has in a subsequent clause of the will used the words "lawful heir" in a repetition of the original devise of his estate real and personal. It cannot be pretended that any one, in this commonwealth, when speaking of his "lawful heir," refers to that person who would inherit according to the law of a distant country; or that, like the phrase "heir-at-law," it has been used in any special, or professionally accurate sense, as an equivalent or abbreviation of the more correct expression, "heir at common law," or "next heir according to the course of the common law." The exact term 'lawful heir' is used in the statute of 1705, to designate that person, or those persons to whom that statute gives the estate. Speaking of escheats of real estate in default of any "known kindred," it says: But "if the lawful heir to any such lanus or tenements shall at any time appear, he shall have them," &c. This clearly means the persons to whom, on the owner's death, that statute gives them, and it entirely changed the common law canon of descent. 3 Smith's Laws, p. 158; section 13, Act 1705. In State v. Engle, 21 N. J. Law, 347, 361, 367, it is said that "the words lawful heir must be understood to mean an heir capable of inheriting the lands in question under the laws of New Jersey." In a Pennsylvania case, (Simpson v. Hall, 4 Serg. & R. 337. And see Hart v. Gregg, 10 Watts, 190,) a brother of the half blood is called 'heir.'

III. The terms "heir-at-law," and "lawful heir," as used in this will, designate the person or persons on whom the law of Pennsylvania at the testator's death, would cast the inheritance of the real estate referred to in the will, as his lawful heir, provided he had died intestate. The general rule, that in a devise to the testator's own heir, the term heir must be construed to apply to the person or persons answering the description at the testator's death, is unquestioned. In such a case the maxim "nemo est haeres viventis," emphatically applies. 2 Jarm. Wills, 28. That the view of the testator was prospective in fact, is evident, for he declares that his estate shall go to the party who would be his lawful heir in case there might be no doubt of his own legitimacy. That doubt could only arise after his death. As matter of law also, as well as of actual intention, the law of descent which is to designate the heir referred to in this will, is the law in force at the testator's death, and not in force at the date of the will. From the very nature of a devise to a testator's own heir, it is plain that every such testator must contemplate two classes of contingencies.

1. The person or persons answering the description may change, by births or deaths, from hour to hour.

2. The laws regulating the course of descent, like all other laws, are liable to change.

In regard to the first class of contingencies, it is not pretended that it is not, as matter of law, within the purview of such a testator. In this very case, the party who was the heir at common law, at the date of the will, died before the testator; yet no one doubts that the present claimant, the son of that party, at the date of the testator's death, answered the description of the testator's heir at common law, although he did not do so at the date of the will. So also, as to changes in the law of descent. A testator when devising to his own heir, ex vi termini, refers to the period of his own death, as that whereat his heir is to be ascertained. He has such period in his actual, as well as legal, contemplation, when making such devise: and as it is then, and then only, that his heir can be ascertained,—and such heir can only be ascertained by the law then in force—it follows that that law, whatever it may be, is the rule which the testator declares it his intention to adopt as part of his will.

This doctrine in no degree conflicts with the general proposition that "the intent of the testator ought always to be taken as things stood at the time of making his will, and is not to be collected from subsequent accidents which the testator could not then foresee;" for in the case of a devise to his own heir, his intention at the date of the will is prospective in its character; it actually looks at the period of his death, as that before which the law cannot operate to define his heir. It does not follow therefore, that because the law of descent changes after the date of the will, in which a testator has devised to his heir, we are to impute an actual change of intention to the testator, and presume that he actually adopts the law as changed. He has relieved us from the necessity of speculating upon such a question, by declaring in advance, that the law in force at his death, is that which is to define his heir. The changes in the law of descent, after the date of such a will, however frequent and however great, affect in no degree his legal intention. Whenever he dies, his heir will still take. The law throughout all its changes, will still carry out his intention, and give the estate to his heir.

All the cases cited on the other side, there-

fore, to the effect that after-purchased lands would not pass at the date of this will, and that devises to classes of individuals in existence at the date of a will, cannot be construed to apply to individuals of the class referred to, who came into existence after the date of the will,—have no application in a case where the devise is in its nature prospective, and looks to the period of the testator's death. Martindale v. Warner, 15 Pa. St. 479, cited as "authoritatively settling" the point now in question, it is submitted, has no bearing on it whatever. In that case a testator, in 1828, bequeathed certain legacies to several of his brothers, nephews and nieces, naming each of them, and died in 1849. Several of the legatees died before the testator—some before, and others after the passage of an act of May 6, 1844, hereafter mentioned—leaving issue; and the question was whether the legacies to those persons lapsed, or whether the issue of such legatees were entitled thereto, under the provisions of the act referred to. The words of the act are as follows:—"No devise or legacy, hereafter made, in favour of a brother or sister, or the children of a deceased brother or sister of any testator, such testator not leaving any lineal descendants, shall be deemed or held to lapse or become void, by reason of the decease of such devisee or legatee in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good and available in favour of such surviving issue, with like effect, as if such devisee or legatee had survived the testator, saving always to every testator the right to direct otherwise." It was held that this act did not operate upon the will in question, because it was obvious by the words "devise or legacy hereafter made," that no retrospective effect was intended to be given to it, and that, such being the case, "that the testator permitted his will to stand without alteration for several years, or that he may have known of the act of 1844 is nothing."

IV. The expression first paying, and the provision for the half blood, is too feeble to control any but an ambiguous expression. We have shown that the term heir-at-law, explained by the term 'lawful heir,' points plainly and fixedly to certain persons who are constantly changing, who are left perfectly uncertain till the testator's death; and are then determined easily, clearly, and unchangeably. The fact that in the course and changes of thirty or forty years these persons happen to fall within some other provision of the testator's bounty, is not enough to unsettle the legal definition of the clearest and best defined term of the law.

V. Extrinsic evidence is inadmissible to show that the testator used the words "heir-at-law," or "lawful heir," in a peculiar sense of his own, differing from their legal signification.

The law upon this subject is embodied by Mr. Wigram on Wills, (page 17,) in a general proposition laid down by him. "When there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted, are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense, be tendered." Delmare v. Robello, 1 Ves. Jr. 412; Hampshire v. Pierce, 2 Ves. Sr. 216. In Mounsey v. Blamire, 4 Russ. 384, the testatrix gave the sum of £4000 "to her heir." Evidence was tendered to prove that the person intended by the testatrix was an individual (a stranger) whom she had promised to make her heir, and whom she used to call her heir. The heir at law claimed the legacy. The master of the rolls decreed the legacy to the heir-at-law.

VI. Argument for the maternal half blood. Supposing all the foregoing arguments to be insufficient, then the case of the heir at common law is disposed of against him. And the new question arises; the one between the half blood itself. To which side of the half blood, or how amongst them does the estate go? Does it go to the paternal side alone, or to the maternal in connexion with it? We contend that it goes to both.

1. This will, in fact and in law, is a will of personal estate alone, and not of real estate, because the testator had no real estate to devise at the time of making his will, nor had he any at any period afterwards, up to the day of his death. The case resembles those cases in which it has been held that a will of real and personal estate is revoked pro tanto, as to real estate, by its alienation subsequently to the date of the will; and becomes a will of personalty alone. Thus in a Massachusetts case, (Brown v. Thorndike, 15 Pick. 388, A. D. 1834,) the language was, "all the residue of my estate, real and personal." But the testator afterwards aliened the only real estate he had at the time of making the will: and this, on a question of probate, was held to be a revocation pro tanto, and that the will became a will of personal estate simply. Evidence extrinsic to the will was held necessarily admissible to show the alienation of the real estate whereby the will had become a will of personal estate only. After speaking of the object of the law in excluding parol testimony generally, as being to prevent the intention of the testator being defeated, Shaw, C. J., says, what is certainly true as a fact, and will explain the testator Aspden's devise of real estate, he having no estate of that sort: "It is usual, in wills as well as in other instru-

ments, to use broad and general language large enough to embrace every species of property, although there are but few species of property in the mind of the testator or in his power to bequeath, upon the safe maxim that "omne majus continet in se minus;" as "all my estate of every name and nature;" "all my property wherever, &c." And see Very v. Very, 3 Pick. 374, and Hilliard v. Binford, 10 Ala. 977. Now, the will being one of personalty merely, the term 'heir' is to be considered in reference to its subject-matter, and means next of kin; who are in this case, it may be observed, the same persons as the heirs general. In Holloway v. Holloway, 5 Ves. 403, where there was a bequest of money to "heirs-at-law," these heirs, at the testator's death, being there also, as in this case, the next of kin, the master of the rolls, Sir R. P. Arden, says: "This is personal property; and it is said that though 'heirs, &c.,' have a definite sense as to real estate, yet as to personal estate it must mean such person as the law points out to succeed to personal property. I am much inclined to think so. If personal property were given to a man and his heirs, it would go to his executors. I rather think if I was under the necessity of deciding this point, I must hold it heirs quoad the property; that is, next of kin. . . . Great difficulties would arise from the construction that heirs-at-law are intended, and applying it to personal property. He might have different heirs-at-law; heirs descending from himself as first purchaser; heirs ex parte paterna and ex parte materna. I am inclined to think the court would in such a case consider him as the first purchaser, so as to take in both lines. However, there is no occasion to say anything upon that." This view is supported by other cases. Vaux v. Henderson, 1 Jac. & W. 388; Gittings v. McDermott, 2 Mylne & K. 69; Evans v. Salt, 6 Beav. 266; Eddings v. Long, 10 Ala. 203.

2. But if this be not so, still real estate which did not belong to the testator at all—estate which was not his—cannot direct the course of this personalty. The words are "my real estate." Now that alone is 'mine' which is not owned by any body else. What I claim, is not necessarily mine; nor even what I believe to be mine. The argument of the Harrison counsel recalls Lord Harwicke's language, when speaking in parliament upon the bill to indemnify witnesses who should give evidence against Sir Robert Walpole, and offering a reward for evidence without assertion of any corpus delicti. 'But, says a noble lord,' replies Lord Hardwicke, sarcastically, 'if we have not here a corpus delicti, we have what is sufficient for the purpose, a corpus suspicionis; a new expression and a new invention, the body of a shadow, and on this foundation he calls upon you to build his new superstructure of injustice.' Camp. Lives Ld. Ch. p. 94. The Harrison counsel seek to change a natural and primary construction of the will, not by showing any real estate which either did or might, could, would, should, or ought to pass by the will, but by showing his unfounded and absurd belief—his delusion—that he owned, or ought to own, some such estate. Such a belief or delusion has never been regarded as real estate, except that kind known as chateaux en Espagne, by any court anywhere. "In expounding a will," says Mr. Wigram, (Wig. Wills, 8,) "the court is to ascertain not what the testator actually intended as contradistinguished from what his words mean, but what is the meaning of the words he used. And certainly in a will so simple as this, calling for no forced construction, 'my' can never be converted into 'his.'

3. All this belief, too, is sought to be proved by the testator's declarations extrinsic to the will. No doubt you may and must resort to extrinsic evidence to show whether or not the testator had or had not real estate. But, then, this is simply a fact, and this case states that it is shown by such evidence that he owned no such estate. The Harrison counsel now attempt to contradict this fact, and to prove this imaginary subject-matter by the testator's ridiculous declarations. This cannot be done. The declarations of a testator prior to or cotemporaneous with, or subsequent to the making of his will, are inadmissible, and cannot be received to prove his intention; not even the instructions given for the will. 1 Jarm. Wills, 353. Nor even an express declaration made at the time, of what his intention was, (Wig. Wills, pl. 104;) and this although no doubt may exist in the mind of the court that such was the actual intention of the testator. To the same purport are our American authorities. "The legal construction of a will in writing," say the court, in Comfort v. Mather, 2 Watts & S. 453, "cannot be explained or altered by the parol declarations of the testator, of his understanding of the meaning of the will, or of his intentions to do something else. So in Lewis v. Lewis, 2 Watts & S. 455; (and see Asay v. Hoover, 5 Pa. St. 21; Trustees v. Sturgeon, 9 Pa. St. 321; Farrar v. Ayres, 5 Pick. 404; Brown v. Saltonstall, 3 Metc. [Mass.] 423,) "where parol declarations made by the testator as to his intention of dying intestate, whether before or after the making of the will, are not admissible to show a revocation of it." The only exception to this is of declarations of the testator to prove a material fact collateral to the question of intention, where such fact would go in aid of the interpretation of the testator's words. These cases, however, will be found to be those only in which the description in the will is unambiguous to any one of several subjects. See cases cited 1 Greenl. Ev. pp. 373-376; 1 Spence, Eq. Jur. 560; Wig. Wills, pl. 104, p. 81; and Id. pls. 194, 195.

GRIER, Circuit Justice. This case has been learnedly, laboriously and on some points

very ably argued, and we congratulate the parties and the counsel that, after twenty-two years of litigation, there is now a prospect that, in three or four years at farthest, those who are entitled to the large estate in suit, will be permitted to enjoy it, and that those who are not, will cease to indulge in vain hopes respecting it.

The first question for our decision, is whether the 11th section of the act of 1794 has been repealed by the 7th section of the act of 4th April, 1797. If so, then all other parts are unimportant. Let us inquire what are the principles laid down by the sages of the law to govern questions like the present.

1st. "An act of parliament may be repealed by the express words of a subsequent statute, or by implication."

2nd. "If a subsequent statute contrary to a former have negative words, it shall be a repeal of the former act."

3rd. "Every affirmative statute is a repeal by implication of a precedent affirmative statute, so far as it is contrary thereto; for 'leges posteriores priores contrarias abrogant.'"

4th. "A later act has never been construed to repeal a former act, unless there be a contrariety or repugnance in them, or at least some notice taken of the former act, so as to indicate an intention in the law-giver to repeal it." The law does not favour a repeal by implication unless the repugnance is quite plain. Dore v. Gray, 2 Term R. 365. Also, when two acts are seemingly repugnant, yet if there be no clause of non obstante in the latter, they shall, if possible, have such construction that the latter may not be a repeal of the former by implication. [Foster's Case,] 11 Reports, [Coke,] 63.

To come to the case before us. The act of 4th April, 1797, was made, says Chief Justice Tilghman, (Cresoe v. Laidley, 2 Bin. 286,) for the express purpose of supplying the defects of the act of 19th April, 1794. The latter act purports to be a supplement to the former. The 5th section, where the cases omitted in the former act, and intended to be supplied, are commenced, has this preamble: "Whereas the provisions of the act to which this is a supplement, appear to be incomplete," &c., and proceeds in that and the following sections, to supply certain casus omissos of the act of 1794, and ends the last section in these words: "and that the second section of the act to which this is supplementary, be, and the same is hereby repealed." Now the legislature have declared, in express terms, that they repeal the 2nd section of the act of 1794 only. There is, therefore, no express repeal of the 11th section. There is no provision in the latter law, which negatives any provision of the 11th section of the former. The issue of the half-blood shall inherit, says the former, in preference to more remote kindred of the whole blood, and there is not a syllable in the last act, which is contrary to this provision of the first. There is no repugnancy between them. The latter was made to supply omissions of the former, and yet, without directly repealing the 11th section, it is contended that the 7th section of the latter act creates a casus omissus by implication, because it omitted to re-enact what already had been provided for in the 11th section of the first act.

In the case of Bevan v. Taylor, 7 Serg. & R. 403, cited at the bar, the supreme court of Pennsylvania declared that the act of 1794, and its supplement of 1797, should be construed as one act. The 11th section of the former applies only to the inheritance of real property, and the 12th section, which appears to include both real and personal, provides for the issue of brothers and sisters of whole and half-blood only by implication, or negative pregnant, and wholly omits the case where there are both. The 7th section supplies this oversight or omission; first, in case there are brothers and sisters, or their representatives, both of the whole and half-blood; and, secondly, provides for the distribution of the personalty when there were no brothers or sisters of the whole blood, but brothers and sisters of the half-blood; but, in supplying this omission, it unnecessarily included the inheritance of the realty, which had already been provided for in the 11th section of the original act; and, moreover, neglected to include the issue of the half-blood, which still remained a casus omissus as regards the personalty, by the omission of the words or "their lawful issue," in the supplement. Construing this act of 1794, with its supplement of 1797, as one act, we have, then, this case: a latter section unnecessarily repeats some of the provisions of the former section, and omits others. This omission does not, I think, amount to a repeal of what is not repeated.

II. As to the meaning of the term, in Pennsylvania, 'heir-at-law.' The language of some of our statutes, as well as that of eminent lawyers belonging to the bar and bench. do seem undoubtedly to favour the argument of John Aspden's counsel; that the term has been generally used in Pennsylvania, to designate the heir at common law. Let us however look at this matter further. By the charter granted to Mr. Penn, the laws of England "for regulating and governing of property, as well as for the enjoyment of lands and succession of goods and chattels," were introduced and established in Pennsylvania, to continue till they were altered by the legislature of the province. But the canons of descent of the common law were soon changed; and as early as 1683 it was enacted "that the estate of an intestate shall go to his wife and child or children, and if he leave no wife, child, or children, it shall go to his brothers and sisters, if any there be," &c., &c. Afterwards the act of 1705 gave the eldest son a double share. But, without attempting to

give a history of the legislation on this subject, it may suffice for the present to say that, although the policy of her legislation was to distribute the estate of an intestate equally amongst the next of kin, no attempt was made to provide a complete canon of descents and distribution till 1794. This act was soon found to have many omissions, and was further amended by a supplement in 1797. In the meanwhile the courts construed these acts strictly, giving the inheritance to the heir at common law in all cases where a contrary direction was not given to it by the plain words of the statute. Johnson v. Haines' Lessee, 4 Dall. [4 U. S.] 64; Cresoe v. Laidley, 2 Bin. 279; Jenks' Lessee v. Backhouse, 1 Bin. 91. The common law of England, as governing cases not specially provided for by statute, was never totally abolished till the revised code of 1833 was adopted. Hence, the language and phraseology of the English courts continued to be used in the courts of Pennsylvania, sometimes, perhaps, without regard to proper distinction or absolute correctness of diction; and here, as there, the term "heir-at-law" was not unfrequently used as an abbreviation, substitute, or equivalent for the expression "heir at common law."

In section 8, of the act "For the Better Settling of Intestate's Estates," passed in 1705, (3 Smith's Laws, 156,) the heir at common law is described with accuracy as "the next heir according to the course of the common law." But in the supplement to that act, passed in 1764, (Id. 160,) and in section 4 of the principal act, the phrase "heir-at-law" is somewhat inaccurately used to distinguish the elder son from his brothers and sisters. In Johnson v. Haines' Lessee, 4 Dall. [4 U. S.] 65, Chief Justice M'Kean uses the expressions "heir-at-law" and "heir at common law" indiscriminately to designate the same person. In the cases of Jenks' Lessee v. Backhouse, 1 Bin. 91, and Cresoe v. Laidley, 2 Bin. 279, reported in the volumes of Mr. Binney, while the very learned and accurate reporter, in his syllabus, carefully uses the phrase "heir at common law" only, the counsel, of whom the reporter was one, and sometimes the court, have used the shorter expression "heir-at-law" as synonymous. Without venturing to assert that these and other instances to be found in our reports are evidences of careless diction, or of an inaccurate application of the language of English lawyers to the peculiar legislation of Pennsylvania, I may say, it is an usus loquendi peculiar to a class; it has not the force of authoritative definition, or of judicial decision, where the question is directly brought before the court. On the other hand, we have a case more like an adjudication of the point. In Ruston v. Ruston, 2 Yeates, 61, the question was made whether a proviso in a devise of land (by will, dated in 1784) to the eldest son, directing the payment of a sum of money, was a condition. It was argued that it could not be so, for the "heir-at-law" only can enter for the condition broken, which heir the defendant himself was. To this it was answered, that in Pennsylvania all the children are "heirs-at-law," or the "heir-at-law" of the father; and with this Chief Justice M'Kean, who delivered the opinion of the court, agreed, and said, "the defendant could not be considered, in this case, as heir-at-law in Pennsylvania, where, if, at that time, a person had died intestate, his real estate would have descended to all his children equally, the eldest son having only a double portion or share, and therefore the devise may even be considered as a condition." In this same view, in another case, (French v. McIlhenny, 2 Bin. 20,) when the two expressions come to be considered together, and therefore to be considered accurately, Chief Justice Tilghman observes, "In England the eldest son is heir; but here the law is more equitable, and the children together are considered as heirs." The persons on whom the law of Pennsylvania casts the estate of an intestate, if more than one, hold as tenants in common, or as co-parceners do in England, and in correct legal phraseology may be styled the 'lawful heir,' or the 'heir-at-law.'

But admitting that if this will had used the words "heir-at-law" alone as descriptive of the person to whom the whole estate is bequeathed, there might have been sufficient reason to doubt whether the testator had not intended thereby to describe the "heir at common law" in contradistinction to the heir-at-law by the statutes of Pennsylvania; we are, nevertheless, relieved from this uncertainty by the second description of the devisee in the will, intended to be explanatory of the first. The testator explains his meaning, by saying he intended to describe the party who would be his "lawful heir," in case he himself were legitimate. Now, it cannot be pretended that any one, either lawyer or layman, in Pennsylvania, when speaking of his "lawful heir," refers to the person who would inherit according to the law of England; or that, like the phrase "heir-at-law," it has been used in any special, peculiar, or professionally technical sense, as an equivalent or abbreviation of the more correct expression "heir at common law," or "next heir according to the course of the common law." The statute of 1705 expressly used it in the sense of any person to whom the statute itself gives the estate. How can the court be justified in construing the expression "heir-at-law" in its peculiar professional sense, according to the modus loquendi of a certain class, and not according to its legal and established definition, as the person or persons on whom the law casts the inheritance, when the testator himself has used another expression, as an equivalent or explanatory of the first, which never was used in that peculiar sense which has been carelessly given to the other, but agrees with

it in its legal and established definition? Nor is this argument subject to the retort which the lord chancellor said the counsel might have on each other, in Lowndes v. Stone, 4 Ves. 649, where A. devised his "estate to his next of kin or heir-at-law." "You have a fair retort," says he, "on each other; one side may contend that 'next of kin' means 'heir-at-law;' the other that 'heir-at-law' means 'next of kin.'" In that case the testator had ignorantly used terms as equivalent or synonymous which are incapable of the same definition. Here the term used as explanatory is capable of the same definition, and relieves the doubt as to whether the first was intended to be used in a special sense, not necessarily included in its general definition.

III. From what date is the will supposed to speak? The strict and legal meaning which the court assign above to the term "heir-at-law," and the decision hereafter given on this account on the admission of parol evidence, will render obvious the reasons of our decision on this point, argued by the counsel of the heir at common law, with so much learning. The maxim "Nemo est haeres viventis," applies; and it follows, that where a testator describes his intended devisee or legatee as the person on whom the law, at his death, would cast the inheritance of his estate, his will must, ex vi termini, be construed as speaking at the death of the testator, and not at the time of its execution. 1 Jarm. Wills, 287. It will also dispose of the argument raised by the same counsel,—

IV. That the expression "first paying" controls the otherwise settled meaning of the term "heir-at-law." It does not follow, the court is of opinion, because the testator gives some legacies to certain of his half-blood relations, that he intended to exclude them if one or more of them answers at the same time this clear, exact, settled, and legal designation of his will. Let us proceed to consider a remaining considerable point, illustrative of the reasons of our decision on these two last.

V. The admission of extrinsic evidence to show in what sense the testator used the phrase "heir-at-law." The difficulty presented in this will is not one arising upon a latent ambiguity, as where a testator bequeaths his estate to his nephew, John Smith, and has two or more nephews of that name. On the contrary the testator has described a certain person, or a certain class of persons, as the objects of his bounty: the description given cannot equally apply to two or more. If the testator declares that the haeres factus of his will shall be the same as the law would designate as his haeres natus, if he had died intestate, there can be no ambiguity to be explained by parol testimony. If A. B. be the person described by the will, it would be a perversion of law to suffer parol testimony to be admitted, to prove that the testator meant C. D. The statute of frauds and perjuries would be annulled. Much of the extrinsic evidence, therefore, which by consent of the court, was conditionally taken and drawn into the discussion of this case, will have to be rejected. Conversations, related after the lapse of half a century, are seldom worthy of credit; and, even if believed, are no evidence of a testator's true intention. The declarations of a rich uncle to his numerous poor relations, may often be considered as made rather to conceal than to exhibit his real intentions. Again, suppose a testator should devise his property to such of his cousins as should be tenants of the manor of Dale, at the time of his death; and that, at the time the will was made, his cousin A. was tenant, but at the time of his death his cousin B. answered the description in the will; would the court admit evidence to show that the testator always lived, and had died under the impression that A. would be the person that would take under this devise? The will having declared the clear, paramount, and ruling intention of the testator, that a person should take, who, at the time of his death, should answer to a certain description; the fact that the testator never knew, or always laboured under a mistake, as to the person who would probably answer to that description, at the time of his death, would not affect the construction of his will.

Now the meaning of the term "heir-at-law," I consider to be settled, and that there is nothing within the four corners of this will which explains or controls that meaning, or shows any intention of the testator to use the word in any other than its technical legal import, to wit, "as the person or persons on whom the law would cast the inheritance of his real estate at his death." I consider the established principles of law, which bear upon the question, being the result of all the cases, to be clearly and correctly stated in the valuable treatise on wills, by Mr. Jarman. 2 Jarm. Wills, c. 28.

1st. Like all other legal terms, the word "heir," when unexplained and uncontrolled by the context, must be interpreted according to its strict legal import, in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in case of intestacy.

2nd. It is clear, therefore, that where a testator devises real estate simply to his heir, or to his heir-at-law, or his right heirs, the devise will apply to the person or persons answering this description at the time of his death.

3rd. The circumstance, that the expression is "heir" (in the singular,) and that the heirship resides in, and is divided among several individuals as co-heirs, would create no difficulty in the application of this rule of construction; the word "heir" being in such cases used in a collective sense, as comprehending any number of persons who may happen to answer the description.

4th. It is true, that with respect to personalty, it is often doubtful whether the testator employs the term "heir" in its strict and proper acceptation, or in a more lax sense, as descriptive of the next of kin, or the person or persons appointed by law to succeed to property of this description. Where the gift to the heirs is by way of substitution, this latter construction has sometimes prevailed, an example of which occurs in the case of Vaux v. Henderson, 1 Jac. & W. 388, note, where a testator bequeathed to A. £200, "and failing him, by decease before me, to his heirs," and the legacy was held to belong to the next of kin of A., living at the death of the testator. Sir R. P. Arden, M. R., in Holloway v. Holloway, 5 Ves. 399, was strongly disposed to give the same construction to the word "heirs" applied to personalty, though his opinion, on another question, rendered the point immaterial.

5th. But cases of this description must not be understood to warrant the general position that the word "heirs," in relation to the personal estate, imports next of kin, especially if real estate be combined with personalty in the gift; which circumstance, according to the principle laid down by Lord Eldon, in Wright v. Atkyns, 19 Ves. 299, affords a ground for giving to the word, in reference to both species of property, the construction which it would receive as to the real estate, if that were the sole object of disposition. Thus, in the case of Gwynne v. Muddock, 14 Ves. 488, where a testator gave all his real and personal estate to A. for life; adding, after her death, "her nearest heir-at-law to enjoy the same," Sir William Grant, M. R., held that the heir-at-law took both the real and personal estate, not the realty only, the testator having blended them in the gift.

6. And even where the entire subject of the gift is personal, the word "heir," unexplained by the context, must be taken to be used in its proper sense, nor will the construction be varied by the circumstance that the gift is to the heir in the singular, and there is a plurality of persons conjointly answering to the description of heir. Thus, under the words "to my heir £4,000," three coheiresses of the testator were held to be entitled; Sir J. Leach, M. R., observing, "where the word is used, not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, then it seems to me to be a substitution of conjecture in the place of clear expression, if I am to depart from the natural and ordinary sense of the word heir." Mounsey v. Blamire, 4 Russ. 384.

Now, we have not here a legacy of money to "heirs" by way of succession; nor is there a syllable in the will indicating that the testator had any peculiar meaning of his own attached to the words "heir-at-law," or "lawful heir," or that he used the word "heir" as a synonym for "relations" or "next of kin." On the contrary, he calls it his "estate," and not only so, but his estate "real and personal," and the person or persons designated to take it, are designated as the "heir-at-law" or "lawful heir." It is manifest that the testator did not intend that his property should be divided into real and personal after his death, and be given to different persons, but that the person or persons on whom the law would cast the inheritance of his lands at his death should have his personal property, subject only to the payment of debts and legacies.

Our decision on these five points disposes of every part of the case of John Aspden, the heir at common law. He has no claim to this estate, on any view of the case which we can take. But now arises a new question between new parties. The two parties of the half blood, neither of whom could get anything if the heir at common law was the person designated, and who therefore combined their forces as friends to dispose of his claims, now raise a question between themselves which they had reserved as against him, and upon which they now dispute separately with one another as strenuously as they before did jointly on the other question with the heir at common law. Assuming rightly that the estate is to go to whomsoever the law would cast the inheritance of the testator's lands; the Harrisons —the heirs ex parte paterna—claim the whole estate. And whether they shall have it all, or whether they must share it with the heirs ex parte materna, their late co-operators, the Hartleys, against the heir at common law, is this new question. The court apprehends fully the argument of the Harrison heirs. As being the only heirs ex parte paterna, they contend that they alone fulfil the description of "heir-at-law," or "lawful heir" of the testator, to the exclusion of the half blood ex parte materna; that the term heir has reference to an inheritance, and the question as to what person is designated by that term depends on the realty which is to be inherited; that this designation of the testator's intention to give his personalty to his heir, instead of his next of kin, cannot depend on the validity of his title to the estate which the testator expects him to inherit. Thus, in England, if a man dies seised of lands which came to him by descent from his father, and without children, his cousin of the whole blood of his father will be his heir; but if his estate came to him from his mother, his cousin of the whole blood ex parte materna would be his heir. That, therefore, the term "heir-at-law," as designatio personae, in a will, has reference, ex necessitate, to something dehors, or without the will, which must be known in order to ascertain the intention of the testator. That the law of Pennsylvania, while it substitutes nearer kindred of the half blood to more distant kindred of the whole blood, adopts the same principle, viz. that the heir must

be of the blood of the first purchaser. That the testator having never owned any property, except that which came to him from his father, and having never voluntarily parted with it, but having tenaciously claimed it all his life (believing his attainder and the forfeiture of his property was not only unjust but illegal), must be supposed to designate and intend by the description "heir-at law or lawful heir" only such person or persons as would stand in that relation to the property which he expected to descend to his heir. That if it is competent to receive parol testimony as to what estate he died seised of, and how the title to it devolved upon him, it is equally competent to ascertain in this way what property he claimed or supposed would descend to his heir, especially as it appears on the face of the will that he supposed himself seised of some real estate, and his intention must be the same whether he was right or wrong in that claim, belief, or supposition. And consequently, that the testator having never owned or claimed to own any property but that which was devised to him by his father, his nephews and nieces of the maternal half-blood would have inherited nothing from him, and the description of heir-at-law or lawful heir could not possibly attach to them.

The court acknowledges the force of this argument. Let us then consider the question, 1st, on the undisputed fact that the testator was not seised of any real estate at the time he made his will, or afterwards; and, 2d, consider whether the unfounded belief that he was the rightful owner of certain property which was devised to him by his father, can be received to vary the result.

1st. It is not true, either in legal or popular parlance, that there can be no heir where there is nothing to be inherited. A man's children and other kindred may be described or designated as heirs, whether they take anything from their ancestor or not. Thus, in Counden v. Clerke, Hob. 31a, it is said: "But this (the words 'right heirs male') hath a divers consideration in cases of descent, and in case of purchase. For the word heir is sometimes taken absolutely, and as the Grecians call it, απλως, or simpliciter, sometimes κατα τι, or secundum quid, or per accidens; sometimes in abstracto, standing naked by itself, or of itself; and sometimes in concreto, clothed with land or rent, in respect of which he may be heir, as the word is here. For example, the younger son in borough English, is heir, and all the sons in gavelkind; whereof the reason is, because the custom of those lands is, that they must descend to the younger sons, or all the sons; so they are heirs secundum quid of those lands, in point of descent, or when they descend, for then they are within the custom that gives the inheritance." Hence, a bequest of personal estate "to my heir-at-law," or "right heir," would not be void for want of some person to take, even though the testator should not die seised of real estate. And whether a bequest by a man seised only of property by inheritance from his mother, to his "right heir," or "heir-at-law," would be interpreted as describing his right heir simpliciter or in abstracto, and not his heir secundem quid, or special heir of the particular estate, is possibly an open question. But in a case in 3 Lev. 406, (Godbold v. Freestone,) an heir ex parte materna limited (by deed) several estates, with reversion to his "right heirs," and it was decided that the reversion should go to his right heirs secundum quid, that is, to his heir ex parte materna.

Now, admitting that a devise of Blackacre "to his heir-at law," or "right heir," by a testator who inherited it from his mother, would be construed as a devise to his heir ex parte materna, or his heir quoad hoc, and that such person would hold by descent, and not by purchase, on the supposition that the testator meant to describe the person who would, at his death, be the lawful heir of the thing devised; and admitting that a bequest by the same person of all his real and personal estate to his heir-at-law would be construed as a designation of the person on whom the law would cast the estate of Blackacre at his death, it is evident that it is the character impressed upon the thing devised of descending to the heir, and to which the testator is supposed especially to refer, which is seized upon by the court to justify them in thus narrowing or changing the general term heir-at-law or right heir, so as to mean his special heir, or heir quoad hoc; and their desire to follow that canon of descent which requires the heir of an estate to be of the blood of the first purchaser. But in case of a bequest of personal estate to the testator's heir-at-law, when he has no special heir, there is no reason for departing from the plain and obvious meaning of the term, nor is there any character impressed upon the thing devised which can restrain it to the blood of the first purchaser. For I do not join in inclination of opinion with Sir R. Pepper Arden, who, in the case of Holloway v. Holloway, 5 Ves. 399, was inclined to think, though he did not assert nor decide, that a bequest in trust for "such person as shall be my heir or heirs-at-law," should be construed "heirs quoad the property," meaning "next of kin." But I concur with what he was further inclined to say in the same case, "that in such case the court would consider the testator as the first purchaser," and, as a consequence thereof, would give a bequest of personalty to "my heirs-at-law," or "right heir," or "lawful heir," the same designation as if it had been a devise of lands acquired or purchased by the testator. But to apply these principles more especially to the case

before us. The testator left at his death a nephew, A., of the paternal half-blood, and a nephew, B., of the maternal half-blood (who, for our present purpose, may represent the two stocks of relatives,) and a cousin, C., of the whole blood ex parte paterna. C. was his heir presumptive at the time this will was made, in 1791. But when a testator describes his heir-at-law, or lawful heir, as the person that shall take his property, he intends such person or persons as shall be found to sustain that character or description at the time of his decease, by the law of the country of his domicile. By the law of Pennsylvania, the persons who would answer to that description in 1824, when the testator died, are A. and B. By that law, they together constitute the lawful heir of the testator in the abstract or simpliciter, and are preferred to C. They take the personal estate by purchase, as the persons described in his will. There is no real property which either would take in exclusion of the other. The terms heir-at-law, or lawful heir, as descriptive of the person to take, are not narrowed by accident to a particular subject, nor are we required to look to the exception in the act, or compelled to give to general terms a special application, in order to conform to a principle of law which excludes the heir general, in order to continue the inheritance of the blood of the first purchaser. The exception in the act, which constitutes one of them as heir to the exclusion of the other, through an accidental quality attached to the thing to be inherited, has not occurred, and the question of preference does not arise. Being, therefore, equally within the description of persons entitled to take under the will, they must take jointly.

2nd. "Can the evidence of the testator's unfounded belief that he was owner of certain property devised to him, be received to show an intention different from that expressed in his will?" In construing wills it is often necessary to receive parol testimony, as to the property and persons described in it, in order to apply the devises and bequests to the proper persons and things. And in this way a latent ambiguity may be discovered, which must of necessity be resolved by testimony of the same description.

Now, as we have seen, the reason for construing the general terms of description in a special or narrowed sense, arises from the disposition of the courts to favour the policy of the law, which confines the descent of real estate to the blood of the first purchaser, and the presumption that such was the intention of the testator. And, admitting, for the sake of argument, that the half-blood ex parte materna would have been excluded by this description, if the testator had died seised of his paternal estate, what evidence have we that he would have given it a different destination from that which it now receives, had he believed otherwise? He did not know, when he made his will, that, before his death, the law of descents would be changed in Pennsylvania, yet, having willed that the law, as it existed at the time of his death should designate the person who should take his property, what right have we to say that he would have made a different will, if he had anticipated the fact of its change? He lived thirty years after the law was changed, and did not change his will on that account. He lived long enough to satisfy any reasonable man that he never would regain his paternal estate. The statute of limitations had twice run against his fancied claim before his death, and yet he made no change in the designation of the person who should take his estate, but left it to the law to settle that question, as the case might be, at his death. We have refused to receive evidence that he lived and died in the belief that his lawful heir would be the son of some of his English cousins. His will, clearly expressed, could not be interpreted by his false notions, because it would be conjecture to say that he would have changed his will had his notions been different. It is equally conjecture to presume that he would have changed it, had he entertained correct ideas as to his real estate. The testimony introduced on this subject is to limit the description of his devisees, or rather to change the destination of his property, unambiguously expressed, both as regards persons and things, to a different person or class of persons, by declarations of the testator of an absurd belief, when it cannot be proved that he would have given a different destination to it, if his knowledge or belief had been different. Such a construction, founded only on conjecture, would annul the statute of frauds, "and leave titles depending on intention to the decision of chance and the sport of opinion." I am of opinion, therefore, that both stocks of half-blood are equally entitled to the property in dispute, and take it under the description in the will, as "heir-at-law" or "lawful heir;" and that a different intention, in favour of one class to the exclusion of the other, cannot be inferred, from the fact that the testator had mistaken notions in regard to his ownership of real property, at the time he made his will and afterwards, and that such evidence cannot be received to narrow the construction of the clear, unambiguous description of his will, as connected with the actual situation of the property and persons referred to in it.

Let me now say, in conclusion of this long pending, important and difficult case, that although made after careful investigation, and with an anxious desire to arrive at the truth, I feel that my opinion is not so certainly right, as I could desire to feel that it is. And that it is a source of great satisfaction to me to believe that it will be review-

ed by my brethren and myself in the highest tribunal of the country.

Equity Docket, No. 1, April sessions, 1828.

NOTE, [from original report.] From the final decree of the court, which was in conformity with the opinion above given, appeals were taken to the supreme court by the heir at common law, and by the Harrisons', so far as related to the parts of the estate from which they were excluded: the question of domicil, passed upon in the case of White v. Brown, [Case No. 17,538,] along with the evidence in that case, which was all documentary, being also taken up with this decree. The parties of the half-blood, here again joined their force. Their counsel, maintaining the Pennsylvania domicil, contended that the fact had been established by the verdict of a jury, upon an issue directed for that purpose by the court below: that the judge who directed the issue, was satisfied with the verdict, and refused a new trial: that under such circumstances, a very strong case must be made out, in order to induce an appellate court to send the cause back for a new trial: and that the law upon that subject is well stated by Lord Lyndhurst in Collins v. Hare, 1 Dow, & C. 139, in these words, "As the issue was directed for the purpose of informing the conscience of the equity judge, if the main object was gained it was sufficient. The judges both at law and equity were satisfied with the verdict, and therefore it must be a strong case indeed, that should induce your lordships to send the matter to a new trial, in opposition to the opinion of the late noble chancellor of Ireland, who had a much better opportunity of investigating the facts on which the case mainly depended, than your lordships have." An examination of the evidence, which was made by the counsel of the half-blood, showed, they contended, that the weight of it was altogether on the side of the American domicil.

On the other hand, the counsel of the heir at common law, contended that, the testator's domicil was England; that the verdict of the jury interposed no obstacle to a decision conformably to the evidence which appears on the record; that the object of the issue was to instruct the conscience of the chancellor, and like all the other proceedings in the circuit court, is the subject of review in the supreme court: that "the chancellor may, if he thinks fit, make no use whatever of the verdict, but treat it as a mere nullity." Gres. Eq. Ev. 405; [Mem.,] 6 Madd. 58; [Ex parte Learmouth, Id.] 113; Harrison v. Rowan, [Case No. 6,141.] They cited a Pennsylvania case, where, on an appeal, the supreme court disregarded a verdict, reversed a decree made in conformity to it, and remanded the case, without sending it to another jury, with instructions to the inferior court to enter a different decree. They relied on the opinion of Coulter, J., who, in delivering the opinion of the court, said: "It was contended by his counsel here, on the argument, that the verdict ought to be, and is conclusive. In a court proceeding according to the forms of the common law, the verdict of a jury is of high import and great solemnity; although, even then one verdict is not conclusive in any case, if against the weight of evidence. The court may set it aside, and grant a new trial. But in a court of equity, its effect and function is entirely different. In that court it is used merely for the purpose of informing the conscience of the court, and is incidental and auxiliary. A chancellor cannot, if he would, surrender his high prerogative and duty of deciding upon facts, according to the convictions of his conscience. In that court, the wisdom of our ancestors deposited the faculty of deciding upon facts within its jurisdiction, as well as determining the rules of equity applicable to them. And where, after all, could the power be more safely lodged, especially in cases of trusts and fiduciary transactions? Long experience, the habit of sifting and comparing testimony, calm deliberation and exemption from local prejudices, seems to give a guaranty for enlightened judgment. A chancellor will examine the notes of evidence by the judge who tried the cause, listen to the explanation of counsel, and, at last, if his conscience is not satisfied, will decide the cause according to his own convictions, and disregard the verdict of the jury." The counsel argued that there is no writ of error in the case of an issue directed for the information of a chancellor, who may after all, disregard the verdict, and that if the verdict enter into the decision of the cause, they had no other remedy that an appeal, which must necessarily be co-extensive with the final decree of the circuit court. Com. v. Judges of Court of Common Pleas, 4 Pa. St. 302. Domicil, they argued, is a mixed question of law and fact; that it is not the verdict, but the evidence, which exhibits the facts from which a correct estimate may be formed of the sense in which the testator used the language in his will; that the jury disregarded the only facts of importance in the controversy; the testator's education and residence for more than fifty years in England, his English doctrines, prejudices and associations, his long absence from Pennsylvania, his embittered feelings towards that state, and every other consideration, calculated to cast light on the meaning of the terms he used, &c. And they went, as did the counsel of the heirs of the half-blood, over the whole case of White v. Brown, already reported. [Case No. 17,538.]

The supreme court heard, at great length, the argument on both sides, as to this question of domicil, as well as upon all the questions reported in the present case. But no opinion was ever delivered in that tribunal. The court was equally divided as to affirming the decree, (See Brown v. Aspden, 14 How. [55 U. S.] 25;) and it was therefore simply affirmed. It was understood by the profession, that the chief difficulty with their honours was, the question of domicil: and it is, perhaps, not easy entirely to reconcile the verdict in the case with certain parts of the language of the judge who gave the opinion of the supreme court delivered at the same term, in the case of Ennis v. Smith, involving the question of the domicil of General Kosciusco. See 14 How. [55 U. S.] 400. On the effect in law of a judgment by an equally divided court, see Krebbs v. Directors of Carlisle Bank, [Case No. 7,932.]

Case No. 590.

In re ASPINWALL.

[7 Ben. 154.][1]

District Court, S. D. New York. Feb., 1874.

RE-EXAMINATION OF CLAIMS—ORDERING OF ISSUES—POWER OF REGISTER.

1. An order was made by the register for the re-examination of the claims of certain creditors against the bankrupt's estate. Evidence having been taken under the order, the register, on the application of the creditors, made an order for the framing of an issue to be certified into court. On the return of the order, the register revoked it, on the motion of the creditors, on the ground that he had no authority to order the framing of issues, until it appeared from the examination before him that the claims should be expunged: *Held*, that, under General Order No. 34, the register had no

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

authority to require the parties to frame issues as to the re-examination of a claim, if either objects to framing such issue, until it appears to the register that the claim ought to be expunged or diminished; but may require them to frame an issue when the examination before him is completed, if neither of them objects;

2. That in this case, it was too late to revoke the order for issues, which had been made without objection, and the revocation should be vacated.

In bankruptcy. In this case the register certified to the court, that an application had been made for the re-examination of claims of the Phoenix National Bank and Richard Irvin & Co., against the estate in bankruptcy; that he made an order fixing a time for hearing the application, and, having taken the examination of the witnesses called by the parties, made an order, on the application of the bank and Richard Irvin & Co., requiring the framing of issues; and that, on the return of that order, on like motion, he revoked the order, as inadvertently made, on the ground that he had not authority to make it, unless it appeared, from the examination before him, that the claims ought to be expunged or diminished.

BLATCHFORD, District Judge. I think, that, under General Order No. 34, [see note at end of case,] the register has no authority to require the parties to form an issue, if either of them objects to forming such issue until it appears to the register that the claim ought to be expunged or diminished, and until objection is then made to his making an order to that effect. He may require them to form an issue, if neither of them objects to forming such issue, at any time after the examination is completed, and may certify such issue for determination. In the present case, the motion for the order for issues was made by the Phoenix National Bank and Richard Irvin & Company, the same parties on whose motion the order was revoked. The other parties, as appears, not only did not object to making the order for issues, but object to its revocation. I think it is too late to revoke the order, and that its revocation should be vacated, and the parties be required to form issues under it.

[NOTE. General Order No. 34 provides, inter alia, as follows: "When the assignee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the register to whom the cause is referred, for an order for such re-examination; and thereupon the register shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail, addressed to the creditor. At the time appointed, the register shall take the examination of the creditor and of any witnesses that may be called by either party; and, if it shall appear from such examination that the claim ought to be expunged or diminished, the register, if no objection be made, may order accordingly. If objection be made, the register shall require the parties then, or within a time to be fixed for that purpose, to form an issue to be certified into court for determination." See Gazz. Bankr. 374.]

Case No. 591.

In re ASPINWALL.

[7 Ben. 433;[1] 10 N. B. R. 448; 31 Leg. Int. 365; 22 Pittsb. Leg. J. 75.]

District Court, S. D. New York. Sept., 1874.

WITNESS—PRIVILEGE OF COUNSEL.

Counsel for a bankrupt is not required, when examined as a witness in the bankruptcy proceedings, to disclose any information as to the affairs of the bankrupt, which he received as such counsel, from the bankrupt, or from persons to whom he was referred by the bankrupt for the purpose of obtaining such information as such counsel. But he may be required to answer questions not coming within this principle.

[See In re Adams, Case No. 42.]

In bankruptcy.

T. Saunders, for the assignee in bankruptcy.

G. H. Forster, for the witness.

BLATCHFORD, District Judge. In the course of his examination as a witness in this matter, before the register, under the 26th section of the act, Mr. Weeks, an attorney and counselor at law, was asked (question 5) what affairs of the bankrupt were the subject of a conversation which he had testified he had with two persons named, other than the bankrupt, at a time named, in which some of the affairs of the bankrupt were the subject of conversation between the witness and those persons. The witness objected to answering the question, on the ground stated by him, that he was acting as counsel for the bankrupt at the time, and that his remarks were made in that capacity. Subsequently, in the course of the same examination, the same witness objected to answering eight other questions, on the same ground. At the close of the examination the witness said: "I wish to state, that all my interviews with Mr. Aspinwall were strictly of a professional character, and all the information in relation to his affairs, imparted to me, was so imparted in the capacity of counsel, and was of a confidential character, and, under the privilege of counsel, I decline to disclose those matters." The point as to whether the nine questions shall be answered, or whether the privilege claimed is a sufficient reason for not answering them, is certified by the register for decision by the court.

Undoubtedly, the witness is entitled to claim that he is not required to disclose any information he received from the bankrupt, in regard to the affairs of the bankrupt, which was imparted to the witness by the bankrupt, if the witness received such information from the bankrupt, as counsel for the bankrupt. And this privilege extends to information received on behalf of the bankrupt, in regard to the affairs of the bankrupt, from persons to whom the wit-

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ness was referred by the bankrupt, for the purpose of his obtaining such information, as counsel for the bankrupt. But the privilege does not have the wide scope which seems to be claimed by the witness. Thus, when the witness is asked, in question 5, what affairs of Aspinwall were the subject of his conversation, his objection, that he was acting as counsel for the bankrupt at the time, and that his remarks were made in that capacity, is too broad. He may have been acting as counsel for the bankrupt at the time, and his remarks may have been made in that capacity, but a designation, in some form, of what affairs of the bankrupt were the subject of the conversation, does not necessarily require the witness to disclose information about such affairs, which was imparted to him by the bankrupt, and thus involve his privilege. I do not see, therefore, that the objection taken is, in view of the question (5), tenable.

So, too, the remark of the witness that all his interviews with the bankrupt were strictly of a professional character, may apply very well when he is asked to disclose the information received by him from the bankrupt at such interviews. And his remark, that all the information in relation to the affairs of the bankrupt, imparted to him, was so imparted in the capacity of counsel, and was of a confidential character, will justify him in withholding the disclosure only of such information in relation to the affairs of the bankrupt as was imparted to him by the bankrupt, in the capacity of counsel for the bankrupt, and of such information in relation to the affairs of the bankrupt as was imparted to him by persons to whom he was, as counsel for the bankrupt, referred by the bankrupt, with a view to his obtaining such information, as such counsel. Guided by these tests, it is difficult to see how the privilege of the witness can cover question 10, as to whether the indebtedness of the bankrupt to a certain named creditor was spoken of at either of the interviews between the witness and the two persons before referred to. The same remark is true of question 11, as to whether anything was said at either of such interviews, by either of the parties present, relating to the bankrupt's inability to meet his obligations to such creditor. The witness had previously stated that he did not think he had any interview with the bankrupt at which either of the two persons referred to was present. Nor does it seem that the witness can be privileged from answering question 12, as to who it was with whom, if with anyone, he had the first conversation concerning the claim of such creditor against the bankrupt; or question 13, as to whether a certain paper shown is one that has ever passed under the witness' observation; or question 14, as to whether the witness drew or directed the drawing of a certain deed from the bankrupt; or question 15, as to whether the witness drew or directed the drawing of a certain declaration of trust between the bankrupt and certain persons named; or question 17, as to whether, at a certain date, the witness received any checks drawn to the order of the bankrupt by a certain named firm; or question 18, as to what disposition was made of any such checks so received.

Case No. 592.

ASPINWALL'S CASE.

[3 Pa. Law J. 212, 380.]

Circuit Court, E. D. Pennsylvania. 1843.

BANKRUPTCY—VOLUNTARY ASSIGNMENT—RELEASES—PREFERRED CREDITORS.

Creditors who have executed releases according to the terms of voluntary assignments, are to be considered as having been preferred thereby over the creditors of the petitioner, who have not executed releases.

In bankruptcy.

BALDWIN, Circuit Justice. In the case of George W. Aspinwall, a petitioner for the benefit of the bankrupt act, on a point [see note at end of case] certified from the district court, it appeared that on the 1st March, 1841, the petitioner and David R. Pope his partner, made an assignment of all their joint and separate estate and effects, real and personal, in trust to pay certain of their creditors in full, and also to pay in full or rateably as the case might be, such of their creditors as should within a limited time execute and deliver an absolute release of all demands against the said Pope and Aspinwall, with a proviso to this effect, that all creditors who held collateral securities might retain them, and all the property thereby secured, and be at liberty to come in under the assignment for the balance due on their respective debts, after exhausing the property secured. The discharge of the petitioner was opposed on the ground of having made this assignment, whereupon the following question arose in the district court, which is now the subject of consideration, viz. Whether those creditors who have executed releases according to the terms of the assignment, are to be considered as having been preferred thereby over the creditors of the petitioner who have not executed releases. This question arises under the second enacting clause of the second section of the bankrupt act which prohibits the discharge of a petitioner who has by assignment or otherwise, after the 1st of January, 1841, or at any other time in contemplation of the passage of a bankrupt law, given or secured any preference to one creditor over another, without the assent of a majority in interest of the creditors who have not been so preferred. This assignment having been made after the 1st of January, 1841, comes

within the above provision as held in the Case of Irwine, [Case No. 7,086.] It gives preferences to certain creditors, and consequently the discharge of the petitioner is subject to the condition of assent by those creditors who have not been preferred, so that the only question is, what is giving or securing a preference of one creditor over another according to the true interpretation of the bankrupt act?

Taken in its common acceptation, a preference of one over another is putting him in a better situation, giving him an advantage or benefit which others do not enjoy; whatever act tends to produce this effect is a preference—is within the law, no matter by what means it is done, whether by assignment "or otherwise," or what may be the mode of preferring. Any preference, of whatever nature or to whatever extent, imposes this condition on the petitioner. No exception is contained in the law, nor are any words used which can justify the implication of one which discriminates between the creditor who is preferred without any act to be done by him after the assignment, or other act giving the preference, and the creditor who by its terms must do something before the preference can attach. The leading policy of the whole bankrupt act, is to enforce the equal distribution of a bankrupt's property among all his creditors, and to prevent all preferences of any creditors over others. not only after the passage of the act, but from the express words of the law the same spirit is directed to all preferences after the 1st of January preceding, or even before if made in contemplation of the passage of a bankrupt act. When the intention of the legislature is so clearly manifested, it ought to be carried into effect in the same spirit; every creditor has a legal right to resort to the property of a debtor for the payment of his debt, without any obligation to submit to any terms or conditions sought to be imposed on him. If the debtor makes such an assignment of his property as to make a release by his creditors a condition of his being entitled to any part of the debtor's property, he is forced to surrender his right, or be cut out of any hope of payment; this of itself puts those creditors who release in a better position than those who do not; it divides the creditors into two classes, one of whom may be paid in full, while the other receives nothing. When paid in full, the giving a receipf or release of the debt is a duty of the creditor, independent of the assignment; no right is given up by the release, and if paid only in part, the releasing creditors will have first exhausted the whole fund, leaving to the others no right or remedy but to pursue the person of the debtor, both of which are under the laws of the state and the late act of congress, difficult if not impossible to enforce, and will be wholly abrogated if the construction relied upon by the petitioner prevails. As the law does not invalidate the assignment, or other act which gives the preference, no vestige remains either of right or remedy in the creditors who do not release, other than the right to oppose the discharge of the bankrupt without the consent of a majority in interest. And even this poor remnant of a creditor's right will be taken from him, if the releasing creditors constitute a majority in interest by themselves, or by the addition of others, and give their assent to the discharge. So to construe the law would be to annul it, for the creditors who have released the debtor have no interest in his discharge. They cannot prove their debts under the bankruptcy, for none exist. They cannot oppose the discharge, for it cannot affect them, nor do or can they in any sense fill the character of creditors after they have absolutely released the debt. This consideration alone would be conclusive to show the true meaning of the law to be, that when a preference of one creditor over another has been given or secured as in this case, the petitioner cannot be discharged without the assent of a majority in interest of those creditors who have not executed releases, and whose debts are existing and unpaid, at the time of the hearing of the petition for a discharge. In ascertaining whether a preference has been given, the act looks to the time when it purports to have been given, and to those who are then creditors; but the discharge must be referred to the final hearing, and none can be recognized as creditors to whom the bankrupt is not then indebted. The question adjourned to this court, must therefore be answered in the affirmative.

NOTE, [from 3 Pa. Law J. 380.] "The opinion of the late Judge Baldwin is given without any statement; and as the question certified to the court is not precisely stated in the opinion, we have examined the record, and give below the question in terms as certified by the district court, and some facts which may serve to prevent any misunderstanding of the decision. The report of the commissioner shows the amount of debts of unpreferred creditors to be $258,732.60, of whom those holding debts amounting to $147,911.05 assented to the discharge. But of these the larger portion though not preferred, had released the petitioner in accordance with the terms of the assignment, which stipulated that all who released within a certain time should be paid pro rata. It was objected that the creditors who had released in accordance with the terms of the assignment, were preferred over those who had not released. The question was thus certified by the judge of the district court: Are the creditors who executed the release stipulated for in the assignment of G. W. A., a copy of which is annexed to the petition, creditors 'not preferred,' within the meaning of the second proviso of the second section of the bankrupt law?

"The decision of the circuit court was, that the releasing creditors were preferred within the meaning, &c. The answer of the circuit court should be in the negative, as it is evident from the course of argument in the opinion, and the manner in which the question is therein stated, that it was understood affirmatively by the circuit court."

Case No. 593.

ASPINWALL v. COUNTY COM'RS.

[3 Wkly. Law Gaz. No. 26.]

Circuit Court, D. Indiana. May Term, 1859.[1]

MANDAMUS—ENFORCING JUDGMENT ON MUNICIPAL BONDS—PEREMPTORY WRIT.

[1. Where county bonds in aid of a railroad are issued under authority of an act of the state legislature providing that the county commissioners shall levy a tax to pay the interest and principal, a judgment for interest thereon, recovered in a federal court, may be enforced by mandamus to compel such levy.]

[See note at end of case.]

[2. Where the defendants have had ample opportunity to set up all substantial defenses in previous litigation, a peremptory instead of an alternative mandamus should be granted.]

[See note at end of case.]

[Application for a peremptory writ of mandamus. In an action of assumpsit by William H. Aspinwall, Joseph W. Alsop, Henry Chauncey, Charles Gould, and Samuel L. M. Barlow against the board of commissioners of Knox county, to enforce the payment of certain coupons of bonds issued by the defendant, judgment had been rendered for plaintiffs for $17,832.36, (case not reported,) and, on writ of error, was affirmed by the supreme court. Board Com'rs Knox Co. v. Aspinwall, 21 How. (62 U. S.) 539. An execution was issued on the judgment in June, 1859, but was subsequently, by order of the court, set aside, and an alternative writ of mandamus granted, commanding the defendant to levy a tax for the payment of the judgment, or to show cause, etc. This writ was quashed, but upon this application a peremptory mandamus was granted. On writ of error sued out by defendant, this judgment was affirmed by the supreme court. 24 How. (65 U. S.) 376.]

Samuel Judah and N. C. McLean, for plaintiffs.

Judge McDonald, for defendant.

HUNTINGTON, District Judge. At the May term of this court, 1857, a judgment was recovered in favor of the plaintiffs, and against the defendant for a large sum of money found due upon the interest warrants of certain bonds issued by the county of Knox to the Ohio and Mississippi Railroad Company, in payment of subscription of stock made by that county to said road. This judgment was, at the last term of the supreme court of the United States, affirmed by that tribunal. The judgment of that court is final and conclusive between these parties. By the act of the legislature under which this subscription of stock was made, and these bonds issued, it was provided that the commissioners of Knox county should levy a tax upon the property of the county to pay these bonds, and the interest as it fell due. For several years the board of commissioners have failed and refused to levy the tax. At last the parties holding these bonds have sued on these interest warrants and obtained a judgment. There being no property in the county subject to the payment of this judgment, the plaintiffs, at the present term of this court moved the court for an alternative mandamus to compel the board of county commissioners to show cause why they had not levied the tax, etc. To this proceeding the county board, by counsel, appeared, acknowledged service, etc., and filed a demurrer. After argument, the court refused the mandamus on the ground that the tax to be levied was by the act directed to be levied at the June term of said board, and that as no such term had intervened since the final determination of the cause, the board should have the then and now passed June term, in which to make the levy before a mandamus should issue. By the affidavit of Samuel Judah the attorney of the plaintiffs, and the affidavit of N. C. McLean, the attorney of other judgment creditors, it appears that application was made by them personally to the county board at its June session, just passed, to make the levy required by law, and that the board peremptorily and utterly refused to do so. Under this state of facts, the plaintiffs ask for a mandamus to compel the board to execute this duty. In opposition to this motion, a transcript of the proceedings of the county board is read, which shows that the regular sessions of the board are limited to nine days, and that the regular county board have adjourned over until the 6th of July next without having decided the question, with a view, as is expressed in the order, to consult public opinion in the matter. It has already been decided by this court at this term, on the former motion, that in order to sustain the jurisdiction of this court and enforce its judgments and decrees, the court may issue this prerogative writ. Indeed, to deny this power is to deny the jurisdiction of the court, for it would be a farce to say that this court has the power to give a judgment without the power to enforce it. It can be enforced in but one way, and that is by a levy of the tax required by the law. The proper officers refuse to levy the tax, and the only remedy is to enforce obedience by this writ.

The usual course in cases of mandamus is to obtain a rule upon the defendant to show cause why the writ should not issue; and if the cause be deemed insufficient, then a mandamus in the alternative issues—to which a return is to be made; and if good cause is not thereby shown for not doing the thing required, then a peremptory mandamus is issued. But if both parties have been fully heard, and there is no dispute about the facts, the court will, if perfectly satisfied, without going through the form of an alternative mandamus, grant a peremptory man-

[1] [Affirmed by supreme court in Board Com'rs Knox Co. v. Aspinwall, 24 How. (65 U. S.) 376.]

damus in the first instance. Board of Police of Attala Co. v. Grant, 9 Smedes & M. 77; Ang. & A. [Corp.] § 729, and notes, page 809. The present application is for a peremptory mandamus. As far as the facts of the case are concerned, there is nothing left for determination. The plaintiffs have a judgment given by the court and affirmed by the supreme court of the United States. The right of the plaintiffs to receive from the county of Knox the amount of this judgment is settled, and cannot be disputed. Payment can be enforced in only one way, and that according to the terms of the act of the legislature. The board whose duty it was to levy the tax has refused to do so, and has adjourned over beyond the period fixed by law for its June term. This board has for years refused to perform a duty expressly enjoined by public law. The court gave it the June session just passed to perform this duty. This board still refuses. It is a case clear of all doubt as far as the right of the parties is concerned; there are no facts to dispute; none to investigate. The county is concluded by the judgment of the highest court in the Union. The board has a mere ministerial duty to perform, and it contumaciously refuses to perform it, and we know of no other mode in which it can be enforced than by this prerogative writ. An execution would be unavailing for not only is there no property by which the judgment can be collected, but if there were, the act requires the debt to be satisfied by a tax on the property of the county. Already has an alternative writ been issued and service acknowledged—it was quashed on the ground that it was prematurely asked for. But what is the object of issuing an alternative writ, unless it be to give the party against whom it is issued the right to set up some real and substantial defense to the proceeding? In this case what defence can be made? The judgment is final—the amount due is fixed—it cannot be changed—there can be no defense to the merits, it can only be purely technical and go to the right of the party to enforce this judgment. This question has already been decided. We grant the writ.

[NOTE. The judgment of the circuit court was affirmed by the supreme court, and Mr. Justice Grier, in delivering the opinion, said: "Why should not the circuit court of the United States be competent to give to suitors this only adequate remedy? By the common law, the writ of mandamus is granted by the king's bench, in virtue of its prerogative and supervisory power over inferior courts. The courts of the United States cannot issue this writ by virtue of any supervisory power at common law over inferior state tribunals. They can derive it only from the constitution and laws of the United States. The jurisdiction of these courts is, by the constitution, extended to 'controversies between citizens of different states.' Congress has authority to make all laws which shall be necessary and proper for carrying this jurisdiction into effect. The jurisdiction of the court to give the judgment in this case is not disputed; nor can it be denied that, by the constitution, congress has the power to make laws necessary for carrying into execution all its judgments. See Wayman v. Southard, 10 Wheat. (23 U. S.) 22. Has it done so? By the 14th section of the judiciary act of 1789 (1 Stat. 73) it is enacted 'that courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles of the common law.' Now, the 'jurisdiction' is not disputed, and it is 'necessary' to an efficient exercise of this jurisdiction that the court have authority to compel the exercise of a ministerial duty by the corporation, which by law they are bound to perform, and by the performance of which alone the plaintiff's remedy can be effected. * * * There is no other writ which can afford the party a remedy, which the court is bound to afford, if within its constitutional powers, except that afforded by this writ of mandamus. It is 'agreeable to the principles of the common law,' and, consequently, within the category as defined by the statute. * * * It is no reason for setting it aside that a previous alternative writ had not issued. The notices served on the commissioners gave them every opportunity of defense that could have been obtained by an alternative mandamus. There was no dispute about facts which could affect the decision. The court gave them an opportunity to comply with the demand of the plaintiffs. Their excuse for not doing so was, palpably, 'a mere colorable adjournment or procrastination of the performance of the act, for the purpose of delay.' It is equivalent to a refusal. Having refused to perform the duty which the law imposed upon them on the proper day, without even the pretense of a reason for such conduct, the peremptory mandamus was very properly awarded, commanding the duty to be performed 'forthwith.'" Knox Co. v. Aspinwall, 24 How. (65 U. S.) 376.]

ASSESSMENT OF INCOME TAX. See Append. Fed. Cas.

Case No. 593a.

ASSIGN v. The G. B. LAMAR.

[Betts' D. C. MS. 36.]

District Court, S. D. New York. Oct. 22, 1840.

ADMIRALTY—JURISDICTION—ENFORCEMENT OF COMMON LAW JUDGMENT.

[A judgment against the master of a vessel, recovered in an action for wages in a common law court, cannot be enforced against either the vessel or its owner in an admiralty court.]

[In admiralty. Action in the marine court of New York city by Norman Assign against the master of the brig G. B. Lamar for seaman's wages. Judgment for plaintiff. Motion in United States district court by plaintiff for summons against the owners of the brig to show cause why the judgment should not be paid by said brig and why an attachment should not issue against her. Denied.]

Mr. Nash, for plaintiff.

PER CURIAM. The object of the proceeding is to employ the remedy applied by the admiralty court, to enforce or execute a judgment rendered in a court of common law. The application is an entire novelty and is without support in any principle con-

nected with the constitution of admiralty courts or the exercise of their jurisdiction. The court takes cognizance only of causes of maritime jurisdiction. Act Sept. 24, 1789. A suit at common law for wages is a mere common law action, subject to the incidents of that action and having no privilege beyond it,—[Ewer v. Jones,] 2 Ld. Raym. 934,—and when carried to judgment the original cause of action is therefore merged in this judgment, and cannot be inquired into or rejected in an ultimate suit upon this judgment.

Decrees of foreign courts proceeding according to the course of the civil law are executed in admiralty when the whole matter is of a maritime character. 2 Bum Cir. & Ad. It was upon the recognition of this general principle that the district courts under the United States constitution were held to have authority to decree the execution of sentences rendered in the court of appeals in prize cases executed under the confederation. [Penhallow v. Doane's Administrators,] 3 Dall. [3 U. S.] 54; [Jennings v. Carson,] 4 Cranch, [8 U. S.] 2; [U. S. v. Peters,] 5 Cranch, [9 U. S.] 115. The arguments of counsel in this court in these cases, however, demonstrate that no idea was entertained that the district court in its capacity of a court of admiralty had authority to act upon the adjudication of any other than courts proceeding strictly in conformity with the principles of the civil law. If this application could succeed there would be nothing to limit the action of this court when invoked to aid judgments assumed to have been rendered upon considerations of a maritime character. The counsel for the petitioners contends that the court is concluded by the statements of the law record, and accordingly, if judgment is obtained in a court of law upon a bill of lading, a policy of insurance or contract for repairing or refitting a vessel, this court may be invoked upon the record exhibiting said cause of action to enforce the judgment by attachment of the property. This certainly is broad not to say bold doctrine, and would if adopted soon lead to results varying to a most important degree the functions of this court. Judgment creditors of that class would have in effect a creditors' bill out of this court of infinitely higher efficacy than could be given by chancery without the creditor being subjected to the hazard of any scrutiny of the justness of his demands. Independent of these objections to adopting common law judgments in this court growing out of the different procedures of the two tribunals antecedent to and concomitant upon the final rendition of a decision it is sufficient to take the facts of the present case in full illustration of the objections of the jurisdiction decreed.

The defendant when tried at law was no longer master of this brig, and suffered judgment by default to such amount as the plaintiff could prove. The principle could be the same if he had given a cognovit. It is not now sought to apply this judgment to the estate of the defendant, but to transfer its lien to the property of third parties having no privity in the matter. The contract of the master with seamen is obligatory upon owners and an action will lie directly against them or the vessel, upon it. So is the master personally liable to the seamen thereon. [The Virgin v. Vyfhius,] 8 Pet. [33 U. S.] 538; Abb. Shipp. & Adm. 476, note. But it could scarcely be contended that a judgment against the vessel or owner could be enforced against the master, nor are there more conclusive reasons for holding the judgment against the master per se binding upon the owners or vessel. The remedy against each is independent and distinct and having sought it in one direction does not deprive a seaman of the right to resort to another upon the original consideration; the judgment on decrees subsisting against either party unsatisfied being no bar or objection to his proceeding de novo against the other.

The motion for an attachment is accordingly denied.

Case No. 594.

In re ASTEN.

[8 Ben. 350;[1] 14 N. B. R. 7.]

District Court, E. D. New York. Jan., 1876.

BANKRUPTCY—RESOLUTION OF COMPOSITION—CONFIRMATION BY REQUISITE NUMBER—AMENDMENT OF BANKRUPT'S STATEMENT.

1. A motion, to record a resolution of composition in bankruptcy, was opposed by creditors on the ground that it had not been confirmed by the number of creditors required in accordance with the debtor's statement presented at the creditors' meeting. The debtor claimed that the statement was inaccurate, and that an accurate statement would show that the composition had been confirmed by the requisite number: *Held*, That the statement could not be corrected at this time, but should have been corrected at the creditors' meeting. At such meeting the creditors are entitled to examine the debtor as to any corrections intended to be made.

2. Confirmation of the resolution of composition denied, the requisite number of creditors according to the list presented at the creditors' meeting not having signed, with leave to renew motion when the list should be corrected and properly confirmed.

In bankruptcy.

G. A. Seixas, for petitioners.

BENEDICT, District Judge. This is a proceeding in bankruptcy which comes before the court upon a motion to record a resolution of composition and to file a statement of assets and debts. The motion is opposed upon the ground that the resolution has not been confirmed by the requisite number of the creditors, upon the debtor's statement of

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

debts and assets, presented at the creditors' meeting, and which it is now proposed to file.

An examination of this statement shows the fact to be as claimed by the opposing creditors; but on the part of the debtor it is claimed (and so the fact appears) that the statement is inaccurate in this, that at least one person named as a creditor is not a creditor, and two of the creditors named as unsecured are in fact secured; so that, as a matter of fact, the resolution has been confirmed by the requisite number of all the creditors. It is therefore contended that the law has been complied with and the resolution can be recorded, although, if the statement of debts and assets be taken as correct, the requisite number have not confirmed the resolution. No doubt the statement of assets may be corrected by the consent of a meeting of the creditors, for the statute so expressly declares; and I incline to the opinion that this statement might have been amended at the first meeting of creditors so as to make it conform to the facts then disclosed by the proofs of debts and the examination of the debtor. But I am also of the opinion that, until so amended, it cannot be filed. It is by the statement presented to the court, that the court is to see that the requisite proportion of creditors have voted to confirm. The evident intention of the statute is, that the statement and resolutions should be filed together, and disclose to all interested a legal confirmation of the resolution by the requisite proportion of the creditors appearing on the statement.

It cannot, therefore, be sufficient that it be made to appear by evidence outside the statement, presented to the court, and not to the creditors, that the statement is inaccurate, and in this way to show that the resolution has been passed by the requisite number of the creditors. The creditors are entitled to learn in what respect the debtor's statement is inaccurate, and wherein it is to be amended, and to have the opportunity of examining the debtor, as to any corrections intended to be made; and the statement as intended to be filed must furnish to the court the basis on which to determine whether the resolution has been passed, as required by law. Looking to the statement now presented in this case, and which is sought to be filed, it cannot be seen that the resolution has been confirmed by the requisite number of creditors.

The motion to record and file must, therefore, be denied, with liberty to renew the same upon an amended statement, when the statement shall have been amended in the method provided by the statute.

The other objections do not appear to me to be sufficient to defeat this composition, and I should have no difficulty in finding it to be for the interest of all concerned to record the resolution, provided it appeared to have been passed in the manner directed by the statute.

ASTLEY, (UNITED STATES v.) See Case No. 14,472.

Case No. 595.

ASTOR v. GIRARD.

[4 Wash. C. C. 711.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1827.

LIMITATION OF ACTIONS—RUNNING OF STATUTE—WHEN CAUSE OF ACTION ACCRUES.

At what time the cause of action may be said to accrue, from which to date the commencement of the running of the act of limitations.

At law. This case resembles that of M'Culloch v. Girard, [Case No. 8,737,] which was tried at the October sessions of this court in 1822, the present plaintiff having been one of the persons on whose account Mr. Jones made the contract with the defendant. The few points of difference between the two cases are totally immaterial to the point decided in this cause, and therefore are not stated. Besides the general issue, the defendant in the present case pleads the act of limitations, and the question to which this plea gave rise was. whether the six years began to run from the 2d of October, 1816, when the interest on the stock paid by the plaintiff to the defendant was received by the latter, or from the 25th of November of that year, when the resolution of the bank of the 5th of that month was rescinded, and if not then, from the 7th January, 1817, when the resolution was passed for restoring to those subscribers who had paid the interest under the first resolution, the sums so respectively paid by them? The agreement to enter an amicable action in this case was signed on the 20th, and was filed on the 27th of November, 1822.

Thomas Sergeant, John Sergeant and Chauncey, for plaintiff.

J. R. Ingersoll and Mr. Binney, for defendant.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

WASHINGTON, Circuit Justice. Thinking, as I do, that this action is barred by the act of limitations, I deem it unnecessary to notice the case upon its merits. It is contended by the plaintiff's counsel, that the cause of action did not arise until the 7th of January, 1817, when the bank of the United States resolved to restore to the subscribers the interest which they had paid under the resolve of the 5th of November, 1816, or at farthest from the 25th of November, 1816, when the resolution of the 5th, asserting the right of the bank to this interest, was rescinded. That the material question to be decided is, which of those resolutions amounted to a renunciation by the bank of their right to this interest, since the plaintiff could have no right to it until that act was

[1] [Published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

performed. If the earliest day, viz. the 25th of November, should be taken, this action was brought five days before the expiration of the six years. I do not agree with the plaintiff's counsel in the position upon which their whole argument upon this point is founded; which is, that the relinquishment by the bank of its claim to the October interest on the subscribed stock was essential to the plaintiff's recovery in this action.

In the case of M'Culloch v. Girard, [Case No. 8,737,] the right of the bank to this interest was asserted by the defendant as a bar to the plaintiff's right of recovery. The court thought it a sufficient answer to the objection that the bank had, by its resolutions of the 25th of November and 7th of January, relinquished to the subscribers its right to the interest; after which it was not competent to the defendant to set it up as a defence in that action. We might have added, that such claim was no answer to that action, whether it was relinquished or not; but this was either not thought of, or the first reason being considered conclusive, it was deemed unnecessary to go further.

In deciding this question it is necessary to keep always in mind the ground of this action. It is not founded upon a right to this interest against all the world, but against the defendant, in consequence of a special agreement, which forms the basis of the action. If a suit could have been brought by the plaintiff against the United States for the recovery of this interest, or a mandamus to the proper officer, commanding him to pay the interest to the plaintiff, the unquestionable right of the bank, before it was relinquished, would have been a conclusive answer to such suit or application. But the present suit is founded upon the agreement of the defendant that the plaintiff should participate with him in his subscription, to the amount of three thousand shares, with every advantage he would have if he were actually a subscriber. This agreement was fully executed on the part of the plaintiff by the payment of the coin, and the transfer of the stock, forming the first instalment on two thousand shares.

Now the question, and almost the only one arising in this view of the case is, what would have been the situation, and what the rights of the plaintiff in relation to this interest, if Mr. Jones had strictly complied with his order, by subscribing for two thousand shares in the name of the plaintiff; instead of making the contract he did with the defendant? The answer is obvious. He would have been placed in the shoes of the defendant as to the interest on $50,000 of stock, and, as the legal owner of the stock, would have been entitled to draw that interest, and to use and retain it against all the world, except the bank of the United States. How then can it be said truly that the plaintiff participated with the defendant in his subscription to a certain amount, and with every advantage of a subscriber, if the interest, to the use and possession of which he would have been entitled had he subscribed, could have been legally retained by the defendant?

If this suit had been brought on the 3d of October 1816, could the defendant have defended himself by setting up the acknowledged right of the bank to this interest? Clearly, I think, he could not. The defendant held the money subject to the better title of the bank. The plaintiff claimed under his contract, and had a right to claim the money to the extent of two hundred shares, subject to the same title. The value of the advantage of possessing and using this money, could have formed no part of the case in such an action. The interest received by the defendant was, by virtue of his contract, received to the use of the plaintiff; and to retain it, was a breach of that contract. To an action to recover damages for the breach of an agreement to convey property, or to a bill for a specific performance of such an agreement; it would surely be no answer in the mouth of the defendant, that some third person had a better title than himself to the property. The plaintiff may well ask, in reply, what that is to the defendant, if he, the plaintiff, is willing, or is bound, to accept a conveyance subject to such outstanding title in a third person? The cause of action then in this case arose upon the receipt of this interest by the defendant, and his failure to pay it over to the plaintiff; which happened more than six years before this action was brought. The jury found for the defendant.

NOTE, [from original report.] A motion was made, and argued at the succeeding term for a new trial, which after mature consideration was denied.

ASTORIA, The. See Case No. 11,539.

Case No. 596.

ASTROM et al. v. HAMMOND.

[3 McLean, 107.][1]

Circuit Court, D. Michigan. Oct. Term, 1842.

TAXATION — LAND PURCHASED FROM UNITED STATES—EXECUTIVE POWER — JUDICIAL REVIEW —UNCONSTITUTIONAL LAWS.

1. Land purchased from the United States and paid for, is liable to be taxed.

[Cited in Pacific Coast Min. & M. Co. v. Spargo, 16 Fed. 350.]

2. And this applies to estates legal and equitable. The final certificate can no more be disregarded by the government than a patent.

[Cited in Pacific Coast Min. & M. Co. v. Spargo, 16 Fed. 350; Cawley v. Johnson, 21 Fed. 495; Hamilton v. Southern Nev. Gold & Silver Min. Co., 33 Fed. 566.]

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

3. The executive power cannot be revised and corrected by the judicial.

[Cited in Case of Electoral College of South Carolina, Case No. 4,336.]

4. Matters of form and discretion are for executive determination.

5. An unconstitutional law can afford a justification to no one.

[Cited in Pacific Coast Min. & M. Co. v. Spargo, 16 Fed. 350.]

[6. Cited in Hamilton v. Southern Nev. Gold & Silver Min. Co., 33 Fed. 566, to the point that equitable title to lands once public passes to individuals on entry and payment, leaving legal title in the government in trust for the purchaser until the issue of a patent to him.]

In equity.

Douglass & Walker and Mr. Romeyn, for complainants.

Norvell & Goodwin, for defendant.

BY THE COURT. The complainants state in their bill that they purchased certain lands of the United States in the state of Michigan, the patent for which was issued the 1st May, 1839. That previous to the emanation of the patent, though subsequent to the entry of the land, the state of Michigan imposed a tax on the same. This tax it is alleged the state could not impose, as the land belonged to the United States, until the fee was vested in the purchaser by a patent. That the ordinance of 1787, [1 Bior. & D. 479.] and the act [Jan. 26, 1837; 5 Stat. 142] which admitted Michigan into the Union, prohibit the state from taxing the lands of the United States. The proceedings in the assessment of the tax are also alleged to have been irregular, and an injunction is prayed, &c. The case was argued as on a demurrer to the bill. The counsel for the complainant insist that any restrictions on the state, contained either in the ordinance or in the act admitting the state into the Union are void, as Michigan was admitted into the Union on the same footing as the other states; and that any restriction on the exercise of its sovereign power is void.

It is admitted that the imposition of a tax is an exercise of sovereign power. This is sometimes done indirectly by vesting the right to tax, for certain purposes, in a corporation. But the act is done under the sovereign authority.

The inhibition on the state in regard to taxing the lands of the United States, does not rest upon an act of congress, but upon a compact made between the general government and the state, and this agreement does not divest the state of any attribute of sovereignty, but withdraws a certain property from taxation for a limited time, and for certain reasons. No one doubts the competency of the state and the federal government to make such a compact; and it can only be dissolved or modified with the consent of both parties. This does not impair the sovereignty of the state, as the power of taxation remains as before the compact. It is not unusual for the state, on grounds of public policy, or for a consideration paid, to exempt from taxation certain property. This is often done in grants to corporations, but no one supposes that this is a cession of a part of the sovereignty of the state. This question was considered somewhat at large in the case of Spooner v. McConnell, [Case No. 13,245,] and it need not again be discussed. In 1832, the land in question was entered and paid for by the purchaser, and by reason of the great press of business in the land office, it is understood the patent was not issued until 1839. But there can be no doubt that the interest of the purchaser, whether it be equitable or legal, was liable to taxation. All property, by whatever name it may be denominated, is liable to be taxed. Until the patent is issued the purchaser has not the legal title, but having made his entry of the land and paid for it, the government can no more dispose of the land to another person, than if the patent had been issued. The final certificate obtained on the payment of the money, is as binding on the government as the patent. That the statute of 1836 [Laws Mich. 1835–36, pp. 57, 60] imposed a tax on these lands, has been settled by the state tribunals. The assessors were required to examine the land office of the United States, to ascertain what lands had been entered, and they were set down for taxation, so that the only question open is as to the power of the state; and that it has this power, as before remarked, there seems to be no doubt. Lands thus purchased descend to the heirs, and do not go to the administrator. They are treated as real estate, and in some states are liable to be sold on execution, before the patent is issued. When the patent issues, it relates back to the entry, and makes good any conveyance the purchaser may have made.

In Ohio, it has often been decided that lands are liable to be taxed by the state before the patent is obtained; and this has embraced land under the credit system, before it was paid for. So lands located by Virginia military warrants, are liable to be taxed before the patent. But whether, on the face of the bill, the court have jurisdiction, is the important question to be considered. It does not follow that there is no jurisdiction, from the mere fact that the defendant is auditor of state. No suit can be sustained against a state; but an unconstitutional law affords no justification to a state officer for an act injurious to an individual. The officer is not the state, and can set up no exemption under it, unless he act within the authority of law. But the judiciary cannot exercise a revisory proceeding over executive duties. In carrying a law into effect, the executive must necessarily construe it, and it is not for this or any other court to say that there is error in the construction, and a different course must be pursued. It is true, if an act be

done without the authority of law, the individual that acts is responsible; and where the mischief would be irremediable, an injunction may be interposed. But, it is only in such a case that the judicial power could be exerted. In all matters of discretion, and in regard to the forms of proceeding, it is clear, that executive acts cannot, in any form, be drawn in question by the judicial power. This power is limited to cases where by the exercise of the executive functions an injury is done to an individual; and in such cases there is a remedy at law. Upon the whole, we think the demurrer to the bill must be sustained. We think the tax was properly imposed by the state, and it does not appear from the bill that the errors stated in the assessment of the tax are of such a character as to produce great mischief, should the land be sold for the taxes. We see no probable result from the proceeding, which may not be remedied by an action at law.

Case No. 597.

The ATALANTA.

[1 Brown, Adm. 489;[1] 6 Chi. Leg. News, 491.]

District Court, E. D. Michigan. March, 1874.

STALE CLAIM—PURCHASER BOUND TO USE DUE DILIGENCE.

1. Where the buyer of a vessel, who had given non-negotiable notes for the purchase money, advanced $2,000 on account of certain claims against her, taking up his notes to this amount, and neglected to ascertain the nature and full amount of the claims, which information was easily accessible, it was *Held* that, in suits for the residue of the claims, he did not stand in the position of a bona fide purchaser without due notice, though he had paid for the vessel in full.

2. The purchaser of a vessel is bound to the exercise of reasonable diligence to ascertain the nature and amount of liens against her.

3. Notice to a purchaser, while a sufficient amount of purchase money remains unpaid to meet the liens, is as effectual to keep the liens alive as it would be if he had such notice at the time of such purchase.

In admiralty. Libels for supplies, towage services, and repairs. The only defense was, that the claimant was a subsequent purchaser for a valuable consideration, in good faith and without notice of liens, and that the liens had become stale and extinguished as against the vessel in claimant's hands, by failure of the libellants to prosecute within a reasonable time. In October, 1870, the Atalanta was disabled in a storm on Lake Huron, and the claims in this case were for towage, supplies and repairs rendered in consequence thereof and at that time. The vessel was then owned in Chicago, and belonged to the estate of her former owner, then deceased. One Wm. H. Rogers was administrator of said estate. Immediately after the repairs, the vessel returned to her home port, Chicago. During the season of 1871 she made one trip to Buffalo, but with that exception, she was not again in the waters of this district until she was seized upon, by process from this court, in May, 1872. Libellants had no knowledge of her trip to Buffalo at the time, although they were on the watch for her. The claimant Whitbeck purchased the vessel of the administrator Roberts, in February, 1871, for $10,575, her full value, of which he paid half cash, and for the other half gave five promissory notes, payable in six months from date. For the purpose of protecting Whitbeck against liens, these notes were made non-negotiable, and each one had indorsed upon it a statement that it should not be collectable so long as there were any unpaid liens upon the vessel. These claims were duly filed and proved in the probate court at Chicago. Soon thereafter an arrangement was made by which one Connors, who had a power of attorney from libellants to collect these claims, and the administrator Rogers called upon Whitbeck for the purpose of obtaining payment of the claims. and he did take up two of the $1,000 non-negotiable notes, and gave negotiable notes instead, which were discounted and the proceeds remitted to libellants, who credited the same upon their claims, but they were not sufficient to pay them in full. Two other of the non-negotiable notes were paid to Rogers at the date of their maturity, but the third, for $1,285.50, remains still unpaid. During the winter of 1871–2, the vessel was seized at Chicago upon a chattel mortgage, and to redeem the same Whitbeck paid $1,142, which he claims as an offset to the remaining note, leaving but a small amount of the purchase money unpaid.

H. B. Brown, for libellants.

Connors swears that, at the time he received the $2,000 in negotiable notes of Whitbeck, he informed him of the amount of the claims on account of which the notes were given. Whitbeck denies this, but admits the notes were given on account of these claims. Paying $2,000, as he did, upon these claims, he was bound to inquire their amount, and cannot now plead his ignorance. He cannot shut his eyes and claim the rights of a bona fide purchaser. But irrespective of notice, libellants have been guilty of no laches, and are entitled to recover, as the vessel was not once in the district, to their knowledge, until she was attached. General admiralty rule requires that every libel in rem should state that the "property is in the district." The Sarah Ann, [Case No. 12,342;] The General Jackson, [Id. 5,314;] Burk v. The Rich. [Id. 2,162;] The D. M. French, [Id. 3,938.] The question is, has the libellant used due diligence, considering all the circumstances of the case? The Chusan, [Id. 2,717;] The Rebecca, [Id. 11,619;] The Lillie Mills, [Id. 8,352;] The Eliza Jane, [Id. 4,363;] The Bolivar, [Id. 1,610.] Claimant must be a

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

bona fide purchaser at the time of payment, as well as at the time of the sale. Blanchard v. Tyler, 12 Mich. 339.

W. A. Moore, for claimant.

Whitbeck was a bona fide purchaser of the vessel, without actual notice of the existence of the claims at the time of the purchase, or that they were outstanding and unpaid at the completion of the purchase price: 1st. By the terms of purchase the title was to be perfect, and the vessel free of liens and incumbrances; and, to secure that, five notes were made non-negotiable. 2d. Rogers and Connors asked for two of the notes to be made negotiable, to pay libellant's claims. No claim for more was made, nor was more ever requested to pay any claims at any time. 3d. The remaining two $1,000 notes were left by Rogers at his bank, and they were paid at or soon after maturity, which Whitbeck would not have done, if he had supposed other claims were outstanding. 4th. The note for $1,287.50 was not paid, because Whitbeck supposed that it was settled by payment of mortgage on the vessel, and costs and expenses connected therewith.

More than one year elapsed after the debts were contracted before any proceedings were taken against the vessel. 1st. The vessel made one trip to Buffalo and return, and therefore, although she may not have stopped at Port Huron, she passed there twice, and must have been for at least from thirty to forty hours within the jurisdiction of this court. 2d. The balance of two seasons of navigation she was accessible, by writ from the district court of the western district of Michigan, or of the northern district of Illinois. 3d. That libellants cannot plead ignorance of the whereabouts of the vessel, for they knew where she was in the summer of 1871, while their agent was endeavoring to collect, in probate court in Chicago, the home port of the vessel.

In this case the libellants had an opportunity to enforce their claim in rem, in the spring of 1871, from this district, for the remainder of the season of 1871, in the western district of Michigan and the northern district of Illinois. They permitted the vessel to pass into a bona fide purchaser's hands, and permitted him to pay the purchase price, without putting the purchaser upon inquiry until after more than one year had elapsed. Under the law, as construed by this court, the claim has become stale. The Buckeye State, [Case No. 13,445;] The Dubuque, [Id. 4,110;] Willard v. Dorr, [Id. 17,679;] Brown v. Jones, [Id. 2,017;] The Mary, [Id. 9,186;] The Sarah Ann, [Id. 12,342;] Pitman v. Hooper, [Id. 11,186;] Jay v. Allen, [Id. 7,235;] The General Jackson, [Id. 5,314;] Ben. Adm. 575; 2 Pars. Shipp. & Adm. 361.

LONGYEAR, District Judge. I. There is no direct evidence that Whitbeck had notice of the particular liens in question at the time of his purchase. The fact, however, that he took the precautions he did to protect himself against liens affords a strong presumption that he knew there were liens then in existence, and to a considerable amount, in addition to the chattel mortgage; and if he knew that much, it would be but a short and reasonable step further, to hold him responsible for the additional knowledge of what those liens were and by whom they were held, especially in the absence of all proof that he made any effort to gain such knowledge, or that it was withheld or concealed from him. But, as we shall presently see, it is unnecessary in this case to resort to such presumptions.

II. Notice to the purchaser while a sufficient amount of the purchase money remained unpaid to meet the liens, is as effectual to keep the liens alive as it would be if he had such notice at the time of such purchase, especially where, as in this case, the balance of purchase money was not secured by negotiable paper. At the time Whitbeck took up the two $1,000 non-negotiable notes and gave negotiable notes in lieu, for the purpose of raising money to pay on these claims, there was then still remaining unpaid on the purchase money an amount more than sufficient to pay the balance of these claims in addition to the chattel mortgage. Then, if not before, he had notice of the existence of these specific claims. But he insists that, because only $2,000 was then demanded of him, he had the right to suppose that the claims represented by Connors, with whom he did the business, were no more than that in amount, although he makes no pretense that any such representation was made by Connors, or that the payment then made was understood to be in full. On the contrary, Connors testified that he thought, as it is quite reasonable he would have done, that he told Whitbeck at the time what the claims amounted to. This was not positively denied by Whitbeck, although he said he did not recollect the fact, and thought it was not so. At all events, and this is conceded by Whitbeck, he was then informed, and knew, if he did not before, that the claims were on file in the probate court, where they were readily accessible to him at any time he might desire to examine them. He also admitted that he may have gone to the probate office and examined the claims, but as to whether he did or did not, his recollection was again quite indistinct. He knew, however, that the information was within his reach, and that it was readily accessible, and if he failed to avail himself of it, he must suffer the consequences of his neglect, and be held responsible for the knowledge he would have gained if he had made the requisite examination. Finally, taking all the proofs together, and taking into consideration the nature and character of the transactions in question, and in view of what a reasonable business man, engaged in an

important business transaction, would naturally and almost inevitably do in the same circumstances, the court cannot avoid the conviction that Whitbeck not only must be presumed to have known, but that he actually did know that there were balances of these claims unpaid, before he paid the remaining two $1,000 notes to the administrator. Therefore, upon all considerations, Whitbeck cannot be granted any exemption from the liens claimed by libellants, for want of notice.

III. Laches on the part of libellants in prosecuting their liens could be made available, if at all, in this case, only in case of want of notice of the liens to Whitbeck as a subsequent purchaser. As the court has already decided that Whitbeck is chargeable with such notice, a consideration of this point is unnecessary. It results, that libellants must have decrees in their favor for the balances due them respectively, including interest to this date, and for costs.

Decree for libellants.

ATALANTA, The, (BRAY v.) See Case No. 1,819.

Case No. 598.

The ATHALIA.

FRAW et al. v. The ATHALIA.

[5 Adm. Rec. 295.]

District Court, S. D. Florida. Nov. 2, 1854.

SALVAGE—COMPENSATION—APPORTIONMENT.

[Seven large wrecking vessels and several small boats, carrying in all 78 men, went to the assistance of a schooner which had run ashore on a Florida reef. All were employed to assist in saving the schooner and cargo, and spent four days (during which the sea was rough, and the schooner became a total loss) in saving and bringing into port the cargo, a portion of which they got by diving; and the aggregate value of the cargo and materials saved was $41,756.41, of which the large vessels saved $41,451.84. *Held*, that the large vessels should be allowed a salvage compensation of 30 per cent. of the value of the property saved by them, less costs and charges, and that the small boats should receive 50 per cent. of what they saved.]

[Cited in Baker v. Cargo and Materials of The Slobodna, 35 Fed. 542.]

[In admiralty. Libel by Simeon Fraw and others against the cargo and materials of the schooner Athalia for salvage. Decree for libelants.]

Winer Bethel, for libelants.

William R. Hackley, for respondent.

MARVIN, District Judge. This schooner, (Welton, master,) laden with an assorted cargo, and bound from New York to Appalachicola, on the night of the 19th of September last, ran ashore on that part of the Florida reef known as the "Western Dry Rocks," situated a few miles west of Sand Key. On the morning of the 20th the wrecking vessels Florida, Dart, Champion, Texas, Chesnut, Champlin, and Lafayette, carrying in all seventy-eight men, arrived at her assistance; and, the sea being rough, and the vessel badly ashore, and in immediate peril of total loss, they were at once all employed to assist to save the vessel and cargo. The vessel lay on the outside of the reef, exposed to the action of the sea, in eight and six feet water, her starboard bilge pressing on a rock lying nearly underneath her main chains. When the wreckers boarded her, she was leaking considerably, but still one pump could keep her free. They immediately carried out an anchor by which to heave her off; and, as the water was too shallow to allow any of their vessels to come alongside, they commenced boating cargo on board their vessels. The leak increased in a short time, so that two pumps could not keep her free; and, about five o'clock in the afternoon, she filled with water, careened over on her starboard side, and appeared to be bilged. She became a total loss. The wreckers took out the cargo, a portion of which, they got by diving, and brought it to this port. They were employed in this service four days. During a considerable part of the time, the weather was squally, and the sea rough. The entire cargo and materials were boated on board their vessels. The aggregate amount of the value of the cargo saved is $40,771.83, and the value of the materials is $984.58, making $41,756.41, as the entire value of the property saved. Of this sum the seven large vessels saved $41,451.84. Thirty per cent. of this sum, less the costs and charges, is a reasonable salvage for these vessels and crews, and fifty per cent. to the small boats.

ATHENS ARMORY, (UNITED STATES v.) See Case No. 14,473.

ATHERTON, (PATTERSON v.) See Case No. 10,822.

Case No. 599.

ATHON v. MORTON et al.

Circuit Court, D. Indiana. Nov. Term, 1864.

[Cited in McCormick v. Humphrey, 27 Ind. 151. Nowhere reported. The clerk of the court writes under date August 2, 1892, that "no opinion or charge is on file" with the papers in the case, and, further, that the "suit was brought by Athon against Morton, governor of Indiana, and others, to enforce payment of $1, which Athon claimed was his fee as secretary of state of Indiana, for each commission issued to Indiana officers by the governor,—in all $20,000." The plea was that the commissions were issued to officers in United States service, and the law governing state militia did not apply. The case was dismissed for want of jurisdiction.]

ATKINS, (CAREY v.) See Case No. 2,399.

Case No. 600.

ATKINS et al. v. FIBRE DISINTEGRATING CO.

[1 Ben. 118.][1]

District Court, E. D. New York. March, 1867.[2]

ATTACHMENT—FOREIGN CORPORATION—AN ADMIRALTY PROCEEDING NOT A "CIVIL SUIT" WITHIN SECTION 11 OF THE JUDICIARY ACT.

1. Where a libel was filed against a corporation foreign to the district, and under process issued upon that libel property of the corporation was attached, and a motion was made to set aside the attachment, as contrary to the provision of the eleventh section of the judiciary act of 1789, *Held*. That the words "civil suit" in that section do not embrace admiralty proceedings.

[Cited in Casey v. Leary, Case No. 2,497; Cushing v. Laird, Id. 3,508; Manchester v. Hotchkiss, Id. 9,004.]

[See note at end of case.]

2. That if they did, the act of August 23, 1842, and the supreme court rules of 1845 must be held to have repealed that section as far as relates to admiralty proceedings.

3. That the power to attach the property of absent defendants to compel an appearance has always been recognized as within "the course of the admiralty," and the intention to withdraw it or to limit its power will not be inferred from the use of an indefinite phrase.

[Cited in Casey v. Leary, Case No. 2,497.]

[See note at end of case.]

4. That the objection to the proceedings based upon the words of the eleventh section of the act of 1789, is not tenable.

[In admiralty. Libel by Joshua Atkins and others against the Fibre Distintegrating Company of New Jersey.] This case came up on a motion to set aside an attachment against the property of the respondents, a foreign corporation. [Motion denied. This cause was heard on the merits. Atkins v. Fibre Disintegrating Co., Case No. 601.]

Beebe, Dean & Donohue, for the motion.
Benedict, Tracy & Benedict, opposed.

BENEDICT, District Judge. This motion is brought up in order to obtain of this court its construction of the eleventh section of the judiciary act of 1789, [1 Stat. 78,] as affecting proceedings in admiralty.

The action is against a foreign corporation created by the laws of New Jersey, and the process was served by attaching the property of the corporation found in this district. This attachment the defendants now move to set aside upon the ground that the provision of the eleventh section of the judiciary act, which declares "that no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process, in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ," governs proceedings in admiralty.

The question is not new. It has been up in various districts, and has been decided both ways. In the southern district of New York, although I find no reported case deciding the precise point, the construction adopted and adhered to for many years has been to consider proceedings in admiralty as not affected by the provision in question. A construction as firmly fixed as this is in the practice of the southern district I should feel bound to follow in this district, even if doubt were entertained as to whether that construction would be laid down if the question were new; for the interests of suitors, as well as the convenience of the judges and the bar, require that if possible the practice of the two courts having concurrent jurisdiction over the waters of this harbor should coincide upon a point like this.

But it seems to me that the question ought to be considered settled by authority. Numerous cases in which the question has existed and where it is not reasonable to suppose that the point was overlooked, have arisen in the southern district, which have been carried by appeal to the circuit court of this circuit, and there the rightfulness of the jurisdiction has been always assumed by both court and counsel. Beyond this, the case of New Jersey Steam Nav. Co. v. Merchants' Bank, decided by the supreme court, (6 How. [47 U. S.] 344,) presented the question, but no such point was made or alluded to, either in the opinion of the court or in the three dissenting opinions, although the discussion was upon the subject of the jurisdiction. "A tacit recognition like this is equivalent to an express determination." [Cliquot's Champagne,] 3 Wall. [70 U. S.] 144.

That the question has been thus passed over, indicates that it has not been considered to be an open one, since the decision of Judge Story in Clark v. New Jersey Steam Nav. Co., [Case No. 2,859,] and of the supreme court in Manro v. Almeida, 10 Wheat. [23 U. S.] 473. These cases with the opposing decision by Judge Hoffman in the California district,—Wilson v. Pierce, [Case No. 17,826,]—have moreover been lately considered and weighed by the distinguished author of Parsons' Maritime Law, who thus announces his conclusion: "We do not consider this decision (Wilson v. Pierce, Hoffman, J.,) to be correct, and have no doubt but that a person who resides out of a certain district may be sued in admiralty in the district, if he has property there which can be attached." 2 Pars. Mar. Law, p. 686. To my mind, the decisions referred to, confirmed by long practice, and supported by an opinion like the one above cited, constitute a weight of authority abundantly sufficient to place the question at rest.

I cannot hope to add anything to the force of the authorities I have referred to, but in

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[2] [Reversed by circuit court in Atkins v. Fibre Disintegrating Co., Case No. 602; but that decree was reversed by the supreme court in 18 Wall. (85 U. S.) 272, and the decree ordered affirmed.]

view of the late contrary decision in the district of Connecticut which has occasioned this motion, (Blair v. Bemis, [Case No. 1,484,] Shipman, J.,) I shall venture some considerations which seem to sustain the construction of the phrase "civil suit" in the eleventh section of the judiciary act as referring to ordinary proceedings in courts of law and equity, and not intended to include causes of admiralty and maritime jurisdiction.

I notice first, then, that in the process act of 1789, which was passed but five days after the judiciary act, and was doubtless under consideration when the judiciary act was passed, admiralty proceedings were not only specially provided for, but they are designated by their appropriate name. It is a reasonable supposition that the same congress passing the two acts almost simultaneously would have used the same particular and proper designation in the eleventh section of the judiciary act, if it had intended there to refer to admiralty proceedings.

Again, the eleventh section of the judiciary act gave rise to difficulties which it was found necessary to remedy, and the first section of the act of February 28th, 1839, [1 Stat. 321,] was passed for that purpose. Law, Pr. p. 84. But this latter section is only made applicable to "suits in law or in equity," although the same difficulties would arise in admiralty proceedings if such proceedings were within the provision of the eleventh section. The studied omission of admiralty proceedings from the effect of the remedial section of the act of 1839, shows, therefore, that those proceedings were not then considered as having been affected by the provision of the eleventh section sought to be remedied.

Indeed, in any properly drawn statute admiralty proceedings, when referred to, will be in some way specially designated, and they are so designated in very many if not most of the statutes heretofore considered as covering them. For instance, the act of August 21, 1862, (12 Stat. 588.) They are proceedings so diverse in form and in spirit from ordinary civil suits, and are applicable to classes of property, of persons, and of obligations, so peculiar in their character and their necessities, and are so seldom in the mind of the law makers in passing general statutes, that it seems to be proper to hold as a general rule of construction that, unless alluded to by name or otherwise necessarily within the provisions of any particular statute, such proceedings will be deemed excluded.

Certainly great confusion will arise if in the numerous statutes now being enacted, affecting new classes of industry and of persons, and providing new forms of remedy, admiralty proceedings are to be considered as referred to whenever the words "suit," "civil suit," or "civil action" are used.

Take as an illustration the act of May 4, 1858, (11 Stat. 272,) which requires residence in the district to give jurisdiction in suits in this and many other states, and its effect upon the well known admiralty proceeding in rem against the ship and in personam against the master under the same libel and process, a proceeding often necessary to a proper administration of the maritime law. If the word "suit" in the act of May 4, 1858, covers causes of admiralty and maritime jurisdiction, this proceeding is substantially destroyed, for it is seldom indeed that the ship is to be found in the district where the master resides.

Take also the more important admiralty proceeding to obtain possession of a ship, which is a proceeding in personam. 22 Adm. Rule; The S. C. Ives, [Case No. 7,958.] What, under the construction contended for, is to be done when the residence of the defendant is in one district and the ship to be seized and delivered is in another? Is it possible that embarrassments like these and those others which are indicated by the act of February, 1839, as having arisen in ordinary civil suits, have existed in admiralty proceedings from 1789 to this day, without attracting attention and calling for remedy? There is still another aspect to this question. By the act of 1842, authority was given to the supreme court to provide, regulate, and alter proceedings in admiralty, under which authority the general admiralty rules were promulgated by the supreme court in 1845. Now these rules, which are held to be effective as statutes, seem to ignore the provision of the judiciary act in question, and authorize service of admiralty process by the attachment of property in all cases where the defendant cannot be found. Even if then the terms of the limitation of the eleventh section of the judiciary act were to be held to cover admiralty proceedings, the act of 1842 and the rules of 1845 taken together would be effective as a repeal of the provision so far as applicable to admiralty proceedings. Such an effect was given to these rules by Judge Betts in regard to the important act of January 14, 1841, [1 Stat. 410,] abolishing imprisonment for debt "on process issuing out of courts of the United States." Gaines v. Travis, [Id. 5,180.] And the decision was confirmed by the action of the supreme court in amending the rule.

Moreover, these rules are intended to be and are but the embodiment, for the sake of uniformity in the various districts, of most ancient and important modes of proceeding—adapted to meet the peculiar necessities of ships and of commerce on the sea—substantially the same in all maritime countries and known as "the course of the admiralty." They are one of the special characteristics of causes of admiralty and maritime jurisdiction, causes which do not differ from ordinary civil suits so much in the law to be declared as in the way in

which it is administered. These methods and modes of proceeding are the life of the admiralty. They constitute an essential part of the jurisdiction which the grant of the constitution secures to the national courts, and when the district courts were constituted courts of admiralty they acquired the right to those methods and modes, among which has from the first been the power to seize property of defendants who cannot be found, and to compel an appearance. This power is recognized by the admiralty rules as existing in these courts; it has never been conferred upon any other tribunal, and any intention to place it in abeyance, or to limit its exercise, when entertained by the law-making power, will, it may well be supposed, be clearly expressed and not left to be inferred from the use of a general and indefinite phrase.

It may be added, in conclusion, that no inconvenience or injustice is known to have been caused by the exercise of this power by the district courts, and it is believed that a withdrawal of it now would be deemed a misfortune to the classes of interests to be affected thereby.

If either from changes in the habits of commerce, or from modifications which are found necessary and become fixed in the practice of admiralty courts of other countries, or from changes in the spirit of our institutions, a limitation of the mode of exercising this power shall become necessary or proper, it is not to be doubted that the supreme court as the high appellate court of admiralty, and as empowered by the act of 1842, will effect a change in this particular as it most properly did in regard to the power of imprisonment.

The objection to the proceedings based upon the eleventh section of the judiciary act of 1789, is therefore held to be untenable, and the motion to set aside the attachment on that ground is denied.

[NOTE. This case was reversed by the circuit court, as to the points decided in above opinion, in Atkins v. Fibre Disintegrating Co., Case No. 602; but, upon appeal to the supreme court, the circuit court decree was reversed in 18 Wall. (85 U. S.) 272, and this opinion affirmed. See note to Case No. 602.]

Case No. 601.

ATKINS et al. v. FIBRE DISINTEGRATING CO.

[2 Ben. 381.]

District Court, E. D. New York. April, 1868.[2]

CHARTER—FREIGHT PER BUNDLE — SECOND SAFE PORT—MASTER'S AUTHORITY.

1. Where a vessel was chartered in New York for a voyage to Kingston, Jamaica, to load with a full cargo of bamboo, in bundles of a specified size, for freight payable per bundle, and it was specified in the charter that if the charterers did not have sufficient cargo to load her at Kingston, they were to have the privilege of sending her "to a second safe port," and the vessel went to Kingston and partly loaded, and was directed to go to Port Morant to complete her loading, and the bamboo with which she was loaded at both ports was in bundles of larger size than that specified in the charter, which the master received under protest, and the vessel, in coming out of Port Morant, owing to the land breeze dying away, as she was coming out through a narrow channel, there being no tugs in the port, nor any means of getting out except the land breeze, struck on one of the reefs which form the channel, and was seriously injured, and the owners sued on the charter to recover the damages sustained by the vessel and also the charter money: *Held*, That the vessel was entitled to recover freight under the charter, at the rate specified in the charter, for as many bundles, of the size specified in the charter, as she could carry.

2. That the words "a second safe port," imply a port which this vessel could enter and depart from without legal restraint, and without incurring more than the ordinary perils of the seas; and that, on the facts, Port Morant was not such a port, and the master of the vessel would have been justified in refusing to go there.

3. But that, as he made no objection, but went without giving any notice of an intention to hold the charterers responsible for any injury that might arise from its unsafeness, he must be deemed to have waived the objection, and his action bound his owners, and they could not recover for the injury received by the vessel in coming out of the port.

[See note at end of case.]

In admiralty. This was an action in which the libellants, who were the owners of the ship Elizabeth Hamilton, sought to recover the sum of $19,500, as the sum due them upon a charter of that vessel made with the respondents. As to the contract there was no dispute. According to its terms the vessel was bound to proceed to Kingston, Jamaica, and there load for New York with a full cargo, both under and on deck, of bamboo, in bundles five feet long and two feet square, for which service she was to receive two dollars and a half per bundle, payable on proper delivery in New York. It was also provided, that in case there should not be cargo enough at Kingston, the charterers were to have "the privilege of sending the vessel to a second safe port, by paying all expenses incurred in changing ports, and the time consumed in changing ports to count as lay days." Under this contract, the vessel duly proceeded to Kingston, and was there partly loaded, and was then directed to proceed to Port Morant to complete her cargo. She accordingly proceeded to Port Morant, and was there filled up with bamboo. But neither the bamboo received in Kingston nor that received at Port Morant corresponded with the contract, the bundles being larger and longer than was required by the charter. It was all received under protest and notice that it was not received as complying with the contract. When the

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

[2] [Reversed by circuit court in Atkins v. Fibre Disintegrating Co., Case No. 602; this decree afterwards affirmed by the supreme court in 18 Wall. (85 U. S.) 272.]

vessel was loaded at Port Morant, she attempted to go to sea, but as she was passing out of the port the breeze failed her, and she struck upon a reef and received considerable injury before she was got off. She then proceeded to New York and delivered her cargo, and brought this action to recover freight on four thousand bundles, at $2.50 each, that being her alleged capacity for bundles of the size provided in the contract, and also for demurrage for twenty days used in loading and discharging and changing ports beyond the lay days given in the charter, and also for $7,500 as the amount of the injury received by the vessel in coming out of Port Morant.

[This action was commenced by attachment against the respondent, a foreign corporation, and, upon hearing, a motion to set aside the attachment was denied in Atkins v. Fibre Disintegrating Co., Case No. 600. Decree for libellants. Afterwards reversed by the circuit court in Case No. 602; but that decree was reversed by the supreme court in 18 Wall. (85 U. S.) 272, with direction that this, the decree of the district court, be affirmed.]

Benedict & Benedict, for libellants.
Beebe, Donohue & Cooke, for respondents.

BENEDICT, District Judge. As it is not disputed that the bundles of bamboo which were furnished to the vessel were larger than the contract permitted, and as the evidence is clear and full that the vessel brought all that she could stow of bundles such as were furnished, the libellants are entitled to receive payment at the rate of $2.50 for as many bundles as she could stow of the required size. They are also entitled, upon the evidence, to recover demurrage, at the rate of $100 per day, for all days used exceeding the lay days given by the charter, including the time used in changing ports.

But they are not entitled to recover the amount claimed for damages sustained in coming out of Port Morant; and this, although it must be conceded that, upon the evidence, Port Morant cannot be held to be a safe port, within the meaning of the charter. The words, "second safe port," imply a port which this vessel could enter and depart from without legal restraint, and without incurring more than the ordinary perils of the seas. The evidence shows that, by reason of reefs extending nearly across the narrow entrance of this port, a vessel of the size of the Elizabeth Hamilton must strike the reefs if, by chance, the breeze should fail her while passing in or out. On the present occasion she passed in in safety, but in coming out the breeze did fail, and she accordingly struck the reefs, and sustained the injury now sought to be recovered.

This accident, as appears from the evidence, was from no want of judgment or seamanship on the part of the vessel, but was inevitable under the circumstances, by reason of the narrowness and character of the channel. No tugs were to be had, and the only power by which this vessel could get out was that of the land breeze; while the peril of the port was such that no vessel of this size could get out without making her safety from the reefs dependent entirely upon the continuance of the breeze. Such a hazard the vessel was not bound to incur under the charter, and the master would have been justified in refusing to accept the designation of such a port as a port within the privilege given in the charter.

But he did not do so. On the contrary, he proceeded to Port Morant, entered the port, and there completed his cargo and then again departed, without objecting to the port, and without giving any notice that it was the intention to hold the charterers responsible for any injury that might arise from its unsafeness. This action of the master bound his owners.

The master is the navigator, presumed to know best the channel of the ports within the natural range of the adventure, and the capacities of his vessel; and he is the proper person to determine whether his vessel can or cannot enter any particular port.

In this case the second port was to be designated at Kingston, where the owners did not intend to be except in the person of the master; and they must have intended that the master should act for them in determining the question which would arise when the second port should be designated, and must be there decided.

If, then, the port named was deemed an unsafe port for his vessel, and so not within the privilege given by the charter, it was the duty of the master, as the sole representative of the owners, to have made known his objections at the time. Not having done so, he must be deemed to have waived the right to object, and, the condition having been waived, no action can now be maintained for the breach of it.

But it is said that the master was induced to accept Port Morant as within the terms of the contract by the representations of the charterers' agent that it was a safe port; and that his acceptance was a qualified acceptance, given upon representations which amounted to a warranty.

The evidence is, that when the agent first spoke of designating Port Morant, he did inform the master that it was a safe port, but it also appears that the master made inquiries elsewhere as to the character of the port, which was, moreover, fully described in the Coast Pilot; and I do not think it could be justly held, upon the evidence, that any thing said or done by the master was calculated to lead the charterers' agent to suppose that Port Morant was not accepted by the master upon his own judgment as a proper port, duly designated within the privilege given by the charter

party, or to inform him that the charterer was to be held responsible in case the vessel received injury in using that port.

The claim for the injuries received in Port Morant is accordingly rejected, and a decree rendered in favor of the libellants for the other portions of their demand, with an order of reference to ascertain the amount, in accordance with this opinion.

[NOTE. This action was commenced by attachment against the respondent, a foreign corporation, and, at a former hearing, a motion to set aside the attachment was denied. Atkins v. Fibre Disintegrating Co., Case No. 600. After this opinion on the merits was filed, an appeal was presented to the circuit court, and the decree reversed, on the ground that the attachment should have been set aside. Case No. 602. The supreme court, however, reversed the circuit court decree, and ordered that this, the decree of the district court, and that in Case No. 600, be affirmed. 18 Wall. (85 U. S.) 272, supra. See note to Case No. 602.]

Case No. 602.

ATKINS v. FIBRE DISINTEGRATING CO.

[7 Blatchf. 555;[1] 10 Amer. Law Reg. (N. S.) 389; 4 Amer. Law T. Rep. U. S. Cts. 13; 5 Amer. Law Rev. 565.]

Circuit Court, E. D. New York. Dec. 14, 1870.[2]

ADMIRALTY—OBJECTION TO JURISDICTION—WAIVER—RESIDENCE OF CORPORATION.

1. A district court of the United States, as a court of admiralty, cannot obtain jurisdiction to proceed in personam against an inhabitant of the United States, not residing within the district, by attachment of the goods or property of such inhabitant, found therein, to compel an appearance.

[Cited in Jobbins v. Montague, Case No. 7,329.]

[See note at end of case.]

2. The cases of non-resident aliens, and of inhabitants resident within the district, but absconding therefrom, or concealed therein, distinguished.

[See note at end of case.]

3. The case of Manro v. Almeida, 10 Wheat. [23 U. S.] 473, commented on.

4. A corporation created by or under the laws of another state of the United States, is to be regarded, in reference to the point above stated, as an inhabitant of the state by or under whose laws it was so created.

[See note at end of case.]

5. An entry in the record of the district court, that, on the return day of the process of attachment, A. B. "appears for the respondent, and has a week to perfect an appearance, and to answer," does not show a submission to the jurisdiction and a waiver of objection, which precludes such respondent from insisting thereafter that the court has not, by attachment of goods, obtained jurisdiction to proceed in the cause against him.

[Cited in Louisiana Ins. Co. v. Nickerson, Case No. 8,539; Romaine v. Union Ins. Co., 28 Fed. 636.]

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

[2] [Reversing Atkins v. Fibre Disintegrating Co., Case No. 601, Id. 600. Reversed by supreme court in 18 Wall. (85 U. S.) 272.]

In admiralty. The libel in this case charged, that the respondents were a corporation, and had property in the eastern district of New York; that a charter party was executed by and between the libellants and the respondents, by which the latter chartered the ship Elizabeth Hamilton, for a voyage from the port of Kingston, Jamaica, to New York, agreeing to provide and furnish a full cargo of bamboo, in bundles five feet long and two feet square, both under and upon deck, to be stowed without dunnage, at a freight of $2.50 per bundle, payable on delivery at New York, with a further stipulation, that, if there should not be cargo enough at Kingston to load the vessel, the respondents should have the privilege of sending the vessel to a second safe port, the vessel to be fitted, provided and navigated by, and at the expense of, the libellants, and the respondents to pay demurrage at $100 per day, for any greater detention than a specified number of lay days; that the vessel proceeded to Jamaica, and was there loaded in part by the agent of the respondents, and the master was directed to proceed to Port Morant, to take in more cargo; that she did so, but, in coming out of the harbor, at the port last named, struck a reef, and was injured; and that such last named port was falsely represented by the respondents, or their agents, to the master of the vessel, to be a safe port, when, in truth, it was unsafe, unsuitable, and dangerous. The libellants claimed, that the respondents did not furnish bamboo in bundles of the length, form and size specified; that, by reason thereof, and of their irregular form, a much less number could be stowed; that the bundles in fact brought, being larger than the specification, were equivalent to a much larger number of the required size; and that, therefore, the respondents were liable for freight according to the number of bundles which might have been brought, of the precise form and size mentioned in the charter party; that is, at the rate of $2.50 for every 20 cubic feet, $10,000. They also claimed $2,000 for demurrage, for an alleged detention of 20 days, and $7,500 for compensation for the damage done to the vessel by striking the reef in the harbor of Port Morant. The prayer of the libel was, "that process in due form of law may issue against the said respondents, and that they may be cited to appear and answer, upon oath, all and singular the premises, and, if they be not found, then that a foreign attachment issue against their property within this district, and that this court would be pleased to decree in favor of the libellants, for the payment by the respondents of said sum of $19,500, besides interest and costs, and otherwise right and justice to administer in the premises."

Process was issued accordingly, commanding the marshal to cite and admonish the respondents, if found within the jurisdic-

tion of the district court, to appear on the 20th of June, 1866, to answer the libel, and, if the respondents could not be found, then to attach their goods and chattels to the amount sued for. On the return day, the marshal returned to the process, that the respondents were not found, and that he had attached all the property of the respondents in their factory, at Red Hook, in the city of Brooklyn. The record contained this entry, as a proceeding on that day: "Mr. Beebe appears for the respondents, and has a week to perfect an appearance and to answer." Thereupon, the respondents procured an order to show cause, why the property should not be discharged from the attachment, or why such other order should not be made as the court should see fit to grant. The affidavits on the part of the respondents showed, that the officers of the respondents' corporation were within the jurisdiction, and that no effort was made by the marshal to find or serve them. The affidavits produced and filed by the libellants showed, that the respondents were a corporation, incorporated by the laws of the state of New Jersey, but having a manufactory, and carrying on business, in the eastern district of New York. The record did not show any disposition of the motion, except by an order dated the 22d of March, 1867, which recited, that a motion had been made to vacate and set aside the attachment and proceedings under the same, "based upon the eleventh section of the judiciary act of 1789, [1 Stat. 78,] on the ground that the respondents are and were nonresidents of the state, and not found therein;" and such motion was, by such order, denied. The opinion of the court on the motion will be found in 1 Ben. 118, [Atkins v. Fibre Disintegrating Co., Case No. 600.] It discusses at length the jurisdiction of the court in admiralty to proceed in personam against an inhabitant of the United States, though not an inhabitant of the district, nor found therein, and sustains the power of the court to proceed by attachment of the property of such an inhabitant, and thence to a decree. Meantime, under an express agreement that it should not prejudice their motion to discharge the property, and that, if such motion should be granted, their stipulations should be cancelled, the respondents had given stipulations for value in $25,000, and the property attached was discharged from custody. After the decision of the motion, the respondents answered the libel, denying the causes of action alleged, and setting up the fact that the respondents were a corporation, incorporated under the laws of the state of New Jersey, and were not residents of the eastern district of New York, and that it was not alleged in the libel that the respondents were either in the district, or resided in the district. The cause being tried, [Atkins v. Fibre Disintegrating Co., Case No. 601,] the district court, upon the proofs, decreed that the libellants should recover against the respondents, for the reasons and causes mentioned in the libel, except that no claim should be allowed for injuries sustained by the libellants' vessel in Port Morant, and ordered a reference to compute the amount due. The commissioner reported $9,737 due for freight, and $1,500 for demurrage, and $1,822.26 for interest, and, thereupon, a final decree was made, that the libellants recover against the respondents, the Fibre Disintegrating Company, the sum of $13,059.26, so reported due, with $243.44, costs, as taxed, making $13,302.70, "and that judgment be, and the same is hereby, entered therefor, in favor of said libellants, against the said respondents," and that the stipulators for value cause their stipulations to be performed, &c.

Both parties appealed to this court—the respondents from the decree as made, and the libellants from the disallowance of their claim for damages by reason of the injury to the ship at Port Morant. [This decree was afterwards reversed by the supreme court in 18 Wall. (85 U. S.) 272.]

Erastus C. Benedict, for libellant.
Charles Donohue, for respondent.

WOODRUFF, Circuit Judge. The respondents insist, that the district court had no jurisdiction to proceed herein, because such respondents were not an inhabitant of the eastern district of New York, nor found therein. If the respondents are right in this, it will be wholly unnecessary to consider any question arising on the merits, on the appeal of either party.

(1) The libellants insist, that the respondents were not in a situation to raise the objection, and that, by appearance, the objection was waived. I think that in this the claim of the libellants has no sufficient foundation. The record shows, only, that, on the return day of the process, "Mr. Beebe appears for the respondents, and has a week to perfect an appearance and to answer." This ought not to be regarded as an appearance which operates as a voluntary submission to the jurisdiction and a waiver of the objection. No doubt, a general appearance and answer, without objection, is to be deemed a voluntary appearance, and is equivalent to service of process within the district. But here the respondents were allowed time to perfect an appearance, and immediately moved to set aside the proceeding; and, that being denied by the court, they were compelled to answer, and did so, by setting up the objection. It was according to the ancient practice in admiralty, in cases of attachment, not to recognize anything as an appearance but putting in of bail; and a similar practice formerly obtained in New York, in cases of attachments against foreign corporations. Although special bail be not now required in New York, it is obvious, that

neither party regarded an appearance by the respondents as perfected, and the libellants stipulated expressly that the subsequent bond for value should not operate as a waiver of the respondents' motion.

(2) Upon the important question, whether a court of admiralty in one district can obtain jurisdiction to proceed against an inhabitant of another district by attachment of his goods, the opinion of the district judge in this case shows some conflict of opinion.

The question is not affected by the circumstance that the respondents are a corporation. For the purposes of the question, a corporation must be deemed an inhabitant of the state in which it is incorporated, and it is as clearly within the reason of the rule regulating jurisdiction over inhabitants, as a natural person. I, therefore, treat the question precisely as I should if the respondents were a natural person, an inhabitant of New Jersey, sued in the eastern district of New York, by attachment of his goods, and not found nor served with process.

Had the district court, sitting in admiralty, jurisdiction to proceed in that manner against the respondents, upon the cause of action alleged? The cause of action was maritime, and, therefore, it was a subject of admiralty jurisdiction. This is not questioned by the respondents. Thereupon, the libellants insist, that it is according to the long and well-established practice of courts of admiralty, to proceed against a respondent by attachment of his goods, if he absconds from, or cannot be found within, the jurisdiction of the court, to be served with process; that, when the congress of the United States established courts of admiralty, and gave them "cognizance of all civil causes of admiralty, and maritime jurisdiction," (Act Sept. 24, 1789, "to establish the judicial courts of the United States," § 9; 1 Stat. 76,) and provided that "the forms and modes of proceedings, in causes of * * * admiralty and maritime jurisdiction, shall be according to the course of the civil law," (Act Sept. 29, 1789, "to regulate processes in the courts of the United States," § 2; 1 Stat. 93,) they sanctioned this mode of obtaining jurisdiction to proceed against a respondent, in personam, for the recovery of a demand which is, in its nature, cognizable in those courts; that this is further confirmed by the second section of the act of May 8, 1792, (1 Stat. 276,) which provides, that "the forms of writs, executions, and other process, except their style, and the forms and modes of proceeding in suits, in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act entitled, 'An act to regulate processes in the courts of the United States,' in those of equity and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and courts of admiralty, respectively, as contradistinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States, subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same;" that, if the question were before doubtful, no such doubt can exist since the act of August 23, 1842, (5 Stat. 516,) which (section 6) gives to the supreme court of the United States "full power * * * to prescribe and regulate and alter the forms of writs, and other process, to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings in suits at common law, or in admiralty and in equity, pending in said courts; * * * and, generally, to regulate the whole practice of the said courts, so as to prevent delays and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein;" and that, by authority of the foregoing statutes, the supreme court have provided by rule, (rule 2, in admiralty,) that, where the respondent to a libel filed in admiralty cannot be found within the district, process may issue against his property in such district.

The general proposition deducible from the statutes above referred to was decided by the supreme court of the United States, in the case of Manro v. Almeida, (in 1825,) 10 Wheat. [23 U. S.] 473, and is not open for discussion in this court, namely, that the courts of the United States, proceeding as courts of admiralty and maritime jurisdiction, may issue the process of attachment to compel appearance, in cases of maritime torts and contracts.

As that is the only case in which the question appears to have been raised and passed upon in that court, and as the decision of that court is conclusive upon me, it is important to state what the case was in which the above general proposition is held, and to what precise extent the decision goes. The libel was filed in the district of Maryland, charging Almeida with having committed a tort, on board a certain vessel off the capes of the Chesapeake, in taking therefrom $5,000 in specie, and converting it to his own use. It appears, by the statement of the case, that Almeida resided in the district, but had absconded from the United States, and fled beyond the jurisdiction of the court; and the libel averred, that the libellants had no means of redress but by process of attachment against his goods, chattels and credits, which were, also, about to be removed, by his orders, to foreign parts. The goods, &c., were attached by the marshal, and a copy of the monition was left at the late dwelling-

house of Almeida, and a copy affixed at the public exchange, and on the mast of the vessel containing the attached goods, &c. On demurrer to the libel, the questions decided were raised, and, from the decision dismissing the libel, an appeal was taken to the supreme court, and the decree was reversed. The decision affirms, therefore, that it is within the power and jurisdiction of the district court, as a court of admiralty, to issue process of attachment to compel the appearance of a respondent proceeded against by a suit in personam; and that, in the United States, such process may issue against the goods of a resident of the district in which the suit is brought, whenever the defendant has concealed himself, or absconded from the country. The case of Bouysson v. Miller, [Case No. 1,709,] is referred to as an authority in this country, and Clerke's Praxis, by Hall, pt. 2, tit. 28, is cited for the general practice of the civil law. The opinion of the court shows, further, that the attachment was originally devised, and is still maintained, as a means of compelling the respondent to appear in the suit to answer, and that this is its primary object, while, if he does, nevertheless, not appear, the goods, &c., may be sold to satisfy the libellant.

In Cushing v. Laird, [Case No. 3,508,] recently decided in the district court of the United States for the southern district of New York, Judge Blatchford has examined the subject further, and concludes, mainly upon the authority of the case of Manro v. Almeida, [10 Wheat. (23 U. S.) 473,] and of the text of Clerke's Praxis, that the jurisdiction and power to attach property to compel an appearance also exists in this country, where the defendant is not an inhabitant of the United States, but is an alien not found within the district, but having property there which can be attached.

With these decisions, the case now before me raises no controversy. They are in perfect consistency with the ground relied upon by the respondents here, to wit, that, being, in a legal sense, inhabitants of the district of New Jersey, they could not be sued in the eastern district of New York, by process of attachment and seizure of their goods. And it is of great pertinency to say, that, recognizing the principles and practice sanctioned by the decisions above referred to, completely satisfies the provisions of the acts of congress already cited, and gives a proper and sufficient field for the operation of the act regulating the practice of the court, and of the rule of the supreme court of the United States prescribing the process of attachment when the defendant cannot be found within the district; for, by these decisions, if he be concealed, or have absconded, or be an alien non-resident, there is occasion for the process.

The question then recurs—and entirely without conflict with those statutes, or with the rule of the supreme court, or with those decisions—Can an inhabitant of the United States be sued in a court of admiralty, by process of attachment of his goods, issued and served to compel his appearance, in any other district than that whereof he is an inhabitant?

The judiciary act of September 24, 1789, (1 Stat. 73,) establishes the judicial tribunals, defines their location and the times of holding courts, distributes and limits their jurisdiction, and regulates the manner of its exercise, with other details to complete the system. By the first section, the organization of the supreme court is declared. By the second, the United States are divided into judicial districts, limited and designated as therein prescribed. By the third, it is declared, that there shall be a district court in each district, and its constitution and its sessions are fixed. By the fourth, the districts (excepting Maine and Kentucky) are allotted to circuits (embracing several districts) and circuit courts in each are provided for. By the fifth, the various sessions of the circuit courts, in the respective districts, are appointed. Organization being thus provided for, the sixth, seventh and eighth sections provide for adjournments, vacancies, continuances, the appointment of clerks, their oath of office and the oath of office of the judges. Then, in section nine, the jurisdiction of the district courts is conferred, first, over certain crimes and offences; and, next, they "shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost * * * where the seizures are made on waters which are navigable * * * within their respective districts, as well as upon the high seas; * * * and shall also have exclusive original cognizance of all seizures on land * * * and of all suits for penalties and forfeitures incurred under the laws of the United States; and shall also have cognizance, concurrently with the courts of the several states or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States; and shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue and the amount in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars; and shall also have jurisdiction, exclusively of the courts of the several states, of all suits against consuls," &c., &c. The tenth section gives to the district court in Kentucky certain circuit court powers.

The eleventh section defines the jurisdiction of the circuit courts and provides as follows: "The circuit court shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or

an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state; and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein." Then follow two provisions, the effect of which is especially important to the question under consideration: "But no person shall be arrested in one district, for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

The further and other provisions of the statute it is unnecessary to recite, as they do not bear on the question. But it is of some significance to note, that the constitution of the United States had already provided, (article 3, § 2, subd. 3,) that "the trial of all crimes, except in cases of impeachment, * * * shall be held in the state where the said crime shall have been committed;" and an amendment, (article 6,) proposed by the same congress, and at the same session, at which the judiciary act was passed, provides, that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

That an attachment of goods to compel appearance, and a holding thereof to answer any claim which a plaintiff may recover, is "original process," within the meaning of the language of the statute above quoted, is not doubtful. That the circuit and district courts of the United States cannot send their process into another district, in suits at common law or in equity, and thereby obtain jurisdiction of the person, is also clear. That, in actions at the common law or in equity, they cannot proceed by attachment, and so obtain jurisdiction of a person who is an inhabitant of another district, is settled. Indeed, it is not here denied, by the counsel for the libellants, that, in such actions, the statute applies according to its very terms; and that, in order to jurisdiction, the defendant must be an inhabitant of the district in which the suit is brought or be found therein, if the defendant be an inhabitant of any of the United States. Picquet v. Swan, [Case No. 11,134;] Toland v. Sprague, 12 Pet. [37 U. S.] 300; Ex parte Graham, [Case No. 5,658;] Hollingsworth v. Adams, [Id. 6,611;] Day v. Newark India Rubber Co., [Id. 3,685,] which applies the principle to a corporation created by the laws of another state; Sayles v. North Western Ins. Co., [Id. 12,421.] If, then, the present is a "civil suit," within the meaning of the act, there is an end of the question; and jurisdiction of the defendant could not be acquired by attachment of goods.

1. The restriction cited, and which forms part of the eleventh section, is not confined, in its operation, to the jurisdiction conferred by that section. This is clear, because, no civil jurisdiction is, by that section, conferred upon the district courts; and yet the restriction forbids that any civil suit shall be brought before either the district or circuit court in any other district, &c. The words "district court" and "either of said courts" would be senseless and inoperative, if the restriction did not apply to other actions than those which were authorized by that section. The terms, therefore, plainly apply to the district court in the exercise of some jurisdiction theretofore mentioned, and must operate to limit or explain the powers given to those courts in the previous ninth section. Including both courts in terms, the limitation operates upon the jurisdiction of each conferred by that section. This is also settled by the cases cited; for, if it were otherwise, then the district court could, in the exercise of such common law jurisdiction as is given by the ninth section, proceed by attachment.

2. The congress of the United States, when this restriction was imposed, were in the very act of framing a judicial system. They provided for the organization of the courts, for a distribution thereof throughout the states, bringing the federal tribunals within easy approach by every citizen, for the determination of controversies deemed appropriate to those tribunals. Their jurisdiction as to subject matter was made to depend chiefly upon the nature of the subjects and the residence of the parties, who, when of different states, might prefer a tribunal existing and acting in freedom from state influence. The courts of original jurisdiction were located in each district. As they acted not under local authority, but derived their power from a government embracing the entire Union, they might seem warranted in entertaining suits against defendants residing in any state, however remote, and in sending process for service compelling appearance. It was, therefore, of great and manifest importance, that some rule on this subject should be prescribed; and it was done so as to prevent parties proceeded against from being called to a great distance to defend actions brought against them, when there was a federal tribunal at their own door competent to administer justice.

3. There is, therefore, no possible reason for any distinction in this respect between a suit in admiralty and a suit in equity or a suit at law. A suit in personam in the court of admiralty is within the jurisdiction of that court, when founded on a maritime contract, or prosecuted for a marine tort.

But no reason can be stated for requiring a party living in New Orleans or San Francisco, to come to New York to defend an action or suit on the covenants in a charter party, when he ought not to be required to come there to defend a suit at law or in equity founded on any commercial or common law contract. For a marine tort committed by a resident of New Orleans, he is liable at common law, and may also be held liable in the court of admiralty. There is no just reason for holding him to answer in such case in any district court of the United States, however remote, if the plaintiff elects to proceed in admiralty, while, if the plaintiff proceeds at common law, he must sue in the district of the defendant's residence, or in the district in which he may be found. The reason of the act of congress includes suits in personam in admiralty, as fully as in equity or at law.

4. The word "civil" is used in the act in distinction from "criminal." In the 9th and 11th sections, conferring jurisdiction on the district and circuit courts, congress had spoken of "crimes and offences," "civil causes of admiralty and maritime jurisdiction," "suits for penalties and forfeitures," "causes where an alien sues for a tort," "suits at common law," "suits against consuls" other than "for offences," and "suits of a civil nature at common law or in equity." They then declare that "no civil suit" shall be brought, &c. A civil cause of admiralty and maritime jurisdiction is prosecuted by a suit. It is within the terms of the restriction as closely as a cause "where an alien sues for a tort." It was wholly unnecessary, in the restrictive clause, to recite again the several terms previously employed, as suits for forfeitures, suits against consuls, suits at common law, &c., and civil causes in admiralty. These are all civil in their nature. A cause in admiralty is so expressly described. It is a civil cause. The general term "civil suit" was apt to describe all these actions and causes of action, and it was so employed. And, as the constitution provided that criminal prosecutions, jurisdiction whereof was given by this act to the circuit and district courts, should be had in the state where the crime was committed, so, also, civil suits against an inhabitant of the United States were required to be brought in the district whereof he was an inhabitant. Jurisdiction of crimes and offences, as well as of proceedings of a civil nature, being conferred on these courts by the sections mentioned, this classification, by the word "civil," as distinguished from "criminal," was an essential conformity to the constitutional requirement, that crimes and offences should be prosecuted where committed. The restriction, therefore, made the system in this respect complete.

5. This view of the effect of this statute, securing to inhabitants of the several states the right of being sued within the district whereof they are respectively inhabitants, is, therefore, in perfect consistency with the claim, that courts of admiralty have general power to proceed in personam by attachment of goods, where the defendant cannot be found within the district, so far as that is asserted in Manro v. Almeida, 10 Wheat. [23 U. S.] 473; in King v. Shepherd, [Case No. 7,804;] in Boyd v. Urquhart, [Id. 1,750;] or in Bouysson v. Miller, [Id. 1,709.] The limitation is the result of the act of congress, and does not deny the original jurisdiction or practice of those courts, or their present power or jurisdiction where the respondent is an alien non-resident, or, being an inhabitant of the district, conceals himself or absconds, so that he cannot be found.

6. To the suggestion, that the acts of congress regulating the process and practice of the courts are in such general terms that they and the rule of the supreme court in admiralty have operated to modify the act of 1789 limiting jurisdiction in this respect, it is sufficient to say, that these acts are not designed to alter or enlarge the jurisdiction of the courts, but only to regulate the exercise of jurisdiction where it exists. I understand this to be distinctly affirmed in Toland v. Sprague, already cited. Indeed, if these acts are held to authorize the supreme court in any respect, by rule, to abrogate the restriction in the act of 1789, it cannot be confined to the jurisdiction of courts of admiralty. For, the act of 1842 (relied upon as above) gives the same power touching proceedings at the common law and in equity as in admiralty; and the construction and effect contended for would enable that court practically to repeal all the restrictions contained in the act of 1789 on this subject, and to authorize common law actions against inhabitants of any state to be brought in any district of the United States.

Of the cases of Clark v. New Jersey Steam Nav. Co., [Case No. 2,859,] and New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, it is sufficient to say, that the point discussed in this case was neither raised nor decided in either; and the first named case is full to the effect above asserted, that, on this question, a corporation stands in the same position as a natural person. The effect of the eleventh section of the judiciary act on the power of the court to proceed against either, was not raised, discussed or decided. The decision in the last named case related, first, to the merits, and, second, to the inquiry whether the case was, in its nature, cognizable in a court of admiralty. The synopsis of the case first named, as reported, would suggest that the point in question was decided adversely to the views I have expressed; but, in truth, the point was not raised, the opinion stating that it had not been doubted, and referring to the general doctrine of Manro v. Almeida, [supra,] with which my views are in no conflict.

The case last referred to suggests what is, perhaps, sufficiently obvious without discussion, that the jurisdiction of courts of admiralty by libel and process in rem is in no conflict, but is in entire harmony, with the views I have expressed. In those cases, the court has jurisdiction of the rem wholly irrespective of the question to whom it belongs. For all the purposes of the proceeding, the liability rests upon the rem, and it is made to answer. In form and in substance, that and that only is charged. It is a proceeding for the enforcement of a maritime lien already existing, or acquired by the seizure of the subject of the lien, and to be enforced against it, without regard to questions of title or ownership; and one who intervenes as claimant does so, not to defend himself from liability, but for the protection of the rem proceeded against. Nor is the right of intervention at all confined to one who is liable upon the same cause of action. Such a proceeding, in very form adverse, not to an inhabitant of the United States, but to a rem or subject within the district, upon which the liability was chargeable, was so clearly according to the established jurisdiction and practice of courts of admiralty, that it must have been recognized by congress, and neither the words of the act, nor any reasonable implication therefrom, affect it.

I have examined the opinion of Judge Shipman, of the district court for Connecticut, in Blair v. Bemis, [Case No. 1,484,] in admiralty, (August, 1863,) and that of Judge Hoffman, of the district court of California, in Wilson v. Pierce, [Id. 17,826,] and am constrained to concur in their conclusion. Their opinions embody many of the views I have suggested, and very ably, I think, present most of the considerations pertinent to the subject, with the authorities.

In the opinion of the district court in this case, the opposite conclusion is ably sustained, and the practice, said to be of long standing in the southern district of New York, is stated to be in conformity with such conclusion. If I could satisfy myself that such practice was not forbidden by the judiciary act, I should prefer to make no decision disturbing such practice. I have, therefore, retained the case for further and more deliberate consideration, longer than I should otherwise have deemed necessary. I am, however, by my convictions, compelled to concur with the conclusions of Judges Hoffman and Shipman, and to hold, that jurisdiction of the defendants was not acquired by the district court, by the attachment in this case.

The decree herein must, therefore, be reversed, and the stipulators be discharged from their stipulations provisionally given.

[NOTE. This decree was reversed by the supreme court. Mr. Justice Swayne, delivering the opinion, said: "This controversy turns upon the 11th section of the judiciary act of 1789. * * * The prohibition to bring a civil suit in a district other than that whereof he is an inhabitant, or in which he shall be found, is the hinge of the controversy between these parties. * * * It may be admitted that an admiralty case is a 'civil suit,' in the general sense of that phrase. But that is not the question before us. It is whether that is the meaning of the phrase as used in this section. The intention of the lawmaker constitutes the law, * * * and, in a case of doubt, that is to be sought from the entire context of the section, statute, or series of statutes in pari materia. * * * The first paragraph of the 11th section defines the jurisdiction of the circuit court as extending to 'all suits of a civil nature, at common law, or in equity, where,' etc. The criminal jurisdiction of the circuit court is next defined. Then follows the provision that no one shall be arrested in one district for trial in another 'in a civil action' before a circuit or district court; and next the prohibition here in question. Construing this section down to the second prohibition, inclusive, by its own light alone, we cannot doubt that by the phrase 'civil suit,' mentioned in this prohibition, is meant a suit within the category of 'all suits of a civil nature, at common law or in equity,' with which the section deals at the outset. * * * We think the conclusion is inevitable that the terms 'civil suit,' in the 11th, and 'civil actions,' in the 22nd, section, were intended to mean the same thing. The meaning of the phrase employed in the latter admits of no doubt: The language there is 'civil actions,' and it is used to distinguish them from 'causes of admiralty and maritime jurisdiction,' provided for in the preceding section. The 21st and 22nd sections are in pari materia with the 11th, and throw back a strong light upon the question arising under the latter. We think it dispels all darkness and doubt if any could otherwise exist upon the subject." Directions were given to affirm the decrees of the district court. Atkins v. Fibre Disintegrating Co., 18 Wall. (85 U. S.) 272.]

Case No. 602a.

ATKINS v. HORRMAN.

[Betts' Scr. Bk. 617.]

District Court, S. D. New York. July 14, 1860.

SHIPPING—DAMAGE TO CARGO—BILL OF LADING—BURDEN OF PROOF.

In admiralty. This was an action by Joshua Atkins and others, the owners of the ship Seth Sprague, against August Horrman, to recover freight on some pipes of wine brought on the ship from Rotterdam to New York in May, 1859, consigned to the respondent. The defence was that a pipe of wine worth more than the freight was lost on the passage by carelessness. This pipe, on arrival of the vessel, was found to have one head pressed in so that the wine had leaked out. The libelants proved that the cargo was well stowed and dunnaged, and proved also that the head of the cask had been made thinner in the middle on the inside than at the sides, and argued that by reason of this the cask had been unable to bear the necessary weight of the cargo. Decree for libelants.

Benedict, Burr & Benedict, for libelants.
Mr. Hart, for respondent.

BETTS, District Judge. The proof clears the ship of negligence in the lading and carriage of the goods, and the defendant does not, by a preponderance of proof, show that the loss was not ascribable to the insufficiency or defect of the casks. The bill of lading renders the ship responsible for no more than the good appearance of the casks externally, and for all just care and stowage of it in transportation. Occult and material defects in the cask are not at the risk of the carrier, but are presumptively at that of the freighter. Decree for libelants for the freight, with a reference to a commissioner to compute the amount.

Case No. 603.

ATKINS v. PEASLEE.

[1 Cliff. 446.][1]

Circuit Court, D. Massachusetts. May Term, 1860.

CUSTOMS DUTIES—ENTRY AND APPRAISAL IN BOND—PRIVATE WAREHOUSE—WAREHOUSE FEES.

Where certain merchandise was stored in private warehouses by the plaintiff, with the consent of the collector of customs, but without expense to him or the United States, and it appeared that this arrangement was made by the plaintiff because he desired to warehouse his goods, and thus obtain the benefit of the warehouse laws, and that the defendant would not assent to such deposits except on condition that the plaintiff would pay to him, in his official capacity, half the usual rates of charges on similar goods stored in the public warehouses. *Held*: 1. That the goods were "warehoused." 2. That the stipulated sum was rightfully received by the collector, and that the same could not be recovered back in an action for money had and received.

[See Clark v. Peaslee, Case No. 2,831.]

[At law. Action of assumpsit by Elisha Atkins against Charles Peaslee, collector for the port of Boston,] for money had and received, and the case came before the court upon an agreed statement of facts as follows: On the 24th of June, 1853, the plaintiff imported into the port of Boston, in the bark Tom Corwin, from Cienfuegos, sundry hogsheads of molasses, and also sundry hogsheads and tierces of sugar, of which he duly made entry for warehousing, and requested the defendant, who was collector of customs for said port of Boston, to cause the same to be stored in the public warehouses at the said port, which the defendant declined to do, for the reason that said warehouses were full. The plaintiff thereupon procured, at his own expense, and without cost or charge to the defendant or the United States, accommodations for two hundred and eighty-five hogsheads and five tierces of sugar, in a store in Broad street, and ten hogsheads of molasses on Packard's wharf, and the defendant assented to the deposit of the said sugar and molasses at those places under the provisions of the warehouse laws, on condition that the plaintiff would pay to the defendant, as collector of the customs for said port, one half the usual rates of storage charged on similar goods deposited in public warehouses. This condition was submitted to by the plaintiff, in order to enable him to warehouse his merchandise as aforesaid. On the withdrawal of the merchandise, the sum of $145.19 was demanded by the defendant as and for storage of said sugar and molasses, which plaintiff paid defendant. If, upon the foregoing statement of facts, the court should be of opinion that the defendant had no legal right to impose such condition and charge half-storage, on the aforesaid merchandise of the plaintiff, then judgment to be entered for the plaintiff for the sum of $145.19, with interest thereon from the time the same was paid, together with costs; but if the court should be of opinion that the charge was legal, then judgment to be entered for defendant, with costs.

Milton Andros, for plaintiff.

By the acts of August 6, 1846, [9 Stat. 53,] and of April 20, 1818, (3 Stat. 469,) and the instructions of the treasury department of February 17, 1849, stores where goods are warehoused must be either public warehouses or private bonded warehouses, and the collector has no right to permit any others to be used. There was no service performed by defendant. There is no rate except for goods stored either in a public or a private bonded warehouse, and the plaintiff's merchandise was stored in neither. By the agreement the warehousing was at the expense of the importer, and he cannot be held to pay twice.

C. L. Woodbury, for defendant.

Warehousing to be at the charge of the importer. [Act March 2, 1799,] 1 Stat. 667, §§ 53, 55, 56, 62. A service was performed by the United States. Act 1846, §§ 1, 3,[2] 7, 34. The act of 1841, § 6, confers a general power as to warehousing imported merchandise upon the secretary of the treasury; and the act of 1846 enlarges that power, and gives full effect to the authorizing of private stores to be used by the government. Section 5.

CLIFFORD, Circuit Justice. Most of the difficulties that surround the case arise from the incompleteness of the statement of facts; as, for example, it is stated that the goods were imported on the 4th of June, 1853, but it nowhere appears when the importation was withdrawn from the operation of the warehouse laws. Entry for warehousing, it is stated, was duly made, and the case shows that the merchandise was subsequently withdrawn; but the agreed statement furnishes no means of determining when the with-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [See Act Aug. 6, 1846; 9 Stat. 53.]

drawal took place, except what may be inferred from the amount demanded and paid for the storage. Full provision was made by the act of the 28th of March, 1854, [10 Stat. 270,] for the selection, use, and regulation of private warehouses under the warehousing system of the United States; but it is insisted by the counsel of the plaintiff, that the provisions of that act have no application to this case, and, considering the small amount demanded and paid for the storage, I am inclined, in the absence of any more explicit statement, to adopt that view of the case. Assuming that to be the correct view of the facts, it then appears that the goods were duly entered for warehousing at the time of their importation, and remained on deposit under the act of the 6th of August, 1846, until they were withdrawn. 9 Stat. 53. Nothing, however, can be more certain than the fact that the goods were duly entered for warehousing, and not for consumption; and the agreed statement is explicit, that the defendant assented to the deposit of the same at the places before mentioned, under the provisions of the warehouse laws. Application was made by the plaintiff for that privilege to the defendant, as collector of the port, and the assent was given, on the condition that the plaintiff would pay to the defendant, as collector of the customs, half the usual rate of storage charged on similar goods, deposited in the public warehouses. All of the goods were deposited under the warehouse laws, and the clear inference is that the plaintiff enjoyed all the benefits of the warehouse system during the period they so remained on deposit; and the goods were finally withdrawn under the warehouse regulations. Whether any protest was ever made does not appear, but it is certain that nothing of the kind is mentioned in the agreed statement. But it is insisted by the plaintiff that no services were performed by the defendant, or any other of the officers of the revenue, that authorized him to charge anything for the storage of the goods, and that the places of deposit were neither public nor private bonded warehouses, and consequently that the defendant had no authority, as collector of the port, to make any such demand as was made in this case. Both of these propositions seem to be relied on by the plaintiff, and yet, in another part of the argument, he concedes that if the goods had been stored in storehouses, properly selected and designated as private bonded storehouses, he would have been liable for the half-storage, which hardly seems consistent with the first proposition. Waiving that matter, however, his objections to the payment of the storage are twofold: first, he insists that the defendant rendered no service for which, either in law or equity, he was entitled to compensation; and, second, that the places of deposit were not private bonded warehouses, within the meaning of the acts of congress establishing the warehouse system. His first proposition he endeavors to maintain by affirming as a matter of inference, from the agreed statement, that all the defendant did in the premises was to refuse the plaintiff his right to store the goods in a public warehouse, and then illegally to consent that he might store them in stores procured by himself, provided he would pay all the expense, and also the further charge which is the subject of complaint in this case. Looking at the agreed statement, however, I am of the opinion that the theory of fact assumed by the plaintiff in his first proposition must receive very considerable qualification. Undoubtedly, he procured the "accommodations" for the goods at his own expense, and without cost or charge to the defendant or the government; but it is nowhere stated that the goods, after being placed in warehouse, were not in the custody and under the control of the customhouse officers. Unless they were so, it is difficult to see in what respect they were under the provisions of the warehouse laws, or what necessity there was for withdrawing them from the warehouse entry, which was made at the time the goods were imported. Services, therefore, must have been performed by the officers of the customs, else it is not true that the goods were deposited, or withdrawn from the original entry under the warehouse laws. Fraud is not to be presumed; and clearly, unless both parties were guilty of a departure from a positive law, the theory of fact assumed by the plaintiff cannot be sustained.

Having disposed of the first point made by the plaintiff, it remains to consider the second, which is, that the plaintiff is entitled to recover back the sum paid, because the goods were not deposited in a private bonded warehouse. Previous to the act of the 6th of August, 1846, [supra,] the privilege of warehousing importations in other than public stores was confined, except in certain special cases, to teas, wines, and distilled spirits. Importers of teas were authorized by the sixty-second section of the act of the 2d of March, 1799, [1 Stat. 673,] either to secure the duties or give bond to the collector of the district in double the amount of the duties, with condition for the payment of the same in two years from the date of the bond; and in case any importer of such goods elected to give the bond, it was made the duty of the collector to accept it without surety, provided the importer deposited the importation in one or more storehouses agreed upon between the importer and the inspector of the revenue. Two locks were then required to be affixed to each storehouse, the key of one to be kept by the importer, and the key of the other by the inspector, whose duty it was to attend at all seasonable hours to deliver the teas; but no delivery could be made till the duties were paid, nor without a permit in

writing, under the hand of the collector and naval officer. 1 Stat. 674. Similar provision was made in behalf of the importers of wines and distilled spirits, by the first section of the act of the 20th of April, 1818, [3 Stat. 469,] whereby it was left at their option, either to secure the duties or give bond in double the amount for the payment of the same in twelve calendar months; and if they elected to give the bond, it was made the duty of the collector to accept the same without surety, on the condition that the goods should be deposited at the expense and risk of the importer, in such public or other storehouses as should be agreed upon between the importer or other officer for the inspection of the revenue. All such importations also were required to be kept under the joint locks of the inspector and the importer; and no delivery could be made of such wines or distilled spirits without a permit in writing, under the hand of the collector and naval officer. 3 Stat. 469. Unclaimed goods have been the subject of frequent legislation, and the twelfth section of the act of the 30th of August, 1842, made provision for the neglect or failure of the merchant to pay the duties on the completion of the entry; but none of these provisions have any application to the question under consideration. 3 Stat. 562. Deposit of the wines or distilled spirits, it will be seen, might be made under the first section of the act of the 20th of April, 1818, in public or other storehouses, and that privilege was extended by the first section of the act of the 6th of August, 1846, to all importations properly entered for warehousing, according to the provisions of that act. Those places for the deposit of importations were called "other storehouses" in the act of the 20th of April, 1818, and "other stores" in the act of the 6th of August, 1846, which is entitled an act to establish a warehousing system. They had never been described as private bonded warehouses in the previous legislation of congress, and are not so denominated in the last-named act. 9 Stat. 53. Authority was given to the secretary of the treasury, by the fifth section of the last-named act, to make such regulations from time to time, not inconsistent with the laws of the United States, as might be necessary to give full effect to the provisions of the act, and secure a just accountability under the same. Assuming to act under that authority, the secretary of the treasury, on the 17th of February, 1849, issued certain instructions to the collectors of the customs. Three classes of bonded warehouses are designated by those instructions: first, stores owned by the United States or leased to them prior to that time, and known as public stores; second, stores in the possession of an importer, and in his sole occupancy for the storing of merchandise imported by himself; third, stores in the occupancy of persons desirous of engaging in the storage business. Every person, before he could be permitted to open such a store, was required by the instructions to give bond with sureties, exonerating the government and all the officers of the customs from any risk growing out of the joint custody of the goods stored in such storehouses. Classes two and three, mentioned in the instructions, are therein denominated private bonded warehouses, and all such stores are required to be placed in the custody of an inspector; but it is expressly directed, in the same instructions, that merchandise entered for warehousing will only be stored in these stores when the same are agreed on by the proper officer of the revenue and the importer, owner, or consignee.

Whether all of these regulations were authorized by the fifth section of the act of the 6th of August, 1846, is a question that need not be considered at the present time, as I am of the opinion that the plaintiff, after having deposited the goods as goods in warehouse, and enjoyed all the benefits of the warehouse system, cannot now, under the circumstances of this case, turn round and deny that the places of deposit agreed on between himself and the collector were proper places for the storage of the goods, within the meaning of the acts of congress then in force establishing the warehouse system. Recurring to the explanations of the agreed statement already given, it will be seen that he duly entered the goods for warehousing, and that the collector, after the accommodations for the goods had been procured by the plaintiff in the manner before stated, assented to the deposit of the same in the places so procured, under the provisions of the warehouse laws, on the condition that the plaintiff would pay to him, as collector of the customs, half the usual rates of storage charged on similar goods in the public warehouses. Payment was accordingly made to the defendant, as collector, on the withdrawal of the merchandise, and of course it was the duty of the collector to render an account of the same to the department. Suppose a bond might properly have been required of the owners of the store, and of the wharf, under the beforementioned instructions, still, it was a security for the benefit of the government, and it did not injuriously affect the rights of the plaintiff, that none such was taken. All his rights were secured under the arrangement, and having paid the charge for storage, under the agreement he made with the collector, he cannot now recover it back. According to the agreement of the parties, judgment must be entered for the defendant, with costs.

Case No. 604.

ATKINS et al. v. PETERSBURG R. CO.

[3 Hughes, 307.] [1]

Circuit Court, E. D. Virginia. July Term, 1879.

RAILROAD COMPANIES—RECEIVERS—ADVANCES TO MEET WAGES PREFERRED TO MORTGAGES.

When the company defendant was in difficulty, before the appointment of a receiver, from its employes threatening to strike for the nonpayment of wages due for months past, and on appeal by its officers to the petitioners, who were holders of bonds, they advanced the money necessary for the payment of the back wages due, on a distinct understanding that they should be reimbursed out of the first net earnings of the company, and that the money advanced should be paid to the employes: and afterwards, before their reimbursement, the road went into the custody of the court under the appointment of a receiver. *Held*, that the advances must be paid in preference to the claims of mortgagees, out of income accruing while the road was in the custody of the court.

[See note at end of case.]

In equity.

Frank W. Christian, for petitioners.

H. H. Marshall and J. Wesley Friend, for the trustees of the mortgagees.

HUGHES, District Judge. The petitioners, Hiram Sibley, John B. Davis, Thomas Wilson, and J. D. Evans, ask for payment, in preference to bonds held under first and second mortgages, of certain moneys advanced to the president of the Petersburg Railroad Company, after default in payment of certain coupons and before the filing of the bill for the appointment of a receiver. The advance was made on an understanding with the president and directors that they should be paid out of the first net current revenues, and that the amount advanced should be used in paying off back wages due to the employes of the company. Each of the petitioners had at the time of the advance second mortgage bonds of the company, each of them except Davis was a stockholder, and Davis had made large advances to one Ragland, personally, on a pledge of shares owned by Ragland, who, until recently before the advances of the petitioners, had been president of the company. Some time in the first half of the year 1875, Ragland resigned, a new board of directors were appointed, and another president was elected. Davis and Sibley were elected members of this new board in their absence, and I believe against their consent, but Sibley refused to serve, and though Davis protested against being assigned to the position, he never actually resigned. Davis held the additional relation to the company of a trustee with Thomas Branch in the deed securing the second mortgage bonds. Isaac H. Carrington was elected president.

Shortly after this reorganization of the company its affairs came to a serious crisis in the form of a threatened strike of its employes for wages in arrears. The amount of the arrearage was about $27,000, and it was necessary for the new president to raise this sum of money without delay. In his extremity he appealed to the petitioners to advance the amount needed. Although the fact is disputed by J. Wilcox Brown, trustee in the first mortgage, and by Thomas Branch, trustee in the second mortgage, who resist this petition, the evidence that that was the object of the petitioners in making the advance, and that they made it on a specific appeal from President Carrington for that particular purpose, is conclusive. Moreover the evidence shows that the advance was made for this object on an understanding between the petitioners and President Carrington, approved by all of the directors but one, who was absent from sickness, that they should be reimbursed their advance out of the first net earnings of the road. The amount advanced was $26,500, and it was paid by the petitioners at several dates, from July 28th to August 6th, 1875. This particular fund was deposited in the Planters' National Bank of Richmond, of which Davis was president; the current earnings of the company were deposited in other banks. In his letter relating to the advance, dated in New York, 26th July, 1875, Mr. Sibley said to President Carrington: "This amount is to pay the men on the road. I regard the labor on the road as the first lien on the property. Mr. Davis will give you an equal amount, which will pay or nearly so, the arrears. I want you to send me your receipt for the ten thousand and a certificate that Mr. Davis has paid an equal amount for the purpose, with an agreement that these advances by me and Mr. Davis are to be refunded to us in equal amounts out of the first net profits of the road. It is desired that the men be paid off at once, in order that any may be discharged that are not wanted, etc."

The reply of President Carrington to this letter is not given in the evidence, and if ever sent in writing, would seem to have been lost. But letters from him to Mr. Sibley are in proof, written in November and December following. In that of November 1st, 1875, Mr. Carrington says: "So far as respects the $20,000 advanced by Mr. Davis and yourself, and the $6500 advanced by Evans and Wilson, I look upon them as debts standing upon a different footing from all other debts of the company. They are for cash advanced to the company without security, at a time when it was necessary to the life of the company, etc." In a long letter of November 23d, explaining his financial plans and efforts, Mr. Carrington uses similar language, and in his letter of Decem-

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

ber 29th, 1875, the same officer says: "Mr. John B. Davis has demanded that the first payments to be made, over and above actual running expenses, shall be, upon the four loans, made to the company which are unsecured, viz.: $10,000 by you, $10,000 by J. B. Davis, $3250 by Thomas Wilson, and $3250 by Evans. I acquiesce in this. I suppose you and Mr. Davis understand each other. I expect to send you a check for $2000 during this week, and to pay Mr. Davis a similar amount, and my expectation is to pay you both $3000 more by February 1st, making $5000 to each in part of above loans."

Mr. Davis, in his deposition, says: "The advance was for the purpose of paying off the employes of the road, and the agreement by the president, Mr. Carrington, was that it should be repaid out of the first earnings of the road." Isaac H. Carrington says, in his testimony: "I was elected president of the Petersburg Railroad Company on the 19th of July, 1875. The road at that time was in very bad condition; the iron was so much worn as to render travel unsafe; the ditches were generally filled up; there were many unsound ties in the track; the rolling stock needed repair; there were very few laborers employed as track hands; many of the employes had brought suit for their wages and recovered judgments in North Carolina. Two engines of the company had been levied on under executions on these judgments, and were in possession of the sheriff; other judgments had been obtained against the company in Virginia; the company was without credit, and its operations were suffering for want of necessary supplies of all kinds. Amounts due to the company from connecting roads had been attached at Baltimore. A few weeks before my election as president, I had made a full examination of the affairs of the road. On my election I represented to John B. Davis and Hiram Sibley in person, and to other stockholders by letter that the condition of the road rendered an immediate advance of money necessary. There were past due wages to employes amounting to between $27,000 and $29,000, and I told them that it would be impossible to manage the road with any success unless payment was made to these employes. I also represented the absolute necessity for immediate outlay on the track and rolling stock; also, that there were debts due and secured by collateral, and that there was imminent danger that the collateral would be sacrificed at forced sale. Four of the stockholders responded to this appeal by making the following advances (these have been already stated). There was no written contract stipulating the terms or conditions of this loan. There was an understanding that the object of the loan was to enable me to pay wages, and my recollection is that Hiram Sibley particularly insisted that his money should take that direction. I executed the notes of the company at four months (I think), and they were renewed at maturity. I resigned the office of president in January, 1876, and do not know what was done with these notes afterwards; our distinct understanding with these gentlemen was that theirs was to be considered a debt of the highest obligation, and I stated to them that if they loaned the money, and I afterwards found that I could not get on with the road, I would devote its receipts to the payment of these notes. I file as part of my deposition three letters, etc. (describing the three letters already quoted from, written by himself to Sibley in November and December, 1875)."

As tending to show that this was not the understanding on which the advances in question were made by petitioners, the defence produce the account of the company with the Planters' National Bank, of which Mr. Davis was president, from which it appears that this specific money was not all paid specifically in discharge of wages in arrear, but went in part to other purposes, and especially that $5000 of it were paid to the counsel of a judgment creditor of the road, in part payment of his debt (paid as the evidence shows without the knowledge of Davis). This creditor was the one on whose bill for foreclosure, this court appointed a receiver and took possession of the road in May, 1877; but under a consent decree. This matter is referred to by Mr. Carrington in his testimony in answer to a question by the defence, whether all the money advanced by Davis, Sibley, Wilson, and Evans was applied to the payment of back dues to the employes of the company. Mr. Carrington says: "It was not. On the 29th of July, 1875, I paid, in part of the judgment for wages due in Weldon, $3777; and on the 7th of August, 1875, I paid $6500 on pay rolls for the months of June and July, 1875. The policy I adopted and which I followed as long as I was president was, to pay current wages as they matured, and thus carry the payments back month by month as I was able.... When I received these loans I deposited them in the Planters' National Bank of Richmond.... Under the arrangements under which I borrowed this money I did not consider myself bound to apply this identical money to the payment of wages; but, if there was pressing necessity from other directions, I felt at liberty to use this money for that purpose, thus relieving current receipts, and looking to current receipts to replace it. I did feel bound to apply an amount equal to these loans to back wages, and continued to make such application from time to time during my presidency. The payment of the pay rolls for June and July, and the partial payment of the judgments of Weldon entirely restored the confidence of the employes, and they were willing to wait, I giving frequent assurances that I would continue the payment as fast as I could."

It would seem in short that the back wages for which the advances were made by the petitioners were all paid off in the course of time, but not in whole with the specific money advanced for that specific purpose, and deposited in the Planters' National Bank. A great deal of the testimony put into the case by the defence (in fact much the greater part of it) relates to the history of the difficulties of the company subsequent to this advance of money, to transactions directly or indirectly connected with the subsequent filing of the bill in this court for the appointment of a receiver, and to the history of the bill between the time it was filed in the summer or fall of 1876 and the appointment of a receiver in May, 1877. But I do not think that this testimony at all affects the case as it appears from the letters of Carrington and Sibley that have been referred to, and the testimony of Carrington and Davis that has been given. The fact seems to be conclusively proved that on the part of the petitioners, their money was advanced for the specific purpose of keeping the road running by the payment of arrears due its employes, and that though all the money deposited in the Planters' National Bank was not specifically used for that one purpose, yet that the equivalent of any particular part of that money which was otherwise used by the president was paid to the employes out of current receipts in time to satisfy the employes and accomplish the object for which it was advanced by the petitioners. When I further state that the net current earnings of the road for any three or four months since the petitioners advanced the money, would have been sufficient to pay off the advance, I believe that I have stated all the facts of the case material to its decision. Although this suit was originally brought by a judgment creditor, yet the decree appointing a receiver was given by consent, and the trustees under the mortgage deeds at once came in by cross-bill, and took the position of domini litis in the cause.

The questions presented by the petition are: 1st. Whether, under any circumstances, the advance of moneys to keep a railroad running without the exaction of security, can entitle the creditor to payment out of the earnings of the road in priority over the claims of mortgagees, and if this can be done in any case? 2d. Whether the circumstances under which the petitioners in this case advanced the money which they now ask the court to repay to them, are such as will justify the court in granting their petition?

The trustees who contest the claim of these petitioners rely upon the priority of their mortgages and the sanctity of their rights, as secured creditors, under solemn deeds. They vouch in support of the superiority of their rights the decision of this court in the Atlantic, Mississippi and Ohio Railroad Case, [Skiddy v. Atlantic, M. & O. R. Co., Case No. 12,922,] upon the petition of the Pennsylvania Steel Company, of sundry creditors holding assigned labor claims, and of sundry other holders of unsecured debts against that defendant company. I concurred in the decision in that case, 1st, Because the principal part of the claims then passed upon did not present the peculiar equities about to be discussed; and, 2d, Because, as to the rest of those claims, the weight of authority seemed at that time to preponderate in favor of mortgage creditors as against unsecured creditors of every name. Since then the supreme court of the United States has had this whole subject before it in a group of suits connected with the Chicago, Danville and Vincennes Railroad Company, in which it has passed upon the rights of a variety of petitioners having claims adverse to the mortgagees of that railroad. Its decrees in the various petitions and suits referred to are the more important because they were made after a general invitation had been extended to members of the bar of that court interested in like cases, to present briefs on the questions arising in that case; and because, after a most patient hearing and the most searching and able argument from the best legal minds of the country, the court arrived at unanimous conclusions on this delicate, difficult, and important subject. In the principal case before it, connected with the railroad mentioned, that of Fosdick v. Schall, [99 U. S. 235,] the court, through Mr. Chief Justice Waite, announced its views of the law in the following paragraphs, which though they fall within the characterization of dicta, yet are in fact a careful and deliberate expression of what the court considered to be the law of this whole subject. Nor is there any reason to doubt but that it will apply the principles indicated to cases which will come before it hereafter. In the case of Fosdick v. Schall, [Id.,] the court, in the course of its decision, said as follows: "We have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may under the circumstances of the particular case appear to be reasonable. Railroad mortgages are comparatively new in the history of judicial proceedings. They are peculiar in their character, and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions, by some parties, from their strict legal

rights, in order to secure advantages that could not otherwise be obtained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation. The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed it frequently happens that debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings which ordinarily should go to pay the daily and monthly expenses are kept from those to whom in equity they belong, and used to pay the mortgaged debt. The income out of which the mortgage is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipments, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income, and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do; for, even though the mortgage may in terms give a lien upon the profits and income until possession of the mortgaged premises is actually taken or something equivalent, the whole earnings belong to the company, and are subject to its control. The mortgagee has his strict rights, which he may enforce in the ordinary way. If he asks no favors, he need grant none; but if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion, and the chancellor should so mould his order that while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied. We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipments provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because in a sense the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, on an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While ordinarily this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that in the course of the administration of the cause the court is called upon to take income, which otherwise would be applied to the payment of old debts, for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipments. In this way the value of the mortgaged property is not unfrequently materially increased."

These principles strike my mind as self-evident. I do not think they can be successfully controverted. More briefly stated they are these: The possession of a receiver is only that of the court whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principles as if no change of possession had taken place. When a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable. If the court should not do this in the decree appointing a receiver, it may enforce these equities against mort-

gagees, in proper cases in later decrees. The income out of which the mortgage is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements; and every railroad mortgagee, even of earnings, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. The mortgagee has his strict rights, which he may enforce in the ordinary way. If he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may be required to submit to the operation of the rule requiring that he shall do equity in order to get equity.

In general the opinion holds that a court may for certain purposes stand in the shoes of the company whose property it has sequestrated, and satisfy equities which the company necessarily contracted for the benefit of all parties interested in keeping the railroad alive and in operation. The opinion does not go to the extent of allowing the court to touch the corpus of the mortgaged property for the purpose of discharging the equitable claims described; but limits it to the earnings as the fund out of which they are to be paid. It virtually requires that the court shall pay these claims out of income earned, while the road is in its custody, forbidding it to fix them as a permanent charge upon the property after it passes out of its custody. The reasoning of the opinion covers cases only of the strongest equity and clearest good faith. It does not cover any expenditures but such as were of urgent necessity, and as inured to the benefit of all parties interested in the property. While the supreme court is thus severe as to the character of the claims which may be paid, and as to the funds out of which payment is to be made; yet it does not limit them to the payment of wages due employes. It allows the expenses of permanent improvements to be refunded where those improvements were necessary to render the road safe for public use, and when the credit for them was incurred on the faith of their being paid for out of current earnings. There was no such pledge of faith given in the case of the Pennsylvania Steel Company, nor in favor of the holders of assigned labor claims in the Atlantic, Mississippi and Ohio Case, which has been referred to. The supreme court, in its opinion under consideration, makes a broad distinction between railroads (which the interests of all classes of creditors and good faith to the public who charter them for public purposes, alike require to be kept going and alive) and other property. It intimates that a court may order the payment of such debts incurred by a railroad company before the appointment of a receiver, as it may authorize a receiver to contract and pay after his appointment; provided that the corpus of the property be not touched.

Now it has never been questioned that a receiver may apply so much of the current income as may be necessary for repairing or operating the road, or may, by receiver's certificates, anticipate the future income for that purpose; and it would be difficult to draw a distinction between the principles under which a court authorizes a receiver to make necessary expenses for operating a railroad and keeping it in a safe condition, and the principles embodied in the language quoted from the opinion of the supreme court, relating to sundry expenses of the railroad companies incurred before the appointment of receivers. The cases where the power to issue receiver's certificates has been denied, have been where they were to be issued, not for the preservation, but for the improvement of the property. Courts have in some instances gone even to the length of authorizing permanent improvements where the circumstances of the case called for the exercise of the power; but the opinion of the supreme court in Fosdick v. Schall, [99 U. S. 235,] does not go that far. It is enough for us that no court has ever refused to issue such certificates when it was necessary for repairing the road or keeping it agoing as a safe road; and if it may authorize such expenditures by a receiver, it may pay them if they have been made by the company before the appointment of a receiver.

Mr. Jones, who cannot be said to lean against the rights of bondholders, in his work on Railroad Securities, (section 537,) says: "When it is necessary for a receiver to raise money for the purpose of repairing or operating a railroad, the court may authorize him to issue negotiable certificates of indebtedness, which shall constitute a first lien of the property or the proceeds of it, and shall be redeemable within a limited time, or when the property is sold by the court." And, at section 542, he says: "The court has power, while in possession of property, to protect it from loss and destruction, and to preserve it in the condition in which it was received; and for this purpose it may authorize the expenditure from the property itself of whatever is absolutely necessary for its preservation, and may do this as against any and all parties interested."

These propositions are fully sustained by the cases of Kennedy v. St. Paul, etc., R. Co., [Case No. 7,706;] Meger v. Johnston, 53 Ala. 237; Hoover v. Montclair, etc., R. Co., 29 N. J. Eq. 4; Jerome v. McCarter, 94 U. S. 734; Vermont & C. R. Co. v. Vermont Cent. R. Co., [50 Vt. 569,] stated in Jones, Ry. Sec. § 536; Stanton v. Alabama & C. R. Co., [Case No. 13,296.]

It seems to me that the equity of the petitioners, Sibley, Davis, Wilson, and Evans, falls within the reasoning of the supreme court. In consequence of the non-payment of their wages the employes of the Peters-

burg Railroad Company were greatly dissatisfied, and it was found that in order to retain their services some provision must be made to satisfy their just claims. Many of them had instituted suits and recovered judgments for their wages. In these suits they had attached property of the company and garnished debts due to it. The officers of the company recognized that for the efficient operation of the road, it was absolutely essential that these claims should be satisfied. But the company had neither money nor credit. In this state of things the petitioners made these advances, at the request of the president of the company. For it they received no consideration, and from it they derived no peculiar or private benefit apart from the general advantage accruing to the railroad. The advance enabled the company to continue its operations, and it inured to the general advantages of all concerned in its success. In July, 1875, the alternative presented was, that these advances should be made or the road be judically sequestrated. The petitioners believed it could be extricated from its difficulties, and most probably it could have but for the discredit and embarrassment of the company produced by subsequent legal proceedings against it. The petitioners did not desire a receiver, and proved their bona fides by this advance of their money. But even if a receiver had been appointed in July, 1875, the first thing that would have confronted him would have been these wages. To run the road it would have been necessary to pay them. They had a claim on the road which the court would have provided for; and the company having no money, the first thing necessary for the court to do would have been to authorize the receiver to issue certificates to raise money to pay these wages, i. e., to raise the money which was supplied by these very advances. As equity regards the substance and not the form, these advances must be treated as preferred debts. The employes had a claim on the road which it was absolutely essential to the interests of all should be satisfied. These petitioners came forward on an appeal from the president, and advanced their private means, as one of the witnesses said, to save the life of the company. They were not speculators, but persons acting for the benefit of a concern in which they had a deep interest. The right of the mortgagees to have the fund realized by the receiver applied to their debts, is equitable only; and should not be so enforced as to produce inequity. The court in a proper case is bound to attach to its enjoyment such conditions as are right and just. It would be highly inequitable to refuse to pay advances made for the benefit of mortgagees by men whom the servants of the mortgagees promised to refund out of current earnings. This court, when it appointed a receiver, might have done so upon the just and reasonable condition that those claims were to be provided for; and, according to the opinion of the supreme court, it may equally do so by an order subsequently made, operating by way of modification of the original order. See, also, Douglass v. Cline, 12 Bush, 608. I will therefore make an order granting the prayer of these petitioners.

[NOTE. Other decisions that wages of employes, accruing prior to the appointment of a receiver, should have priority over the claims of mortgagees or other lienholders, are as follows: Turner v. Indianapolis, B. & W. Ry. Co., Case No. 14,258; Taylor v. Philadelphia & R. R. Co., 7 Fed. 377; Union Trust Co. v. Souther, 107 U. S. 591, 2 Sup. Ct. 295; Olyphant v. St. Louis Ore & Steel Co., 22 Fed. 179; Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. 286, 1 Sup. Ct. 140; Dow v. Memphis & L. R. Co., 20 Fed. 260; Blair v. St. Louis, H. & K. R. Co., 22 Fed. 471.]

ATKINS, (STATE OF GEORGIA v.) See Case No. 5,350.

Case No. 605.

ATKINS v. STEACY.

[5 Dill. 381, note.][1]

Circuit Court, E. D. Arkansas. 1879.

STOCKHOLDER'S BILL TO IMPEACH JUDGMENT AGAINST THE CORPORATION.

A bill by a stockholder to impeach a judgment against the corporation was, under the circumstances, dismissed, but without prejudice.

In equity. The plaintiff [Elisha Atkins] in this suit, in behalf of himself and all other stockholders of the Little Rock and Fort Smith Railroad Company [against John G. Steacy, surviving partner of Peirce, Steacy & Yorston, and others,] prays that the defendant, Steacy, may be enjoined from proceeding further against the plaintiff and said railroad company, and all the stockholders thereof, in a suit which he, as surviving partner of the firm of Peirce, Steacy & Yorston, has instituted in this court against the plaintiff and certain alleged stockholders, to collect from them the amount of a judgment for $1,041,181.70, which judgment the said Steacy, as such surviving partner, recovered against said company by default on the 8th day of December, 1875, in the circuit court of Pulaski county. The plaintiff also prays that the said defendant may be enjoined from otherwise seeking and endeavoring to enforce the collection and satisfaction of said judgment against the plaintiff and said company and all the stockholders thereof. Then follows a prayer for general relief. The equities set forth in the bill were denied in the answers, and, a replication having been filed, voluminous proofs were taken. The cause is before the court on final hearing, and was submitted and argued with that of Steacy and Hurley v. Atkins, impleaded with

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

the Little Rock and Fort Smith Railroad Company, et als., [Case No. 13,329.]

C. W. Huntington, for plaintiff.

W. H. Winfield, B. F. Rice, and M. L. Rice, for defendants.

Before DILLON, Circuit Judge, and CALDWELL, District Judge.

DILLON, Circuit Judge. The judgment which the bill seeks to impeach was rendered in the state court. The judgment creditor made that judgment the basis, in part, of an original creditor's bill in equity in this court to enforce against the complainant, Atkins, and other stockholders in the Little Rock and Fort Smith Railroad Company, an alleged individual and corporate liability as stockholders. We have held, in that case, that the stockholders were under no individual or double liability, and that, as Atkins was a bona fide transferee for value of full-paid stock, he was under no liability, of any kind, to the plaintiffs or other creditors of the company in respect thereto. Accordingly, a decree has been ordered dismissing the bill as to him. No other stockholder has joined him in the present suit to impeach the judgment of Steacy for $1,041,181.70 rendered by the state court. This bill of Atkins is, in its nature, supplementary or ancillary to the creditors' suit against him as a stockholder. Since it has been determined that he is in no way liable to the creditors of the company in his capacity as a stockholder, he has no interest in the result of the creditors' suit against other stockholders.

The judgment in question, it is to remembered, was not rendered in this court, but in the state court. The learned counsel for Mr. Atkins admitted, in the argument, that an original bill would not lie in this court by Mr. Atkins to impeach the judgment recovered in the state court, and that the basis of Mr. Atkins' present bill was that, since the judgment in the state court was being proceeded upon in this court as the basis, in part, of a creditors' bill, this gave to this court the right to prevent any inequitable or fraudulent use being made of it to his injury. Since no such injury can, under our decree in the other case, occur, and since no other stockholder has united with Mr. Atkins in seeking to impeach that judgment, a decree will be here entered (without deciding whether that judgment is wholly invalid or is excessive in the amount recovered) dismissing the plaintiff's bill, without prejudice to the right to bring another suit if occasion should arise, and without prejudice, also, to other stockholders in this regard.

Bill dismissed.

CALDWELL, District Judge, concurs.

[NOTE. This case was originally published as a note to Steacy v. Little Rock & Ft. S. R. Co., Case No. 13,329.]

ATKINS, (UNITED STATES v.) See Case No. 14,474.

Case No. 606.

In re ATKINSON.

[7 N. B. R. 143; 5 Amer. Law T. Rep. 320; 4 Chi. Leg. News, 359; 19 Pittsb. Leg. J. 188; 3 Pittsb. Rep. 423.]

District Court, W. D. Pennsylvania. July 2, 1872.

CONTEMPT—VIOLATION OF INJUNCTION—STATE AND FEDERAL COURTS.

[A creditor holding a judgment from a state court, and proceeding with the execution, in defiance of an injunction from a federal court, in which the debtor has filed a voluntary petition in bankruptcy, will be attached for contempt.]

[Cited in Re Litchfield, 13 Fed. 866; Hudson v. Schwab, Case No. 6,835.]

[In bankruptcy. A rule nisi was granted against certain creditors who held a judgment from the court of common pleas of Wyoming county, and who proceeded with the execution in defiance of an injunction. On final hearing. Rule absolute.]

H. B. Swoope and S. A. & W. S. Purviance, for the rule.

Mr. Platt, contra.

McCANDLESS, District Judge. The proofs show that the respondents held judgments against Atkinson in the court of common pleas of Wyoming county, upon which they issued writs of fi. fa. on the twentieth of November, eighteen hundred and seventy-one, and levied upon the personal property of the defendant on the twenty-fifth of December, eighteen hundred and seventy-one. Atkinson filed a voluntary petition in bankruptcy in this court, and on the third day of January, eighteen hundred and seventy-two, was duly declared a bankrupt. A petition was presented on the thirteenth of January, eighteen hundred and seventy-two, praying for an injunction to restrain the respondents from proceeding with their execution, and the return of the marshal shows that it was regularly served on the seventeenth of the same month. Notwithstanding this, the respondents, in defiance of the writ of injunction, proceeded with their writs of fi. fa., and caused the sheriff of Wyoming county to sell the personal property of the bankrupt. The court is willing to make all proper allowance for the want of knowledge which exists in agricultural communities as to the operation of the bankrupt law, and the power of the courts of the United States in its administration. At the proper time that will be taken into consideration; but we would be recreant to our judicial trust should we fail to maintain the law and vindicate its process. The respondents to this rule were in error in supposing that the judgment of the state court and its execution were paramount to the federal authority. The bankrupt law was passed in pursuance of a provision of the constitution of the United States. Its

administration, and when invoked, the cases of all insolvent persons and corporations are, by its requirements, placed exclusively within the jurisdiction of the federal courts sitting as courts of bankruptcy. It suspends all state insolvent laws mitigating [militating] against its provisions. It is a wise and beneficial law, making an equal distribution of the assets of the debtor among all the creditors who have proved their debts, at the same time preserving intact all valid liens entitled to priority. It was designed to relieve the debtor from oppressive liabilities which render him unfit to contribute to the productive wealth of the country; and it affords to the creditor the assurance that all the property of the debtor, except what from motives of humanity he is permitted to retain, shall be honestly devoted to the payment of his debts. With a fraudulent debtor it is wisely and justly stringent, compelling a full discovery and surrender of his assets for the benefit of his creditors, under peril of imprisonment for contempt, which in the courts of the United States, is a penalty not to be disregarded. Disobedience of the injunction in the present instance was a grave offense. Its palliation, so ably argued by respondent's counsel at the argument, will be considered upon the return of the attachment. The rule is made absolute and attachment ordered.

ATKINSON, In re. See Case No. 613.

Case No. 607.

ATKINSON v. BOARDMAN.

Circuit Court, S. D. New York. 1851.

SUIT TO INVALIDATE PATENT GRANTED AFTER INTERFERENCE—HEARING—EVIDENCE.

1. Upon a bill filed to declare a patent granted by the commissioner, after an interference, invalid or inoperative, under section 16 of the act of [July 4,] 1836, [5 Stat. 123,] amended by section 10 of the act of [March 3,] 1839, [5 Stat. 354,] the hearing is altogether independent of that before the commissioner, and takes place upon such testimony as the parties may see fit to produce, agreeably to the rules and practice of a court of equity.

2. The evidence before the commissioner is not evidence in such a suit, except by consent of parties; nor are the parties to the suit restricted to the testimony used before the commissioner. Either party is at liberty to introduce additional evidence.

[Cited in Re Squire, Case No. 13,269, and in Union Paper-Bag Mach. Co. v. Crane, Case No. 14,388.]

[NOTE. Nowhere reported. Opinion by NELSON, Circuit Justice, not now accessible. Statement of points determined taken from Law Pat. Dig. 265,666.]

Case No. 608.

ATKINSON v. BOARDMAN.

[1 McA. Pat. Cas. 80; Cranch. Pat. Dec. 139.]

Circuit Court, District of Columbia. Oct., 1847.

PATENTS FOR INVENTION — CONFLICTING APPLICATIONS—INTERFERENCE.

[In a case of conflicting applications for letters patent for certain improvements in the construction of steam-pumps, it appeared that defendant filed his application for the invention, which was rejected, presumably for want of patentability in the design as it was then presented; that certain improvements were thereafter made, by which the matter became patentable; that, after the rejection of defendant's first application, no patentable improvements were invented or made by plaintiff, who claimed to have been the inventor; that five pumps were made under the direction and supervision of defendant; that plaintiff did not suggest the peculiar combination of mechanical principles upon which the improvements were based. *Held*, that defendant was entitled to letters patent for the improvements.]

[On appeal from the commissioner of patents.]

Chas. M. Keller, for Atkinson.

1. The commissioner has no authority in deciding an interference to refer to caveats, letters alleged to have been filed in the patent office, or generally to the files and entries in the patent office which have not been introduced in evidence by the parties.

2. The fact that Boardman, in carrying out the invention of Atkinson, was the first to make a machine embodying the invention, does not place the burden of proof upon Atkinson. The invention is his who first conceives of and discovers the thought or idea which is the essence of the invention; and if the inventor is not a worker with tools, he is at liberty to employ skilled mechanics to carry his invention into effect. Bloxam v. Elsee, [6 Barn. & C. 169;] Hind. Pat. 23, 25, 31, 445. The fact that the inventor does employ, and is often compelled so to employ, mechanics in building his inventions does not, and should not in reason, create a prima-facie case against him.

Keller & Greenough, for appellant.

Z. C. Robbins, for appellee.

CRANCH, Chief Judge. This is an appeal from the decision of the commissioner of patents in a case of conflicting applications for certain improvements in the construction of steam-pumps. [Affirmed.]

It appears by the files in the patent office that on the 4th of December, 1843, William Boardman, Jr., filed his application for his invention "of a new and improved portable steam-pumping engine for relieving stranded vessels, and for other purposes;" which application was rejected by the then commissioner of patents on the 20th of February, 1844. It does not appear upon what grounds that application was rejected, but it is suggested that the matter as then presented was not patentable, but that certain improvements have been since invented and made by which the matter has become patentable; and the commissioner has decided that the applicant —William Boardman, Jr.—is entitled to a patent. It is unnecessary to ascertain what those improvements were, as this is a case of conflicting applications for a patent for the same thing. The question is not, now,

who invented the matter upon which the first application of Mr. Boardman was founded, but who is the inventor of the improvements which have made the matter patentable. That such improvements have been made, is admitted by both parties and by the commissioner.

I do not find any evidence that Mr. Atkinson, after the rejection of Mr. Boardman's first application on the 20th of February, 1844, invented any patentable improvement upon the pump. It appears, by all the evidence that Mr. Boardman constructed the pump and all the improvements. In the absence of all evidence to the contrary, the presumption, therefore, is that he was also the inventor; and the burden of proof is thrown upon Mr. Atkinson to show, not merely that he first suggested to Mr. Boardman the abstract idea of a steam-pump—(for steam-pumps had been in common use for many years)—but that he invented the improvements which entitled it to a patent. To rebut this inference Mr. Atkinson produces the deposition of Josiah L. Hale, who says: "Not long after the loss of the ship 'Sheffield,' in November or December, 1843, I met Mr. Atkinson and Mr. Boardman in the Merchants' Exchange; and knowing that some alienation of feeling existed between them, and being anxious that they should be friends, I said to Mr. Boardman, 'Why don't you and Mr. Atkinson settle your difficulties,' or words equivalent. He (Boardman) made a reply having reference to a little paragraph which had about that time appeared in one of the papers respecting the pump in question,—meaning, no doubt, the paragraph which appeared in the Journal of Commerce of the 25th of November, 1843, which gave to Mr. Atkinson the whole credit of the invention of the pump. He (Boardman) spoke with some warmth, but respectfully. The deponent replied, I had always supposed Mr. Atkinson was the inventor; he (Boardman) said he was, I again say he was; he (Boardman) used these words or words equally strong. I (deponent) replied, 'so I always supposed.' After those strong expressions, Mr. Boardman said that it was the combination which made the steam-pump. Always supposing that Mr. Atkinson was the inventor, I feel certain I could never have conveyed any other idea to any person that he was not the inventor."

Taking the whole testimony of Mr. Josiah L. Hale together, it seems strange that Mr. Boardman, while expressing indignation at the paragraph which gave to Mr. Atkinson the whole credit for the invention of the pump, should have admitted that he was the inventor in the technical sense of the word. He might have admitted that Mr. Atkinson suggested the idea of having a steam-pump, as testified by Mr. Flanders, and yet he (Boardman) might be the inventor of the peculiar combination of mechanical principles which entitled it to a patent. Mr. Hale says that Mr. Boardman told him "that it was the combination which made the steam-pump." There is no evidence that that combination was suggested to him by Mr. Atkinson. I do not perceive in the testimony any further evidence in support of Mr. Atkinson's claim to be the inventor of any of the patentable improvements of the portable steam-pump. I have not considered the declarations of the parties in their own favor in the absence of each other as competent evidence in this cause for any purpose but to ascertain when and what they have respectively claimed to have invented. There is no evidence that Mr. Boardman was in the employment and pay of Mr. Atkinson at the time of the supposed invention, or at the time of the construction of the improvements which rendered it a patentable invention, or at any previous time. On the contrary, it appears in the testimony of Mr. Carmen that before the first application for a patent in December, 1843, Mr. Boardman built four of these pumps for the board of underwriters, who paid him for the construction thereof, and that this was done without the interference or agency, but with the knowledge, of Mr. Boardman. There does not appear to be any evidence that Mr. Atkinson, either before or after the rejection of Mr. Boardman's application for a patent for the pump, gave Mr. Boardman any instructions in relation to the particular combination of mechanical principles which is understood to be the ground of his present application for a patent, nor any model or drawings by which to construct the pump; nor does there appear to be any evidence that he paid Boardman or any other person for constructing it, or that the underwriters had any authority from Mr. Atkinson to use those pumps which had been built for them by Mr. Boardman.

The deposition of Mr. Josiah L. Hale was taken in New York ten days after Mr. Boardman's (Sr.) deposition had been taken in Nashville, N. H., and may have been taken with a view to rebut it. Mr. Boardman testified that between the spring of 1841 and the fall of 1842 Mr. Atkinson told him that William (his son) had invented a steam-pump at his (Atkinson's) request, and that he had requested him to give his attention to getting up a steam-pump—a portable pump to be used about wrecked vessels. That Atkinson asked him if he had seen the model of the pump invented by William. He and this witness replied that it was shown to him by Carmen. That in none of the conversations which he had with Mr. Atkinson did he ever pretend or intimate that he was the inventor of the pump or of any part of it; but, on the contrary, had always stated that William (his son) was the inventor. That in September, 1842, Mr. Hale, speaking of William Boardman, Jr., said he had recently invented a steam-pump which they thought highly of, and he should

use his influence to have the insurance company adopt it and to have one built, and that he intended William should make money out of it. Mrs. Boardman, mother of the appellee, says that in the summer of 1842 Mr. Atkinson, speaking of her son William, told her that he had been inventing a new pump—a steam-pump—to raise ships from the ocean; that he thought William would do something great with it; that he would assist him; that in the next season Mr. Atkinson was again at their house in Nashville. He said William was getting along finely with his pump, and expressed his opinion that it would be very valuable to him; that in neither of those conversations did Mr. Atkinson intimate that he had invented any part of the said pump; that he expressed himself as grateful for favors he had received from her husband, and was glad to have some opportunities to make a return by assisting her son. Mr. Jeremiah J. Dickson says that some time between June or September, 1842, he was present at the exhibition of a steam-pump in Pearl street at the request of Mr. Atkinson; that two or three of the board of underwriters were there, and he thinks Mr. Boardman was there also. He understood from Mr. Atkinson that Mr. Boardman was the inventor of the pump; that Mr. Atkinson was to find the funds, and that they were to be partners in the concern, and that he always thought they were partners until one or two years ago, when he learned there had been some misunderstanding between them. Horace Prior testifies that he received from Mr. Boardman compensation for the use of the room in which the pump was exhibited. Mr. Orlando Burnett proves the publication of the offensive paragraph which seems to have caused the misunderstanding between Boardman and Atkinson, by attributing the whole invention to Mr. Atkinson. This paragraph, a copy of which is annexed to Mr. Burnett's deposition, appeared in the Journal of Commerce of the 25th of November, 1843. This seems to have excited Mr. Boardman, and on the 4th of December following he filed his petition for a patent. William Hetcher testifies that William Boardman, Jr., employed him to make the patterns for the pump, and paid him for making them. Mr. Boardman showed him a sketch which gave him the idea so that he could commence. He never had any communication with Mr. Atkinson, and did not know him till the day of taking his deposition. This witness made a casting of the pump pattern. Mr. Boardman made an alteration in the angle of the discharge nozzle. About the 1st of June, 1842, he took to Mr. Boardman a boiler for the purpose of trying the model, which was then complete. The boiler was of iron. The pumps were cast in Browning's foundry.

Cyrus Currin, of the firm of Davis, Currin & Co., machinists at Newark, New Jersey, testifies that they made five of these steam-pumps for Mr. Boardman, and were paid for them by the New York underwriters, Mr. Boardman having testified to the accuracy of the accounts; that he directed the building of them and drafted them. The order for the first pump was given about the middle of March, and completed the middle of May, 1843. Mr. Atkinson was never in the shop during the building of these pumps to the knowledge of this witness, and gave no instructions about the building of them. He (Mr. Atkinson) has been in the shop since they were removed. He came and said he wanted an engine built with a pump attached to it. He gave no drawings, but asked this witness' opinion as to the size, &c.; thinks he asked if Mr. Boardman's patterns were there. We answered, "No, they are in New York." He then asked the witness if he could build him a pump the same as they had built for Boardman; thinks it was in the fall of 1841 that Boardman first told him he contemplated building a pump for wrecking purposes; thinks it was in the middle of the fall. He first saw the model of the steam-pump completed in the spring or summer of 1842. He saw Atkinson at the place where he saw the model. Mr. Atkinson did not at the time claim to be the inventor of the pump, or say anything to lead this witness to think that he was the inventor; nor did he say or do anything which gave this witness to understand that he did not recognize Mr. Boardman at that time as the inventor. Mr. Atkinson said nothing about it. Mr. Boardman showed him the whole, and explained it to him. Mr. Julius Von Schmidt, a machinist in Washington, D. C., testified that he was applied to to make a model for Mr. Atkinson "a year ago last winter" (his deposition was taken in 1847.) Mr. Atkinson showed him a model and drawing in Doctor Jones' office, and wished him to make him such a model, which he did with some small variations; saw the same model in the patent office about three months ago; the name of William Boardman, Jr., was upon it; he made a sketch of it at Doctor Jones' office; he has seen at the patent office the model he made for Mr. Atkinson. Mr. Atkinson did not give him any idea of the principle or construction of the pump before he took him to Doctor Jones' office; he called the model at Doctor Jones' office his model; he did not examine the drawing particularly; he only took a glance at it; Doctor Jones held it in his hands and took it away immediately, and told him he could sketch better from the model. Upon a careful consideration and comparison of the evidence on both sides, I am of opinion that the preponderance is greatly in favor of William Boardman, Jr., as the inventor of the improvement in the steam-pump for which he has now applied for a patent; and I do therefore affirm the decision of the honorable commissioner of patents in this cause.

Case No. 609.

ATKINSON v. FARMERS' BANK.

[Crabbe, 529.][1]

District Court, E. D. Pennsylvania. Feb., 1844.

VOLUNTARY BANKRUPTCY — PREFERENCES — COERCION BY CREDITORS—RIGHTS OF ASSIGNEE.

1. To render the confession of a judgment an act of bankruptcy, it must not only have been intended as a preference, but also have been given in contemplation of bankruptcy.

2. An assignee in bankruptcy is not bound by proceedings against the bankrupt to which he was not a party.

3. By "contemplation of bankruptcy" is not meant a contemplation of applying for the benefit of the bankrupt law, or of proceedings in a court of bankruptcy, but a contemplation of the breaking up of one's business, or an inability to continue it.

4. Payments made or securities given by a party knowing himself to be insolvent, are not in contemplation of bankruptcy, if, at the time, he fully expected to continue his business and retrieve his losses.

5. A preference in contemplation of bankruptcy is no less an act of bankruptcy because yielded to the threats and coercion of a creditor.

[Cited in Grow v. Ballard, Case No. 5,848; Graham v. Stark, Id. 5,676.]

At law. This was an action of assumpsit [by Samuel Atkinson, assignee in bankruptcy of David B. Taylor, against the Farmers' Bank of Bucks County,] to recover a sum of money paid to the defendants by the sheriff of Bucks county, in Pennsylvania, on an execution by them against David B. Taylor. It appeared that Taylor, being in failing circumstances, confessed judgments to various relatives, sureties, and particular creditors, and, among the rest, one to the defendants for $7163.22. Execution being issued on this judgment the sheriff of Bucks county levied on and sold Taylor's personal property, and of the proceeds paid the defendants $1618.90, under a rule upon him to that effect. Taylor was subsequently decreed a bankrupt, and his assignee thereupon brought this suit, contending that the judgment to defendants was fraudulent and void, as being confessed in contemplation of bankruptcy, and to secure them in preference to other creditors. In the petition to have Taylor declared a bankrupt this judgment was mentioned, but as it was not there alleged to have been given in contemplation of bankruptcy, this court decided the allegation to be insufficient, and made no decision as to the validity of the judgment. The case came on for trial on the 23d February, 1844, before Judge RANDALL and a special jury, and was argued by:

C. & J. Fallon, for plaintiff.

J. W. Wallace and Mr. Reed, for defendant.

RANDALL, District Judge, (charging jury.) This action is brought by the assignee in bankruptcy of David B. Taylor, to recover from the defendants a sum exceeding sixteen hundred dollars with interest, being the proceeds of the personal property of the bankrupt sold by the sheriff of Bucks county, under an execution issued by the defendants on a judgment confessed by David B. Taylor in their favor, and which proceeds were received by them from the sheriff.. The plaintiff contends that the judgment on which this execution issued was fraudulent and void, under the provision of the bankrupt law which declares "that all future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser, surety, or other person, any preference or priority over the general creditors of such bankrupt, and all other payments, securities, conveyances, or transfers of property, or agreements made or given by such bankrupt, in contemplation of bankruptcy, to any person or persons whatever, not being a bona fide creditor or purchaser for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act, and the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive the same as part of the assets of the bankrupt."

Independently of the bankrupt law, Taylor had a perfect right to give the judgment and the defendants to receive the proceeds, and under the laws of Pennsylvania the proceedings would be valid. But it is alleged that the judgment was confessed for the purpose of preferring either the bank or the endorsers of D. B. Taylor over his creditors generally, in contemplation of bankruptcy, and is, therefore, void.

In order to make this judgment void, it is necessary that it should have been given not only to effect a preference, but also in contemplation of bankruptcy. It has been said that this court has already decided the judgment to be valid by its decree on the application of Taylor's creditors to have him declared a bankrupt; but there has been no such decision. In that petition the judgment was not alleged to have been given "in contemplation of bankruptcy," and for that reason the court determined the allegation to be insufficient, but decided nothing as to the validity of the judgment. But if the court had decided the judgment not to be invalid, it would not have been binding on the jury. The party suing here is the assignee in bankruptcy, who must satisfy them of the facts necessary to support his case, but who cannot be bound by a decree in proceedings to which he was not a party. It is incumbent on the plaintiff to satisfy the jury by evidence that this judgment was confessed with intent to give a preference, and also in contemplation of bankruptcy. By "contemplation of bankruptcy" the law does not mean a contemplation of applying for the benefit

[1] [Reported by William H. Crabbe, Esq.]

of the bankrupt law, or of proceedings in a court of bankruptcy, but a contemplation of the breaking up of one's business, or an inability to continue it. It has been held by this court that a knowledge of such a derangement of one's affairs as would prevent a party from carrying on his business, is a contemplation of bankruptcy; not mere insolvency, for a party may be insolvent, and know it, and yet payments made or securities given by him not be in contemplation of bankruptcy, if, at the time, he fully expected to continue his business and retrieve his losses; but if he did not expect this, or if the derangement of his affairs was such as to make the inability to continue his business highly probable, then the act was in contemplation of bankruptcy within the meaning of the bankrupt law. The question of intention to give a preference is entirely for the jury, to be judged of by the acts and conduct of the parties at and about the time of making the payment or giving the security. If a party makes payments secretly; or gives securities to friends, or relatives, or persons to whom he may feel under special obligation; or when he says, as William Taylor swears David B. Taylor said, that he intends to prefer his sureties, and such security is given, there can be little doubt of the intention with which such payment or transfer is made. The credibility of the witnesses, however, is a question entirely for the jury.

It has been argued that the giving of judgments by David B. Taylor, about the same time, to his friends and relatives, would be without purpose, if, at the time, he expected to be able to pay all his creditors, and did not intend to give preferences. The giving of such judgments will be considered by the jury so far as it bears on or evidences the intention of D. B. Taylor, in the giving of this judgment to the bank. Again, it is alleged by the defendants that the judgment was given by Taylor at the pressing instance of the bank, and was obtained by their threats and coercion. The evidence of coercion is very slight; but if, at the time, Taylor contemplated bankruptcy within the meaning I have given to those words, and if he also intended to give a preference to the bank, then this judgment is void under the bankrupt law, and the plaintiff is entitled to recover, though the jury should believe that it was yielded to the threats and coercion of the creditor.

The jury rendered a verdict for the plaintiff for $1697.40.

See Atkinson v. Purdy, [Case No. 616.]

Case No. 610.

ATKINSON v. GLENN.

[4 Cranch, C. C. 134.] [1]

Circuit Court, District of Columbia. April Term, 1831.

DEPOSITION—COMMISSION—NOTICE—VERIFICATION OF AFFIDAVIT.

1. Notice on the 28th of December, to take a deposition in Alexandria, on the 29th, is not too short, all the parties residing in that town.

2. An affidavit may be sworn before the counsel of the party, and may be wholly in his handwriting.

[See note at end of case.]

The plaintiff's counsel, Mr. Neale, offered to read the deposition of Thomas Lee taken by commission under the act of Virginia of November 29th, 1792, § 12, p. 279, [providing for the examination by a commission of witnesses who are about to leave the country, or are unable to attend court.]

Mr. Hodgson, for the defendant, objected that the notice was too short, it having been given on the 28th of December; to take the deposition on the 29th of December, at Alexandria, all the parties residing in that town. He also objected, that the affidavit that the plaintiff's claim depended, in a material part, upon the testimony of a single witness who was about to depart, was sworn before the plaintiff's counsel as a justice of the peace; and that the deposition also was wholly in his handwriting.

But THE COURT (MORSELL, Circuit Judge, absent) overruled the objections, and permitted the deposition to be read. Verdict for the plaintiff.

[NOTE. The question arose in U. S. v. Pings, 4 Fed. 714, as to whether or not it was a fatal objection to a deposition, taken under a commission "according to common usage," that the attorney for one of the parties to the action wrote down the answers for the commissioner, the other party to the suit not being represented; and plaintiff's counsel cited this case and Nichols v. White, Case No. 10,235, as authorities for the proposition that a commission, so executed, was executed "according to common usage." In considering the effect of these cases, Choate, District Judge, said: "In neither does it certainly appear that the party making the objection was not represented by his counsel upon the taking of the testimony. If he was, the objection might well have been considered waived, if not taken at the time. If, however, it was otherwise, and the cases were like the present, yet a practice, which at one time may appear to the courts harmless, may, at a different period and in a different state of things, be seen to involve such possibility of abuse that it should not be permitted."]

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 611.

ATKINSON v. The HAMILTON.

[1 Bond, 536.][1]

District Court, S. D. Ohio. June Term, 1862.

ADMIRALTY—PLEADING—MISJOINDER OF DEFENDANTS—DISTINCT CAUSES OF ACTION.

1. Where a collision is the joint act of two steamboats, there can be no objection to the joinder of both as defendants in an action.
2. If each boat is charged with a distinct and separate act of collision, without any allegation of privity between them, or concert or unity of purpose, they cannot be joined in the same libel.

[In admiralty. Libel in rem by John H. Atkinson against the steamboats R. B. Hamilton and H. Logan for damages caused by collision. Heard on exception to the libel because of the misjoinder of defendants and of distinct causes of action. Exception sustained.]

Lee & Fisher, for libellant.

Lincoln, Smith & Warnock, for respondents.

OPINION OF THE COURT: An exception to the libel has been filed in this case, based on an alleged misjoinder of distinct causes of action, and of two defendants, as between whom there is no privity in the facts set forth in the libel as the grounds of the action. In deciding on this exception, the court must view it in the light of a demurrer in an action at law. The only question therefore is, whether from the statements and averments of the libel, the alleged misjoinder is apparent, and of a character to render it impossible to enter a valid decree in the case.

The suit is in rem. against the steamboats Hamilton and Logan for an alleged collision, by which a keel-boat laden with firebrick, fire-clay, etc., the property of the libellant, was sunk in the Ohio river while on its way from New Cumberland, in the state of Virginia, to the city of Cincinnati. The keel-boat and its cargo are alleged to have been a total loss to the libellant, and damages are claimed for the full value thereof. In the introductory part of the libel, it is averred that the suit is brought against the steamboats named, "jointly and against both and each of them." After stating that the keel-boat was navigated with all proper care and skill, and that every precaution was used by those having it in charge to avoid a collision, the libel alleges that the two steamboats, then ascending the river, were unlawfully engaged in racing, and were attempting at an undue speed to pass each other; and being just abreast, "almost simultaneously came into collision with said floating keel-boat—the bow of the said Henry Logan striking said keel-boat near her bow with a force sufficient to sink said keel-boat, and cause the same, her cargo, etc., to become a total loss, and the bow of the said Hamilton almost at the same time coming in violent collision with said keel-boat about ten or fifteen feet forward of her stern, with force also sufficient to sink her, and cause her to become a total loss." It is then averred, that as the result of these collisions the keel-boat was sunk, and that boat and cargo are a total loss to the libellant.

Upon these averments, the question presented, is whether the collisions were the joint act of the two steamboats, in the sense of making each collision the act of both. If this is the logical and legal import of the averments of the libel, there can be no objection to the joinder of both in this action. On the other hand, it is clear, if each boat is charged with a distinct and separate act of collision without any allegation of privity between them, or concert or unity of purpose, they can not be joined in the same libel. Such a course would be liable to the same objections that would lie to the joinder of two different persons for two distinct acts of trespass or misfeasance, in an action at law. It needs no citation of authorities to prove that this can not be done. In analogy to the settled principles of chancery, as connected with the frame of a bill, a libel thus setting forth the cause of action, would be liable to the objection of multifariousness in averring different causes of action, necessarily leading to distinct issues, and involving confusion and inconvenience in the trial. Its further practical effect would be to bring parties defendants before the court, between whom there is no privity, and who in defending the action might find it necessary to assume distinct grounds of defense and to rely on wholly different evidence.

In 1 Conk. Adm. 368, the author asserts, in very comprehensive terms, that "persons between whom there is no privity, can neither join as libellants, nor be joined in the same libel as respondents." And this doctrine, the learned author says, is alike applicable to cases arising ex contractu and ex delicto. In the case of Thomas v. Lane, [Case No. 13,902,] Judge Story held, that a libel charging two persons with distinct acts of assault and battery, could not be sustained. The learned judge says, "If the trespasses are different and distinct, several suits must be brought against the parties; and if they are joined, the libel ought to be dismissed for multifariousness and a misjoinder of parties." There can be no question that this doctrine applies to all actions sounding in tort, as well as to the action of trespass for an assault and battery. Suits for collisions always involve the commission of a tort, predicated of some act of carelessness, negligence, or want of skill. And if the acts charged are the separate acts of different boats, not acting in concert and with a common purpose, they can not be joined in the same action. And this doc-

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

trine does not at all conflict with the doctrine well settled, and of universal application, that tort feasors are liable both jointly and severally, and may be sued either jointly or severally. But this principle must be limited in its application to cases in which the parties have acted in concert in the commission of the tort, and resting under a common responsibility. Betts, Adm. 20.

Now, it may undoubtedly occur that two boats may be so acting in privity and with a common purpose, that both may be jointly responsible for an injury inflicted by either. If two boats, for any purpose, should be lashed or fastened together, and while thus connected, from carelessness or want of skill should injure another boat by collision, there can be no doubt that there would be a joint liability, and that both could be proceeded against in the same suit. In such a case, in legal estimation, the two boats would be considered as one, and both under the same management and control. But clearly, to sustain such a proceeding, there must be the distinct allegation that they were thus in privity or union; and on the hearing, such allegation must be proved.

In this libel there is clearly no such averment of concert or unity of action between these boats as to justify the conclusion of a joint liability. It is not averred that the boats were the property of the same persons, or that there was any mutuality of interest as between the owners, or that they were both under the control of the same persons. Nor is it averred that the same collision resulted in the loss of the libellant's boat and cargo. On the contrary, the averments are, that each boat was guilty of a separate act of collision, each of which was sufficiently violent to have caused the sinking of the libellant's boat and cargo. These collisions were committed not only by each boat separately, but the injury by each was on a different part of the keel-boat, and though near together in point of time, were not simultaneous. It is thus evident that the owners of the two boats might find it necessary to resort to different lines of defense in resisting the claim of the libellant, and to rely on different evidence for this purpose. The interests of each boat might therefore be brought into direct conflict and confusion, and inconvenience arise, not only in the final hearing, but in the preparation of the case for trial. There certainly is no necessity for this, as it is the undoubted right of the libellant to proceed in a separate action against each of the boats. To avoid any injury that might possibly result from such a course, it would perhaps be the duty of the court in the exercise of its discretion, to see that no decree should be entered in either case, until both should be heard. Thus, if the libellant by his evidence shall prove a case of fault and consequent liability, as to one or both the boats charged with fault, damages may be decreed on such principles as shall meet the justice of the case. If the libellant, by amendment, can allege a state of facts showing such concert and privity between the two steamboats, as will create a joint liability, within the principles stated by the court, he can have permission to do so; otherwise, the libel must be dismissed, and the proceeding commenced de novo.

Case No. 612.

ATKINSON v. HUBBARD.

[43 Hunt, Mer. Mag. 206.]

Circuit Court, D. Illinois. 1860.

CONTRACTS—SALE—VALIDITY.

[A principal can recover on a contract to buy made by his broker, where the seller, knowing nothing of the principal's financial standing, has agreed to write for information, and, if the answer is unsatisfactory, to accept security, although no answer at all has been received.]

[At law. Action by Richard Atkinson against Gurdon S. Hubbard & Co. for breach of a contract of sale. Judgment for plaintiff.]

Some time on or about the 4th day of November, 1858, Mr. J. K. Fisher, an extensive produce broker in this city, having several orders from different parties for the purchase of pork, called at the office of Hubbard and Hunt, and ascertained from Mr. Hubbard that they had one thousand barrels mess pork, which they would sell at $15 per barrel, February and March delivery, seller's option. Fisher agreed to buy the pork, and Hubbard agreed to sell. Fisher then gave Mr. Hubbard at different times the names of several persons as his principal, to each of whom Mr. Hubbard objected for the reason that he did not know anything about them. Fisher, on the morning of the 6th of November 1858, (Hubbard and Hunt having declined each of the names before given them,) gave them the name of the plaintiff, and said he was a member of the firm of Hewitt and Co., of New York, and was in every way responsible, and if, when they wrote to their New York correspondent, (which they volunteered to do,) his reply was not satisfactory, then he was willing to put up security at any time. Hubbard and Hunt both expressed their entire satisfaction, and said that was all right. Fisher at the time held money in his hands which belonged to Atkinson, and with which he was ready at any time to put up the required security. Hubbard and Hunt wrote to New York to inquire about Atkinson. Fisher, after allowing a reasonable time for a letter to get to New York and a reply to be received, called upon Messrs. Hubbard and Hunt on several occasions to know whether they had heard from New York, and if they would require him to put up the security, and received a reply from Messrs. Hubbard and Hunt that they had not heard. He called again on

or about the 16th of November to make the same inquiry, and then, for the first time, was told by Mr. Hunt that they had made no contract. Mr. Fisher told Mr. Hunt that it was as fair a purchase as he had ever made, and he should hold them to it. On the 31st of March, 1859, the last day in which Messrs. Hubbard and Hunt had the right to deliver the pork, Mr. Fisher called on them, and demanded the pork, and tendered them the sum of $15,000 in gold. They declined to receive the money or deliver the pork. From the 6th of November, 1858, until the 31st of March, 1859, there was a firm feeling and steady advance in the market, and on the 31st of March pork was worth $16.75 per barrel. Such was in substance the proof on the part of the plaintiff, and upon which he claimed a contract was made on the 6th of November, 1858, and for a breach of which he claimed damages.

The defendants claimed that there was no contract made on the 6th of November, 1858, and that they had the right to make the contract or not, as they pleased, on hearing from New York, and introduced evidence to establish their view of the case, which in many particulars, in relation to the making of the contract, was conflicting with the evidence introduced by the plaintiffs. Of amount of pork, time of delivery, the price to be paid for the same, and the price on the 31st of March, 1859, there was no dispute.

DRUMMOND, District Judge, presiding. The court instructed the jury that if they believed the parties mutually understood, on the 6th of November, that the contract was complete and binding in case the reply from New York was satisfactory, and that in such event nothing further was to be done by either party to complete the contract, then the contract was binding, and the plaintiff was entitled to recover; but, if both parties did not so mutually understand it, then the plaintiff could not recover.

The jury found a verdict for the plaintiff of $1,750.

The defendants have filed a motion for a new trial.

Case No. 613.

ATKINSON v. KELLOGG.

[10 N. B. R. (1874,) 535; 7 Chi. Leg. News, 9.]

District Court, D. Minnesota.

BANKRUPTCY—DIVIDENDS—SET-OFF—PARTNERSHIP.

[An assignee in bankruptcy may withhold payment of a dividend, out of the assets of a bankrupt firm, to a creditor who is debtor to one of the members of the firm, which debt is included in the schedule of such member, until the recovery by the assignee of such debt, or the determination of a suit for the same.]

[In bankruptcy. Motion to compel the assignee in bankruptcy of the partnership of Atkinson & Kellogg to pay Patrick Rahilly, a creditor of the firm, a dividend which the assignee had refused to pay, because Rahilly was a debtor, by the schedules, to the estate of one of the partners, for which debt Rahilly had been sued by the assignee before the dividend was declared.]

Bigelow, Flandrau & Clarke, for the motion.

E. C. Palmer, opposed.

NELSON, District Judge. The only question presented for decision in the view taken by the court, is whether the assignee can withhold the payment of the dividend to Rahilly declared upon the net proceeds of the joint stock of Atkinson & Kellogg until the recovery by him or the final determination, by the suit now pending, of a disputed indebtedness of Rahilly to the estate of George Atkinson, one of the members of the firm. The bankrupt Atkinson, in his schedules, has placed the indebtedness of Rahilly to him personally, at one thousand nine hundred and twenty-five dollars and fifty cents, and the assignee has commenced a suit to recover this amount, or whatever may be the sum due. Rahilly has filed a proof of debt against the estate of Atkinson for the sum of one thousand four hundred and thirty-one dollars and forty-five cents, less certain advances, which, according to the computation made in the proof filed, leaves no debt against the estate, but, on the contrary, an indebtedness by Rahilly in the sum of four hundred and ninety-three dollars and fifty-five cents. The proof, it is claimed, is defective, and Rahilly insists that it does not correctly state the actual condition of the account between himself and Atkinson.

In my opinion, it is immaterial whether the proof is correct or not, so far as this motion is concerned. The assignee is certainly justified in taking the statement of Atkinson's schedules as true, and in seeking to collect this claim by suit, if necessary, as well as all others in favor of the bankrupts, either as partners or individuals.

The bankrupt law (section 36) provides that in case members of partnerships are declared bankrupts, the estates of the individual members, as well as the partnership estate, must be settled in the bankrupt court. The creditors of the partnership elect the assignee, but he becomes the assignee of the estate of the individuals as well as the firm. It is true he must keep a separate account of the joint stock of the copartnership and of the individual estate of each member, but the expense and disbursements are taken out of the property received by the assignee, without reference to the fact whether it was collected from the partnership or the separate estate. It is only when the claims of creditors are to be determined that the assignee must consider the estate separately. He, of course, must pay the firm creditors before the creditors of the individuals, and in order to do equal and exact justice, the

proceedings resulting in the final settlement of the partnership estate and the individual members' estate are conducted as if they had been commenced against one person. The assignee can adjust all the credits and debits of individuals to the firm, and the members thereof, provided he permits the partnership creditors to obtain their pay out of the partnership estate, and the separate creditors of each partner out of his separate estate, in the first instance. But adjustment of claims against the partnership and debts in favor of either partner with the same person is a part of the assignee's duty, and prevents unnecessary and vexatious litigation. There can be no objection to the settlement by the assignee of an indebtedness of the partnership, by canceling a debt due from the same person to the separate estate of one of the members, placing the proceeds to the proper account. If the claim is disputed, and is one that has been returned in the schedules, I can see no reason why the assignee should not retain in his possession, until the final decision, as much of the proceeds which would otherwise belong to the creditor of the partnership as is necessary to satisfy the debt due from the partnership creditor to the separate estate of one of the members. In this way multiplicity of suits is avoided, and no possible injury can result to any one. The assignee must pay over the balance in his lands, after deducting the sum which appears to be due to Atkinson's individual estate from the proofs on file.

Case No. 614.

ATKINSON v. PATTON.

[1 Cranch, C. C. 46.][1]

Circuit Court, District of Columbia. Jan. Term, 1802.

LIBEL AND SLANDER—JUSTIFICATION—INFORMATION RECEIVED FROM SLAVE.

It is no justification, in slander, that the defendant received his information from his slave.

Slander. Office judgment at the rules before last term.

Mr. Taylor, for the defendant, moved to set aside the office judgment on filing special pleas of justification to the first and third counts, and a demurrer to second count. The special justification was, that, at the time the defendant spoke the words, he stated that he had received his information from his slave.

Mr. Lee, for the defendant, cited the following cases in support of the plea. Davis v. Lewis, 7 Term R. 17; Earl of Northampton's Case, 12 Coke, 132; and Actions for Slander, 4 Coke, 12.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Mr. Swann and Mr. Young, for the plaintiff, said that the reason of those decisions was that the plaintiff might have his action against the person from whom the defendant received his information. But in the present case the defendant's informer is a slave, against whom no action lies.

THE COURT seemed inclined to the opinion that the special matter, if good, might be given in evidence on the general issue.

Cur. ad. vult. Afterwards THE COURT was unanimously of opinion that the pleas ought not now to be received. KILTY, Chief Judge, because the facts stated are not a justification; MARSHALL, Judge, because the pleas did not confess the words charged.

Case No. 615.

ATKINSON v. PHILADELPHIA & T. R. CO.

FIELD v. SAME.

[14 Haz. Reg. Pa. (1834,) 10.]

Circuit Court, E. D. Pennsylvania.

NAVIGABLE WATERS — OBSTRUCTION—INJUNCTION

[1. An act incorporating a certain railroad company authorized, by necessary implication, the erection of bridges, providing that no obstruction should be placed across any stream declared a public highway so as to interfere with the full and free navigation thereof, nor across any unnavigable stream so as to divert its flow to the injury of private rights, and that, for injuries so inflicted, compensation should be given as for other property. *Held*, that an injunction would not be granted by a federal court, at the suit of an owner of certain vessels under contract to pass with cargo beyond the bridge, when it did not appear that the bridge contemplated would necessitate any alteration to be made in such vessels other than striking the masts, and any injury caused by the construction of the bridge admitted of adequate compensation.]

[2. Were it made to appear that the proposed bridge was a common nuisance or purpresture, the proper remedy would be in a court of law, at the prosecution of the state for a public offense.]

[3. Wherever the public convenience and common interest of the people demand it, the state, by legislative enactment, may repeal or modify a law declaring a stream a public highway.]

[4. Cited in Baring v. Erdman, Case No. 981, to the point that equity will not interfere by injunction when the act complained of is done under color of authority conferred by law until all doubts as to such authority have been removed, and the matter finally determined at law.]

[In equity. Suit by Chalkley Atkinson and others against the Philadelphia & Trenton Railroad Company for an injunction to restrain the defendant from creating a bridge across the Neshaminy creek, on a proposed route of a railroad, the construction of which was authorized under an act of the general assembly of .Pennsylvania. Injunction denied.]

C. J. Ingersoll, for plaintiffs.

W. B. Reed and J. Sergeant, for defendants.

BALDWIN, Circuit Justice. Chalkley Atkinson vs. John Savage, president, Simon Gratz and others, citizens of Pennsylvania, and Edmund Carlis, and Jesse Oakley, citizens of New York, directors of an incorporated company called the Philadelphia and Trenton Railroad Company. Timothy Field vs. The Same Defendants.

The complainants having filed their respective bills on the equity side of this court, praying for injunctions to restrain the defendants from erecting a bridge across the Neshaminy creek on the route of a railroad from Philadelphia to Trenton, which they are about constructing under order of an act of assembly, but as is alleged without any authority in law, to the great injury of the complainants, now move that one be granted till answer and the further order of the court. Due notice has been given to the defendants, who accordingly appeared by their counsel; affidavits have been taken on both sides, and the cases fully and ably argued; they are the same in their leading features, the principal difference between them being that Mr. Atkinson is under a contract for delivering lime in vessels navigating the Neshaminy, while Mr. Field is employed in transporting stone thereon from places on said river above the site of the contemplated bridge. As they both depend on the same facts and principles of law, it is unnecessary to recite the allegations of both bills.

The bill of Mr. Atkinson states that he is a citizen of New Jersey, employed in transporting articles by water to and from different places, for which purpose he is the owner of five schooners; that he has recently in the course of such business, made a contract with Anthony Taylor, who resides on the Neshaminy river, in Bucks county, in this state, to deliver to him one thousand bushels of lime at his wharf about two miles from the mouth of said river, which is by law a public navigable river or highway for the free passage of vessels up and down the same. That the defendants, under color of an act of assembly of this state for incorporating the Philadelphia and Trenton Rail Road Company, passed in February 1832, are about constructing a permanent bridge over and across said stream, near its mouth, where it is navigable for sea vessels, and thence to the farm of said Taylor, which bridge is intended to be a flat structure, without an elevated arch, span, draw, or other contrivance for permitting masted vessels to pass up and down the river, freely without interruption, hindrance, delay, or unnecessary expense as heretofore. That neither by the laws of Pennsylvania, or the constitution of the United States, can any obstruction be placed across the said stream; that it is contrary to law, to impede or interfere with the full and free navigation thereof, for the accommodation of the inhabitants on said river, as well as all the citizens of the United States who may have occasion to pass and repass on the same with any masted vessel. That the act of incorporation gives no authority to erect such a bridge as is contemplated, which the defendants have begun to construct, or any bridge which shall in any way impede the full and free navigation of said river. The prayer of the bill, is for an injunction to restrain the said president and directors, their agents, workmen, laborers, and all other persons employed about said railroad, from constructing any bridge whatever over and across said river, and for further relief. The complainant asserts no right of property on the bank or in the bed of the river; his claim to the interposition of this court rests on his contract with Mr. Taylor for the delivery of one thousand bushels of lime at his wharf above the site of the contemplated bridge, and on the common right of navigation resulting from the act of assembly declaring the Neshaminy a public navigable river. In this position, he asks us to arrest the completion of a public improvement now in rapid progress under an authority claimed in virtue of a law especially directed to this object; on such an application, it was our plain duty to pause and inquire whether this was a case in which an injunction should be granted on the usual allegations of ordinary bills, and the common affidavit of their truth.

That the matters involved are of deep concern to the parties and the public at large, cannot be denied, or that the consequences of our interference would be most serious; the injunction asked is not a matter of right, but rests in the discretion of the court to be exercised according to certain well known rules of equity from which we cannot depart. It is perhaps the highest, most delicate, and dangerous power which can be confided to any judicial tribunal, yet it is one which is indispensable for the purposes of preventive justice; the nature of the cases which call for its exercise is such too, as often to require a prompt and decisive action, on an ex parte application without a hearing of the adverse party, and sometimes without even notice, as that might lead to the immediate commission of an irremediable injury, in order to avoid the effect of the injunction, as the transfer of stock, the negotiation of a bill of exchange or promissory note, the transfer of a chattel of peculiar value, &c. On the other hand, as the erroneous exercise of this power may operate to the irretrievable injury of the party enjoined, and for which, as it is the act of the court, he can have no legal redress in damages, while the complainant may have his remedy at law, though the relief in equity is refused; too much caution cannot be used by the court in satisfying themselves that the case presented for their

summary action is one which admits of neither doubt or delay. Hence the complainant must show in himself an apparent prima facie right of property or action to the subject matter of the injunction, as well as an injury intended or threatened by the defendant, which if done cannot be compensated by damages or adequate legal remedies, and can be effectually averted only by the protecting preventing power of a court of equity. [Osborn v. Bank,] 9 Wheat. [22 U. S.] 840, 846; Bonaparte v. Camden & A. R. Co., [Case No. 1,617.] It is never exercised in a doubtful case, or in a new one, which does not come within the established rules of equity, (2 Dickens, 600; Coop. 77; 7 Johns. Ch. 334;) and if the courts of the United States can be at liberty to depart at all from the settled course of proceeding in chancery, it would seem to be their duty to proceed with more caution than its ordinary rules require. In England it is in the discretion of the chancellor, to proceed without notice, it is directed or not, according to the nature of the case; if the effect of the injunction would be to suspend the operations of a manufactory established and carried on at great expense, he would not proceed one step without notice of the motion for an injunction, (18 Ves. 217;) but this is merely a matter of discretion. The act of congress however makes notice indispensable before any proceedings had by the court—"Nor shall such writ be granted in any case without reasonable notice to the adverse party, or his attorney of the time and place of moving for the same." [Albers v. Whitney, Case No. 137.] The spirit of this requisition is not merely to give the notice in fact, the party is entitled to all the benefits resulting from notice; to be heard by his counsel on all matters appearing in the bill or disclosed in the affidavits of the complainant, not as amici curiae, but as representing the party in interest who may be affected by the motion as to whom it becomes an adversary suit, even before demurrer, plea, or answer. It is difficult to draw with precision the line between the merits of the summary application, and the final hearing on the whole equity of the case after an issue. On the motion for the injunction, the court will permit either party to inform its conscience as to the nature of the case, the consequences of granting or refusing it; without going into a full examination of the respective rights of the parties, they are bound to inquire into all circumstances bearing on the necessity of immediate action to prevent an irreparable injury to a prima facie right, and in doing so are not confined to the case made out by the complainant. Though this remedy will not be withheld merely because the title of the complainant may admit of doubt, or be open to litigation, there must be a clear case made out of impending danger, requiring prompt action to save an apparent right from destruction. Eden, Inj. 234; 7 Ves. 309; Dickens, 101, 102; 2 Atk. 182, 184. The defendant has an undoubted right to show by affidavit, or otherwise, the authority or claim of right by which he acts, and to explain his conduct in relation to the subject matter of complaint. The whole matter resting solely in the discretion of the court, they must be governed in its exercise by the particular circumstances of each case; a greater latitude will be allowed in those which affect persons engaged in large and expensive undertakings, especially great works of public improvements, in which a great portion of the community may be interested, than in those merely affecting individuals, litigating on their own account. The consequences of arresting the progress and completion of canals, bridges, or artificial roads, are too serious, and the responsibility of doing it is too great to be assumed, unless in a plain case of the violation of rights which are under the peculiar protection of courts of equity. Vide 7 Johns. Ch. 330. In this case it was of special importance, to be well informed as to the kind of navigation upon the Neshaminy, the kind of bridge proposed to be constructed,—the extent of the inconvenience to which vessels would be subjected in consequence of its erection on the plan contemplated by the defendants, and the nature of the injury which might be done to the complainants by its completion. To restrict the defendants, to the case made out by the bill and affidavits of the complainants, would mainly deprive the former of the benefits of notice of the motion, as well as confine our inquiries within limits much too narrow for a case so interesting to all concerned as this; in the development of which we are fully satisfied that a less expanded view of the subject, as to the localities and facts, would not have enabled us to come to a conclusion satisfactory to our minds, as to the justice and equity of the application.

A preliminary question of jurisdiction has been raised by the counsel of the respondents, on which we do not deem it necessary to express any opinion; without being understood as deciding it, by taking the case into our consideration, we shall assume that there are proper parties before us, for all the purposes of the motion, and proceed to consider the grounds on which it is urged and resisted. By an act of assembly of March, 1771, the Neshaminy was declared a public highway for the purposes of navigation, up and down the same as far as Barnley's ford, and no further. 1 Smith, Laws, 322. All citizens of this and other states, had therefore, the full and free right of passing and re-passing on the said river with all kinds of vessels or water craft, which no individual could in any way impede or obstruct, without subjecting himself to an indictment for a nuisance or an action for damages by the party injured. This common right is as much under the protection of the law, as a

right of property in a citizen, in all matters relating to individuals to the full extent in which the legislature have granted it; but it is a right derived from legislation, which may be abridged or modified from time to time, as may be thought most conducive to the public welfare, by authorizing the erection of bridges or dams, which may subject the navigation to partial interruption or wholly destroy it.

It is also competent to the legislature, to repeal a law declaring any stream a public highway for the purposes of navigation, as it is to vacate a road; the source of the power is the same, and the reasons for its exercise on land or water are the same, public convenience and the common advantage of the people, for the furtherance of which the legislature may take away or modify at their pleasure a common right of passage, or any easement which could be enjoyed by any person, who had no right of soil or property, in the river or road. The only restraint which the constitution imposes on their authority is, that private property shall not be taken for public use, without just compensation, and the consent of the representatives of the people. Const. Pa. art. 9, § 10. Laws in relation to roads, bridges, rivers, and other public highways, which do not take away private rights to property, may be passed at the discretion of the legislature, however much they may affect common rights, even private rights, if they are not those of property, may be taken away if it is deemed necessary for the promotion of public improvements, or if their destruction is the necessary consequence of their construction, without making compensation. The various laws of this state authorizing the making canals, either by the state or incorporated companies, have been so construed by the supreme court, as to establish the rule—"that the jury are to value the injury to property, without reference to the owner or the actual state of his business, and in doing that, the only safe rule is to inquire, what would the property unaffected by the obstruction have sold for at the time the injury was committed, what would it have sold for as affected by the injury. The difference is the true measure of compensation." 7 Serg. & R. 422, 423. The injuries to be compensated, are those which are done to property immediately, "as the swelling of waters into mill races, the inundation of land, the carrying of canal or lock through a man's land, or the taking away materials." This is the line which seems to have been marked by the legislature. Compensation shall be made for all damage from immediate injury to property, but not for any damage where there is no legal injury, which is called damnum sine injuriae—as the loss of a fishery by the erection of a dam in the Schuylkill, whereby the passage of fish are prevented. "For not only may the owners of land contiguous to the river, complain of the obstruction, but all others near it who have been accustomed to receive fish thence, or to fish with an angle or hoop net. 'There are other kinds of injury too, sustained particularly by the owners of land on the river, between the Fairmount dam and the lower falls. All those persons have lost the benefit of navigation from toll, in batteaux flats, &c. which was very useful, as it served for carrying produce to market, and bringing up manure for their lands. Yet it has not been contended that for such injuries compensation is to be made. Suppose the health of the country to be injured by evaporation from the dams, is compensation to be made for this the greatest of all injuries? I presume not. No property has been taken from him, he had no property in the fish or the river, and he was bound to know the law by which the river remained public property, and of course all emoluments were precarious,' 14 Serg. & R. 83, 84." So of a spring of water between high and low water mark, of the use of which the owner of adjacent land has been deprived,—he is entitled to no compensation, because, he had no vested property in it, "and it is ridiculous (say the supreme court) to talk gravely of a great national work being obstructed because a man will be deprived of the use of what never was his own." 1 Pen. & W. 467. We must consider these adjudications of the supreme court of the state, as establishing the general principle, that the right to the use of the navigable streams which are public highways, either for fishing or navigation, is subordinate to laws which regulate its general police and internal concerns; and that no common right in the common property of rivers, is considered as private property, or the subject of individual ownership. As it rests wholly in the discretion of the legislature, to provide for any other injury than what the constitution compels them to compensate, the sole remedy for any damages, sustained by the interruption of any common right, is that which the law authorizing the construction of a road or canal across a navigable stream, prescribes in favor of a party who may sustain a loss; if the law is silent, the loss is deemed no legal injury, which gives a claim to redress. So far then as depends on the constitution and laws of Pennsylvania, and their judicial construction, there is no doubt that the right of navigation on the Neshaminy may be wholly or partially taken away by the legislative power of the state, without compensation.

The only remaining objection to the validity of this law rests on its alleged repugnancy to the constitution of the United States by interfering with the power of congress "to regulate commerce among the several states," and violating that provision which declares that "the citizens of each state shall be entitled to all privileges and immunities in the several states."

The first of these objections is fully an-

swered by the opinion of the supreme court in the case of the Black Bird Creek Marsh Co., 2 Pet. [27 U. S.] 245. The legislature of Delaware had authorized this company to erect a dam across a navigable creek; the dam formed a permanent obstruction to the navigation, so that no vessel could pass on the stream; but the court decided, that the act of assembly was neither repugnant to the constitution nor in conflict with any act of congress on the subject of commerce or navigation; and that this abridgment of the common right of navigation was a matter between the government of the state and its citizens; of which they could take no cognizance. Id. 252. State laws on the subject of turnpike roads, ferries, and bridges, are a part of the system of internal commerce, and police of the respective states, the regulation of which they have reserved to themselves without any control by congress,—[Gibbons v. Ogden,] 9 Wheat. [22 U. S.] 208; [Brown v. Maryland,] 12 Wheat. [25 U. S.] 443; [Livingston v. Van Ingen,] 9 Johns. 560, 564, 573; 4 Wash. C. C. 378, [Corfield v. Coryell, Case No. 3,230;] Bennett v. Boggs, [Case No. 1,319,]—and no law on these subjects is prohibited by the constitution of the United States, unless it impairs the obligation of a contract,—[Satterlee v. Matthewson,] 2 Pet. [27 U. S.] 410, etc. The other objection is wholly inapplicable, as the law abridges the right of the citizens of Pennsylvania to the free navigation of the Neshaminy to the same extent as those of New Jersey, while both are equally entitled to its benefits. This brings us to the construction of the act. The eighth section authorizes the company to construct a railroad from Philadelphia to Trenton which by necessary implication gives the power of erecting bridges over the stream between these places, without which the object of the law could not be effected. This is admitted by the counsel for the complainants, but he contends, that the proviso to the eleventh section is a positive prohibition, to erect any bridge that shall not leave the navigation as full and free from all impediments as it has heretofore been, so that vessels can pass and repass with standing masts. This proviso is in these words: "That no obstruction whatever shall be placed on or across any stream now declared a public highway, so as to impede or interfere with the full and free navigation thereof; or to change the direction of any stream or water course not declared a public highway, so as to affect the rights and interests of the owners thereof, without the consent of the said owners, unless the right to the same be obtained by such process as is before directed in relation to other property; and that any inconvenience or expense attending the alteration of vessels now navigating said streams to conform, to the bridges erected by said company shall be paid out of the funds of the company." The sense of the legislature as expressed in this proviso seems clear; the first part is a declaration that there shall be no obstruction to the full and free navigation of the streams, the last clause is the legislative construction of the first, that an inconvenience or expense in so altering the vessels as to conform to the bridge, is not such an obstruction as is prohibited; it is by necessary implication a declaration, that the company are not bound to conform the bridge to the vessel, but that the vessel must be made to conform to the bridge, on the company paying the expense. We are bound to give this meaning to the law, or the last sentence becomes senseless for it can admit of none other; taking the whole together the sense is obviously, that if the erection of the bridge causes no other obstruction to the navigation, than the inconvenience in the alteration of the vessel passing it, it is within the authority of the law. This is the more evident, from the obligation of the company to pay for the expenses being confined to vessels "now navigating said streams;" this refers to the time of passing the act incorporating the railroad company, and would exclude the owner of any vessel which had not in February 1832, navigated the Neshaminy from a right to call on the company for any reimbursement of the expenses attending the alteration. The words "full and free navigation," must therefore be taken with the qualification attached to them by the legislature; which precludes us from considering such a bridge as they have authorized to be erected, as an obstruction in violation of the law; if the bed of the river is unobstructed, if vessels can freely pass and repass between the piers of the bridge, without injury or interruption, it seems to us that the public common right of navigation is protected to the extent contemplated by the law. Had it been intended that the construction of the bridge should have been such, as to permit masted vessel to pass, there would have been a provision, that a draw should have been made as is often done; this seems to have been a matter left to the discretion of the company, on condition of their making compensation to the owners of vessels then navigating the river.

So far as we can judge from the bills and affidavits, the only subject of complaint seems to be, that the masts of the vessels must be struck in order to pass the bridge, according to its present plan of construction; it is admitted that such is the fact, and it is not denied that vessels with struck masts can freely and safely navigate the river without meeting any obstruction from the bridge, except the trifling delay in striking and raising them. Though the prayer of the bill is for an injunction to restrain the erection "of any bridge," the case has not been pressed to that extent in the argument; the great question seems to be whether the company have a right to erect one without a draw, which will permit those vessels which have

standing masts to pass at pleasure. It appears to us, that the law imposes no such restriction, but that it contemplates the striking the masts, as the very alteration for which provision is made. The affidavits point us to no other inconvenience or expense to which the owners of vessels can be subjected, and unless some other is pointed out, it may be fairly inferred that none other exists; the consequence is, that the owners of vessels must submit to this restriction on their right of navigation on the terms prescribed. The legislature had the power to authorize the erection of a dam or causeway which would stop the navigation, if in their opinion it was conducive to the general welfare; whether it would be a discreet exercise of their power is not for this court to decide, as the whole subject is clearly within their discretion which the judicial power cannot control. [Satterlee v. Matthewson,] 2 Pet. [27 U. S.] 412; [Providence Bank v. Billings,] 4 Pet. [29 U. S.] 563; [McCulloch v. Maryland,] 4 Wheat. [17 U. S.] 423; [U. S. v. Arredondo,] 6 Pet. [31 U. S.] 729. They have thought proper to authorize this company to subject the navigation of the streams on the route of the road to some inconvenience under the obligation making compensation for the only injury to the common right of the citizens, which they deemed a proper subject of indemnity. In this respect and to this extent, they put it upon the same footing as private property, but they have deemed any other inconvenience, expense or abridgment of navigation, to be matters of subordinate importance to the construction of the road—these are questions of public policy with which we cannot interfere without usurping legislative powers. Though as it would seem from the affidavits, that the contemplated bridge may render the Neshaminy unnavigable for sea vessels, yet that must have been foreseen by the legislature, to be the necessary consequence of the authority given by the eleventh section, they have made no provision for such a case, the same effect has been produced on the Schuylkill, and other navigable rivers in the state, over which permanent bridges without draws have been erected by corporations under the authority of laws without a doubt of their validity or expediency. The authority given to this corporation, is agreeable to the uniform course of legislation, which allows a degree of latitude in the construction of works of public improvement, according to its nature and objects, by which more or less discretion is allowed as to the route, plan and execution, which we are not prepared to say has been wantonly abused by the officers of the company. Vide 2 Dow, 521; 20 Johns. 740; 7 Johns. Ch. 330.

The affidavits produced on the part of the company, especially that of the person employed to construct the bridge, are very strong to show, that its erection on the present plan is not only required by considerations of convenience, economy, and security, to the company; but that the making of a draw would be productive of very serious obstructions to the navigation, by requiring an additional pier in the bed of the stream, which would narrow the channel at low water, so that vessels could not pass. They also state, that the bridge crosses the stream at an angle with the current, whereby vessels would be incommoded and endangered in passing through a draw, and express an opinion that the striking of the masts is a much less inconvenience than passing the draw. These statements and opinions, tend strongly to prove, that the powers of the company have not been so exercised as to evince either a want of discretion, or a design to deviate from their authority by perverting it, so as unnecessarily to impair the rights of navigation. Whether they have abused, or misused their privileges, is an inquiry more proper for the legislature to institute under the provisions of the 20th section of the law, than for this court to make on an application for a summary injunction; if we could interfere at all in such an allegation, it would only be on a clear departure from the route, or a palpable abuse of their discretion, in a manner that could admit of no colorable excuse—such a case we think has not been made out by the complainants.

We cannot perceive in the law in question, any excess of legislative authority, any violation of any provision of the state or federal constitution, or in its execution by the defendants, the assumption of any power not conferred upon them, any wanton invasion of public or common rights, or any legal ground for an injunction arresting the further progress of the work, on any principle hitherto recognized in a court of equity. Were it even conceded that the bridge is a common nuisance, or a purpresture, the remedy is in a court of law at the prosecution of the state for the public offence, where the defendants would have a right of trial by jury before conviction. If this court enjoin them, it is in effect an adjudication that the offence has been committed, and the consequence becomes visited upon them in anticipation of their legal guilt. Whether a court of equity would do this in any case before a conviction at law, is not well settled, there may be cases where on an application of the attorney general such a proceeding might be sustained, it is unnecessary to give any opinion on such a case till it arises; it is clear, however, that to sustain such an application the injury must be a public one, and can be redressed only at its suit. 18 Ves. 217, etc.; 2 Johns. Ch. 375, etc.; Harg. Law Tracts, 83, 87. If a public nuisance is also a specific injury to the property of an individual, he has his remedy in equity, not because the act complained of is a nuisance, but on account of the irremediable injury to his private right of property. 6 Johns. Ch. 439, 440. No case has yet occurred, in which an injunction has been granted in favor of

an individual, who claims only a common right on a common highway in which he can have no private property; nor can we conceive one in which it could be justified, unless it was accompanied with an obstruction, or destruction of a private right. The injury too must be what is deemed in equity to be irremediable, a permanent appropriation of the property of the complainant to the use of the defendants, a destruction or total loss consequent on the act about to be done; "if the injury is susceptible of perfect pecuniary compensation, if the ordinary legal remedy in courts of law can afford adequate satisfaction, it is not in the sense of the law irreparable," "it must reach to the very substance and value of the estate going to its destruction in the character in which it is enjoyed." If the act complained of is done under color of an authority conferred by law, the court will not interfere if there is any ground of doubt as to the authority, until the doubt has been removed, and the matter finally determined at law. 7 Johns. Ch. 332, etc., and cases cited; also [Osborn v. Bank,] 9 Wheat. [22 U. S.] 842, etc.; 4 Johns. Ch. 22; Coop. 77; Dickens, 600; 2 Johns. Ch. 473.

The application of these familiar principles of the law of equity to the present motions seems conclusive against them. Mr. Atkinson as the owner of vessels employed in navigating the Delaware and its waters, can have only a common right to the navigation of the Neshaminy, the interference with which by the defendants is not the proper subject of an injunction; but if it were so on general principles, his case would be a clear exception. He does not alledge in his bill, that his vessels have standing masts, or that he would be subjected to any particular inconvenience or expense, by conforming his vessels to the bridge about to be erected, or that they had ever been employed in navigating the Neshaminy prior to the passage of the act. On the contrary, the affidavits of the defendants are full to the fact, that his five schooners have struck masts, and go far to negative their ever having navigated this river as early as 1832. The bill does not state the time when the contract was made for the delivery of lime, or how much of the 1000 bushels remains to be delivered; one schooner load it seems has been received, but we are left in the dark as to the present state of the contract—be that as it may, there seems no impediment to its completion. If his vessels have struck masts, they can pass and re-pass as heretofore, or if the defendants have illegally obstructed the navigation, the injury is one which admits of adequate compensation; it is at most but temporary, as it must cease with the expiration of the contract.

Mr. Field's case differs from the other, only in the circumstance of his being engaged in transporting stone from a quarry on the river above the bridge; this gives him no peculiar claims to our interference, as it is only the mode in which he exercises his common right of navigation—he must stand on the same footing as the other citizens of this and other states, whose common right is protected by the law, subject to the qualifications imposed upon it by the provisions of the charter to this company. So long as they comply with its requisitions for the indemnity of the owners of vessels navigating the river at the time of its passage, this court cannot restrain them in the completion of the bridge; should they refuse to pay for the inconvenience and expenses attendant on the necessary alteration of the vessels, that might be a case of special injury under the provisions of the law, which would call for the interposition of the equitable powers of the court. It appears, however, that the company have made a public offer, to pay for such alterations, which is all they are bound to do before an application for indemnity, by any person who alleges himself entitled to it. Vide 2 Daw. 6, 523; 20 Johns. 105, 740; Bonaparte v. Camden & A. R. Co., [Case No. 1,617.] We can take no judicial notice of any special injury sustained by any citizens of this state, or any general inconvenience to which the people on the Neshaminy or its vicinity may be subject on account of the bridge; those are exclusively the subjects of judicial cognizance in the courts of the state, nor can we in any way consider the injury which any persons who are citizens of other states have sustained who are not parties to this suit. The remedy of injunction is individual, applicable only to special injuries in violation of private right, as to which the grievances of one man can have no bearing on those of another, nor can any alleged grievances of the public authorize any one to redress it at his own suit, either in a court of law or equity. Considering these cases, therefore, as depending either on the validity of the act of incorporation or its construction, we are of opinion that the defendants have full legal authority to erect the contemplated bridge on the plan now in progress, and that it is neither a public nuisance or purpresture; but independently of this consideration, we are also of opinion that neither of the complainants have such a right, as under any circumstances to entitle them to an injunction before a trial at law. There is another objection to their motion arising from the acquiescence of the complainants, from the time, when from the plan of the bridge, it was known that it was not intended to construct it with a draw, and its erection was commenced in September or October last, till the present application was made; this objection might be a very serious one if it was necessary to consider it, but as we have no doubt on the other points in the case, we shall give no opinion upon it. The motions for injunctions are accordingly overruled.

Case No. 616.

ATKINSON v. PURDY.

[Crabbe, 551.] [1]

District Court, E. D. Pennsylvania. Sept. 30, 1844.

COURTS — CONFLICTING STATE AND FEDERAL JURISDICTION — PROCEEDINGS BY ASSIGNEE IN BANKRUPTCY—JUDGMENT.

1. Suits by an assignee in bankruptcy are excepted from the general rule that court of the United States have not jurisdiction of controversies between citizens of the same state, and this exception includes a suit by such assignee against a person not a party to the proceedings in bankruptcy.

2. The bankrupt law, being supreme, overrides all state legislation, and, therefore, judgments confessed in contravention of that act are void, and not liens on the bankrupt's property, although they may be valid by the state laws.

3. In general, every judgment of a court having jurisdiction over the parties and subject-matter in controversy is binding upon those parties, and their privies, until regularly reversed, and, though founded on an erroneous view of the matter in controversy, is conclusive on every other court; therefore, this court, in a suit by the assignee of a bankrupt, refused to examine into the validity of a judgment confessed by the bankrupt in a state court, the jurisdiction of which was not denied.

[Cited in Shuford v. Cain, Case No. 12,823.]

At law. This was an action of assumpsit [by Samuel Atkinson, assignee in bankruptcy of David B. Taylor, against Thomas Purdy] to recover a balance of purchase-money, received by the defendant, as sheriff of Bucks county, in Pennsylvania, for certain real estate sold by him, in execution, as the property of one David B. Taylor. It appeared that Taylor had, when in failing circumstances, confessed various judgments to particular creditors, and among others to the Farmers' Bank of Bucks County. Execution was issued on this judgment, and Taylor's personal property sold thereunder. Atkinson v. The Bank, [Case No. 609.] Subsequently his real estate was also sold under the same judgment, but the proceeds of the sale were exceeded by the amount of judgments confessed by him, which were liens on the real estate prior to that of the bank. In the mean time Taylor had been declared a bankrupt, and his assignee brought this suit, alleging that the judgments confessed by Taylor were void, and in fraud of the bankrupt law. The case came on to be tried, on the 18th September, 1844, before Judge RANDALL and a special jury, and was argued by C. and J. Fallon for the plaintiff, and by Miller and Reed for the defendant.

J. Fallon, for plaintiff.

After commenting on the facts and evidence, cited in support of the plaintiff's right to recover, Lewis v. Smith, 2 Serg. & R. 158; Stewart v. Stocker, 13 Serg. & R. 204; Wats. Sher. 7 Law Lib. 61, (*84.)

Mr. Miller, for defendant.

The court under whose process the money was made is the only one which can protect the sheriff, and the assignee has no right to sue him here. The courts of the United States have, on general principles, no jurisdiction over such a case as this, it being between citizens of the same state, one of whom was not a party to the proceedings in bankruptcy. Those courts being of limited jurisdiction, the record must show a case wherein the jurisdiction may attach. This is not so here. Lucas v. Morris, [Case No. 8,587.] We are bound by the state decisions and must proceed according to them, and cannot, therefore, in this court, inquire into the validity of Taylor's judgments, so long as they are unreversed in the state tribunals. Act Sept. 24, 1789, § 34; 1 Story's Laws, 67, [1 Stat. 92;] Golden v. Prince, [Case No. 5,509;] U. S. v. Howland, 4 Wheat. [17 U. S.] 115; Pratt v. Northam, [Case No. 11,376;] McFarland v. Griffith, [Id. 8,790;] Wayman v. Southard, 10 Wheat. [23 U. S.] 25.

Mr. Reed, for defendant.

The question as to the validity of the judgments is not for this court; it is similar to the case of process against a foreign minister: that process is declared to be void, but it must be decided so by the court which issues it. Cabrera's Case, [Case No. 2,278.] These judgments have been passed upon and treated as valid in courts of competent jurisdiction; they may not be inquired into here.

C. Fallon, for plaintiff, in reply.

The act of 1789 merely provides that state laws shall be regarded as rules of decision in the courts of the United States, when the statutes of the United States do not otherwise require, not that where state laws and those of the United States conflict, the latter shall give way. Yet here, where judgments, probably valid by the law of Pennsylvania, are in manifest violation of the bankrupt law of the United States, the defendant asks this court to sustain those judgments notwithstanding the bankrupt law, and denies that it has jurisdiction to inquire into their validity. Such an inquiry, however, has been made in this very case, and by this court, in Atkinson v. Farmers' Bank, [Case No. 609.]

RANDALL, District Judge, (charging jury.) This action is brought by Samuel Atkinson, the assignee in bankruptcy of David B. Taylor, against Thomas Purdy, the sheriff of Bucks county, to recover the balance of purchase-money said to have been received for certain real estate of Taylor sold by the defendant, as sheriff, by virtue of process issued out of the court of common pleas of Bucks county, on a judgment entered in that court in favor of the Farmers' Bank of Bucks County. The sale of the property and receipt of the purchase-money is not the sub-

[1] [Reported by William H. Crabbe, Esq., and here reprinted by permission.]

ject of much controversy, but it is said the plaintiff is not entitled to recover in this action, because this court has no jurisdiction of the cause of action, and because—being a court of limited jurisdiction as to parties—that jurisdiction has not been made to appear, as is requisite, on the face of the record. The position is undoubtedly correct in law, but is not supported by the facts. The declaration states the suit to be brought by the plaintiff as assignee in bankruptcy of David B. Taylor, and although, in general, the courts of the United States have no jurisdiction, in civil actions, between citizens of the same state, there are exceptions to the rule. A suit by an assignee of a bankrupt, although he may be a citizen of the same state as the defendant, is one of these exceptions. It has been said, too, that the recovery of a debt from one not a party to the proceedings in bankruptcy is not such a cause of action as gives jurisdiction to this court, although the parties may be otherwise liable to its process. In this also I think the defendant is in error; the eighth section of the bankrupt law gives concurrent jurisdiction to circuit and district courts, within and for the district where the decree of bankruptcy is passed, of all suits, at law and in equity, which may or shall be brought, by any assignee of the bankrupt, against any person or persons claiming an adverse interest touching any property or right of property of the said bankrupt. If, therefore, on the merits of the case, the plaintiff has the right to recover, I have no doubt of the jurisdiction of the court over the parties.

The defendant alleges, however, that, at the time of the sale by him, and before the decree of bankruptcy, there were sundry judgments entered in the court of common pleas of Bucks county against David B. Taylor, which, by the laws of Pennsylvania, were liens upon the real estate sold, and in amount exceeded the whole of the purchase-money. The existence of such judgments is admitted, but it is said that they are fraudulent and void, having been confessed by the bankrupt in contemplation of bankruptcy, and with an intention of giving the several plaintiffs a preference or priority over the general creditors of the bankrupt.

The second section of the bankrupt law declares, "that all future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser, surety, or other person, any preference or priority over the general creditors of such bankrupt, * * * shall be deemed utterly void." This act, being within the express powers of congress, is supreme, and overrides all state legislation on the subject; if therefore the judgments were confessed in contravention of this law, they are void, and are not liens on the property of the bankrupt.

A most material question now arises:—which is the tribunal to decide on the validity of these judgments? The constitution of the United States provides, in the first section of its fourth article, that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." And congress have provided, by the act of 26th May, 1790,—1st Story's Laws, 93, [1 Stat. 122, c. 11,]—that the records and judicial proceedings of the several states, authenticated in the manner therein provided, shall have such faith and credit given them in every court within the United States, as they have by law or usage in the courts of the state from whence they are taken. As a general principle, every judgment of a court having jurisdiction of the parties and the subject-matter in controversy, is binding upon the parties and their privies until it is regularly reversed, and, although founded upon an erroneous view of the matter in controversy, is binding upon every other court. The errors and irregularities, if any exist, are to be corrected only by some direct proceedings before the same court to set them aside, or in an appellate court. If, however, the court has no jurisdiction of the subject-matter then its proceedings are void, and may be treated as a nullity.

It is not disputed that the court of Bucks county had jurisdiction of the parties, and the subject-matter in the causes before them. The congress of the United States has been careful to avoid anything like a conflict of jurisdiction between the courts of the United States and the state courts, and in granting equity powers to the supreme court has provided that no writ of injunction shall be granted to stay proceedings in any court of a state. If there has been any fraud or irregularity in the proceedings of the state court, it cannot be doubted—indeed it has been proved in this case—that that court will afford every facility to correct it; but for this court to inquire into it, would not only be an evasion of the act of congress prohibiting the interference of courts of the United States with the process of state courts, but might be productive of great injustice to the defendant, inasmuch as a judgment against him for the amount claimed here would not be an available answer to the demands of the plaintiffs whose judgments are subsisting in the court of the state, unless those judgments are set aside or opened by that court. By the sale, the lien of the judgments upon the land was discharged, and the sheriff substituted as the debtor of the plaintiffs therein, according to the priority of their liens. He must account to the court which authorized the sale. By permitting the plaintiff to recover in this action, we must either subject the defendant

to the liability of paying the money twice, or say to the courts of the state: We have inquired into the regularity of your proceedings and find them erroneous; you will therefore proceed no further. Such a direction there is no power in this court to enforce, and it therefore cannot be given. The true and proper remedy for the plaintiff is in the court of common pleas of Bucks county, and to that he is confined. The jury must, therefore, under this view of the law, find a verdict for the defendant. On the same day, the jury came into court and were ready to deliver their verdict, but the plaintiff being called did not come, and made default; whereupon a judgment of nonsuit was entered, with leave reserved to the plaintiff to move to have the same taken off. The motion to take off the nonsuit was made, and, on the 3d January, 1845, discharged, and the judgment made absolute.

ATKINSON v. The R. B. HAMILTON. See Case No. 611.

Case No. 617.

ATKINSON v. ROBBINS.

[5 Cranch, C. C. 312.][1]

Circuit Court, District of Columbia. May Term, 1837.

EXECUTORS AND ADMINISTRATORS—COMPENSATION—FEDERAL COURTS.

1. The orphans' court for the county of Alexandria has authority under the law of Virginia, to regulate and fix the compensation of an executor in settling the estate; and for that purpose may order an inventory to be taken and an appraisement to be made, although the will directs that no inventory should be taken.

2. The rights of the parties under the will are to be decided by the law of Virginia; the powers and jurisdiction only of the court, are to be ascertained by the law of Maryland, referred to by the act of congress erecting the orphans' court.

Appeal from the orphans' court for the county of Alexandria, allowing the executor for his compensation seven and a half per cent. on the appraisement of the stock in trade, which the testator directed not to be appraised, and to be kept in trade to be carried on by one of his sons for the joint benefit of all the children until it should become necessary to divide it among them. Exception was taken in the orphans' court, by Mr. Semmes, for the legatees, and overruled by the judge, because, he says, the profits cannot be ascertained but by a comparison of the present value of the stock, with the value at the time of division; and because the orphans' court, in practice, proceeds under the Maryland law, which requires an appraisement in all cases.

Mr. Semmes, for the legatees, contended that the orphans' court had no jurisdiction to have an appraisement made, for the purpose suggested, against the express provisions of the will. The rights under the will must be determined by the law of Virginia. The powers, duties, and jurisdiction of the court only are to be ascertained by the law of Maryland referred to by the act of congress erecting the court. The case of Nicholls v. Hodges, 1 Pet. [26 U. S.] 562, was decided under the express provisions of the Maryland law, which requires the compensation to be made by way of commissions on the amount of the inventory. But there is no statute in Virginia ascertaining the amount of the commissions. The compensation of an executor is by an allowance made by the judges in their discretion according to the circumstances of each case.

Mr. Taylor, contra. By the act of congress of the 27th of February, 1801, § 12, (2 Stat. 103,) the orphans' court in each county is to "have all the powers, perform all the duties, and receive the like fees, as are exercised, performed, and received by the judges of the orphans' court within the state of Maryland." This is not a question of the right of property; it is only of the compensation to the executor for his services. His duties are to be ascertained by the law of Maryland. There is no law in Virginia to regulate the commissions. The practice and forms of proceeding must be governed by the Maryland law. Some commission must be allowed, but without an inventory and appraisement it cannot appear how much. There is no evidence from which this court can say whether the commission is too large. The whole personal estate passes through the hands of the executor, in whom it is vested by law, and the legacies vest only by his assent. He is responsible to the legatees and must finally make a distribution.

THE COURT, (THRUSTON, Circuit Judge, contra,) affirmed the decree of the orphans' court.

CRANCH, Chief Judge, stated his opinion to be, that the rights of all parties under the will are to be decided by the law of Virginia. The powers and jurisdiction, only, of the orphans' court are to be ascertained by the law of Maryland. The rights of the legatees, and of the executor, are to be governed by the law of Virginia. By that law the court is to fix the compensation of the executor. It is a right which the executor has under that law. The court in Virginia is not obliged to give the compensation in the form of commissions; but may take the commissions, (or rather the sum upon which commissions might be charged) as a guide to their discretion. So may the orphans' court here. And the supreme court has decided in Nicholls v. Hodges, 1 Pet. [26 U. S.] 562, that the rate of compensation is exclusively in the cognizance of the orphans' court, and its decision is conclusive.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 618.

ATKYNS v. BURROWS.

[1 Pet. Adm. 244.][1]

District Court, D. Pennsylvania. 1804.

SEAMEN—WAGES—AUTHORITY OF MASTER TO DISPLACE MATE—ADMIRALTY JURISDICTION — MASTER AS WITNESS.

1. When and for what causes a mate may be displaced by the master.

[Cited in Sherwood v. McIntosh, Case No. 12,778; The Exchange, Id. 4,594.]

2. Accounts for traffic and dealing between master and mate, not subjects of admiralty jurisdiction.

3. The master is answerable to the owners for damages accruing from the illegal discharge of mariners, and also for extravagant wages given.

[Cited in The Fortitude, Case No. 4,953.]

4. Mate may sue for wages in the admiralty court, [and] all rules operating on mariners apply to him.

[Cited in The Leonidas, Case No. 8,262.]

5. Master may displace the mate for just and lawful cause; but this cause may be enquired into.

[Cited in Thompson v. Busch, Case No. 13,944; Sherwood v. McIntosh, Id. 12,778; Wood v. The Nimrod, Id. 17,959; The Exchange, Id. 4,594.]

6. Mate not being lawfully displaced, and offering to do his proper duty, should have been received; [and,] if a loss accrues when the mate is unlawfully displaced, the master must answer.

[Cited in Thompson v. Busch, Case No. 13,944; Sherwood v. McIntosh, Id. 12,778; The Exchange, Id. 4,594.]

7. Master offered as a witness, and refused.

[Cited in The Trial, Case No. 14,170.]

In admiralty. The dispute, between the master and the mate, in this cause, was concerning the mate's wages. Process, or a citation was issued against the master and owner. There were accounts of monies and articles of traffic and dealing between the captain and mate, but they were not considered within the jurisdiction of the admiralty, except so far as they were connected with the claim for wages. The master had, a short time before the arrival of the vessel at Philadelphia, the last port of delivery, turned the mate before the mast. The mate insisted on his wages, agreeably to contract. He went on shore at Philadelphia, where the voyage ended, against the captain's orders, to take advice. He returned in a few hours (far under forty-eight) and tendered himself ready to assist in unlading the cargo, as mate. The captain refused to reinstate him in the capacity of mate, and he would not labour as a mariner, in delivering the cargo.

The forfeiture of wages was insisted on—First. Because the captain had displaced the mate at sea, for causes of which he was competent to judge, and having legal authority so to do. Second. The mate had gone on shore without the captain's orders and against his directions—He had not assisted to unlade the cargo; and had left the ship before she was unladen, thereby incurring a forfeiture of all his wages, as he was absent without leave, and did not return on board, within forty-eight hours, as the act of congress directs. On the first point. The causes assigned for displacing were—First. The mate having been found asleep during his watch—the proof was, that the mate, who was lame in one of his feet, was found during the watch, lying for a few minutes on a hencoop. One witness said he was asleep; the other could not be positive, and spoke doubtfully. Second. The mate had disobeyed the orders of the captain at sea, in neglecting to have the jib hauled down, on the approach of a squall, whereby the jib was split. The proof on this point was not satisfactory; it appeared that the mate had at first ordered the jib down—afterwards he conceived there would be no necessity for it—but on the squall encreasing he repeated, too late, the orders to haul it down: all this happened in the course of a few minutes.

The captain was offered as a witness, to prove these and other facts, which the mate denied. The judge refused to permit the captain to be sworn; alleging it to have been his practice not to admit such testimony. In this case there appeared much personal animosity; and the contest seemed to lay entirely between the master and mate. The master is answerable to the owners for damages accruing to them by his improper and illegal discharge of mariners, as well as for extravagant wages given to, or injurious contracts made with them. This, he said, was among the reasons inducing him to refuse permitting the master to be examined as a witness, in such controversies. The mate is permitted to sue in the admiralty, as a mariner. All general rules in cases of mariners apply to him. On the several points, the judge declared his opinion, and determined as follows.

BY THE COURT. When I first came into this court, I found it taken for granted, that the captain had a legal right to displace the mate for just cause. I have seen repeated instances, where the exercise of this power was necessary for the safety of the ship; and I have examined into many cases, wherein it had been executed from arbitrary, capricious, and improper motives. It is established by the maritime laws, and so it ought to be, that the captain must be supreme in the ship. His lawful orders must be obeyed. But when a contract is in question, the law, by its proper courts, will see that it is not vacated, for any other than legal, reasonable and necessary causes. The courts will control and examine the powers and conduct of the master. He is authorized to give all commands for the navigating, government and safety of the ship; but he has

[1] [Reported by Richard Peters, Jr., Esq.]

no authority to nullify a contract at his will, or for light and trifling causes. A contract is a solemn engagement, not to be vacated without the consent of all parties, or on considerations, on which the law must decide through the tribunals established to make such decisions. The mate is a respectable officer in the ship, and generally chosen with the consent of the owners; he is under the orders of the master, in his ordinary duty; but his contract is not subject to arbitrary control. He may forfeit his right to command and wages, by fraudulent, unfaithful, and illegal practices; by gross and repeated negligence, or flagrant, wilful and unjustifiable disobedience; by incapacity, brought on him by his own fault, to perform his duty, or palpable want of skill in his profession. These are very different from the charges alleged, but not satisfactorily proved, in this cause. I do not therefore think that the captain was justifiable in displacing the mate for the causes assigned. The safety of the ship often depends on this officer, who is sometimes more trustworthy and capable than the master; and commonly placed by the owners to encrease the security of their property. In case of the absence, incapacity or death of the captain, the command and responsibility devolve on the mate. [See note at end of case.] The causes of removal should, on all these considerations, be evident, strong and legally important.

The second point depends on the first—the mate tendered himself ready to perform his duty as mate, but the master refused to receive him in that capacity: he was not bound to act in any other station. If any loss accrued to the owners hereby, the master, and not the mate, is responsible. If a common mariner even rebels, disobeys and refuses to do his duty, but repents in time and offers amends, and a return to, and faithful discharge of his duty, the master is bound to receive him. If the master will not so receive and reinstate him, but discharges him, the maritime laws declare that he may follow the ship, and recover his wages for the whole voyage.

I do not think it necessary to determine the point made in this cause, "Whether the mate is, or is not, bound when the voyage is ended, to assist in unlading the cargo?" The mate seems peculiarly charged with this duty (however it may be with the mariners) and he offered to perform the service. I have on many occasions, given my opinion on the subject of the duty of mariners, under similar circumstances with the mate. On the whole, I think wages must be paid agreeably to the contract in the shipping articles.

[NOTE. The footnote (1 Pet. Adm. 247) cites a case in the district court for the district of Pennsylvania to the point that the command and responsibility necessarily fall upon the mate in the absence of the captain. This case is the same as Anonymous, Case No. 467a.]

Case No. 619.

The ATLANTA.

[2 Spr. 251;[1] 3 Amer. Law Reg. (N. S.) 675; 26 Law Rep. 204.]

District Court, D. Massachusetts. Jan., 1864.[2]

[PRIZE — WHAT CONSTITUTES THE CAPTURING FORCE — DISTRIBUTION BETWEEN CAPTORS AND THE UNITED STATES.]

[1. A war vessel within signal distance of another, making a prize, is entitled to share in the prize, under 12 Stat. 606, § 3, but is not a part of the "capturing force," within the meaning of section 2, providing that, where the capturing force is superior, the prize shall be divided equally between the United States and the officers and men making the capture.]

[Cited in The Selma, Case No. 12,647.]

[See note at end of case.]

[2. The Confederate ironclad Atlanta came down Warsaw sound on June 17, 1863, to attack the United States monitors Nahant and Weehawken, stationed there to prevent the Atlanta's egress, supposing herself superior to their combined force. The monitors steamed away from the Atlanta until fully prepared for action, when the Weehawken turned, followed immediately by the Nahant, and both vessels ran towards the Atlanta, which had directed her fire wholly against the Nahant. As they approached, the Weehawken fired five shots, with such effect as to compel the Atlanta's surrender. The Nahant had reserved her fire for closer range, but had never been more than 1,000 yards from the Weehawken, and, at the time of the surrender, was equally distant with the latter from the Atlanta. *Held*, that the Nahant was a part of the "capturing force," within the meaning of 12 Stat. 606, § 2.][3]

[See note at end of case.]

[3. Each monitor was inferior to the Atlanta in tonnage, armament, and number of crew, but together they were superior in these respects. *Held*, that the capturing force was superior, and that half the prize should go to the United States, under 12 Stat. 606, § 2.][3]

[See note at end of case.]

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[1] [This case was originally reported by Hon. Richard H. Dana, Jr., with the following syllabus: "What co-operation constitutes a vessel one of 'the vessels making the capture,' for the purpose of determining the relative force of the captors and the prize." Opinion reprinted from 2 Spr. 251, by permission.]

[2] [Affirmed by the supreme court in The Weehawken v. The Atlanta, 3 Wall. (70 U. S.) 425.]

[3] [The provisions of the statutes at the time of this case were as follows, (12 Stat. 606:) "§ 2. And be it further enacted, that the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors; and when of inferior force, shall be divided equally between the United States and the officers and men making the capture. § 3. * * * Fourth. When one or more vessels shall be within signal distance of another making a prize, all shall share in the prize." These are slightly changed in the Revised Statutes. "§ 4630. The net proceeds of all property condemned as prize, shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one-half shall be decreed to the United States and the other half to the captors, except that in case of privateers and letters of marque, the whole shall be decreed to the captors, unless it shall be other-

[In admiralty. Libel in rem by the officers and men of the United States monitors Weehawken and Nahant and the United States steamer Cimmerone, as captors, against the ironclad ram Atlanta, a prize. Decree awarding one-half the prize money to the United States, and one-half to the libellants.]

R. H. Dana, Jr., U. S. Atty.

Mr. Hodge, of Washington, agent of captors, submitted a written argument.

C. P. Curtis, Jr., afterwards appeared for the captors.

SPRAGUE, District Judge. This vessel, an iron-clad war steamer, taken from the rebels in battle, has been condemned as lawful prize, and the question now is on the distribution. The main and difficult question is, whether the entire value is to go to the captors, or half to them and half to the government. The act of 1862, c. 204, § 2, (12 Stat. 606,) prescribes the rule thus: If the prize is "of equal or superior force to the vessel or vessels making the capture," it goes wholly to the captors; if of inferior force, it is divided equally between the United States and the "officers and men making the capture." The third section provides for the distribution of the whole or half adjudged to the captors in these words: "When one or more vessels of the navy shall be within signal distance of another making a prize, all shall share in the prize." In determining whether the captors shall have half or all, the court must first decide what vessel or vessels "made the capture" or "made the prize," and then compare the capturing force with the force of the prize. Then, having by this process adjudged the whole or the half to the vessels making the prize or capture, the court is to determine whether any and what vessels of the navy were within signal distance of the vessel or vessels that made the prize, and let them in to participation.

What vessel or vessels, in this case, "made the capture"? The officers of the Atlanta, now prisoners of war at Fort Warren in this harbor, have refused to testify, so that I have not the benefit of their statements. But still the evidence in the cause presents a clear account of this most interesting conflict,—perhaps, in its bearings on naval science, the most significant battle in modern times, except that of the Monitor and Merrimac. The Atlanta, originally a British steamer, powerful and fast, called the Fingal, had, early in the war, run the blockade of Savannah, and had been converted by the rebels into an iron-clad war steamer, at a vast expense. She had a long low deck, with a casemate or covered iron-plated house in the centre, with sloping sides and ends, in which was her battery. She had also a powerful ram, and, attached to her bow and carried under water, a torpedo charged with about fifty pounds of powder. Two steam vessels of our navy, of the type so novel, and yet already so universally known as "monitors," were guarding the Warsaw sound, to prevent the egress of the Atlanta. These were the Weehawken, commanded by Captain John Rodgers, and the Nahant, commanded by Captain John Downes. Captain Rodgers was the senior and commanding officer. Each monitor had one revolving turret, with two smooth-bore Dahlgren guns, one of fifteen-inch and the other of eleven-inch calibre. The rebels knew that these monitors were there, and knew their size and force; and the Atlanta, when fully ready, was sent down the sound for the purpose of capturing or destroying them. It would seem, too, that they had little doubt of their success. The Atlanta was accompanied by several steamers having passengers on board, to be spectators of the conflict. Two of these steamers were armed, and belonged to the rebel navy; but, being wooden vessels, they kept at a safe distance, and took no part in the action. On our side, also, there was the wooden gunboat Cimmerone, which was directed by Captain Rodgers to keep out of the action unless signalled specially.

It was at early dawn on the 17th of June, 1863, a little after four o'clock, that the Atlanta was descried coming down the sound. The monitors at once began to prepare for action. The Weehawken lay higher up than the Nahant. She slipped her cable. The Nahant weighed her anchor, Captain Downes thinking he might need it in the action in case of injury to his motive power, and that he could prepare for action as well while weighing. To give themselves time to get fully ready, Captain Rodgers steamed slowly down the sound, directing Captain Downes to follow in his wake, the Weehawken having the pilot. Captain Downes followed in the wake of the Weehawken as soon as he got his anchor. This left him for a time nearer to the advancing enemy than the Weehawken. When fully ready, the Weehawken turned toward the enemy. Just as she turned, the Atlanta opened her fire on the Nahant. Her shot did not take effect. The Weehawken rounded and steamed towards the Atlanta, the Nahant following in her wake. It was then seen that the Atlanta was stationary, and lying partly across the channel. When within between three hundred and four hundred yards, the Weehawken slowed, and fired her fifteen-inch gun. Drifting with the tide, and under slow way, when within about two hundred yards, she fired both her guns, as nearly together as possible. Captain Downes acted on a different plan. He thought his fire would be most effectual close aboard, and made directly for the Atlanta at full

wise provided in the commissions issued to such vessels." "§ 4632. All vessels of the navy within signal-distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid, if required, shall share in the prize."]

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treat as actual captors all who were within signal distance of actual captors. Another result would follow, that all vessels within signal distance of this second class of vessels would share in the distribution, though not within signal distance of the first class, because they would be within signal distance of some of the vessels which we should have held to be vessels making the capture. I have no difficulty, therefore, in deciding that I must exclude the Cimmerone, in determining the relative force of the captors and the prize. In like manner, I exclude the gunboats of the rebels which were within signal distance of the Atlanta, but kept aloof.

It now becomes necessary to compare the force of the Atlanta with that of our monitors.

Beside the depositions, complete drawings of the Atlanta have been annexed to Captain Rodger's evidence, and a report from the bureau of construction. The Atlanta's dimensions were as follows: Length, 191 feet 2 inches; extreme beam, 40 feet 6 inches; depth of hold to top of beam, 13 feet and one-half inch. These dimensions make her measurement tonnage 927 6-10 tons, or if, as the agent of the captors contends, we must include the thickness of the deck, 1075 8-95 tons. She was plated with two layers of iron, one horizontal and one vertical, each two inches thick, making four inches of plating. At the knuckle, where the casemate was fastened to the hull, her sides were six feet in thickness of solid wood. Her deck was two feet one inch in thickness of plank, beside the iron covering. Her casemate was a little over one hundred feet in length, fastened to the hull, in about the middle of the length of the deck, and covering its entire width, leaving an open deck of about forty-five feet at each end. This casemate had sloping sides and ends, at an angle of twenty-nine degrees from the horizontal, and three ports on each side, with heavy port-stoppers. The sides of the casemate were four inches of iron and thirty-six inches of solid wood. She mounted four guns, Brooke's rifled ordnance,—two of seven inch, throwing balls of one hundred and fifty pounds, and two of six inch, throwing balls of one hundred pounds; the six-inch guns working in broadsides, and the seven-inch guns, one at the forward and one at the after end of the casemate, working on pivots, either as broadside, or as bow and stern guns, so that three of her four guns could be used on either broadside. She had a powerful ram of solid wood, strapped with iron bands, above water; and a torpedo at the end of a jointed crane, capable of being raised in the air or lowered under water, carried about twenty feet beyond the bow, and charged with some fifty pounds of powder, expected to explode on concussion. Her crew were one hundred and forty-three, all told. The two monitors were as nearly equal, indeed as nearly identical, as it is easy to suppose war vessels to be. They were each 844 tons measurement, armed and arranged alike, with the usual low deck of the monitors, but little above the water line, with one revolving turret. Their guns were of the same calibre; one of fifteen-inch, and one of eleven-inch, smooth-bore Dahlgrens; the former throwing shots of 440 pounds solid and 400 pounds cored, and the latter 168 pounds solid. The Weehawken had eighty-four men, and the Nahant eighty-five men.

In comparing the force of these novel engines of war, the old rules of naval science are superseded. Not only are the vessels extraordinary and experimental, but the ordnance scarcely less so. The first shot from the Weehawken is said to have been the first iron shot of that size ever fired in naval warfare. I entertain no serious doubt that the force of the two monitors combined was superior to that of the Atlanta (I do not judge merely by the result); I am aware that a different course on either or both sides, might have presented a different aspect. If the Atlanta had run at the monitors with her full force, instead of lying still to take and give fire, and her torpedo had exploded under one of them successfully; or if she had struck both, or either of them, with the full force of her ram; or if a better-aimed or more fortunate shot had injured the turret, or the steering or motive power, of either monitor; or if the first two shots from the Weehawken had been less skilfully directed, or less fortunate, or the Weehawken had reserved her fire to the last, and thus the Atlanta had been able to use her battery steadily until at close quarters,—under any or all these suppositions, the length of the contest, and the injuries on each side, might have been very different, if the final result had been the same. I am to consider the means the vessels possessed, and not the use they made of them. Still, I am satisfied, that, for offence and defence, the two monitors, with their batteries, acting together, at the same time, and under one command, must be considered of superior force to the Atlanta. They were each of 844 tons, and the Atlanta of about 1000 tons. They had, one eighty-four, and the other eighty-five men, and the Atlanta one hundred and forty-three men. The effective power of large ordnance against iron-clads has not yet been fully tested by experience; and, in the present state of our knowledge, the actual effect of the shot of the Weehawken must have much influence in forming our opinion. I am constrained to think that two fifteen-inch and two eleven-inch smooth-bore Dahlgrens, mounted on two vessels, capable of taking separate positions, are superior, for offence, to two seven-inch and two six-inch rifled Brookes, in one vessel. And in case of a fight on the decks, by boarding or otherwise, we had the superiority of men. As to defence, the Atlanta presented a larger surface than the monitors, and could be more easily hit; and the result show-

ed that the walls of her sides and pilot-house, however strong, were not, in fact, a protection against the shot of the monitors at that range. We do not know, by experiment, how well our hulls and turrets would have resisted her shot; but a construction which avoids shot is an element to be calculated, as well as one which resists shot. Indeed, neither the agent of the captors, in his argument, nor the two commanders, in their depositions, appear to contend, or to give an opinion, that the Atlanta was equal, or superior to, the two monitors.

The agent for the captors contends that, in comparing the forces, the Weehawken alone is to be counted. It is said, that the only shot fired, and the only damage done, was by the Weehawken, and that her shot compelled the surrender; that the Atlanta was put beyond the possibility of fighting or escaping, by the first two shots, and actually surrendered, by reason of them, before the Nahant had, in fact, done any thing. It is contended, that it was not necessary that the Nahant should have been present; that the Atlanta did not surrender by reason of intimidation from the presence and approach of the Nahant, but by reason of her own totally disabled condition. It is further argued, that the Nahant must be considered only a constructive captor; that she was within signal distance, ready and eager, and doing her best to aid in the battle; so situated as to afford encouragement to our side, and intimidation to the enemy; but that such is the definition of a constructive captor, and that the facts go no further. It may be said, too, that the policy of the statute is to stimulate vessels to attack equal or superior vessels at once and alone; and that if a vessel does so, and succeeds, before others actually strike a blow, the entire prize should go to the captors; and that, in such case, it ought to be deemed immaterial how near the others may be, or on what theory of battle they reserved their fire. In a question solely between conduct of the highest merit and the public treasury, the government would doubtless desire a construction liberal to the officers and men who perilled all in a strange and unwonted conflict, and attained a success that has attracted the attention of the world. But my duty is limited to construing the statute. I cannot make a gratuity of the public property, however meritorious the object.

I shall decide the present case on its exact and peculiar circumstances. I lay down no rule for other cases, nor do I say what variation from the facts of this case would have led to a different application of the statute. I am led to the belief that the Nahant must be considered so far a participator in the conflict of forces, as to be included in the comparison. The Atlanta came down to attack both the monitors, knowing they were together, under one command, and for one purpose. She calculated on their combined force, and governed herself accordingly. It is impossible for me to say now, whether the Atlanta would have taken the same course, if she had had only the Weehawken to deal with. Each monitor knew that the other was co-operating,—not merely ready to co-operate, but actually taking part in the attack, during all the time, within effective distance for firing, and part of the time at nearly the same distance from the enemy, with her consort, and one as capable as the other of all acts of offence and defence. This is not all. It was the Nahant that the Atlanta fired at. The Nahant drew off the fire of the enemy, and engaged its offensive force, so far aiding her consort. It was known to those on board the Atlanta, that the Nahant, apparently uninjured by their previous fire, was coming upon the Atlanta at full speed, reserving her fire, though within easy range. This would have been enough to settle a doubtful question of surrender, if a doubt remained. One of the facts to be considered by the commander of the Atlanta, in determining whether and when to surrender, might well have been the demoralized state of his crew. How far may the knowledge that a second monitor of the same force with that from which they had suffered so terribly was within equal distance, have contributed to this demoralization? How far did the co-operation of the two monitors affect the course taken by the Atlanta in all respects, the training her guns on the Nahant, her lying still to present her broadside? How far did this co-operation affect the course taken by each monitor? If the Weehawken had not been there, or had not opened fire, would or would not Captain Downes have reserved his fire as he did? If the Weehawken had been alone, or with a vessel within signal distance capable of aiding, but not just where the Nahant was, and doing just what she was doing, would or would not her course have been the same? If the Nahant had not diverted the fire of the Atlanta, what might have been its effect on the Weehawken? If Captain Rodgers's shot had been unsuccessful, might or might not, in a few minutes, almost seconds, the close discharge of the Nahant have been decisive?

The result to which I am brought is, that in comparing the force of "the vessel or vessels making the capture" with that of the prize, I must include the Nahant with the Weehawken. I do this, as the result of the special circumstances of this case, without attempting to establish a test for determining who, under other circumstances, should be deemed actual captors. The result is, that half the net proceeds of the prize are to be given to the captors, and half to the United States, and that the vessels entitled to participate in the distribution are the Weehawken, Nahant, and Cimmerone.

[NOTE. The officers and crew of the Weehawken, John Rodgers commanding, took an appeal to the supreme court, which affirmed the

decree. The Weehawken v. The Atlanta, 3 Wall. (70 U. S.) 425. Mr. Justice Field, in delivering the opinion, said: "'The mere fact that the only shot fired, and the only damage done, was by the Weehawken, is not decisive. Other circumstances must be taken into account in determining the matter; such as the force, position, conduct, and intention of the Nahant. The two vessels were known to be under the same command and of nearly equal force. The Atlanta descended the sound to attack both, and governed herself with reference to their combined action. It is not reasonable to suppose that her course would have been the one pursued had she had only the Weehawken to encounter. Besides, the fire of the Atlanta was directed entirely to the Nahant, and of course diverted from her consort. It is possible that a different result might have followed had the fire been turned upon the Weehawken. This diversion must be considered in every just sense of the term as giving aid to her. Again, the power of the shot of the Weehawken had evidently surprised the officers of the Atlanta, who found their vessel speedily disabled, and their crew demoralized. The advance upon her, at full speed, of a second monitor, of equal force, ready to inflict similar injuries, may have hastened the surrender. It can hardly be supposed that the approach of the second monitor did not enter into the consideration of the captain and officers of the Atlanta. If the shot from the guns of one of the monitors could, in a few moments, penetrate the casemate of the Atlanta, crush in the bars of her pilot house, and prostrate between forty and fifty of her men, her captain might well conclude that the combined fire of both would speedily sink his vessel and destory his entire crew. It cannot be affirmed, nor is it reasonable to suppose, that any of the incidents of the battle would have occurred as they did if the Nahant had not been present in the action. We concur, therefore, in the view of the learned district judge, that, in the comparison of the forces engaged in the conflict, the Nahant must be included with the Weehawken."]

ATLANTA, The. See Case No. 597.

ATLANTA & R. AIR-LINE R. CO., (WILMER v.) See Cases Nos. 17,775 and 17,776.

Case No. 620.

The ATLANTIC.

[Abb. Adm. 451.][1]

District Court, S. D. New York. Feb., 1849.

SEAMEN — LIBEL FOR WAGES — DEFENSES — DISCHARGE BY CONSUL—PROOF—CONTRACT OF SEAMAN—PLEADING—SPECIAL REPLICATION—LIABILITY OF SHIP TO INJURED SEAMAN.

1. Where, in answer to a libel for wages, the claimants set up a discharge of libellant in a foreign port by order of the consul, it is incumbent on them to set forth in their answer a state of facts justifying the discharge relied on, and to support the allegations by adequate proof.

2. The discharge of a seaman in a foreign port (under the acts of February 28, 1803, [2 Stat. 203, c. 9,] and July 20, 1840, [5 Stat. 394, c. 48,]) can be ordered by the consul, only upon the consent of the seaman, given, or proved before him.

[3. Cited in Coffin v. Weld, Case No. 2,953, to the point that the certificate of the consul must show clearly his jurisdiction, and the grounds of his action.]

4. The party relying upon such discharge in defence to an action for subsequent wages, must show the fact that such consent was given.

[Cited in Coffin v. Weld, Case No. 2,953.]

5. To entitle an instrument to the respect accorded to documents under official signature and seal, the signature must be legible, and the impression of the seal sufficiently distinct to allow the vignette and motto to be distinguished.

6. In answer to a libel for wages, the claimants set up a stipulation in the shipping articles in bar of the recovery. The libellant served a replication in the usual form, but contended, upon the trial, that the stipulation relied upon was void. *Held*, 1. That so far as the claim to treat the stipulation as void might rest upon any matters of fact outside the stipulation itself, the question was not raised by the general replication; but the libellant ought, either by an amendment of the libel or by a special replication, to have introduced into the pleadings averments contesting or avoiding the apparent bar contained in the stipulation. 2. That the question, whether the stipulation was not void in point of law in itself considered, and apart from any extraneous facts, might be raised on the general replication, and should be considered as if it had arisen upon demurrer or exception to the answer.

7. As a general rule, seamen are competent to bind themselves by a contract with the master and owners; and in the ordinary case of a hiring for money wages at a specific rate, the contract of the seamen in respect to the rate will be upheld.

[Cited in The Antelope, Case No. 484; Frates v. Howland, Id. 5,066; Slocum v. Swift, Id. 12,954.]

8. The contract of a seaman in respect to his compensation will likewise be upheld where the mode of compensation contemplated is by a proportional division of the earnings of the vessel among the owners, officers, and crew.

[Cited in The Antelope, Case No. 484; Slocum v. Swift, Id. 12,954.]

9. Shipping articles entered into for a whaling voyage, and contemplating the payment of the officers and crew by "lays" or shares in the vessel's earnings, contained a stipulation that either of the officers or crew who might be prevented by any cause from performing their duty during the whole of the voyage, should receive of his lay only in proportion as the time served by him should be to the whole time of the voyage. *Held*, That this stipulation would be sustained; even without evidence that special explanation of it was made to the seaman.

[Cited in The Antelope, Case No. 484; Slocum v. Swift, Id. 12,954; The Grace Darling, Id. 5,651.]

10. A mariner receiving injury in the performance of his duty is entitled to be treated and cured at the expense of the ship; and this is equally true, whether his compensation is by specific money wages, or by a share in the earnings of the vessel.

[Cited in Babcock v. Terry, Case No. 702; The Ben Flint, Id. 1,299; The City of Alexandria, 17 Fed. 394; The Lizzie Frank, 31 Fed. 481; The City of Carlisle, 39 Fed. 816; The J. F. Card, 43 Fed. 94.]

11. As a general principle, the liability of the ship in this regard is limited to the reconveyance of the disabled mariner to the United States, or to such period of time as may be reasonable, to enable him to return thither; but this rule is liable to variations.

[Cited in Babcock v. Terry, Case No. 702; The Ben Flint, Id. 1,299; The Lizzie Frank, 31 Fed. 481; The City of Carlisle, 39 Fed. 816; The J. F. Card, 43 Fed. 94.]

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[1] [Reported by Abbott Bros.]

[12. Cited in Burdett v. Williams, 27 Fed. 117, to the point that a whaling voyage which is not from port to port has never been regarded as within the provisions of Rev. St. § 4520, requiring shipping articles to specify certain particulars.]

In admiralty. This was a libel in rem by George Stotesburg, against the ship Atlantic, to recover wages, and also the expenses of libellant's cure for injuries received during his service on board. The libel stated the following facts: That in July, 1845, the master of the Atlantic, then in the port of New London making ready for a three years' whaling voyage to the Northwest coast, shipped the libellant as green hand for such voyage, on the two hundred and twenty-fifth lay or share of what should be taken by the ship, as the libellant's wages. That the libellant signed the shipping articles, in which the contract was fully set forth. That in August following, he entered upon the service of the vessel, under the agreement, and the vessel, with the libellant on board, proceeded on her intended voyage, and cruised for about seven months, when she arrived at Maui, one of the Sandwich Islands. That on March 16, 1846, the ship being yet at Maui, the libellant, while in the performance of his duty, fell from the maintopsail yard, and was so severely injured that he was taken ashore to the hospital, where he remained confined to his bed for about twenty-one months. That while he was in the hospital, the ship proceeded on her cruise until November, 1847, when she started for home, and on her way touched at Maui, and took the libellant on board, and then proceeded to the port of New London, where she arrived April 20, 1848; having taken a cargo of which the two hundred and twenty-fifth part claimed by the libellant was averred to be of the value of $300 and upward, which he claimed to recover from the ship. The libel further stated, that by reason of the injuries received by libellant in his fall, he had lost the use of one of his legs, and one of his arms had been rendered almost useless; that he had already incurred great expense for medical advice, and must incur still more before he could be fully restored; and he claimed to recover from the ship "his reasonable expenses already incurred, and hereafter to be incurred in his cure, and his reasonable support since his injury and till he shall be cured."

The answer stated that the libellant shipped on board the Atlantic as alleged in the libel, except that he shipped as carpenter's mate instead of green hand, and that no limit of three years or otherwise was set to the duration of the voyage. The answer then set up as a defence to the claim for wages a clause in the shipping articles, which was in these words: "It is also further agreed between the owner of said ship Atlantic on the one part, and the captain, officers, and crew on the other part, that if the captain, officers, and crew, or either of them, are prevented by sickness or any other cause from performing their duty during the whole of said voyage in said ship Atlantic, that any of them so falling short, shall receive of their lay or share in proportion as the time served or duty performed by them is to the whole time said ship is performing her voyage." And it was also charged, in respect to the injury received by libellant, that the accident with which he met was not occasioned by his being engaged in any unusual duty, or by any agency or through any fault of the master, or of any officer of the ship, but through want of sufficient care on the part of the libellant. The answer further showed, that on the libellant's being placed in the hospital at the port of Lahaina, at Maui, the libellant was discharged from the ship with his own consent, and by the authority of the United States consul at the port. That the master of the ship then produced to the consul the list of the ship's company certified as required by law, and paid to the consul $36, being three months' wages of libellant, for which the consul gave his receipt, together with his certificate that the libellant had been discharged from the ship according to the laws of the United States. That on the return of the vessel to the port, the United States consular agent put the libellant on board the ship as a sick and disabled seaman, to be carried as passenger to the United States, and that he was so received and brought home. The answer further stated that advances had been made to the libellant, which more than paid the amount due him upon his lay or share under the stipulation in the shipping articles before mentioned.

To this answer the libellant filed only a general replication in the usual form. The cause was heard upon depositions and documentary evidence; the important points of which are adverted to in the opinion of the court.

Burr & Benedict, for libellant.

I. The rule of the maritime law is well settled from the earliest periods, that a seaman taken sick shall be cured and tended at the ship's expense, and have his whole wages; if he be hurt in doing his duty, and in rendering services to the master or the ship, he must be cured and indemnified at the expense of the ship; if he be disabled for life in defending himself or the ship, he must be provided for, for life, at the ship's expense. Cleirac, 25, on article 6 of Laws of Oleron; Laws of Oleron, arts. 6, 7, [Append. Fed. Cas.,] of Wisbuy, arts. 18, 19, [Append. Fed. Cas.;] of Hanse Towns, art. 39, [Append. Fed. Cas.;] Pardessus, passim; 1 Valin, 721; 2 Valin, 167; 2 Boulay-Paty, §§ 9–11, tit. 5; Abb. Shipp. 622, 624, note; Harden v. Gordon, [Case No. 6047;] The

George, [Id. 5,329;] Reed v. Canfield, [Id. 11,641;] The Forest, [Id. 4,936.]

II. This law is dictated by humanity and policy. "The Spaniards are the most unkind and indeed unjust to their sick mariners of any people, for they neither pay them any wages, nor maintain them, unless they pay others to serve in their stead." 1 Pet. Adm. Append. 107, note; Sea Laws, 203; Translation of Cleirac, note to article 45 of Laws of Hanse Towns. "Public policy, as well as the ordinary claims of humanity, demands that the interests of the seaman should be linked, in these respects, to those of the ship." The George, [supra.] All the ancient codes and their commentators, and the uniform current of modern decisions, agree in the rule and the reasons of it.

III. The claimants, however, insist that the rule is confined to seamen who ship by the month, and does not apply to seamen on whaling voyages, whose wages are usually a share of the profits. It is not easy to see how the mode of hiring should alter either the humanity or the policy of the law, or in any manner change the rule. In length of voyage,—in absence from friends and the comforts of civilized life on shore,—in purely maritime service, and perils, and hardships,—in the great profits and national benefits which result from his labors,—and in the necessity of being kept in good condition, the whaling seaman is the mariner par excellence.

IV. A participation in the profits of the voyage is believed to have been originally the mode of compensation of mariners in all employments, and by degrees the capitalist took the profits, and the mariner had fixed wages; but in the fisheries the original and primitive plan has always prevailed with modifications. In the time of Cleirac there were six modes or hiring mariners. 1. By the voyage or by the run—a fixed sum. 2. By the month, week, or day. 3. By the distance—so much a mile or league. 4. By a share of the freight. 5. By the right to put so much freight on board belonging to themselves or others. 6. The most common—part in money and part in the right to put freight on board. Cleirac, 38, §§ 32-34; Laws of Oleron, arts. 19, 28, 29. All the cases in which mariners are spoken of, in the codes and elsewhere, make no distinction in their rights and duties, depending on the mode of payment. Pardessus, Lois Mar. passim; Laws of Oleron, art. 19; Laws of Wisbuy, art. 35; 1 Pardessus, 382, 485. Their rights belong to them as "mariners," "matelots," and not as paid by the month or otherwise.

V. The whaling business existed before the codes and the commentators. The Biscayans were the first people who prosecuted the whale fishery as a regular commercial pursuit. They carried it on with great vigor in the twelfth, thirteenth, and fourteenth centuries. Encyc. Am. art. Whale-fishery. The whale-fishery is one of the oldest, most profitable, and purely maritime commercial pursuits. Cleirac, in his notes to article 44 of the Laws of Oleron, (page 119,) devotes more space to this subject than to any other in his whole commentary. Twelve closely printed and interesting pages are devoted to the history, mode of conducting, and commercial importance of this great maritime pursuit. It was conducted then, as now, on shares. Not only the men in each vessel were paid in shares, but several vessels often went on shares. Those who pursued it were always subject to the maritime law, and to the jurisdiction of the admiralty, except in England, since the masters of the English admiralty have prohibited it from exercising its jurisdiction. 2 Valin, 794; Curt. Merch. Seam. 71, 353.

VI. "Although seamen in whaling voyages are compensated by shares of the proceeds, this compensation is always treated as in the nature of wages. They are never deemed partners, although they may be said to partake of the profits of the voyage. The apportionment of the proceeds is only a mode of ascertaining their compensation." Reed v. Canfield, 1 Story, 203, 204, [1 Sumn. 203, 204, Case No. 11,641.] This was a case of a seaman injured on a whaling voyage, and shows that the modern rule, like the ancient one, extends to whaling seamen as well as others.

VII. It is said, however, that the mariners contracted in the articles that they should not be paid for time lost by sickness. The clause in the articles is a most extraordinary one. 1. Its inhumanity and impolicy in connection with whaling voyages is most manifest. It leaves the sailor after eight months' service sick and unprotected, 12,000 miles from home, on an island in the sea, without a dollar. It makes it the pecuniary interest of the officers to have the men sick, or to disable them, or confine them, or disrate them, or put them off duty, during that large portion of the voyage when there is little to do. It makes it the interest of the seaman to shrink from peril and exposure. Every accident or a cold must cost them a portion of their lay. 2. It also makes the measure of compensation two things which cannot be correctly measured—relative health and labor. How long must he be sick, and how sick, and how much labor shall he fail to do? Shall every hour be deducted, or must it run to a day, a week, or a month? Shall every headache, and stiff joint, and swelled finger, that impairs his efficiency, take away a portion of his wages?

VIII. Courts of admiralty are in the habit of watching with scrupulous jealousy every deviation from the principles of the maritime law; and when any stipulation is found in the shipping articles which derogates from the general rights and privileges of seamen, courts of admiralty hold it void, unless the

nature and operation of the clause be fully and fairly explained to the seaman, and an additional compensation is allowed. Brown v. Lull, [Case No. 2,018;] The Juliana, 2 Dod. 504; 2 Mason, 541, 556, [Harden v. Gordon, Case No. 6,047;] 3 Kent, Comm. 193; The Minerva, 1 Hagg. Adm. 347; Abb. Shipp. 609, § 3, and 610, [Johnson v. The Walterstorff, Case No. 7,413,] note, and cases cited.

IX. It is not material whether the articles be in the usual form, or what is the custom of New London. It is the departure from the principles of the maritime law, and the general rights of seamen, and not the departure from the usual form of articles, or from the custom of a particular place, that avoids the clause. All articles are stuffed with void clauses. Abb. Shipp. p. 609, § 3; The Minerva, 1 Sumn. 158, [1 Hagg. Adm. 347;] Curt. Merch. Seam. 57, note.

X. There is no evidence that the articles were explained to the libellant, nor that he received any additional compensation, nor that he knew of any custom or was bound by it. It is not to be presumed from his signing articles at New London. Harden v. Gordon, supra; 1 Sumn. 158, [The George, Case No. 5,329;] [Rankin v. American Ins. Co.,] 1 Hall, 631, 632.

XI. This clause may be construed consistently with the maritime law. The court will therefore so construe it. 1. It may reasonably apply only to cases in which seamen, from sickness or other cause, needlessly or wrongfully, or by consent of the consul, leave the service before the voyage is up,—or only to provide that in cases in which a seaman for any cause should not be entitled to be paid for the whole voyage, that he should be paid his share of the whole voyage ratably to the time, and not be entitled or restricted to his share of what was taken before he left. 2. Does he not do his duty who does all he can? By either of these constructions, the rule of the maritime law is unimpaired, and the libellant is entitled to recover his entire wages.

XII. There is nothing in the articles to impair his right to recover the indemnification for the injury received in the services of the ship. That stands under the maritime laws. The clause in the articles only relates to wages.

XIII. The alleged discharge of the libellant in Maui the morning after the accident is not proved. The consular certificate is not evidence of a discharge. It is only a certificate that the seaman was left there sick, to save the captain's liability on his bond to the collector if the ship should not return to Maui. The consul has no jurisdiction to discharge a man except in cases of joint application or consent, of which this does not appear to be one, there being no pretence of any consent, and the man was not in a situation to consent, and it would have been brutal to ask him.

Asa Childs, for the claimants.

I. The libellant's claim is founded on the special contract. He does not set up the relation of a mariner to the ship, and claim wages, and the expense of his cure from the ship, as the result of that relation in virtue of the maritime law; but he sets up this contract, alleges he signed it, and making it the ground of his claim, asks the court to decree its specific performance, and give him his share of the products of the voyage. 1. Now, either the contract is in force or it is not. If it is not in force, or is abandoned, then it is certain this action cannot be sustained. If it is in force, then the duty of the court is to ascertain its import, and giving it a fair legal construction, to enforce it. But in respect to compensation, the rights of seamen are and always have been matters of contract. The maritime law, like the common law, will imply a contract to pay wages, in the absence of an express contract, upon the principle of a quantum meruit, but it leaves parties free to make their own contracts, and when there is a contract made it will enforce it. The whole regulation as to shipping articles rests upon this recognition of the right of parties to make contracts. 2. Whatever may be the rules of the maritime law as to the rights of parties, it is perfectly well settled that they may be controlled by special contracts in respect to the parties themselves. 1 Pet. Adm. 113, [Thompson v. The Catharina. Case No. 13,949;] 1 Pet. Adm. 186, [Relf v. The Maria, Id. 11,692;] 1 Pet. Adm. 214, [Jameson v. The Regulus, Id. 7,198.] 3. It is not denied that the contract, to be valid, must be fairly and honestly made. But the law as to seamen is in this respect the same as the law as to other men. Acts of oppression, cunning, deception, introduced into contracts, courts will protect the parties against. Inequality in terms, disproportions in bargains, sacrifice of rights on one side only, not compensated by benefits on the other, courts will pronounce unjust, and regard as evidence of fraud. 4. All the rules as to the illegality of provisions inserted in shipping articles, and all the grounds for showing special favor to seamen by courts, rest upon either their liability to be imposed upon, in consequence of their peculiar relation, or actual fraud practised upon them. But even in the extreme cases, if the contract is fairly made, the parties are bound by it.

II. The contract now under consideration can be affected by none of the principles referred to. It is not a contract imposed upon seamen by the master or owners of a ship. It is in the nature of a copartnership. Abb. Shipp. (5th Amer. Ed.) 915. The owners, officers, and men have associated to pursue a particular business. The owners furnish the ship, the officers and men agree to do the work; and they are all by their agreement to be interested jointly in the whole enter-

prise. They all unite in a mutual covenant, and for their own protection submit to the authority of the captain, and prescribe their own terms of interest. The men are not laboring for the owners, but for themselves, as much so in every sense as the members of a mercantile firm. The business in which they engage is not a trading voyage, but rather a manufacturing business. Except the time spent in passing from port to their fishing ground, they are engaged in the actual labor of procuring oil and bone, &c. The early business of catching whales and other fish was carried on by companies collected in tents on the shore, and had no connection with shipping business whatever. The peculiar rules adopted in maritime ports for the regulation of seamen in trading voyages —men employed simply to navigate ships— cannot be applicable to such an association as this.

III. This contract was fairly made. It is in the form used at the port where made by every company engaged in the business for thirty years. It is free from all suspicious circumstances. It is signed by the libellant, who writes a good hand, and furnishes evidence of having been understandingly executed. There is no pretence of unfairness. The captain and officers are all subject to the same rules, and have signed the same articles.

IV. The contract is reasonable in its terms, and equal as respects all parties. Every man is to receive the fruit of his own labor for the time he shall perform his duties. In a trading voyage from port to port, where the seamen take charge of the owner's ship, and expose themselves to danger for his exclusive benefit, there may be a reason and it may be just that he receive his wages from the owners, though sick. But this is not such a voyage. The voyage is without limit; the crew are to engage for themselves, as well as the owners, in a particular enterprise, to work as long as circumstances shall seem favorable. If a man fails to continue with his associates, and another person is procured in his place, the loss should be his own, and not fall upon his associates. At any rate, a contract so providing is not unjust or unreasonable. It is not just, it is not right, that the earnings of others should be transferred to him. The question is not, what shall be done to cure a sick man; but the question is, can it be said to be an unreasonable provision in a contract that he shall not, as a pecuniary interest, receive the fruit of other men's labors. Bear in mind this is not a claim against owners of the ship for wages, but against the associates in the enterprise, to obtain a part of their earnings.

V. The principle adopted by Story, in 2 Mason, 541, [Harden v. Gordon, Case No. 6,047,] and 2 Sumn. 449, [Brown v. Lull, Case No. 2,018,] that where a contract imposes unusual hardships on a seaman without extra compensation, or deprives him of rights secured by the mercantile law, the court will presume the contract to be fraudulent, does not apply to this case. No such unusual hardships are imposed, no ordinary rights are taken away. This contract stands like every other contract brought before the court, presumed upon well-settled principles of law to be fair till the contrary is shown. Admit that a contract on its face apparently unjust imposes upon the party who sets it up the burden of proving it to be fair. This contract contains no provision which justifies any presumption against it.

VI. As to the claim of the libellant, that he is to be cured at the expense of the ship, no question of any practical importance can arise. He was placed in the hospital at the Sandwich Islands, and all the expenses paid by the captain. He was brought home at the expense of the United States. His board bill and his surgeon's bill at New London, and all his expenses, were paid by the owners.

VII. The libellant was discharged according to law at the Sandwich Islands, and this would be conclusive against his claim to be cured at the expense of the ship. 1. The consul had a right to discharge him. Act July 20, 1840, (5 Stat. 394.) 2. His certificate is that he was discharged according to law. 3. The presumption of law is that a public officer has done his duty. 4. The payment of $36 is confirmatory evidence that the consul discharged him according to law. 5. His sending him home as a disabled seaman proves that he was discharged.

BETTS, District Judge. The libellant shipped at New London in July, 1845, as carpenter's mate, on a whaling voyage. In consequence of injuries received by him, in the discharge of his duty, he was taken on shore in the port of Lahaina, in the island of Maui, one of the Sandwich Islands, and left in the hospital there. The ship proceeded on her voyage, and after completing her cruise, touched at Maui, on her return home, and received the libellant on board, he being placed there as a sick and disabled seaman by the consul, and was brought to the United States, the master receiving $10 passage money from the consul therefor. The libellant now demands wages for the whole voyage, together with the expenses of his cure. There are disagreements in several particulars between the statements of the libel and those of the answer, but they do not essentially affect the points upon which the cause turns, and accordingly no time will be spent in the consideration of them.

The questions in the case are three:—Was the libellant discharged from the ship at Maui, so as to terminate the shipping contract, and exempt the vessel from all further liability in consequence of his shipment? Was the condition contained in the shipping articles, limiting the libellant's compensation or wages to the time he was ac-

tually on board and capable of rendering the services he contracted to perform, a legal condition and obligatory upon him? Is the ship chargeable with the expenses of the libellant's cure? and if so, to what extent?

1. It is incumbent on the claimants to set forth in their answer, a state of facts justifying the discharge of the libellant in a foreign port, and to support the allegations by competent and sufficient proofs. They plead that the libellant, on March 16, 1846, fell from the topsail yard of the ship through want of sufficient care on his part, and was so severely injured by the fall, and became so sick in consequence of it, that he was rendered unable to perform his duty on board. and was, at his own request, and by order of the captain, and by aid of the consular agent, placed in the hospital. That on March 18th, he was discharged from the ship by his own consent, and by the consent and authority of Giles Waldo, the United States consul at that port, the master of the ship having produced to the consul the list of the ship's company, certified according to law, and having paid to the consul the sum of $36, being three months' wages to the libellant. The evidence to support this discharge is a certificate,—represented to be under the consular seal, but the impression of the seal is too faint to admit of its being deciphered, —attached to the articles, and expressed in these terms:—

"United States Consular Agency, Lahaina, Hawaiian Islands. I, the undersigned U. S. consular agent, do hereby certify, that George Stotesburg has been discharged from ship Atlantic on account of sickness and in accordance with the laws of the United States. Given under my hand and seal this 18th day of March, 1846. Giles Waldo, U. S. Consular Agent. By A. H. Linigsyez," (or some other similar name, not easily determined from the signature.) On another paper a memorandum or account is made in this form:—"Ship Atlantic and owners to U. S. consulate.

3 months' wages to Stotesburg.....	$36 00
Certificate	2 00
	$38 00

"Rec'd payment, (Signed as above.) Lahaina, March 18, 1846."

These papers are all the evidence produced to support the allegation of the answer, that three months' wages had been paid to the commercial agent, and that the discharge had been given under the authorization of the act of congress of February 28, 1803, (5 Stat. 396.) The discharge, however, manifestly was not made in conformity with the provisions of the statute; for the cardinal requisite to the exercise of that authority is, that application for the discharge shall be made by both the master and mariner; and it is not even certified that the consular agent acted on any such application; on the contrary the proofs import that the libellant was sent ashore by direction of the master, and under expectation that he still remained connected with the vessel as if he had continued in her. The court cannot assume that the assent of the libellant to his discharge was given, merely upon the fact of his being left in a hospital in his then maimed and dangerous condition; nor upon the assertion of the person acting for the consular agent that the libellant was discharged from the ship in accordance with the laws of the United States. It is unnecessary to inquire, whether an averment in such certificate that consent was given by the seaman and master in the presence of the consul, or was proved to him, would justify the discharge without other evidence of the fact, because the certificate contains no such allegation. Indubitably the particular which gives authority to consuls to act in this behalf under the statute, must be duly established, or his proceedings will be a nullity. This is a special power and trust confided to consuls and commercial agents, and must be exercised by those officers strictly in pursuance of the directions of the statute. Nor can the payment of $36 wages made to the consul by the master, be accepted as a payment of the three months' wages prescribed by the act. The hiring was for a share of the takings on an entire whaling voyage; and the rate of the lays could not, by the method of apportionment appointed in the articles, be applied with any justness to the period of service which had then elapsed. The vessel was on her outward cruise to the fishing grounds, and it would be evidently unjust to measure the compensation of the libellant by lay shares out of the chance takings on that part of the cruise. The takings of the entire voyage was the basis upon which the libellant's share should be computed. Twelve dollars per month was evidently adopted as an arbitrary allowance of wages. It might chance to be more advantageous to the libellant than his lay of the earnings of the adventure, apportioning the time he was in the ship with the entire duration of the voyage. Still, it might be disproportionately short of his share. And it certainly was not competent to the master and consular agent to determine that matter without the clear understanding and concurrence of the libellant. I think, therefore, there is not in this discharge that conformity with the requirements of the act of 1803, which will uphold it to protect the ship. Jay v. Almy, [Case No. 7,236.][2] The act of July 20, 1840, (5 Stat. 394, c. 48, §§ 5, 6, 9,) empowers consuls and consular agents abroad, to discharge seamen from their contracts or their ships, and to exact the payment of three months' wages, or even more, or to dispense with it as in their judgment they may think expedient. This power can

[2] Compare Hutchinson v. Coombs, [Case No. 6,955;] also, Minor v. Harbeck, [Id. 9,629.]

be exercised but in two cases,—upon the application of both the master and the mariner, or upon that of the mariner alone. The master can act in the matter only jointly with the mariner. And it is not enough for the consul to certify that he gave the discharge "lawfully," or that he gave it "in accordance with the laws of the United States." It must be made to appear upon what grounds he proceeded. The court cannot intend that it was on the joint request of the master and seaman; nor that it was on the sole application of the latter, nor even that one or other ingredient of fact actually existed. The power imparted to consuls is limited and specific in character, not appertaining to him virtute officii, but conferred by a statutory provision; and the law raises no presumption or intendment in support of his doings, until it is shown that his jurisdiction attached to the subject,—that a case had occurred falling within the scope of his powers. The rule is coeval with the existence of statutory or limited tribunals or officers, that their doings must be made to appear to be within their authority, and that nothing can be supplied in support of their jurisdiction by intendment. 1 Co. Inst. 117; 2 Coke, 16b; 1 Lil. Abr. 371; 1 Lev. 104; Powers v. People, 4 Johns. 292; Adkins v. Brewer, 3 Cow. 206; Grignon v. Astor, 2 How. [43 U. S.] 319; Bennett v. Burch, 1 Denio, 141. Nor is it sufficient for the officer to aver ever so positively his jurisdiction. He must set forth the facts necessary to confer it, and those jurisdictional facts must be established by proof. The People v. Koeber, 7 Hill, 39, and cases cited. I do not discuss the question raised respecting the sufficiency of the proof, that Giles Waldo was the consular agent of the United States at Lahaina, or that the gentleman who has subscribed the act for him, was his legally authorized substitute. Admitting that the seal of the consulate imports a legal authority in the person using it to do all official acts appertaining to the office, still the case calls for the remark, that the papers should present a distinct impression of a seal so that it may be identified and discriminated. The paper before the court does indeed bear a faint similitude of a seal, but neither vignette nor motto is distinguishable; and the vague flourish employed for a signature, affords no means by which the authentication of the discharge can be verified.[1]

2. To meet the claim for wages during the period of the libellant's disability, the answer sets up a stipulation in the shipping articles signed by the libellant, whereby it was agreed that if either of the officers or crew should be prevented by sickness or other cause from performing their duty during the whole of the voyage, he should receive of his lay or share only in proportion as the time served or duty performed by him should bear to the whole time the ship should be in performing the voyage. A general replication to the answer is filed by the libellant, which has only the effect to put both parties to the proof of the allegations in their respective pleadings not admitted to be true, (Dist. Ct. Rules, 88;) or of permitting the cause, when the answer operates as a plea in bar, to be set down for hearing upon the libel and answer alone, (Dist. Ct. Rules, 78.) That rule allows the libellant to treat the answer as a plea in bar, and by so replying to it, save himself from the consequences of admitting its truth, which he would do in effect by setting it down for hearing on a general replication. It may admit of question whether the supreme court rules (rule 27) do not, by fair implication, take away the right of a claimant or respondent to interpose a formal plea or demurrer on the merits to a libel or information in admiralty, and whether he is not limited to a defence by answers alone. See Sup. Ct. Rules, 27. The rule, however, does not import that he can interpose no other defence than a denial or admission of the facts. The facts may be undisputed, and yet supply no cause of action; or the defendant may be able to adduce other facts avoiding the effect of those alleged by the libellant, or he may possess matter of estoppel and bar which the court could never intend he should be precluded from using, without his being also compelled to make formal denial of the facts set up by the libel. Certain Logs of Mahogany, [Case No. 2,559;] Pratt v. Thomas, [Id. 11,377.] The provisions of the supreme court rule must be deemed satisfied if the defendant, whether or not required by the libel, replies to the allegations in the libel by a full and explicit answer. The special replication authorized by the district court rule, may thus be urged to create a triable issue upon the merits. This is the practice in equity. Sup. Ct. Rules, Equity. There would be equal conveniency and fitness in applying it to pleadings in Admiralty.

The supreme court rules indicate no method of pleading applicable to such case, unless it be embraced in the right to amend the libel. Rule 24. That would necessarily lead to a new answer, and would by no means further the simplicity in pleading which was regarded by congress as an object of cardinal importance in authorizing the supreme court to regulate Admiralty proceedings. Act Aug. 23, 1842, (5 Stat. 518, § 61.) In the summary of the practice of this court, it is stated that the replication to an answer as to a plea, may, in case of urgent importance, be special or double; but ordinarily it should take a single issue upon the allegations of the answer, however multifarious those may be. Betts, Adm. 50. The practice in the Dis-

[1] That a regular and valid consular discharge, properly certified, is conclusive on all points duly passed upon by the consul, unless his conduct be proved corrupt or fraudulent, see Lamb v. Briard, [Case No. 8,010;] Tingle v. Tucker, decided April, 1849, [Id. 14,057.]

trict of Louisiana appears to be essentially to the same effect, (Waring v. Clarke, 5 How. [46 U. S.] 441,) but in general, special replications to answers would not seem to be in use, in American Courts of Admiralty, unless demanded by the libellant, (Dunl. Adm. Pr. 197; Coffin v. Jenks, [Coffin v. Jenkins, Case No. 2,948.]) It is otherwise in the English Admiralty, although an eminent compiler appears to regard the practice as irregular. 2 Browne, Civil & Adm. Law, 365, 415. Pleas in bar may be interposed, with the right to plead generally afterwards, (The Sarah Jane, 7 Jur. 659, 2 W. Rob. Adm. 110;) and a reply or rejoinder contradictory to the allegations in the answer, or setting up new matter, are of constant use in the English Admiralty. The Aurora, 1 W. Rob. Adm. 325; The Anne and Jane, 2 W. Rob. Adm. 104; The Hebe, Id. 146, 152.

Manifestly, then, the libellant ought to have introduced into the pleadings, either by an amendment of the libel after the answer was interposed, or by special replication to this branch of the defence, such averments as were necessary to enable him to contest or avoid the bar to his recovery supposed to be contained in the stipulations of the shipping articles, which he admits he signed and that they contain the true contract with him. His counsel, however, insist that he has a right to treat the engagement as a nullity, without alleging any facts impugning it; and that the court, as matter of law, must pronounce an agreement of that description, entered into with a mariner, to be nugatory and void, in respect to him. In considering the question thus raised, I shall regard the objection urged to the defence founded upon the stipulation, as if it arose upon demurrer or formal exception to that part of the answer. It is not to be denied that a common sailor is competent to make a shipping contract. Indeed, the statutes of both the United States and England imperatively impose on masters the duty of entering into contracts in writing with seamen employed by them. And the acts of congress clearly imply that such contracts will be valid although operating to the disadvantage of the mariner even in their most essential feature,—the rate of wages,—for they make that a particular which must be stipulated, and on omission by the master to have a written contract, they give the mariner a chance of higher wages than he may have bargained for verbally, by allowing him to demand the highest current rate at his port of shipment. Act July 20, 1790, (1 Stat. 131, c. 29, § 1;) Act July 20, 1840, (5 Stat. 395, § 1, arts. 3, 10, 19.) The written or printed shipping articles must now "contain all the conditions of contract with the crew as to their service, pay, voyage, and all other things." Act July 20, 1840, (5 Stat. 395, § 3.) It is remarkable, that the act of congress of July 20, 1790, in specifying the constituent parts of a contract with seamen, should omit the rate of pay or wages he was to receive. By the provisions of that act the agreement must "declare the voyage or voyages, term or terms of time for which such seaman or mariner shall be shipped." Section 1. The act of July 20, 1840, assumes that the rate of wages is a component part of shipping articles, (section 3,) and the courts, previous to that enactment, always enforced against masters of vessels the obligation to stipulate the rate of pay as an essential part of the written contract. Bartlett v. Wyman, 14 Johns. 260; Johnson v. Dalton, 1 Cow. 543; 3 Kent, Comm. (4th Ed.) 177; Gilpin, 305, [U. S. v. Twenty-Three Coils of Cordage, Case No. 16,573;] Gilpin, 452, [Wickham v. Blight, Case No. 17,611.] The English statutes moreover are precise and unequivocal upon this point. Abb. Shipp. 607. See 3 Kent, Comm. 196, note c, where a summary of the last English act is given. The English and American admiralty have, in many instances, interposed to protect seamen against stipulations introduced into shipping articles, not demanded by statute, and which were in abridgment of their rights under the law maritime, and where no adequate compensation was secured them as an equivalent for the rights relinquished. Abb. Shipp. 722; Curt. Merch. Seam. 44; 3 Kent, Comm. (6th Ed.) 193, note. But they have uniformly held that the shipping articles are conclusive as to the wages, where no fraud or deception is proved.

Upon these principles it would seem to result, that the mariner can act in forming a contract for wages or compensation with the same authority, and can bind himself to the same degree as any other contracting party, where specific wages for a period of time, or for a voyage or cruise are agreed upon, or where any other special mode of compensation is adopted. The Sydney Cove, 2 Dod. Adm. 11; The Mona, 1 W. Rob. Adm. 137; The Riby Grove, 2 W. Rob. Adm. 52; The Mariner's Case, 8 Mod. 379; Howe v. Nappier, 4 Burrows, 1944. The law has established no distinction which goes to invalidate his contract when coupled with conditions or qualifications to his right to recover the stipulated wages in full. The courts have gone no further than to declare that they will scrutinize agreements to the seaman's prejudice, which are outside of the statutory requirements, or unusual in shipping articles; and will absolve the mariner from them unless it is proved by the master or owners that he clearly understood their character, and was secured a compensation correspondent to the disadvantages or restriction imposed upon him. 3 Kent, Comm. 193, and note; Abb. Shipp. 722, and note. With this limitation the contract operates in respect to the mariner with no less efficiency than upon the owner. Contracts for wages in money have become al-

most exclusively those now employed in general navigation by commercial nations. 3 Kent, Comm. 185. Shipping agreements are accordingly greatly simplified in comparison with what might be required were seamen now accustomed to be rewarded, as in the earlier periods of commerce, out of the freight or profits of the voyage, or by their own ventures on board. In defining and fixing the metod of compensation in such cases, agreements might be required or appropriate, which should make the mariner's right to a full share, or to any share of the ship's earnings, dependent upon circumstances which ought not to affect a contract for money wages. I do not find, in looking carefully through the ancient ordinances of maritime countries, any inhibition upon the right of a master or owner to make special contracts with seamen in voyages for freight or profits, or any exoneration of seamen from the obligation of their special agreements in relation thereto. Both parties were considered as acting in concert and by mutual consent in arranging the terms upon which the voyage was to be undertaken and in conducting it after it commenced, (Laws of Oleron, art. 16; Laws of Wisbuy, art. 32,) and as having a common interest in the direction of the vessel, (Laws of Oleron, art. 21.) In all critical emergencies the advice or opinion of a major part of the ship's company determined the matter. Laws of Oleron, art. 2; Wisbuy, arts. 14, 21. The laws secured to seamen certain advantages of venture or portage in shipping portions of the cargo on their own account, (Laws of Oleron, art. 16; Wisbuy, art. 30; 1 Pardessus, Lois Mar. 336; Lubeck, art. 10; Hamburg, art. 9,) and the privileges were sometimes in addition to money wages; at other times they constituted the entire compensation, (3 Pardessus, 340.) These provisions denote that the mariners, in a common adventure, had a concurring voice with the owners and master in controlling its management, and could regulate, at their own discretion, the privileges they were to have in the voyage. No intimation is made that they were under tutelage or disabilities in that respect, so that their engagements would be voidable if varying from the familiar formula adopted in money hirings. Whaling voyages, as conducted in England and in the United States, form a species of navigation bearing considerable similitude to the ancient method of rewarding seamen by shares of freight earned, but very little, if any, with the system of employment on money wages, which forms the basis of ordinary shipping agreements. They are held not to be strictly copartnerships, (Abb. Shipp. 705; The Phebe, [Case No. 11,064;] 3 Kent, Comm. 185;) yet they are mutual concerns, involving an entire reciprocity between owners and mariners in respect to the profits and losses of the adventure, (1 Boul. P. Dr. Com. 197, § 7; Cleirac, Cout. de la Mer, 66, note 2.) They result in communities or associations, in which each and all take a common risk, and are mutually entitled to a profit. The owner supplies the ship, her equipment, and stores, and the officers and crew contribute their services, and an agreed ratio of remuneration out of the earnings of the enterprise is allotted to these respective interests. The proportions in this distribution will, from the nature of the case, be exceedingly dissimilar, and are invariably the subject of express agreement, because not a matter capable of adjustment by the courts on any principle of legal or equitable merits between the parties.

It is somewhat singular that an interest of such magnitude in this country as the whaling business, should not have been regarded by congress as deserving regulation by law as much as fishing voyages, or ordinary trading ones. No statute has, however, fixed the rights of parties in these adventures, or required their agreements to be in writing. Chancellor Kent is mistaken in supposing that the act of June 19, 1813, (3 Stat. p. 2, c. 2,) applies to whaling voyages. 3 Kent, Comm. 178. It is limited to the bank and other cod fisheries. But a species of usages, adapted to the necessities of these adventures, are growing into practice, which the courts seem disposed to favor, and which may soon acquire the character and usefulness of authoritative ordinances. Curt. Merch. Seam. 394, App. 2; Barney v. Coffin, 3 Pick. 115; Baxter v. Rodman, Id. 435. The contract brought before the court in this case is a fair representation of the terms upon which these engagements are usually arranged. If the limitation of the rights of the crew to shares in those takings only which they have aided in making be not of general use, the stipulation would seem in itself reasonable and appropriate, if entered into by the mariner with an understanding of its purport and aim. The exception taken in this case to the argument does not go to the provision as in itself inadmissible, but the scope of the objection is, that the stipulation is void for want of proof on the part of the owners that the libellant had it clearly explained to him, and that he was secured an equivalent for a general right to wages for the voyage surrendered by this clause of the engagement. There are facts in evidence affording a strong implication that the libellant well understood this provision. The vessel was fitted out in the port of New London, and it is proved that for a long period of years a like condition has been introduced into shipping articles signed at that port, and that for twenty years, or more, voyages have been made up and settled there upon that basis. The libellant, in his libel, evinces a familiarity with the contents of the shipping articles, as he asserts that his contract is fully set forth in them. He was a mechanic,

a carpenter's mate, shipped at New London, and joined the vessel there; and in the absence of all evidence to the contrary, it will be implied that he was a resident of that place or vicinity, and he must be deemed cognizant of so old and notorious a custom in the line of business in which he engaged. His handwriting indicates a good education, and as he took a rate of wages above that of green hands and ordinary seamen or cooper's mate, and equal with that of seamen, it is also fairly inferable that the particulars of his compensation and the circumstances likely to affect it, were ascertained and particularly attended to upon his part. But, in my opinion, the stipulation is not of that unusual or extraordinary character that any explanation of it to the libellant was requisite. It clearly was the customary one at that port, and it seems to be exactly adapted to the character of the adventure in which the parties were about to unite upon a ground of common interest. Upon the basis of recompense adopted, each party would be solicitous to secure the whole advantage of his own labor, and to prevent others from participating in profits and earnings towards which they had contributed no aid. There was a legal and equitable equivalent for the engagement in its mutuality. It applied alike to officers and crew. Those who were to receive large shares and those whose portions were the smallest reciprocally surrendered and acquired like rights under it; and it is to be observed, that although the libellant was entitled to a precedence over portions of the ship's company, other portions had reserved to them shares much larger than his own. His chance of gain might thus, by their shares falling into the distribution fund, counterbalance his risk of loss. The adventure was in its nature one of hazard, and each person would naturally compute the chances as more likely to turn in his favor than against him, and would accordingly regard the stipulation as promising an advantage to himself. I shall accordingly hold that the engagement was valid, and that the libellant cannot claim any part of the takings earned during the period of his disability.

3. The remaining question is, as to the liability of the ship in this peculiar engagement, to bear the charge of the libellant's sickness and cure. The general principle applicable to the rights and liabilities of seamen is, that the shipping contract is presumed to include the provisions of the law maritime, except as varied or modified by express stipulation between the parties. The Crusader, [Case No. 3,456;] Jameson v. The Regulus, [Id. 7,198;] Curt. Merch. Seam. 106. A fundamental doctrine applicable to mariners' contracts, and one regarded in the maritime law as forming a part of the contract, is the right of the seamen to be cured at the expense of the ship, of sickness or injury received in the ship's service. Jac. Sea Laws, 144; Abb. Shipp. 258; Curt. Merch. Seam. 106, 111. Pardessus, in his compilation of marine ordinances and laws, collects the provisions upon this subject embodied in those edicts and usages. 1 Pardessus, 327, 471, 474; 2 Pardessus, 521; 3 Pardessus, 141, 374, 510, 518. See, also, 1 Boulay-Paty, 202. Valin comments upon the import of several of the ancient ordinances which are embraced in article XI. of the Ordinance of the Marine of Louis XIV.; and evidently regards them as being of universal obligation, including mariners employed under every method of hiring. 1 Valin, 721. The decisions of the American courts rest upon and sanction the maritime codes of continental Europe upon this subject. Abb. Shipp. 260, notes; 3 Kent, Comm. (6th Ed.) 184–186, notes; Curt. Merch. Seam. 106–111. Seamen are entitled to be maintained and cured at the expense of the ship of sickness or injuries received while in her service. And courts would receive with great distrust any engagement upon the part of mariners to dispense with or qualify this privilege, alike important to them personally in point of humanity and in view of wise policy, in aid of the navigation and commerce of the country. The case of the libellant falls clearly within this rule, and nothing is shown in its character in any way detracting from his right to the full benefit of it. The pretended discharge at Lahaina was of no effect upon the rights of libellant, for the reasons already stated; and his assent to be put on shore, if such assent is to be implied, was only in accordance with the direction of the master and the convenience of the ship. He still continued entitled to support from the vessel, and to all the advantages he would have possessed if put on shore without being consulted or against his consent, or if he had continued on board during the residue of the cruise. In my judgment, therefore, there is no ground to question his right to be treated and cured at the expense of the ship.

The essential question is, what is the extent and duration of that charge, and how is its value to be measured in money? The vessel must cover every necessary and appropriate expenditure made and responsibility incurred by the libellant during the period, for board, nursing, or medical treatment. The authorities above referred to fully support his right of recovery to that extent; and whether such disbursements have been made by him, or there is an outstanding liability on his behalf for them, may be a fit subject of reference and adjustment before a commissioner. The main difficulty is, whether the libellant's disabilities still continue a charge upon the vessel after the voyage is fully completed, and if so, what is to be the legal termination of the charge. The expression often employed in the various ordinances and in the decisions is, that mariners are entitled to be

cured of sickness and wounds received in service of the ship.[4] This statement is clearly not to be taken in an absolute sense. That would involve impossibilities. Diseases and injuries so incurred are frequently in their nature, and in their direct consequences, incurable. An exposure to unusual labor or privations on the voyage may induce maladies permanent or irremediable in their character; thus broken limbs, or bodily debility resulting from services in the ship, are very often the sailor's heritage for the residue of his life.

Judge Story was manifestly laboring under uncertainty of mind whether the liability of the ship or owner was of indeterminate duration, and might be enforced so long as the necessity should continue. In Harden v. Gordon, [Case No. 6,047,] the rule was laid down with great amplitude, that the expenses of sick seamen were to be borne by the ship, including medicines, medical advice, nursing, and lodging. In The George, 1 Sumn. 59, [1 Sumn. 151, Case No. 5,329,] this rule was restated, and applied to the case of a mate substituted as master by the consul abroad, and who was lodged and treated on shore. In Reed v. Canfield, [Id. 11,641,] the point was presented with more distinctness, as that was a case of disability continuing after the termination of the voyage, and which might probably last for the life of the sailor. Judge Story puts the inquiries:—"What are the limits of the allowance?" "May they be extended over years or for life?" "Are they to be like the pensions allowed by some of the marine ordinances in cases of wounds and other injuries received by seamen in defending the ship from the attack of pirates?" These are interrogatories of great significance and weight, and it is to be regretted that the learned judge has not relieved the subject of its pressing difficulties by a more full solution of the questions. He says,—"The answer to suggestions of this sort is, that the law embodies in its formulary the limits of the liability. The seaman is to be cured at the expense of the ship of the sickness or injuries sustained in the ship's service. It must be sustained by the party while in the ship's service; and he is not to receive any compensation or allowance for effects of the injury which are merely consequential. The owners are liable only for expenses necessarily incurred for the cure, and when the cure is completed, at least so far as the ordinary medical means extend, the owners are free from all further liability." This is sufficiently distinct as to the period within which the injury must have been received, or the sickness incurred. The ship can only be held liable for those events occurring whilst the mariner is attached to her. 1 Pardessus, Droit Comm. § 688. Still, the inquiry whether the cure required during the voyage is to be continued after its termination, is not met in terms by this decision, and seems to be left open for solution upon general principles. Reed v. Canfield, [supra.]

The British act of 7 & 8 Vict. (chapter 192, § 18) lays down a clear and practical rule upon this subject. It enacts that, in case the master or any seaman shall receive any hurt in the services of the ship, the expense of medical advice, attendance, medicine, and subsistence for him "until cured, or brought to this country," together with the costs of his conveyance thither, be defrayed by the owners without any deduction whatever from his wages. This is but a reenactment, in substance, of the provisions of the act of 5 & 6 Wm. IV. c. 19. Abb. Shipp. 170; Id. 616. It is probable that the ancient ordinances referred to by Judge Story, were those cited by Cleirac, (Cont. de la Mer, 25, 26,) which provided that seamen wounded in fighting for their vessel, should, besides their cure, be supported for the rest of their lives at the expense of the ship and cargo; but I do not find this rule extended to ordinary cases of sickness or injuries in the merchant service. Ord. de Oleron, art. 7; Cleirac, 27. This was regarded as a general average charge. 9 Code de Commerce, art. 400. The French marine law, according to the commentary of Pardessus, limits the obligation of the master, in case of a seaman left sick abroad, to the providing for the charge of his sickness, and for the expense necessary to place him in a condition to return home. 1 Pardessus, § 688; 1 Boulay-Paty, 202; The Littlejohn, [Case No. 6,153.] The Code of Commerce leaves the subject without special legislation, (Code Comm. art. 262,) further than the general principle that the mariner shall be cured by the ship, and receive his wages without abatement. The term cure, was probably employed originally in the sense of taken charge or care of the disabled seaman, and not in that of positive healing. The obligation of the ship to the mariner would then be coextensive in duration to that of the mariner to the ship. Natural reason would seem to point to that limitation, it being the one consonant to the relation in which the law places the parties to each other, and by which it measures their privileges and liabilities under a shipping contract. This rule may undoubtedly be subject to variations. When a course of medical treatment, necessary and appropriate to the cure of the seaman, has been commenced and is in a course of favorable termination, there would be an impressive propriety in holding the ship chargeable with its completion, at least for a reasonable time after the voyage is ended or the mariner is at home. So, also, in case due attention to his necessities has been unjustly omitted by the ship abroad, or his case has been improperly treated, the courts

[4] Compare Ringold v. Crocker, [Case No. 11,843.]

may properly enforce against the ship this great duty towards disabled mariners, even after her contracts are terminated, upon the ground of a failure to perform towards them the obligation in the shipping contract. These particulars, however, are not stated as ingredients in the present case, but are referred to in illustration of the doctrine involved in some of the authorities, and to show they are not inconsistent with the general principle, that a seaman has no claim upon the ship or her owner for the cure of his sickness or disabilities after his contract has terminated, and he is returned to his port of shipment or discharge, or has been furnished with means to do so. A reference must be ordered to have an account stated upon the principles of this decree, stating the expenses incurred by the libellant, and the amount of wages due him, the credits to which the claimants are entitled, and the balance, if any, due the libellant. Decree accordingly.

NOTE, [from original report.] The report of the commissioner, filed pursuant to this decree, found that no balance was due to the libellant. On the confirmation of this report, the claimants moved, that the libel be dismissed with costs. The libellant objected to the allowance of costs, upon the ground that the main point in controversy was novel, and that the decision against his claim turned upon a point of law and not on the merits. The court concurred in this view, and denied costs against the libellant.

Case No. 621.

The ATLANTIC.

[1 Ware, 121.][1]

District Court, D. Maine. 1827.

SHIPPING — PUBLIC REGULATIONS — COASTING LICENSE — FOREIGN VOYAGE — ACT MARCH 1, 1823.

1. A vessel under a coasting license is not subject to forfeiture for a voyage from an American port to Calais, and delivering her cargo to a British merchant, while lying in the stream, on the American side of the jurisdictional line.

2. This is not a foreign voyage, the delivery of the cargo being within the American waters, though it is delivered to a British subject residing on the British side of the stream.

[See The Lark, Case No. 8,090; The Three Brothers, Id. 14,009.]

3. The waters of the river Schoodiac and of the bay of Passamaquoddy, separating the United States from the British province of New Brunswick, are common to both parties for the purposes of navigation.

4. The act of 1823, [3 Stat. 740, c. 22,] c. 21, entitled "An act to regulate the commercial intercourse between the United States and certain British colonial ports," does not render unlawful the exportation of American produce in American vessels to any of the ports of the British North American provinces not enumerated as open ports in that act.

In admiralty. December term, 1827.—This was a vessel seized by the collector of the customs for the district of Passamaquoddy, for an alleged violation of the revenue and navigation laws. The libel contained three allegations of forfeiture. 1st. That she was a vessel licensed for carrying on the coasting trade, and was engaged in another trade than that for which she was licensed. 2d. That she proceeded on a foreign voyage, without first giving up her license and taking out a register. 3d. That the merchandise was shipped and water-borne for the purpose of being exported to the port of St. Stephens, in the province of New Brunswick, in violation of the act of March 1, 1823, entitled "An act to regulate the commercial intercourse between the United States and certain British colonial ports," mentioned in the act, [3 Stat. 740.] The material facts proved at the hearing were, that the Atlantic sailed from the port of Bath, under a coasting license, with a cargo of hay, corn, &c., previously bargained for by Mr. Jones, a British merchant resident at St. Stephens, a place lying on the river Schoodiac, opposite to Calais, with written orders, which were produced on her arrival, to deliver her cargo, "along-side," while she should be lying in the stream. There was some evidence introduced, tending to show that she came to anchor and discharged part of her cargo while lying on the British side. But this was met by contradictory testimony on the part of [Swan and others,] claimants, and was abandoned at the argument by the district attorney. While lying at anchor in American waters, as the proof was, several bundles of hay were discharged into a flat-bottomed boat, or gondola, part of which were carried to a British vessel lying in the stream, and part to the shore in St. Stephens. The captain, who was released and examined as a witness, stated that the boats did not belong to the vessel, and were not employed by him, but by Jones, and that the delivery of the cargo into them was a delivery to the purchaser, and discharged the owners from all further responsibility.

Shepley, U. S. Dist. Atty.
Allen & Sprague, for claimants.

WARE, District Judge. Upon the facts which have been proved in the case, the counsel for the libellants has argued that the vessel and cargo are forfeited under the 8th section of the act of February 18, 1793, commonly called the coasting act,—2 U. S. Laws, c. 153, [1 Stat. 308,]—for proceeding on a foreign voyage without first giving up her license and taking out a register. The ostensible voyage was strictly one of coasting from Bath to Calais. In making such a voyage, a vessel with a coasting license is not rendered liable to forfeiture by merely passing out of the jurisdiction of the United States into that of an adjoining power. The waters of the bay of Passamaquoddy and the river Schoodiac, separating the United

[1] [Reported by Hon. Ashur Ware, District Judge.]

States from the British provinces, are, upon the principles of public law, common to both powers for the purposes of navigation. The Fame, [Case No. 4,634;] The Apollon, 9 Wheat. [22 U. S.] 362. The mere fact, therefore, of her transit through British waters in the performance of the voyage, will not work a forfeiture, and it is not contended upon the evidence that she discharged her cargo while lying beyond the jurisdictional line of this country. But it is argued that though she was discharged while lying in American waters, yet if the cargo was taken in boats belonging to the vessel, and carried to the British side, or in boats employed by the master, this would, on a sound construction of the law, be a foreign voyage, as much as if she actually discharged her cargo at the wharf in a foreign port, the termination being that which fixes the character of the voyage, and determines whether it be a foreign or coasting voyage. The argument would certainly be entitled to great consideration, upon a different state of facts. But the testimony of the master on this point is clear and uncontradicted. He states explicitly that the cargo was delivered to Jones, along-side the vessel, into boats provided by him, and that the goods were at his risk from the moment that they were in the boat; and the facts as he states them are in conformity with his written instructions. There is nothing in the case to bring his statement into doubt. The true question on the facts is, whether this delivery of the cargo to a British merchant, within the waters of the United States, rendered this enterprise a foreign voyage, within the meaning of the law. I am clear in the opinion that it did not. The whole voyage, from its commencement to its termination, was within the jurisdiction of the United States, nor can I see how this section of the law is any more violated by the delivery of the cargo in the harbor of Calais, than it would be by a delivery on the wharf. It is then contended that the vessel and cargo are forfeited under the 32d section of this law, for being engaged in a trade other than that for which she was licensed. It is argued that the voyage was in violation of the act of congress of [March 1,] 1823, [3 Stat. 740,] c. 21, entitled "An act to regulate the commercial intercourse between the United States and certain British colonial ports." If the voyage was illegal, a forfeiture will undoubtedly follow from this section of the coasting act which prohibits all trade but that for which she was specially licensed; and if it had not already been settled by adjudicated cases, it is too clear to admit of a question, that the license cannot be extended to protect a traffic prohibited by law. The Eliza, [Case No. 4,346;] The Resolution, [Id. 11,709.]

The third allegation of the libel is founded on the 8th section of this act, and alleges that the cargo was shipped and water-borne for the purpose of being exported to the port of St. Stephens, in violation of this act. This offence is visited by a forfeiture of the goods only; but if the voyage were illegal, as the forfeiture of the vessel would follow from the 32d section of the coasting act, by the operation of the two laws the forfeiture will extend to both the vessel and cargo. It is this point which has been most elaborately argued at the bar. The cargo was sold to a British merchant at St. Stephens, to be delivered at Calais, while the Atlantic was lying in the stream. A part, after being discharged from the Atlantic, was actually carried to St. Stephens in British boats, and part put on board a British vessel lying in the stream. None was landed at Calais. It is contended that it was originally shipped and water-borne for the purpose of being carried to St. Stephens in British bottoms; and further that the voyage was, under the operation of the act of 1823, illegal, whether the conveyance was in British or in American vessels, and that by the true construction of that act, all intercourse with the non-enumerated British colonial ports is interdicted. Two questions may be raised on this argument. First, whether such be the true construction of the act; secondly, if it is, whether the whole act is not abrogated by the president's proclamation of March 17, 1827. The first section of the act suspends the navigation act of April 18, 1818, [3 Stat. 432,] and the supplementary act of May 15, 1820, [3 Stat. 602,] as to the ports enumerated in the act. The second and third sections regulate the importations from these ports in British vessels. The fifth, which is the section relied upon, provides, "That it shall be lawful to export from the United States directly to any of the above enumerated British colonial ports, in any vessel of the United States, or in any British vessel, navigated as by the second section of this act is provided, &c., any article of the growth, produce, and manufacture of the United States, or any other article legally imported therein, the exportation of which elsewhere shall not be prohibited by law." The argument is, that this is an implied prohibition of exporting to any other than one of the enumerated ports, either in British or American bottoms; that it was the policy of the act to confine the intercourse entirely to those ports, and establish a non-intercourse with all the other ports. If such were not the intention, it is asked, why were the words "vessels of the United States" used? I cannot assent to the correctness of this argument. It is well known as an historical fact, that our government has always sought a free and unrestrained commercial intercourse with all parts of the world. Its policy always has been to extend the trade of the country to its utmost limits in every direction. No stronger proof could be given of it than the act of 1815,—4 U. S. Laws, p. 824, [Bi. & D. Laws, 3 Stat. 224,]—

which abolishes all discriminating duties against foreign vessels of any nation which has no such discriminating duties against vessels of this country. They are at once admitted to all the privileges of American vessels in the direct intercourse with this country, as soon as our vessels are put on the same footing with respect to privileges, as theirs, in their ports. Such are the terms of the treaty regulating the intercourse between this country and the European ports of the British empire. The only condition required by our laws, to give to our trade with any foreign nation its utmost extent and activity, is, that such nation shall extend to the navigating interests of this country the same advantages which we offer to theirs. If British vessels are prohibited from coming to an entry in our ports, when arriving from any of their colonial ports, it is only because our vessels are prohibited by their navigation laws from engaging in trade at the same ports. The 7th section of this act offers to every other colonial port all the privileges of the act as soon as their ports shall be opened to American vessels on the same terms as the ports enumerated in the act are. To suppose, then, that this act prohibits a trade to the non-enumerated colonial ports, in American vessels, would be to give a construction in direct hostility to the whole policy of the country in relation to its commerce and navigation. If the intention of the legislature were such as is contended, why are not American vessels required to give a bond, analogous to that required of British vessels, to land their cargoes in some of the specified ports. Yet American vessels are nowhere named in the proviso, though it contains the penal clause on which this allegation of the libel is founded. Whatever may have been the object of introducing the words "vessels of the United States" in the enacting clause of the section, it would be a bold construction to hold that the effect is to interdict, by implication, a trade which was before lawful, even if the statute contained nothing to repel such a construction. But it is not so. The disabling and penal clause in this section clearly negatives the construction contended for by the libellants. The words are, "It shall not be lawful to export from the United States any article whatsoever, to any of the above enumerated British colonial ports in any British vessel, other than such as shall have come directly from one of the said ports to the United States; nor shall it be lawful to export from the United States any article whatsoever, in any British vessel having come from one of the said enumerated ports, to any other port or place whatsoever than directly to one of said ports. And in case any such article shall be shipped or waterborne for the purpose of being exported, contrary to this act, the same shall be forfeited," &c. Here we have both the interdict and the penalty, and this is the only part of the act which regulates the export trade. And what is prohibited by this clause? It is a shipment for the purpose of exportation to some of the enumerated ports in a British vessel which did not arrive from one of them; or a shipment in a British vessel arriving from one of these ports for a non-enumerated port. I see no other case in which the forfeiture would attach. But if the intention was what is supposed by the argument, the words "vessels of the United States" would have appeared in this clause.

It is further contended that the original purpose of this enterprise was a transportation of the cargo from Bath to Calais, to be there transhipped and conveyed in British bottoms to St. Stephens. As these two places lie on opposite sides of the river, it is manifest that for all purposes of navigation a voyage to Calais is a voyage to St. Stephens. The object of this law being to secure to our shipping a fair proportion of the carrying trade, if the termination of this voyage is that which is alleged, this would be no violation of the spirit and intention of the act, even if it were of its letter. If it were necessary to decide this point, it would be difficult to maintain that the mere discharge of a cargo into boats, while the vessel was lying in waters common for many purposes to both parties, for the purposes of landing it, was, in any proper sense of the word a transhipment. It is, however, unnecessary for me to decide on these facts. My opinion is that the whole law is repealed and suspended by the president's proclamation. The sixth section provides that if at any time any of the ports named in the act should be closed against American vessels, "proclamation to that effect having been made by the president, each and every provision of this act, so far as the same apply to the intercourse between the United States and the above enumerated British colonial ports in British vessels, shall cease to operate in their favor;" and that the acts of 1818 and 1820 should revive and be in full force. The fact contemplated in this section having happened, the president issued his proclamation on the 17th of March last, to that effect; the consequence of which was, that this act, from that time, ceased to operate in favor of British vessels, and the two other acts were restored to their full force. When this part of the act is erased, what is there remaining? The act was not necessary to render the trade in American vessels lawful; that was lawful before, and continues to be so after the repeal. The whole operation of the statute was to open our ports to British vessels, under such regulations as are prescribed. When the whole act is repealed, so far as it grants this liberty, or regulates it, the penalty necessarily falls with it; for nothing remains on which it can act. There can be no violation of an act which is extinct. It would be extravagant to suppose

that the penalty is kept alive when the act is dead. It is not pretended that the vessel here violated any of the provisions of the two acts revived by the proclamation. I therefore decree her to be restored to the claimants.

ATLANTIC, The, (AUTHER v.) See Case No. 668.

ATLANTIC, The, (COLE v.) See Case No. 2,976.

ATLANTIC, The, (MAITLAND v.) See Case No. 8,980.

ATLANTIC DELAINE CO. (JAMES v.) See Case No. 7,177.

Case No. 622.

ATLANTIC DOCK CO. v. WENBERG.

[9 Ben. 464.][1]

District Court, E. D. New York. April, 1878.

WHARFAGE—MARITIME LIEN—STATE LAW.

1. The agent to whom a vessel is consigned and who does the business of the vessel, and to whom an account of the wharfage of the vessel during the time she was in his charge is presented before the departure of the vessel, is made liable for such wharfage by the statute of the state of New York. Laws 1873, p. 430, [2 Rev. Laws N. Y. 1813, c. 216, p. 430.]

2. Such liability, although created by statute, springs out of and is incident to a maritime transaction, is therefore maritime in its character and accordingly may be enforced in admiralty.

[In admiralty. Action by the Atlantic Dock Company against B. J. Wenberg to recover wharfage due. Decree for plaintiff.]

Nathan Burchard, for libellant.

Beebe, Wilcox & Hobbs, for respondent.

BENEDICT, District Judge. This action is brought to recover the sum of $682.50, being the amount of a bill of wharfage due for the wharfage of the brig San Juan. There is no question as to the correctness of the bill, but the liability of the defendant is denied.

The brig San Juan was a foreign vessel, which came to the port of New York, consigned to the defendant, her owners being absent. The defendant was the agent of the vessel, and transacted her business in New York while she occupied the wharf of the libellant. Before the departure of the vessel an account of the amounts due for her wharfage while in charge of the defendant as agent, was delivered to the defendant, and a demand made upon him for the payment of the same. He acknowledged the demand, and promised to pay, but has hitherto neglected so to do. The statute of the state of New York, which fixes the rate of wharfage, provides also as follows: "The master or owner of any ship or vessel, or in their absence the factor or agent to whom such ship or vessel shall be consigned, shall be liable to pay the wharfage due for such ship or vessel; provided, however, that such factor or agent shall not be liable for the same, unless an account of the wharfage due be delivered to such factor or agent, or if absent, left at his usual place of abode, and the money there demanded before the departure of such ship or vessel from the port." See 2 Rev. Laws 1873, p. 430, [2 Rev. Laws N. Y. 1813, c. 216, p. 430.] The facts of this case clearly bring the defendant within the effect of this statute, so that, if this were an action at common law, no question could arise as to the plaintiff's right to recover. But the action being in admiralty the question is presented whether a court of admiralty has jurisdiction to enforce the liability created by the statute of the state above recited.

It is now settled that the courts of admiralty have jurisdiction in actions to recover wharfage by reason of the subject matter. Such an action the present must be held to be, notwithstanding the circumstance that the liability of the defendant arises under a statute of the state. The defendant's liability is to pay a demand maritime in character. He is made liable to pay wharfage. The liability springs out of, and is incidental to, a transaction maritime in character. The effect of the statute is to create a legal presumption that wharfage service is rendered on the request of the ship's agent as principal, when in the absence of the ship's owner the vessel under the control of the agent makes use of a wharf. In my judgment such a liability is one that a court of admiralty can enforce.

Let a decree be entered for the sum of $682.50, with interest from May 21, 1875, and costs.

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

Case No. 623.

ATLANTIC GIANT POWDER CO. v. GOODYEAR.

SAME v. TOWNSEND.

[3 Ban. & A. 161;[1] 13 O. G. 45.]

Circuit Court, D. Massachusetts. Dec., 1877.

PATENTS FOR INVENTIONS — ENJOINING INFRINGEMENT—SUBSTITUTION OF EQUIVALENTS—ENLARGING SCOPE ON REISSUE—COMITY BETWEEN COURTS.

1. The reissued letters patent, No. 5,799, for a compound of nitro-glycerine with an absorbent substance, preferably infusorial earth, are infringed by the use of a mealed powder composed of nitrate of soda, charcoal and sulphur.

[Cited in Atlantic Giant Powder Co. v. Rand, Case No. 626; Atlantic Giant Powder Co. v. Mowbray, Case No. 624.]

[See Atlantic Giant Powder Co. v. Dittmar, 1 Fed. 328.]

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

2. The rule, that when a substitute is used for one ingredient in a patented combination, which substitute has every property and performs every function of the original in the combination, it does not cease to be an equivalent because in addition it does something more and better, recognized.

[Cited in Atlantic Giant Powder Co. v. Rand, Case No. 626; Atlantic Giant Powder Co. v. Mowbray, Id. 624.]

3. The term "inexplosive" in the original patent, was properly omitted in the reissue as being ambiguous and meaning only comparatively inexplosive, or explosive under certain conditions; and such omission, reference being had to the terms of the original specification, did not enlarge the scope of the invention.

[Cited in The Atlantic Giant Powder Co. v. Rand, Case No. 626.]

4. The patent having already been contested and held valid in this court on final hearing, this court will not postpone the granting of a preliminary injunction, merely because another suit is pending on the patent in another circuit.

5. The question of comity between courts of co-ordinate jurisdiction, reviewed.

[In equity. Suits by the Atlantic Giant Powder Company against George A. Goodyear, and against George W. Townsend, to enjoin infringement of reissued letters patent No. 5,799 of patent No. 78,317. Decrees for complainants.]

Browne, Holmes & Browne, for complainants.

Godfrey Morse, for defendants.

SHEPLEY, Circuit Judge. The reissued patent of complainants, No. 5,799, for the invention of Nobel of a new explosive compound, consisting of a combination of nitro-glycerine with infusorial earth, or other equivalent substance, was fully considered by this court in the case of Atlantic Giant Powder Co. v. Mowbray, [Case No. 624.] In that case the reissued patent was fully sustained as valid, and as not claiming in the reissue any invention different from the one substantially set forth and suggested in the original. The question presented in this case is, whether the pulverulent powder compounded of the usual proportions of nitrate of soda, charcoal and sulphur, as used in the "Vulcan blasting-powder," in combination with nitro-glycerine, is, for the purposes of and in that combination, the equivalent of "the substance" described in the Nobel patent, which "possesses a great absorbent capacity, and which, at the same time, is free from any quality which will decompose, destroy, or injure the nitro-glycerine, or its explosiveness," thus, when combined with nitro-glycerine, forming out of the two ingredients "a composition which, without losing the great explosive power of nitro-glycerine, is very much altered as to its explosive and other properties, being far more safe and convenient for transportation, storage, and use than nitro-glycerine." The preferred form of this substance, as described by Nobel, was the kieselgurgh, or infusorial earth. The substance used by defendants, in combination with nitro-glycerine, is a mealed powder of nitrate of soda, charcoal and sulphur, in proportions the same as in some gunpowder in common use in granular form. This substance has in the combination "a great absorbent capacity," and it is "free from any quality which will decompose, destroy, or injure the nitro-glycerine or its explosiveness." The compound of this substance with nitro-glycerine, without losing the great explosive power of nitro-glycerine, is far more safe and convenient for transportation, storage and use than nitro-glycerine. It does not appear to be contended that the substance itself used by defendants does not possess, in the combination, every property claimed for the infusorial earth in the dynamite patent, or that the combination of it with nitro-glycerine, as "Vulcan blasting-powder," does not possess every attribute and property, in a greater or less degree, possessed by dynamite.

The contention of defendants is, that the only object and aim of Nobel's invention, as patented, was to render nitro-glycerine safer in handling and transportation; that there was no intent to augment its explosive force; that, on the contrary, the solid substance exerted no influence and remained as inert matter, while the object of the manufacturer of the Vulcan powder is stated to be "to render the explosion and combustion of gunpowder instantaneous." That this is not the sole or principal object of the combination is perfectly evident. If the only object of the combination be "to render the explosion and combustion of gunpowder instantaneous," why begin the process by substituting for the granular gunpowder, so highly explosive, a mealed powder of the same ingredients in a pulverulent state, and of a lower degree of explosiveness than grained powder? As nitro-glycerine has eight or ten times the explosive force of the same quantity of gunpowder, as it explodes under proper conditions much more rapidly and instantaneously than gunpowder, the object of the compound is, manifestly, not merely to get an instantaneous explosion and combustion of the gunpowder, but primarily to effect an explosion, the operative effect of which is principally due to the nitro-glycerine in the compound, although augmented in some degree by the gas generated by the explosion of the powder. If the purpose be merely, by means of the nitro-glycerine, to effect instantaneous combustion of the powder, why is the ingredient of sulphur introduced, whose only function is to facilitate ignition—a purpose better accomplished by the nitro-glycerine itself? The real question in the case is more truly stated as follows: Does the substitution of gunpowder, as used in the Vulcan powder in combination with nitro-glycerine, in the place of the infusorial earth or other absorbent described by Nobel, make the combination a different and not an equivalent

compound, because when gunpowder is used as an absorbent, in addition to fulfilling every condition and performing every function of the absorbent in the dynamite compound up to the time of the explosion, and at that time, it then has the additional function of co-operating, by means of its conversion into gas, with the nitro-glycerine in rending the rock, instead of remaining, like the infusorial earth, an inert substance?

The mica powder of Mowbray was held to be an equivalent of the dynamite, and to be subordinate to the dynamite patent, although the mica scales of Mowbray, while possessing all the properties which render the infusorial earth efficient and useful in the compound, had additional properties of greater elasticity and resiliency, and although the nitro-glycerine used by him and prepared by his process was much more effective than the less highly nitrated nitro-glycerine known to Nobel at the date of his invention. The books are full of cases proving that when a substitute is used for one ingredient in a patented combination which has every property and performs every function of the original in the combination, it does not cease to be an equivalent because in addition it does something more and better.

The equities in Mowbray's case were much stronger than in this case. For Mowbray, although not the first and original, but a subsequent inventor, was in fact an independent inventor of the substance of the Nobel invention, and he also made a subsidiary invention, an improvement on the dynamite invention. In the present case there is no evidence of a combination of nitro-glycerine with gunpowder as an absorbent before the invention of Nobel, or even before it was used by the owners of the Nobel patent, as one of the modes of using and embodying his invention. The defendants rely upon the position assumed by them that, as gunpowder is an explosive of itself, the use of it in the combination is open to them, as the assignees of Nobel are claimed by them to be limited by the terms of their patent to a non-explosive substance as the absorbent. At the hearing on this motion the argument was strenuously and forcibly presented to the court that Nobel described his absorbent as an "inexplosive" substance, and that if the omission of the term "inexplosive" in the reissue enlarges the scope of the invention, the reissue itself is void; and that if the reissue is to be construed in connection with the original, and for the same invention, it must be limited to the use of absorbents as equivalents which are inexplosive. This position of the defendants is entitled to careful consideration.

In Russell v. Dodge, 93 U. S. 460, in delivering the opinion of the supreme court of the United States, Mr. Justice Field says: "The change made in the old specification, by eliminating the necessity of using the fat liquor in a heated condition, and making in the new specification its use in that condition a mere matter of convenience, and the insertion of an independent claim for the use of fat liquor in the treatment of leather generally, operated to enlarge the character and scope of the invention. The evident object of the patentee in seeking a reissue was not to correct any defects in specification or claim, but to change both, and thus obtain, in fact, a patent for a different invention. This result the law, as we have seen, does not permit." See, also, Seymour v. Osborne, 11 Wall. [78 U. S.] 544. The reissue in this case is not invalid according to the principles of law as stated in Russell v. Dodge, [supra,] and Seymour v. Osborne, [supra.] The word "inexplosive" is applied in the original patent as a term of description to a substance only preferentially used. The other descriptions in the specification clearly apply to substances which in one sense may be explosive, but are inexplosive as compared with nitro-glycerine. The word "inexplosive" appears clearly to have been used in the original patent to describe substances which, as compared with nitro-glycerine, were inexplosive by concussion, which would not, of themselves, explode under those conditions which rendered nitro-glycerine so dangerous and unsafe for practical use, and which, inexplosive of themselves under those conditions, when combined with nitro-glycerine, would make the combination a compound which would also be inexplosive except under such conditions as were not inconsistent with substantial safety in its use for blasting and similar purposes. In this sense the mealed powder used by the defendants is inexplosive. It prevents, by the interposition of its particles, the explosion of the nitro-glycerine by any such concussion as would ordinarily explode it when uncombined with an absorbent. It makes the compound practically inexplosive under ordinary fortuitous and accidental concussions, and practically explosive only under predetermined and prearranged conditions. The word is omitted in the reissue, and we think properly omitted, not for the purpose of including equivalents which were not within the scope of the original invention as described, but as an ambiguous expression not consistent with the other words in the specification which clearly describe the absorbent, its properties and functions, all of which properties and functions, it is evident, from a reading of the original patent, might appertain to a substance explosive under some conditions, but inexplosive under those conditions which made nitro-glycerine explosive by concussion, and dangerous and unsafe for practical use.

The conclusion, therefore, I think is a legitimate one, that under the reissued patent the owners of the patent are not limited to treat as infringements the use of such equivalents only as are actually inexplosive, but they are entitled to the exclusive use of such equiva-

lents as are inexplosive as compared with nitro-glycerine, and which, while complying with the other requisites of the infusorial earth in the combination, will, also, when combined with nitro-glycerine, form out of the two ingredients a composition which, without losing the great explosive power of nitro-glycerine, is more safe and convenient for transportation, storage and use than nitro-glycerine.

The objection is taken by the counsel for the defendants to the granting of a preliminary injunction by this court in the cases now before the court, for the reason that an action has been pending for two years and upward in the circuit court for the second circuit, in which the same questions are involved, and that no effort has been made to prosecute such action, or to obtain a preliminary injunction. It is proved that this action is pending in the circuit court for the second circuit. It is urged that the courtesy usually observed by one court toward another court of equal jurisdiction should deter this court from the exercise of its power to grant a preliminary injunction till that case, which was first originated in the other tribunal, should be finally brought to trial and decided by the court.

A consideration of the condition of this litigation in the respective courts will show that there is no foundation for this objection, and no ground for contending that the exercise of the jurisdiction of this court over the subject-matter would involve any want of courtesy to the court in which the other action is pending. It is to be observed, in the first place, that the Nobel patent, under which this litigation arises, has been made the subject of litigation in this circuit, and that the Nobel patent, after a long and patient and exhaustive examination and argument by able counsel, and a hearing of the testimony of the most competent experts, has been adjudicated to be valid. The foundation, therefore, has been laid in this circuit for a motion for a preliminary injunction. The patent itself having been sustained after a litigation closely contested and free from any pretence of collusion or of any neglect to properly raise and and ably present any issues which could be raised in defence, there is good ground upon which the party complainant can urge with more force its motion for the preliminary injunction in this circuit, in which the validity of the patent itself has been sustained, in which the principal questions arising in this case, as well as in others in relation to the validity of the reissue, have been fully tried and determined.

If such had not been the case in this circuit, and if there were a case pending in another circuit court of the United States involving the validity of this patent which had not been adjudicated upon in this circuit, and that case had progressed to a final hearing and was before the court for adjudication in such other circuit, this court, in the exercise of proper courtesy toward other tribunals of concurrent jurisdiction, would probably decline to hear a motion for a preliminary injunction, and would certainly decline to adjudicate upon it, under ordinary circumstances, without awaiting the decision of such other circuit court before which the case was pending for adjudication after a final hearing.

It would seem to follow that in this court, in which there has been such adjudication after a final hearing and a determination upon the validity of the patent, was the place, and peculiarly the proper place, to make the motion for a preliminary injunction, and that the exercise of its jurisdiction involves clearly no want of courtesy to any other tribunal in which such case has not reached a final hearing, and in which the testimony does not appear to have been taken. The injunctions, therefore, in these cases must issue against the defendants in the usual form.

[NOTE. Patent No. 78,317, was granted May 26, 1868, to A. Nobel, and reissued March 17, 1874, No. 5,799. For other cases involving this patent. see note to Atlantic Giant Powder Co. v. Mowbray, Case No. 624.]

Case No. 624.

ATLANTIC GIANT POWDER CO. v. MOWBRAY et al.

[2 Ban. & A. 442;[1] 12 O. G. No. 14, p. iii.]

Circuit Court, D. Massachusetts. Oct., 1876.

PATENTS FOR INVENTIONS—WHAT CONSTITUTES INFRINGEMENT — SUBSTITUTION OF INGREDIENTS—SAME BENEFICIAL RESULT.

1. The principal feature in Nobel's invention of dynamite was the absorption of liquid nitro-glycerine by means of absorbent material, preferably infusorial earth, thus, among other results, rendering the explosive safer and more readily used: *Held*, that the use of extremely minute scales of mica, which become coated with the liquid, is, in principle and effect, equally absorption, and although an improvement, is yet an infringement.

[Cited in Atlantic Giant Powder Co. v. Rand, Case No. 626.]

2. In a compound material, the substitution of an ingredient somewhat different, even if preferable, is nevertheless an infringement, if the same beneficial results are obtained by substantially the same means.

[Cited in Atlantic Giant Powder Co. v. Rand, Case No. 626.]

[See note at end of case.]

3. Reissued patent No. 5,799, granted to Alfred Nobel, March 17, 1874, for the combination of nitro-glycerine with infusorial earth, or other equivalent absorbent substance, as a new explosive compound, *held*, valid.

[Cited in Atlantic Giant Powder Co. v. Goodyear, Case No. 623; Same v. Rand, Id. 626.]

[In equity. Bill by the Atlantic Giant Powder Company against George W. Mow-

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

bray and others for an injunction, and for an accounting for the infringement of reissue No. 5,799, of patent No. 78,317, and reissues Nos. 5,798 and 5,800, of patent No. 50,617. Decree for complainant as to the first reissue, (5,799,) but for the defendants as to the others.]

Causten Browne and Jabez S. Holmes, for complainants.

Charles F. Blake, for defendants.

SHEPLEY, Circuit Judge. This bill is founded on three patents, one being reissue No. 5,798, for an improvement in methods of exploding nitro-glycerine, the claims in which are for a process or certain described modes of utilizing nitro-glycerine as an explosive by means of fire, heat, electricity, or an initial explosion, communicated to the mass under a condition of confinement, so as to produce an instantaneous explosion of the entire mass, and generally by effecting an impulse of explosion by the detonation of an explosive substance communicated to the mass under such condition as to produce an instantaneous explosion of the whole mass. This may be briefly described as the process patent. The second one is reissue No. 5,800, in which there are seven claims for as many different igniters or exploders for initiating the impulse of explosion in a charge of nitro-glycerine. This will be styled, for the sake of brevity, the exploder patent. The third patent, reissue No. 5,799, for an improvement in explosive compounds, is for the combination of nitro-glycerine with infusorial earth, or other equivalent absorbent substance, as a new explosive compound. This compound is generally spoken of as dynamite, and therefore this may appropriately be called the dynamite patent. This last-named patent will be first considered. In 1847, Ascagne Sobrero (soon after the discovery by Schonbein, in the same year, of gun-cotton) invented nitro-glycerine, an explosive substance prepared by treating glycerine with a mixture of nitric and sulphuric acids. For a long time after the invention of nitro-glycerine by Sobrero in 1847, in fact, until 1863, when Nobel's inventions began, although nitro-glycerine was well known to be a very powerful explosive as compared with gunpowder and gun-cotton, it was very little used for blasting purposes. This delay in the introduction of nitro-glycerine as an explosive to practical use appears to have been attributable, first, to the enormous danger to life and property attending its manipulation, transportation, and use in its fluid state; and secondly, to a practical difficulty, amounting almost to an impossibility, of exploding the whole mass of fluid nitro-glycerine, no instantaneous decomposition of the whole mass following from the application of heat or of a blow, as in case of gunpowder or gun-cotton when fire is applied. To overcome this last objection was the object of the exploder and the process patents. The object of the dynamite patent was to remedy the first objection of enormous danger to life and property, and to combine the nitro-glycerine with some absorbent substance, whereby the condition of the nitro-glycerine is so modified as to render the resulting compound more practically useful and effective as an explosive, and far more safe and convenient for handling, storage, and transportation, than nitro-glycerine in its ordinary condition as a liquid. Objection is made to the reissue of the dynamite patent, on the ground that the description of the invention is broader in the reissue than in the original patent; but the description of the invention in the original patent appears to describe in general terms, although without minutely demonstrating all the peculiarities of operation in the new compound, all that is more specifically described in the reissue. The invention is described in general terms to "consist in mixing with nitro-glycerine a substance which possesses a very great absorbent capacity, and which at the same time is free from any quality which will decompose, destroy, or injure the nitro-glycerine or its explosiveness." A certain kind of silicious earth, known under the several names of silicious marl, tripoli, rotten stone, etc., the preferred variety being infusorial earth, is described as the inert matter which he mixes with the nitro-glycerine. The described advantages are, that it will, by reason of its great absorbent capacity, take up about three times its own weight of nitro-glycerine, and still retain its powder form, thus leaving the nitro-glycerine so compact and concentrated as to have nearly its original explosive power. The patent also points out the result of insensibility of the compound to ordinary concussions without loss of the great explosive power of the liquid nitro-glycerine, where it describes it "as being far more safe and convenient for transportation, storage, and use, than nitro-glycerine." It is true that the original patent does not undertake to enunciate the law of the explosion of nitro-glycerine by concussion, or to explain fully the peculiarities of operation attending the use of the compound. This was not necessary to the validity of the patent any further than might be requisite to instruct others as to the qualities to be inherent in other substances to be used as equivalents for the silicious earth described, and I hardly think essential for that purpose. If, in this respect, there was any need of more specific detailed description in addition to the general words in the patent, it has been corrected, and, as far as I can judge, properly corrected in the reissue. Without giving that extended comparison and collocation of corresponding passages in the original and reissue which would be necessary to

properly answer all the objections raised in the argument, I must content myself with stating that such careful comparison has failed to satisfy me that the reissued dynamite patent is open to objection on the ground of its being for an invention broader than, or different from, the one described in the original. The omission of the word "inexplosive" might seem to indicate, as it perhaps does, a disposition to enlarge the scope of the patent; but, as I think, when a question shall arise on that expression in the patent, the court will look to the specifications in both the original and the reissue, in aid of the true construction of the reissue, as stated in Forsyth v. Clapp, [Case No. 4,949.] I do not think the omission of that word renders the reissue defective. The construction which the court would give as to what would be an equivalent for the silicious earth would be the same under the reissue as on the original patent.

The patent to Shaffner for a mode of tamping, and for a combination of sand with nitro-glycerine in the blast-hole, does not anticipate the invention of Nobel. It does not approach any nearer to it than the explosion of nitro-glycerine in the sand and gravel, in front of the stable at Titusville, approaches Mowbray's perfected invention of mica powder, although it suggested the train of experiments which resulted finally in that invention. The defendants have used mica powder, an invention of the defendant Mowbray, a great improvement in the art of blasting with nitro-glycerine, the valuable properties of which have been signally demonstrated in the use which has been made of it in blasting operations in the Hoosac Tunnel, attaining the result of the highest efficiency and greatest economy consistent with perfect safety, as compared with all other highly explosive substances. Mica powder, so called, is prepared by pouring tri-nitro-glycerine, at a temperature of about seventy degrees, in the proportions of about fifty-two and one-half pounds of tri-nitro-glycerine to about forty-seven and one-half pounds of mica scales, over mica scales prepared by triturating mica or Muscovy talc into scales of about one-thousandth of an inch in thickness, and exceedingly minute surfaces, and free from the powder or dust of mica, in such a manner that the surfaces of the minute mica scales are painted or coated with the tri-nitro-glycerine, and the mass of forty-seven and one-half pounds of mica scales retains or holds in suspension the fifty-two and one-half pounds of tri-nitroglycerine. To determine whether this, which must be admitted to be a great and patentable improvement upon the dynamite of Nobel, be an independent or a subsidiary invention, we must look carefully into the nature and scope and the limitations of the reissued dynamite patent, treating it, as we have already shown, as a valid patent for the invention described therein and in the original.

The invention is described in the original as consisting "in mixing with nitro-glycerine a substance which possesses a very great absorbent capacity, and which at the same time is free from any quality which will decompose, destroy, or injure the nitro-glycerine or its explosiveness," thus forming out of the two ingredients "a composition which, without losing the great explosive power of nitro-glycerine, is very much altered as to its explosive and other properties, being far more safe and convenient for transportation, storage, and use than nitro-glycerine." In the original and the reissues there is a statement, in different forms of expression, and with more particularity in the reissues than in the original, of the advantage of the use of this compound, enabling the miner to fill up the bore-hole with the compound, while the cartridge containing the fluid nitro-glycerine must be of less diameter than the bore-hole, thus obtaining as much nitro-glycerine in the same height of bore-hole with this powder as with nitro-glycerine in the pure state, increasing the safety of the miner by preventing leakage into the seams of the rock. The claim in the original patent is for the composition of matter made substantially of the ingredients, and in the manner and for the purposes set forth. The reissues claim the combination of nitro-glycerine with infusorial earth or other equivalent absorbent substance as a new explosive compound. It is not perceived that the claim in the reissues is any broader than in the original. The defendants' explosive compound is prepared by mixing the nitro-glycerine with the mica scales before described. Are the mica scales an equivalent in the compound for the infusorial earth or other substance which possesses a great absorbent capacity, and which at the the same time is free from any quality which will decompose, destroy, or injure the nitro-glycerine or its explosiveness? I am forced, upon mature reflection, to the conclusion that in this compound the mica scales possess all the properties which render the infusorial earth efficient and useful in the compound, as well as some additional properties of greater elasticity and resiliency, which add to their value. It is true that the infusorial earth is described as a porous substance, and is supposed to hold the nitro-glycerine suspended in the pores by capillary attraction, but it must also hold it in suspension by coating and adhering to the exterior surfaces of the particles. The mica scales, on the other hand, are supposed to hold the nitro-glycerine in suspension only as it is painted or coated on the exterior surfaces of the minute scales; but they each in the compound perform the same funtion as an absorbent of the nitro-glycerine. They each take up and hold by cohesive or molecular action, and each without

chemical action or reaction, the nitro-glycerine in the compound. The mixture is a mechanical one, and it is not material to the function of the compound or its properties whether the absorption be effected by that mode of absorption by which a sponge, or the lacteals of the body suck in or draw up a liquid, or that by which some pulverulent substances absorb gases or moisture, whether the liquid is held absorbed or suspended in the inner surfaces of minute capillary tubes, or on the outer surfaces of minute scales. I have seen diatoms, small silicious scales, called animalcules, yet of vegetable origin, so minute that four hundred different forms catalogued and classified are arranged within the space of less than one-fourth of an inch square on the surface of the glass slide of a microscope. These small silicious scales make up the substance of large tracts and mounds of earth. If used as the inert matter with a mixture of nitro-glycerine, it would be difficult to say whether they were more closely the equivalent of the infusorial earth of Nobel or the mica scales of Mowbray. The kieselgurgh or infusorial earth of Nobel is composed of the minute scales of the diatomaceae. Each one of the properties and qualities ascribed by Nobel to the inert matter in his compound pertains to the mica scale in the mica powder, and the functions are the same in each. Nobel uses nitro-glycerine manufactured by a process which, with acids of the specific gravity used by him, produces mono or di nitro-glycerine. Mowbray uses nitro-glycerine prepared by processes which yield a substantially pure tri-nitro-glycerine, which is only another more concentrated and more highly nitrated form of nitro-glycerine, in mono-nitro-glycerine one of the hydrogen atoms of glycerine being replaced by nytril (constituting nitric acid,) in di-nitro-glycerine two of the hydrogen atoms being so replaced by nytril, and in tri-nitro-glycerine three being so replaced. For the purposes of the compound the substances are substantially the same in kind, though differing in degree. In strictness, either by the old or the new graphical system of chemical notation, they would be differently described and represented. But notwithstanding this difference in chemical nomenclature, the practical fact remains, that the only difference is in the degree to which the glycerine is nitrated, and the three resulting products, as to the properties which constitute the peculiar character of nitro-glycerine as an explosive, and as one of the elements of the patented compound, differ only in degree and not in kind.

As to the other two patents—the exploder and the process patents—without any elaborate statement of reasons, I must content myself for the present with a very brief statement of the conclusions at which I have arrived. Initial exploders—the use of one explosive compound or substance to communicate the impulse or action of explosion to another—are old. These initial exploders have been made of fuses of gunpowder or other ignitible compounds, and different forms of tubes or capsules containing ignitible or explosive compounds, which communicated sufficient heat directly or indirectly by a shock, adequate, when arrested, to produce sufficient heat to explode the mass by detonation or deflagration, or both. These initial exploders have been used to explode gunpowder and gun-cotton, both of which can be exploded by detonation. In this state of the art, if there was anything patentable in the initial exploders of Nobel, the claims of the patent must receive so narrow a construction as would not charge the defendants as infringers. Decree for injunction and account as to infringements of reissued patent No. 5,799, for an improvement in explosive compounds, and that no infringement is proved of reissues 5,798 and 5,800.

[NOTE. Reissue No. 5,799, of patent No. 78,317, was granted May 26, 1868, and was construed, held valid, and held to have been infringed in the following cases: Atlantic Giant Powder Co. v. Parker, Case No. 625; Same v. Rand, Id. 626; Same v. California Vigorit Powder Co., 5 Fed. 197; Same v. Dittmar, Powder Co., 1 Fed. 328; Same v. Goodyear Case No. 623; Same v. California Vigorit Powder Works, 98 U. S. 126. Reissue No. 5,798, of patent No. 50,617, was granted March 17, 1874, and was construed in Atlantic Giant Powder Co. v. Hulings, 21 Fed. 519. Reissue No. 5,800, of patent No. 50,617, was granted March 17, 1874, and was construed in Atlantic Giant Powder Co. v. California Vigorit Powder Works, 98 U. S. 126.]

Case No. 625.

ATLANTIC GIANT POWDER CO. v. PARKER.

[16 Blatchf. 281; 4 Ban. & A. 292; 16 O. G. 495; Merw. Pat. Inv. 175.] [1]

Circuit Court, S. D. New York. May 5, 1879.

PATENTS FOR INVENTIONS—WHAT CONSTITUTES INFRINGEMENT—PRIOR PATENT—CLAIM.

1. The reissued letters patent No. 5,799, granted to the Giant Powder Company, March 17th, 1874, for an "improved explosive compound," (the original patent having been granted to Julius Bandmann, as assignee of Alfred Nobel, the inventor, as No. 78,317, May 26th, 1868,) are valid.

[Cited in Atlantic Giant Powder Co. v. Dittmar Powder Manuf'g Co., 1 Fed. 328.]

[See note at end of case.]

2. The decision in Atlantic Giant Powder Co. v. Rand, [Case No. 626,] confirmed.

3. The claim of that patent is infringed by a powder called "Neptune Powder," composed of 56 parts of nitrate of soda, 14 parts of charcoal, and 30 parts of nitro-glycerine.

[See note at end of case.]

4. A description in a prior patent, to invalidate a subsequent patent, must be such as to show that the article described in the subse-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, reprinted in 4 Ban. & A. 292, and here republished by permission. Merw. Pat. Inv. 175, contains partial report only.]

quent patent can be certainly arrived at by following the prior description.

[In equity. Bill by the Atlantic Giant Powder Company against Andrew J. Parker and others for an injunction restraining the infringement of reissue No. 5,799 of patent No. 78,317. Preliminary injunction granted.]

George Gifford and Causten Browne, for plaintiff.

Charles F. Blake, for defendants.

BLATCHFORD, Circuit Judge. This is an application for a preliminary injunction founded on reissued letters patent No. 5,799, granted to the Giant Powder Company, March 17th, 1874, the original patent having been granted to Julius Bandmann, as assignee of Alfred Nobel, the inventor, as No. 78,317, May 26th, 1868, being the same reissue considered in the case of the same plaintiff against Jasper R. Rand and others, [Case No. 626,] decided herewith. The powder of the defendants in the present case is known as Neptune powder, and is composed of 56 parts of nitrate of soda, 14 parts of charcoal, and 30 parts of nitro-glycerine. It is the same powder which was held by this court, in May, 1878, in the case of the same plaintiff against the Neptune Powder Company, to be an infringement of No. 5,799. Many views now urged in defence in this case have been considered at length and overruled in the decision in the case against Rand. Those views were, to some extent, presented and passed upon in the case against the Neptune Powder Company, but no written decision was given in that case, [nowhere reported.] There are, however, some points taken in the present case which are not discussed in the decision in the Rand case, and those points are also urged as grounds for dissolving the injunction granted in the case against the Neptune Powder Company.

Stress is laid on the fact that a compound made of 30 per cent. of nitro-glycerine and 70 per cent. of infusorial earth, will not explode, while the defendants' compound will explode, although it has but 30 per cent. of nitro-glycerine, and its gunpowder ingredients will not absorb a greater amount of nitro-glycerine. But, it is a plain direction of the patent, that an absorbent must be used which will absorb and retain sufficient nitro-glycerine to make the compound explodable by detonation, at the place of designed use. The less the absorbing and holding capacity of the absorbent, the less the explosive force of the nitro-glycerine absorbed, because the less the quantity of nitro-glycerine absorbed. There is nothing in the patent which admits of the use of an absorbent which will not, with the nitro-glycerine, make a compound explodable by detonation, or of the use, with an absorbent which will absorb and hold sufficient nitro-glycerine to make a compound explodable by detonation, of an insufficient quantity of nitro-glycerine for such purpose. It is, therefore, of no consequence that a particular proportion of nitro-glycerine with a particular absorbent will not make a compound explodable by detonation, such compound being outside of the patent.

On the question of novelty, a book published in Germany, in the German language, is introduced, called Dingler's Polytechnic Journal, volume 171, 1864, page 443, cviii. The particular article is headed: "On Nobel's blasting powder, improved by addition of nitro-glycerine. By B. Turly, mining engineer." The translation of the text is as follows: "W. Nobel, an engineer of Stockholm, has taken out a patent in different countries for an improved blasting and shooting powder. His improvement consists in making the ordinary powder considerably stronger by an addition of nitro-glycerine. As is known, nitro-glycerine is a very clear oleaginous liquid, is ignited at about 170° C., without exploding, but burns slowly away with a crackling and snapping noise. If this oil is poured on a solid foundation and struck heavily with an iron hammer, it explodes with a violent detonation, but only on the spot where the hammer touches the liquid, while all the rest of the mass of oil remains unchanged, that is, unexploded. The combustion of the liquid follows without the development of any gas perceptible by the odor. From this relation this much appears, that this mass, in and of itself, is quite harmless, and requires a strong concussion or blow to make it partially explode; that its employment has, at least, no greater danger than that of common powder. But, in combination with common powder, nitro-glycerine developes a very considerable strength, and this new nitro-glycerine powder is at least three to five times stronger than ordinary powder or blasting powder. In the fortress of Carlborg, on the Wetten Lake, Mr. Nobel has made experiments with his powder in the presence of a commission. Bomb shells with ordinary and the improved powder were bursted, and the effect of the latter is said to have been five to seven times that of the ordinary powder. The experiments of blasting rocks, performed in my presence, have, however, in general, shown only a three times greater development of strength, but always the result that merits the greatest attention. Besides, it is not to be left out of the consideration, that a bore hole can only be quite generally compared with a grenade or bomb; that, while these missiles consist of homogeneous cast iron, in which the strength must show itself proportionally much greater—in a bore hole in a rock, in most cases, a certain part of the force is uselessly lost, so that, consequently the effect will be proportionally a smaller one than in the former case. Nevertheless, this new powder is an essential improvement

on the old, and, when it passes a wholesale test, of which there is no present reason to doubt, it will find the greatest recognition and most extended employment by the mining public. The blasting experiments were performed as follows: The powder employed is distinguished from the blasting powder here in use by being much finer and not round but oblong and angular. Mr. Nobel shows this powder for common Swedish cannon powder, which has the same price as the mining powder of Nora. The improved powder was used in cartridge shells of sheet zinc, 18 millimetres in width, and in length of from 75 to 100 and 200 millimetres. These zinc shells, which are open at one end, are filled with the ordinary cannon powder, and, when the filling is completed, as much nitro-glycerine is poured upon it as can find room in the interstices of the powder. The powder, moistened with the oil, has a 40 per cent. (?) greater weight. After the cartridge is filled with powder and oil, it is tightly closed with a stopper of cork 20 millimetres long. It will be better to solder the cartridge. The charging of the hole is performed as follows: The bore hole, which, at its lower end, must have a width 4 to 6 millimetres greater than the thickness of the cartridge, is, of course, made dry. The cartridge is so inserted in it that the cork comes towards the bottom, that is, touching the solid rock. The space between the cartridge and the wall of the bore hole is now filled up with cannon powder, so that the latter surrounds the cartridge as completely as possible, (according to Mr. Nobel, the soldering should offer no difficulties—perhaps it suffices to pour sulphur on the cartridge—) being, also, 15 to 30 millimetres over the cartridge. This powder serves only for the ignition of the charge, for the bursting of the cartridge. The fuse is then stuck into the touch-hole, and the hole is not filled quite as usual, only care must be taken not to injure the cartridge with the tamper, on which account the first tamping is only made very loosely. If the hole is sufficiently wide, the fuse may be fastened to the cartridge with a piece of thread, and then it is not necessary to take so much igniting powder. It seems better, however, not to be sparing with the latter, in order to insure the explosion of the blast. On the explosion of the blast it is found that the detonation is a much weaker one than with common mining powder. A few examples of the effect of this powder will here be sufficient: 1. A hole 18 inches deep was discharged three times with a 9-inch mining cartridge, without showing the slightest effect; the same hole was charged with a 6-inch glycerine cartridge, and was well and completely broken up. 2. Several holes 24 inches deep, that usually here require mining cartridges 9 to 12 inches long, were well blasted with glycerine cartridges 3 inches in length. 3. Holes of 30 inches depth, that are otherwise charged with mining cartridges 18 inches long, broke with glycerine cartridges 6 inches long. From these experiments I have already deduced the conviction, that the degree of effect of this improved powder in blasting is at least three times that of the ordinary mining powder. The great advantage which will probably be obtained with this new powder will consist in this—that greater masses can be obtained at a time; that, consequently, the cost of production will be diminished. The charge of a single blast might be rather dear, but a workman will, perhaps, accomplish twice as much in the same time. First of all, will this powder be particularly valuable in building above ground and stone quarries—in general, in ample spaces where a great deal can be given to a single blast. Experiments still to be made must decide as to its utility in small spaces, confined quarters and works. Cartridges 18 inches in length might seem astonishingly large for German use. Here, the same (containing 180 grains powder) are often employed in working above ground, but each blast throws at least ⅛ cubic foot of solid mass. I consider it my duty not to withhold these preliminary remarks on a subject which possesses so great an importance for mining, and I can only add the wish that the mining public will accept this thing as far as possible, and will test and employ the new powder. Ammeberg, January 1, 1864." The number of the Journal in which the foregoing article appeared was published March 6th, 1864.

Professor Henry Morton, in an affidavit on the part of the defendants, says, that he finds in said article the following description of experiments: "The blasting experiments were conducted as follows: The powder used differs from the blasting powder ordinarily in use here, in being much finer and not round, but longish and angular. Nobel states that this powder is common Swedish gunpowder, which has the same price as (Nora blasting powder?). The improved powder was used in zinc cartridge cases, 18 millimetres in width, and in length varying from 75 to 150 and 200 millimetres. These zinc cases, which are open at one end, are filled with the ordinary gunpowder, after which so much nitro-glycerine is poured in as can find room in the interstices of the powder. The powder soaked with the oil has an increased weight of 40 per cent.?" He further says, that, in order to repeat the experiment so described, he took "a quantity of common blasting powder, such as is sold throughout the country, and, having first removed from it all dust by means of a fine sieve, passed it through a coarse sieve, so as to secure only the moderately fine grains;" that "the powder so obtained corresponded, in all respects," as he believes, "to that described in the above extract as being much finer than that ordinarily in use, and not round but angular;" that he "then selected

a glass test tube about ¾ inch in diameter, and 4½ inches long, this corresponding to the dimensions of the cartridge cases given in the extract, namely, 18 millimetres in width and 75 to 150 millimetres long;" that into this glass tube he "then poured 15 grammes of the fine grain blasting powder above described, and upon it poured 6 grammes of nitro-glycerine, these being the proportions of powder to nitro-glycerine mentioned in the above extract;" and that "the nitro-glycerine was rapidly absorbed by the powder, and produced an essentially dry powder, which could evidently be handled and transported with as much safety as is attainable with any similar mixture." He further says, that he "mixed together 14 parts, by weight, of charcoal, and 56 parts of nitrate of soda, both in fine powder, and to these added 30 parts, by weight, of nitro-glycerine; and that the mixture, when made, constituted an essentially dry powder, evidently capable of being handled and transported with as much safety as is attainable with any such mixture." He further says, that the proportion of nitro-glycerine to gunpowder in said two experiments is 28 5-10 per cent. of the whole mixture in experiment one and 30 per cent. in experiment two; that these do not, in his opinion, differ to any practical extent; and that, in his opinion, "nothing further is required, beyond the description given by Turly, above quoted, to enable any one familiar with the manufacture of ordinary gunpowder, to make such mixtures of gunpowder and nitro-glycerine as are described in experiment two, which is the powder of the defendants."

Mr. Robert J. Howe, one of the defendants, says, in an affidavit: "It is a well-known fact, that gunpowder is more effective when exploded by percussion caps than by simple fuse. Some consumers (contractors) always use percussion caps for that purpose. For the same reason, caps are better to explode the improved blasting powder, but the improved gunpowder is largely used by some parties and exploded (without cap) by fuse alone. In such use, the gunpowder of the mixture explodes the nitro-glycerine of the mixture."

Mr. Thomas Varney, an expert for the plaintiff, testifies as follows, in an affidavit, in regard to the foregoing affidavits of Professor Morton and Mr. Howe: "I have read the affidavits of Professor Henry Morton and Robert J. Howe. I understand how Professor Morton made his mixture of nitro-glycerine and gunpowder, in imitation of that described in the report of Mr. Turly, in Dingler's Journal of 1864. I have made and further tested Dr. Morton's mixture, to ascertain whether his opinion was correct, that this mixture was a safety one—as safe as the powder made by the defendants. I find it is not. I experimented with two kinds of gunpowder. In one case I used common blasting powder. In the other I used the Laflin & Rand Orange Ducking Powder—a powder closely resembling that used by Professor Morton both in structure and size of grain. The proportions of nitro-glycerine and gunpowder were the same in each case, and the same as Professor Morton's, to wit, 28½ parts, by weight, of nitro-glycerine to 71½ of gunpowder. I placed these mixtures upon several thicknesses of paper and allowed them to remain in a room having a temperature of 75° Fahrenheit for 45 hours, and then weighed them. I found they had lost almost two-thirds of their nitro-glycerine, the same having drained out of the mixture and became absorbed into the paper, going through ten thicknesses thereof. * * * This mixture is not a safety one, nor is it dynamite," (meaning, the compound of No. 5,799,) "or the same thing as that made by the defendants. It is leaky. If it should be packed in paper cartridges, and these cartridges be packed in wooden cases, and be carried in cars, as is done with the powder made by the defendants, nitro-glycerine would drain from it and run into the springs, journals and other machinery beneath and upon the wheels and rails, as was the case with the leaky dualin at Worcester, Massachusetts, and the result would be the same as in that case—the entire cargo of powder would be exploded; whereas, the powder made by the defendants is thus packed and transported without the slightest danger of explosion from this source, because it is not leaky. The mixture in the Turly experiment was not made according to the rules of the dynamite patent," (meaning No. 5,799,) "but the defendant's powder is, to wit, so much nitro-glycerine is put in as will make the mixture an efficient explosive, and be retained without leakage, and no more. The leading rule for making the old mixture, as stated by Turly, is, that so much nitro-glycerine was poured in as could find room in the interstices of the powder. I tried this also, and found the mixture much more wet and leaky than the others above described. The reason why the old mixture was put into zinc cases instead of paper ones or directly into the bore hole, was because it was leaky and had to be treated like liquid nitro-glycerine. I have carefully studied the French patent of 1863, the English one of 1864, and the memoranda filed in the American patent office in 1865," (the last is a part of the contents of the file wrapper in the matter of the patent granted to Nobel, No. 50,617, October 24th, 1865, for "substitute for gunpowder," and being the original of reissues, Nos. 4,818, division D, and 4,819, division E, both dated March 19th, 1872,) "being all the evidence, except the Turly report, referred to by the defendants herein as either anticipating the dynamite invention or tending otherwise to invalidate it. My views as to the old mixtures, and some of the grounds for them, are as follows: I regard them as really merely

experimental, because, in the first place, as practical things, they amounted to nothing. They did not go into practice at all. They were tried and abandoned. At this time, we are able to understand them and their value fully, and, we know they were quite worthless, except as links in the chain of experiments which led to the exploding of nitro-glycerine by detonation. If, at this day, any one should do, in all respects, what was described in the documents referred to, or what was actually done, as shown by Turly's report, he would be guilty of a great folly, but he would not infringe the dynamite patent. Nobody has ever been guilty of this folly, or ever will, except from sheer ignorance or some ulterior design. He will never adopt the old process, as an economic mode of blasting. We presume this old process aided Nobel in reaching the detonating mode of exploding nitro-glycerine; but, however this may be, it has never been used except experimentally, so far as I know. Let any one be ever so deeply skilled as an expert, or ever so experienced in the practice of all that is shown by these old documents, yet he could not make the defendants' powder, that is, gunpowder dynamite. Furthermore, even if, by accident, in making the old mixtures, the ingredients may have been used in dynamite proportions, yet there is no evidence that the mixture was ever applied to the purposes and uses peculiar to dynamite. The leading purposes of dynamite are safety in transport and freedom from leakage at the bore hole. There is no account, as far as I know, either of the transport of the old mixtures, or of their use naked in the bore hole, or in mere paper cartridges. In the documents referred to, it appears that the old mixtures were designed for two purposes—fire-arms and blasting. If it was dynamite, or such powder as the defendants make, and was used as theirs is, to wit, detonated in a gun or cannon, the gun and cannon were blown to pieces in every instance. The defendants' powder never has been used, and never can be used, in ordnance or fire-arms. We must, therefore, conclude, that the old mixture designed for fire-arms was not dynamite, or that it was never used in fire-arms, was, therefore, never transported, and was, therefore, never put to dynamite use. As to the old blasting mixture, Turly, the only reporter on the subject, gives his account in such manner as to lead one to conclude that the mixture was made at the mine. The narrative of the process shows, that the shell of zinc was filled with gunpowder—then the nitro-glycerine poured in—then corked—then turned cork downwards and put into the bore hole, &c.—as if each step immediately followed the preceding one. The old mixtures were never used as dynamites, that is to say, the leading functions of dynamite were never involved, applied or enjoyed. Not a single life or limb, or a single dollar's worth of property, was ever saved by their use, whereas, undoubtedly, many lives and much property have been saved by the use of the defendants' powder, instead of using the nitro-glycerine contained in it in its pure state, or in the form of the old mining mixture. Mr. Howe says his powder is largely used by some parties and exploded (without caps) by fuse alone. If it be inferred from this statement, or from his calling his powder an improved gunpowder, that it is more readily explodable by fire than infusorial dynamite, or any other dynamite, such inference would be erroneous; in this respect, it is precisely like all others. The original dynamite patent," (meaning, No. 78,317,) "fully explains this subject."

In reply to the foregoing affidavit of Mr. Varney, the defendants produced the affidavit of Charles Leibshner, to show that the Swedish gunpowder mentioned by Turly must have been an uncompressed, unglazed, saltpetre powder, and that the gunpowder used by Mr. Varney, in his experiments, was a compressed and glazed powder, so that the former would be a better absorbent than the latter. The defendant Howe also makes an affidavit to the effect that unpressed powder is comparatively loose, porous and absorbent, and would readily absorb and retain 30 per cent. of nitro-glycerine, while pressed powder is hard, compact and non-absorbent; and that he believes the Swedish gunpowder of the Turly article was uncompressed, unglazed gunpowder. Professor Morton also makes an affidavit, in reply to that of Mr. Varney. He says: "I have examined what I understand to be the powders named by Mr. Varney, namely, the 'common blasting powder' used in this vicinity at present, and the 'Laflin & Rand Orange Ducking Powder,' and find them to differ in a very essential respect from the powder used by me in the experiment mentioned by me in my said previous affidavit, and from the powder which I believe to have been used in the experiments recited in the Turly extract. That is to say, these powders, used by Mr. Varney, are extremely hard and compact, and not porous, or capable of absorbing a fluid, and are, moreover, highly glazed with black lead; while, on the contrary, the powder which I employed in my experiment, and which I believe to be that described in the Turly extract, was a powder made without compression, in the manner in general use long ago, and, consequently, light, porous and eminently absorbent. I repeated the experiments with these powders as described by Mr. Varney, and found that, when they were mixed with nitro-glycerine in the proportions named, they produced by no means dry powders, but, on the contrary, refusing to absorb the nitro-glycerine, the grains of powder were simply drenched on the outside with nitro-glycerine, which ran from them into the vessel in which they were mixed, or drained from them into the paper on which I spread a

portion. This was true of both the common blasting powder and of the orange ducking powder." He further makes statements to show that a powder made and sold by the plaintiff, and called "giant powder, No. 2," permitted nitro-glycerine to leak from it "in a very marked manner, equal in degree to the leakage of the nitro-glycerine from the Turly mixture" made by him, though "not nearly so much as the leakage of nitro-glycerine from the mixtures described in the Varney affidavit," and made up by him "in accordance with the directions of the same;" that a mixture of nitro-glycerine and the best English rotten stone, pulverized to a very fine powder like flour, in the proportions of 40 per cent. of rotten stone to 60 per cent. of nitro-glycerine, produced a semi-fluid paste; and that a mixture of 78 per cent. of nitro-glycerine with 22 per cent. of infusorial earth, of low specific gravity and great absorbent capacity, furnished to him by the plaintiff, as a specimen of the best absorbent substance of that character, produced a pasty mixture, which drained to a greater extent than did the Turly mixture; and that samples of the two powders used by Mr. Varney in his experiments, showed both of them to be compressed, hard and non-absorbent, and glazed with black lead, and corresponded, in all those respects, with the powders with which he made his said repetitions of Mr. Varney's experiments.

To those affidavits the plaintiff replies by several affidavits. There is an affidavit of T. P. Shaffner, setting forth, that, during the year 1864, he was engaged by the Swedish government, at Stockholm, in experimenting with explosives, and was well acquainted with the powder mentioned in the Turly article as being used in the experiments of Nobel, and knows that that powder was compressed and was very hard; that, although he has been acquainted with different kinds of powder, both in this country and in foreign countries, from long before 1864 down to the present time, the powder referred to in said article as having been used in the experiments of Nobel was the hardest powder he ever handled, and was, also, a highly glazed powder; that it was much harder than any blasting powder he has ever known; that Turly, in said article, says: "After the cartridge is filled with powder and oil, it is tightly closed with a stopper of cork, twenty millimetres long. It will be better to solder the cartridge;" and that it is perfectly clear to his mind, that the use of the cork stopper ("tightly closed") and of the solder, was to keep the nitro-glycerine from leaking out, for, the article says, that "as much nitro-glycerine is poured upon it as can find room in the interstices of the powder." There is also an affidavit of John Schrader, to the effect, that he poured upon some medium sized grains of the powder in a vial, as much nitro-glycerine, at about 70° Fahrenheit, as could find room in the interstices of the powder; that the powder became saturated in about three minutes; that the powder was represented as the kind used many years ago, being made in stamp mills, and not either pressed or glazed; and that it is very soft and absorbent, but, like all absorbents, when saturated with nitro-glycerine in the manner above described, the mixture is leaky, and is substantially as dangerous for handling and transport as pure nitro-glycerine. There is also an affidavit of Alfred Mordecai, the author of "Report of Experiments made at Washington Arsenal, in 1843 and 1844," published in 1845. He states, that the experiments described in that Report were made, and the Report was printed, under his immediate superintendence; that the powder therein mentioned as Swedish musket powder was part of a sample of gunpowder brought from Sweden in 1840, by a commission of officers of the ordnance department of the United States, of whom he was one; that the powder is mentioned in the report of the commission as "a sample of gunpowder from the royal manufactory;" that it was contained in a sealed glass bottle; and that it is correctly described in said "Report of Experiments" as "musket powder, glazed, grain very hard, fracture slaty." It is also shown, by various European books, that powder is described, in 1842, as being pressed in a hydraulic or screw press, and smoothed or polished, to make it dense, and to take off its rough surface, splintering edges and corners, and to make angular powder round; that powder is described, in 1850, as being submitted to a pressure of about 75 tons to a superficial foot, and made hard, and then glazed, with the result of giving an equal degree of density to the grains, and a polish to their surface, and rendering the powder less susceptible of absorbing moisture; and that it is described, from 1807 to 1861, as being pressed and glazed.

To such affidavits the defendants reply. Carll Dittmar says, that the powder generally used for all purposes, on the continent of Europe, in 1864 and 1865, was loose, porous and absorbent in character, capable of absorbing 30 per cent. of nitro-glycerine, more or less; that, as a general thing, no hydraulic or screw presses were used in the manufacture of gunpowder, on the continent of Europe, prior to 1865, nor up to 1869; that the structure of the powders made in this country, at the present day, which have been subjected to the pressure of powerful hydraulic or screw presses, is essentially different from that made with the stamp mills and without pressure, the former being hard, compact, and slow of absorption, and the latter light, porous, and readily absorbent; and that he has no doubt that the powder alluded to in the Turly article as "common Swedish gunpowder" was a loose, porous, absorbent powder, uncompressed, and that the nitro-glycerine, used in the proportions cited by Turly, was all taken up by the powder

and was held by the same, and that the resulting compound was a dry powder, safe to be handled, transported and used. Carl W. Volney says, that all Swedish and German powders that were commonly used in those countries prior to and during 1864, and for some years afterwards, were what is known as stamp mill powder, unglazed and unpressed. The defendant Parker states, that hard grained unpressed powder absorbs and retains, as a comparatively dry powder, safe to transport, handle and use, 30 per cent. of nitro-glycerine.

The Turly article starts out with stating, that what Nobel had invented and patented before January 1st, 1864, was an improvement which made ordinary powder, for blasting and shooting, considerably stronger by adding to it nitro-glycerine. This evidently refers to Nobel's specifications of September, 1863, in the English and French patents to Nobel, referred to in the Rand case; and the article of Turly alludes to no other feature of the compound made of nitro-glycerine and gunpowder, except that it is stronger in its effects, when exploded, than ordinary powder. The only place in the Turly article where any suggestion is made as to the percentage, in weight, of the added nitro-glycerine, is in the account of the blasting experiments. The description manifestly is narrating an experiment where the cartridge is filled with the two substances at the bore hole and then immediately used. There is no suggestion of a resulting dry powder, capable of transportation, or of any thing but a wet mixture, in a vessel which is to be tightly corked, because it would otherwise allow the nitro-glycerine to leak out, when it is turned with the cork downward, in which position it is inserted in the bore hole. The cartridge is then imbedded in gunpowder in the bore hole, and the gunpowder is fired by a fuse. The description is entirely insufficient as an anticipation of Noble's invention. All the speculation indulged in as to what the Swedish cannon powder was, and all the experiments to show that a powder which is assumed to be what that was, will, with the addition of the indicated proportion of nitro-glycerine, make a dry compound, amount to nothing, in the face of the fact, that the article does not suggest that the blasting compound was a dry powder, or a safety powder, or such a compound as the patent sued on describes. The prior description, to invalidate the patent, must be such as to show that the article described in the patent can be certainly arrived at by following the prior description; and it is not enough to show, that, by the lucky accident of taking gunpowder of the proper quality, a compound may be obtained which is unlike that indicated by such description. By the light of what Nobel has taught in the patent sued on, much can now be asserted to be seen in what was published before, which no one ever, in fact, saw in it before the original of the patent sued on was taken out. There is no evidence that any one, from the Turly article, or by any method supposed to be described in it, made, before the invention in question, as patented by Nobel, in the original of the patent sued on, was made by him, the safety powder which constitutes that invention. So far from this, the Turly article starts out with the assertion, that a mass of liquid nitro-glycerine is quite harmless in and of itself, and that its employment has no greater danger than that of common powder. The memoranda referred to by Mr. Varney, in his affidavit, show, in common with the English and French patents to which he refers, nothing more than attempts by Nobel to mix gunpowder with nitro-glycerine, and then to burn the nitro-glycerine by igniting the gunpowder. After that, he discovered that nitro-glycerine could be exploded in a mass, under given conditions, by detonation, and then its liability to accidental explosion in mass by concussion in handling and transportation was observed, and then followed the invention we are considering.

In every view the case for the plaintiff is such as to warrant the granting of a preliminary injunction, in this case, and the denial of the motion to vacate the injunction against the Neptune Powder Company.

[NOTE. See note to Atlantic Giant Powder Co. v. Mowbray, Case No. 624.]

Case No. 626.

ATLANTIC GIANT POWDER CO. v. RAND et al.

[16 Blatchf. 250; 4 Ban. & A. 263; 16 O. G. 87; Merw. Pat. Inv. 173.][1]

Circuit Court, S. D. New York. May 5, 1879.

PATENTS FOR INVENTIONS—WHAT CONSTITUTES INFRINGMENT—REISSUE—GIANT POWDER—PRIOR PATENT.

1. The reissued letters patent, No. 5,799, granted to the Giant Powder Company, March 17th, 1874, for 17 years from the 26th of May, 1868, for an "improved explosive compound," (the original patent having been granted to Julius Bandmann, as assignee of Alfred Nobel, as inventor, as No. 78,317, May 26th, 1868,) are valid.

[See note at end of case.]

2. The claim of said patent, namely, "The combination of nitro-glycerine with infusorial earth, or other equivalent absorbent substance, as a new explosive compound," is infringed by an explosive compound known as "rendrock powder," and containing, in 100 parts by weight, 34.71 parts of nitro-glycerine, 52.68 parts of nitrate of potash, 5.84 parts of sulphur and 6.77 parts of woody fibre, charcoal and resin, in nearly equal proportions. Said reissued patent is not for a different invention from the said original patent. The specifications of the original and the reissue examined and compared.

[See note at end of case.]

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 263; and here republished by permission. Merw. Pat. Inv. 173, contains partial report only.]

3. Where a defendant has always been notified that it was claimed he infringed, and has not been misled, by any action of the plaintiff, into making investments, and has no peculiar equity as against the plaintiff, an injunction will not be withheld because the plaintiff, having sued the defendant for infringement, permitted the suit to rest until a recovery was had on the patent in other suits, and then discontinued it and brought a new suit against the defendant.

4. A description in a prior patent, to invalidate a subsequent patent, must show how the article can be certainly made, and its making must be the result of directions in the description, and not of accident.

[Cited in Atlantic Giant Powder Co. v. Parker, Case No. 625; Atlantic Giant Powder Co. v. Dittmar Powder Manuf'g Co., 1 Fed. 328.]

[In equity. Bill by the Atlantic Giant Powder Company against Jasper R. Rand and others for a preliminary injunction restraining the infringement of reissue No. 5,799, of patent No. 78,317. Injunction granted.]

George Gifford and Causten Browne, for plaintiff.

Edward N. Dickerson and Charles C. Beaman, Jr., for defendants.

BLATCHFORD, Circuit Judge. This is an application for a preliminary injunction, founded on reissued letters patent, No. 5,799, granted to the Giant Powder Company, March 17th, 1874, for 17 years from the 26th of May, 1868. The original patent was granted to Julius Bandmann, as assignee of Alfred Nobel, of Hamburg, Germany, the inventor, as No. 78,317, May 26th, 1868. Bandmann assigned the patent to the Giant Powder Company, and it was reissued to them October 21st, 1873, as No. 5,619. On the surrender of No. 5,619, reissue No. 5,799 was granted. The plaintiff is the owner of No. 5,799 for all the States and territories of the United States which lie east of the easterly boundary lines of the territories of Montana, Wyoming, Colorado, and New Mexico. The application for No. 5,799 was filed March 11th, 1874. The specification of No. 5,799 is signed by the Giant Powder Company. It begins by setting forth that Nobel invented "an improved explosive compound, of which the following is a specification." It then proceeds: "This invention relates to a new and useful combination or mixture of nitro-glycerine with some absorbent substance, whereby the condition of the nitro-glycerine is so modified as to render the resulting explosive compound more practically useful and effective as an explosive, and far more safe and convenient for handling, storage, and transportation, than nitro-glycerine in its ordinary condition as a liquid. The invention consists in combining or mixing with nitro-glycerine some porous or absorbent substance, which, being free from any quality which will cause it to decompose, destroy or injure the nitro-glycerine, forms, in combination with it, an explosive compound possessing certain marked properties of great practical utility, which not only increases its efficiency, but also obviates many of the serious practical objections to the employment of nitro-glycerine as an explosive. Some of these peculiar properties of this mixture will be briefly stated. Nitro-glycerine being a liquid, it is usually necessary, in exploding it as an explosive for blasting purposes, to place it in cases or cartridges formed of paper, metal or other substance, which must, of course, be of somewhat smaller diameter than the bore holes, as, if not so inclosed, the nitro-glycerine would permeate the seams of the rock, and prove highly dangerous to the miner, on account of its liability to explode in subsequent drillings; but, by means of this invention the nitro-glycerine, being held in combination with the porous or absorbent substance with which it is mixed, and then assuming the altered form of a powder or paste, remains in the bore hole in which it is placed, without leaking through the seams of the rock. Another advantage over liquid nitro-glycerine is, that this mixture can be made to fill the bore hole more closely than a cartridge case will, owing to the irregularities of the shape of the hole, which greatly increases its efficiency. The liability of fluid nitro-glycerine to accidental explosion from agitation or concussion, renders its handling and transportation very dangerous. This danger is, however, almost entirely obviated by the use of the compound described in this specification, because, when mixed with a suitable absorbent, the nitro-glycerine is far less sensitive to shocks than when in a liquid condition, so that it may be handled in mass, either loose or in packages, with impunity. So much is this the case, that, when this mixture is packed in a wooden case or box, the inclosure may be knocked to pieces without danger of exploding its contents. This invention, then, consists in mixing liquid nitro-glycerine with some solid (as distinguished from liquid or fluid) substance, which will absorb and retain a sufficient amount of nitro-glycerine to form an efficient explosive. The substance which is believed to be best adapted for this purpose, is a kind of silicious earth, found in various parts of the globe, and known by the various names of silicious marl, tripoli and rotten stone. The peculiar variety of this material best suited for this use is homogeneous, has a large specific gravity and great absorbent capacity, and is generally composed of the remains of infusoria. So great is the absorbent capacity of this infusorial earth, that, when in a pulverized condition, it will take up about three times its own weight of liquid nitro-glycerine, and still retain the form of a powder. Other porous substances, even though they have less absorbent capacity, may be used; but, in this case, the explosive strength of the powder will be diminished, owing to the smaller proportion of nitro-

glycerine contained therein. Chalk, for example, will absorb about fifteen per cent. of nitro-glycerine and retain its powdered condition; and porous charcoal, although of greater absorbent capacity, has less elasticity of particles, so that nitro-glycerine is apt to squeeze out of it. Any of the various vegetable or mineral substances susceptible of pulverization or comminution, and which will retain nitro-glycerine by absorption, may be substituted for infusorial earth. The relative proportion of the ingredients used in making this new explosive compound will vary according to the absorbent capacity of the substance mixed with the nitro-glycerine, it being preferable in all cases—and this is the only limit—to use so much only of the liquid nitro-glycerine as the absorbent substance will retain without liability to subsequent separation by compression or leakage. Where the absorbent used in a powdered condition is infusorial earth, a thin paste or semi-fluid condition of the mixture is to be avoided. The method of making this new explosive compound with infusorial earth is as follows: The earth being first thoroughly dried and pulverized, is placed in any suitable vessel, and the nitro-glycerine is then gradually introduced and thoroughly mixed with the powdered earth, which is effected either by stirring with the naked hand or by means of any suitable wooden instrument, worked either by machinery or by hand. Where infusorial earth is used, the proportions may be conveniently varied, from sixty parts, by weight, of liquid nitro-glycerine, and forty parts, by weight, of infusorial earth, to seventy-eight parts, by weight, of nitro-glycerine, and twenty-two parts, by weight, of infusorial earth, the former proportions forming, at ordinary temperatures, a dry, pulverulent mass, and the latter a pasty mixture. These proportions may, however, be varied outside of the limits above stated, it being observed, that the explosive force of the mixture is increased where a larger proportion of nitro-glycerine is employed, and that, when the mixture is to be used in a cold climate, a larger quantity of nitro-glycerine may be safely employed than when it is to be exposed to a warmer atmosphere. For ordinary practical purposes, a mixture of seventy-five parts, by weight, of nitro-glycerine, and twenty-five parts, by weight, of infusorial earth, gives a powder sufficiently dry at ordinary temperatures, and which is susceptible of compression to a specific gravity nearly equal to that of pure nitro-glycerine. When the ingredients have been intimately mixed and thoroughly incorporated, by stirring and kneading, the compound may be rubbed through a sieve made of hair, silk or brass wire, and any lumps which remain may be powdered by rubbing them through the sieve with a stiff bristle brush. The powder is then ready for use, and may be packed in bulk in boxes, or compressed into cartridge cases made of paper, of such convenient sizes as may be most in demand for blasting purposes. A greater or less degree of fineness of grain may be given to the powder by using a fine or coarse sieve. In using this improved explosive compound for blasting, it may be inserted into cartridge cases, as above stated, or without any inclosure or wrapping, as may be preferred. For the best effect, it should be pressed firmly down so as to fill the bore hole, whether in cartridge or not, a small quantity at a time, with a wooden rod, until it is firmly packed. If the cartridges are smaller than the bore, the pressure will burst them, and allow the powder to spread laterally and fill the bore. It may be easily and efficiently exploded by means of an ordinary blasting fuse inserted into the open end of a percussion cap, the metallic edges of the cap being compressed or crimped tightly and firmly around the fuse, so as to hold it in place, with the end of the fuse in close contact with the fulminate in the percussion cap. The capped end of the fuse is then inserted into the explosive powder, which is pressed closely around it in the bore hole, and a tamping of sand or other suitable material may be placed above the charge of powder, and pressed down upon it. The fuse thus applied is fired in the ordinary manner, and, when the fire reaches the percussion cap, it explodes, which effects the immediate explosion of the charge of explosive compound. It is better to use a percussion cap having a heavy charge of fulminate, in order to insure an explosion of the powder, although, under favorable circumstances, it might be exploded with an ordinary fuse, without any cap; but this method is too uncertain to be relied upon. For ordinary blasting, the bore holes may be about one-half the size, and the charge of explosive compound about one-fifth the quantity, that would be made use of when gunpowder is used as the explosive." The claim is in these words: "The combination of nitro-glycerine with infusorial earth, or other equivalent absorbent substance, as a new explosive compound."

The infringement complained of is the making and selling by the defendants of an explosive compound known as "rendrock powder," and which, by analysis, contains in one hundred parts, by weight, the following ingredients in the following quantities: nitro-glycerine, 34.71 parts; nitrate of potash, 52.68 parts; sulphur, 5.84 parts; woody fibre, charcoal and resin, in nearly equal proportions, 6.77 parts. Mr. Hayes, the chemist who made such analysis, testifies, that the solid ingredients found in such powder constitute together an absorbent substance which is the equivalent of the infusorial earth mentioned in the plaintiff's patent; that such powder is a combination of nitro-glycerine with such absorbent substance, in substantially the same manner as the combination of nitro-glycerine and in-

fusorial earth specifically mentioned in said patent; that said solid ingredients have the property of absorbing and retaining by absorption nitro-glycerine, and are free from any quality which will cause them to decompose, destroy or injure nitro-glycerine; that the nitro-glycerine is combined with such solid ingredients in such proportions as to be retained without liability to separation by compression or leakage; that such solid ingredients are not liable to explode by concussion, as nitro-glycerine is; that the entire combination constitutes a safety powder, which can undergo the ordinary shocks of transportation and manipulation without explosion; that the nitro-glycerine therein is explosible, in blasting operations, by the means ordinarily employed for exploding nitro-glycerine; that, while the mixture is in the form of a powder, the nitro-glycerine remains so compact and concentrated as to have its original explosive power; that he has been unable to separate the carbonaceous woody fibre and the resin from the charcoal, so as to determine their percentage proportions with accuracy, but that they are not materially different from charcoal, as constituents of the powder; and that they each have all the properties which the other solid ingredients of the powder have, as above described, for the purposes of performing the office of infusorial earth in the mixture. These averments in respect to the rendrock powder are not controverted by the defendants.

The rendrock made by the defendants is a composition of nitro-glycerine with an explosive substance, but it was admitted, on the hearing, by the counsel for the defendants, that the claim of the plaintiff's patent includes a mixture of nitro-glycerine with an explosive substance, as well as a mixture of nitro-glycerine with an inexplosive substance. It is very plain, therefore, that the claim of the plaintiff's patent covers the defendants' powder.

It is insisted, however, by the defendants, that the cause [course] of litigation between the parties, in regard to the rendrock powder and the patent No. 5,799, has been such that the plaintiffs are not now entitled to a preliminary injunction. The view urged is, that the plaintiffs, owning No. 5,799, and also owning a reissued patent No. 4,818, brought a suit in equity in this court on both them, in 1874, against these defendants, for making this rendrock powder; that the plaintiffs took proofs in that suit to show that the rendrock powder, as a mixture of nitro-glycerine with an explosive substance, infringed No. 4,818; that they gave no evidence to show that it infringed No. 5,799; that they subsequently notified the defendants that they need not, until further notice, put in proofs in that case; that they then brought and prosecuted suits on No. 5,799, in another court; and that, having been successful in those suits, they discontinued the first suit against the defendants, and brought the present one on No. 5,799 alone. It is urged that this course of action deprives the plaintiffs of the right to ask, in this suit, for a preliminary injunction. The answer to this contention is, that the defendants appear to have been always notified, by the existence of the first suit against them, and by the suit in Massachusetts against Goodyear, [Case No. 623,] that the plaintiffs claimed that powders like the rendrock powder infringed No. 5,799. There is nothing to show that the defendants were misled into making investments by any action of the plaintiffs, or that they have any peculiar equity, as against the plaintiffs, to be allowed to continue to infringe the patent until a final hearing, while preliminary injunctions are granted against others making like powders.

It is urged by the defendants that the reissued patent No. 5,799 is for a different invention from the original, No. 78,317, and is, therefore, invalid. The specification of No. 78,317 says that the invention is "a new and useful composition of matter, to wit, an explosive powder." It proceeds: "The nature of the invention consists in forming out of two ingredients long known, viz.: the explosive substance, nitro-glycerine, and an inexplosive porous substance hereafter specified, a composition which, without losing the great explosive power of nitro-glycerine, is very much altered as to its explosive and other properties, being far more safe and convenient for transportation, storage and use than nitro-glycerine. In general terms, my invention consists in mixing with nitro-glycerine a substance which possesses a very great absorbent capacity, and which, at the same time, is free from any quality which will decompose, destroy or injure the nitro-glycerine or its explosiveness. It is undoubtedly true, as a general rule, that nitro-glycerine, when mixed with another substance, possesses less concentration of power than when used alone; but, while the safety of the miner, (to prevent leakage into seams in the rock,) prohibits the use of nitro-glycerine without cartridges, which latter must, of course, be somewhat less in diameter than the bore holes which are to contain them, the powder herein described can be made to form a semi-pasty mass, which yields to the slightest pressure, and thus can be made to fill up the bore hole entirely. Practically, therefore, the miner will have as much nitro-glycerine in the same height of bore hole with this powder as with nitro-glycerine in its pure state. This is the real character and purpose of my invention, and, in order to enable others skilled in the art to which it appertains, or with which it is most nearly connected, to make, compound and use the same, I will proceed to describe the same, and also the manner and process of making, compounding and using it, in full, clear and exact terms. The substance which most fully meets the requirements above mention-

ed, so far as I know or have been able to ascertain from numerous experiments, is a certain kind of silicious earth or silicic acid found in various parts of the globe, and known under the several names of silicious marl, tripoli, rotten stone, &c. The particular variety of this material which is best for my compound is homogeneous, has a low specific gravity, great absorbent capacity, and is generally composed of the remains of infusoria. So great is the absorbent capacity of this earth that it will take up about three times its own weight of nitro-glycerine, and still retain its powder form, thus leaving the nitro-glycerine so compact and concentrated as to have very nearly its original explosive power; whereas, if another substance having a less absorbent capacity is used, a correspondingly less proportion of nitro-glycerine will be absorbed, and the powder will be correspondingly weak or wholly inexplosive. For example, most chalk will take but about fifteen per cent. of nitro-glycerine and retain its powder form; twenty per cent. will reduce it to a paste. Porous charcoal has also a considerable absorbent capacity, but it has the defect of being itself a combustible material, and also of less elasticity of its particles, which renders it easy to squeeze out a part of its nitro-glycerine. The two materials are combined in the following manner: The earth, thoroughly dried and pulverized, is placed in a wooden vessel. To it is introduced the nitro-glycerine in a steady stream, so small that the two ingredients can be kept thoroughly mixed. The mixing may be effected by the naked hand, or by any proper wooden instrument used in the hand, or by wooden machinery. Sufficient of nitro-glycerine should be used to render the compound explosive, but not so much as to change its form of powder to a liquid or pasty consistency. Practically, about sixty parts, by weight, of nitro-glycerine to forty of earth forms the useful minimum, and seventy-eight parts, by weight, of nitro-glycerine to twenty-two of earth, the useful maximum of explosive power. The former has a perfectly dry appearance; the latter is pasty. Between these two extremes the composition will be explosive powder, and it will be more easily exploded, and its explosive power greater, as the relative proportion of the nitro-glycerine is greater. The proportions, by weight, of seventy-five of nitro-glycerine to twenty-five of earth gives a powder as well adapted to ordinary practical purposes as that from any proportions I am now able to name, and can be easily compressed to a specific gravity nearly equal to that of pure nitro-glycerine. When the mass has been intimately mixed and thoroughly incorporated by stirring and kneading, it is rubbed through a hair, silk or brass wire sieve, (iron corrodes,) and any lumps which may remain are rubbed with a stiff bristle brush till they are reduced and made to pass the sieve. The powder is then finished and ready for use. The fineness desired for the powder will determine the fineness of the sieve to be used. The chief characteristic of this powder is its nearly perfect exemption from liability to accidental or involuntary explosion. It is far less sensitive than nitro-glycerine to concussion or percussion, and, contained in its usual packing, a wooden cask or box, the latter may be smashed completely to pieces without any danger of explosion. Unlike gunpowder in the open air or in ordinary packing, a wooden cask or box, it burns up, when set fire to, without exploding. It can, therefore, be handled, stored and transported with less danger than ordinary gunpowder. When confined in a tight and strong inclosure, it explodes by heat applied in any form when above the temperature of 360° Fahrenheit. Under all other circumstances, it may be exploded by some other explosion in it or into it. The most simple and certain method known to me of exploding it is as follows: The end of a common blasting fuse is inserted into a percussion cap, and the rim of the cap crimped tightly and firmly about the fuse by nippers or other means, so as to leave the fulminating powder of the cap and the end of the fuse tightly and firmly inclosed together. The end of the fuse with the cap attached is then imbedded in the powder, the more firmly the more certain the explosion. In blasting, the powder is pressed tightly about the cap and fuse, and tamping of sand, or other proper material, added and pressed, but not pounded in. A tamping firmly pressed is as good as if rammed in the most solid manner. The fuse explodes the cap and this explosion explodes the powder. I will here add, that, by carefully packing the end of a good fuse amid the powder of a charge inclosed, like a blasting charge, in a tight place, the fuse alone will explode the powder, especially if the powder is strongly charged with nitro-glycerine; but this method of explosion requires too much care, and is too uncertain, to be depended upon or generally used. As before stated, the more strongly the powder is charged with nitro-glycerine the more easily it explodes. If, therefore, the powder contains a low proportion of nitro-glycerine, it is necessary to employ in its explosion a correspondingly long, strong and heavily charged percussion cap, made especially for the purpose. For the sake of certainty of explosion, it is better to use such a cap in all cases. If the fire from the fuse comes in contact with the powder before the cap is exploded, (which is liable to occur if the fuse is leaky and the cap extends too far into the powder,) a portion of the powder will be burned before the explosion takes place. To guard against this, the cap should only be fairly inserted into the powder, and poor fuses wound next to the cap firmly with strong glued paper or hemp, or otherwise secured. The bore holes, as a practical but

not absolute rule, should be about one-half the size, and the charge should be from one-fifth to one-tenth the quantity, ordinarily used in gunpowder blasting. A very convenient form in which to use the powder is to pack it firmly in cartridges of strong paper." The claim is in these words: "The composition of matter made substantially of the ingredients and in the manner and for the purposes set forth."

It is contended by the defendants that the invention set forth in No. 78,317 had for its declared object, the preparing of a solid composition of matter which should contain practically, in a given space, as much nitro-glycerine as could be put into that space in a liquid state, whereby the force of the nitro-glycerine would be preserved, while at the same time the inconvenience of using it as a liquid would be obviated; that No. 78,317 stated that to be the "real character and purpose" of the invention; and that No. 78,317 did not set forth that the inventor had in view, as an object, the safety character of the compound. It is urged that, in these respects, the reissue departs from the original: and that, as the claim in the original was a claim to the invention of a compound made substantially of the ingredients, and in the manner, and for the purposes set forth in the specification of the original, and the reissue claims broadly the combination of nitro-glycerine with infusorial earth, or other equivalent absorbent substance, as a new explosive compound, ignoring the concentration feature as the character and purpose and essence of the invention, the original and the re-issue are for different inventions, and not for the same invention, and so the reissue is invalid.

The specification of No. 78,317 sets out with declaring that the invention is of an explosive powder. This means a powder, as distinguished from a fluid mixture, and a powder which will explode. It states that the composition forming the powder is made of nitro-glycerine and infusorial earth; that nitro-glycerine is explosive, and infusorial earth is inexplosive; that, while the explosive power of nitro-glycerine is preserved in the composition, the composition is more safe and convenient for transportation, storage and use, than nitro-glycerine; that, in general terms, the invention consists in mixing with nitro-glycerine a substance which possesses a very great absorbent capacity, and yet will not injure the nitro-glycerine or its explosiveness; that, generally, the mixture of nitro-glycerine with another substance causes the nitro-glycerine in the mixture to possess less concentration of power than when it is not so mixed; that, while liquid nitro-glycerine must be used in cartridges, which must be less in diameter than the bore hole, this new powder can be made into a semi-pasty mass, and be used without cartridges, and so fill the bore hole entirely; and that thus, by using this new powder, the miner will have, in a bore hole of a given size, practically as much nitro-glycerine, notwithstanding he has in the hole the infusorial earth also, as if he used a cartridge with liquid nitro-glycerine. The specification then says that what has thus been stated is the real character and purpose of the invention. That is, that, by the mixture of the nitro-glycerine with the absorbent substance, the explosive power of the former will be preserved and not injured, while the mixture will be more safe in use than the liquid nitro-glycerine, with the incidental result, that any loss of concentration of power in the nitro-glycerine, by mixing it with the other substance, will be compensated by the fact that the bore hole can be filled with the mixture while it could not be filled with liquid nitro-glycerine, and thus practically there will be the same quantity of nitro-glycerine in a given size of hole in one case as in the other. The specification then states, that the best substance to meet the above requirements is the infusorial earth, because it will take up about three times its own weight of nitro-glycerine, and yet retain its original powder form, so that, in four pounds of the mixture, there will be three pounds of nitro-glycerine, and that the latter will be so concentrated as to have very nearly its original explosive power; that, when a substance of less absorbent capacity than infusorial earth is used, a less proportion of nitro-glycerine will be absorbed, and the explosive power of the powder will be reduced; that, for example, most chalk will take but about 15 per cent. of nitro-glycerine and retain its powder form, while 20 per cent. will reduce it to a paste; and that porous charcoal, while absorbent, is combustible and will suffer what it absorbs to leak out. These remarks show that the inventor contemplated the use, also, of a substance having less absorbent capacity than the infusorial earth, resulting in a mixture with a less proportion of nitro-glycerine, and with a less explosive power than the mixture in which infusorial earth is used; and that the mixture was in all cases to be and remain in the powder form, and to be such as to retain the absorbed nitro-glycerine and not suffer it to leak out. The mode of preparing the mixture with infusorial earth is then set forth. Stress is laid on the requirement that enough nitro-glycerine must be used in the compound to render it explosive, while the earth, in dry powder, is not to have so much nitro-glycerine put with it as to change its form of powder to a liquid or a paste. The useful minimum and the useful maximum of explosive power are then stated, according to given proportional weights of nitro-glycerine to infusorial earth, the minimum compound having a perfectly dry appearance and the maximum compound being pasty. It is then set forth, that, between these two extremes the compound will be explosive powder, and that it will be more easily exploded, and its explosive power be greater, as the

relative proportion of the nitro-glycerine in the compound is greater. These observations are to the effect, that the useful maximum of explosive power in the compound is attained when the absorption of nitro-glycerine causes the mixture to cease to have the form of powder; that the useful minimum of explosive power in the compound is what results from the stated proportion of nitro-glycerine; that, although so much as 78 parts by weight of nitro-glycerine to 22 of infusorial earth may be used, and still the compound be just leaving the powder form, yet, even in the use of infusorial earth, a useful result will be given when the nitro-glycerine is 60 parts by weight to 40 of the earth; and that between such maximum and such minimum the compound will be a powder and an explosive powder, with greater explosive power and more easy of explosion as the relative proportion of the nitro-glycerine is greater. The specification then states, that, when infusorial earth is used, the proportion, by weight, of 75 nitro-glycerine to 25 of earth will give a powder, and one as well adapted to ordinary practical purposes as can be specified, and one which can be made to have a specific gravity nearly equal to that of pure nitro-glycerine. Directions are then given how to treat the mixture to make it pulverulent. The specification then sets forth, that the chief characteristic of the powder is its nearly perfect exemption from liability to accidental or involuntary explosion; that it is far less sensitive than nitro-glycerine to concussion or percussion; that, unlike gunpowder, it burns up, when set fire to, without exploding; and that it can, therefore, be handled, stored and transported with less danger than ordinary gunpowder. The safety character of the powder is thus dwelt upon. It will not explode accidentally or involuntarily, because, first, fortuitous concussion or percussion will not be likely to cause it to explode; and, secondly, it will burn, and not explode, when set fire to. The specification then sets forth the proper method of exploding the powder, by exploding a percussion cap in it, with the injunction, that the percussion cap must be longer, stronger and more heavily charged, as the proportion of nitro-glycerine is less in the powder, for the reason, that, the greater the proportion of nitro-glycerine, the more easily will the powder explode. This analysis of the specification of No. 78,317 shows, that, taking the whole of it together, the concentration feature referred to, that is, the preparing of a solid compound which should contain practically, in a given space, as much nitro-glycerine as could be put into that space in a liquid state, was not set forth in that specification as of the essence of the invention; that such concentration feature was set forth as an incident of the use of the proportions of 75 parts of nitro-glycerine, by weight, to 25 of infusorial earth; that a compound of less nitro-glycerine and more earth, which would, of course, not have such concentration feature, was stated to be useful and to be within the invention; that the safety character of the compound was set forth as an object in view, in the invention; and that one feature of such safety character was alleged to consist in the diminished sensitiveness of the compound to accidental explosion from concussion or percussion, as compared with liquid nitro-glycerine. The reissue is, therefore, not open to the objection, that it departs from the original, in the respects mentioned.

The original patent speaks of the substance that is to be mixed with the nitro-glycerine as "an inexplosive, porous substance." The substances it mentions are the silicious or infusorial earth, chalk and porous charcoal. These substances are absolutely inexplosive, whether fire be applied to them or not, and without reference to the fact whether they will burn or not. Nitro-glycerine is liable to explode by accidental concussion or percussion. The proper and usual mode of exploding in it is by designed percussion, that is, exploding something in it or into it. The object desired was to prevent its explosion by accidental percussion, and to ensure its explosion by designed percussion. In that view, and taking the whole of the original specification together, when the absorbent substance is spoken of therein as inexplosive, it clearly means inexplosive by percussion or concussion, as compared with nitro-glycerine. The object was to mix with the nitro-glycerine a substance which, not being liable, like nitro-glycerine, to explode by accidental percussion or concussion, would produce a powder not liable to explode by accidental percussion or concussion. The word "inexplosive" had reference to the explosive nature of nitro-glycerine. If the substance mixed with it acted its part of an absorbent, to make a powder safe from liability to accidental explosion by percussion, and yet a powder the nitro-glycerine in which could be exploded by designed percussion, and could not be injured, in its explosive quality, by such substance, it was, manifestly, entirely immaterial what became of such substance after the nitro-glycerine in the powder had been exploded, whether it did or did not itself burn up, or even though it should itself be caused to explode by the explosion of the nitro-glycerine, and thus perform a useful office, in addition to that of acting as such an absorbent as the specification prescribes. Such is the plain meaning of the language of the original specification.

The questions thus considered were, to some extent, passed upon by Judge Shepley, in his decision in the case of The Atlantic Giant Powder Co. v. Mowbray, [Case No. 624,] where this same patent was sued on. Objection was there made to the reissue, on the ground that the description of the invention was broader in the reissue than in the original patent. Judge Shepley held that the description of the invention in the original

patent appeared to describe all that was more specifically described in the reissue, and stated that a careful comparison of corresponding passages in the original and reissue had failed to satisfy him that the reissue was open to objection on the ground of its being for an invention broader than, or different from, the one described in the original. He added, that he did not think that the omission of the word "inexplosive," in the reissue, rendered the reissue defective, or that the claim in the reissue was any broader than in the original.

The defendants in the Mowbray case made a powder by mixing 52½ pounds of tri-nitro-glycerine with 47½ pounds of mica scales. Judge Shepley held, that, in the compound so made, the mica scales possessed all the properties which rendered the infusorial earth efficient and useful in the compound, as well as some additional valuable properties; and that the mica scales performed the same function, in the compound, that the infusorial earth did, as an absorbent of the nitro-glycerine.

Reissue No. 5,799 came again before Judge Shepley in the case of The Atlantic Giant Powder Co. v. Goodyear, [Case No. 623,] where the defendant made a powder composed of 32.60 parts of nitro-glycerine, 49.46 of nitrate of soda, 9.63 of charcoal, and 8.31 of sulphur. The nitrate of soda, charcoal and sulphur were in the form of a mealed powder, their proportions being the same as in gunpowder in common use in the granular form. This mealed powder was mixed with the nitro-glycerine. It possessed, in the mixture, as Judge Shepley held, every property claimed for the infusorial earth in the plaintiff's patent, and the powder known as "Vulcan blasting powder," resulting from its combination with the nitro-glycerine, possessed every attribute and property, in a greater or less degree, possessed by the plaintiff's powder. It was set up, in the Goodyear case, as a defence, that the only object of Noble's invention, as patented, was to render nitro-glycerine safer in handling and transportation, without any intent to augment its explosive force, because the substance mixed with the nitro-glycerine was inert; and that the object of the manufacturer of the Vulcan powder was "to render the explosion and combustion of gunpowder instantaneous." But Judge Shepley held, that the substitution of gunpowder, as used in the Vulcan powder, in combination with nitro-glycerine, in the place of the infusorial earth or other absorbent of the plaintiff's patent, did not make the combination a different, and not equivalent, compound, because the gunpowder, when used as an absorbent, in addition to fulfilling every condition, and performing every function, of the absorbent in the plaintiff's compound, up to the time of the explosion, and at that time, had then the additional function of co-operating, by means of its conversion into gas, with the nitro-glycerine, in rending the rock, instead of remaining, like the infusorial earth, an inert substance. In the Goodyear case, it was further contended for the defendant, that, as gunpowder was an explosive of itself, the use of it in the compound was no infringement, because the plaintiff was limited to a non-explosive substance as the absorbent; that, if the omission of the term "inexplosive," in the reissue, enlarged the scope of the invention, the reissue was void; and that, if the reissue was to be construed in connection with the original, and for the same invention, it must be limited to the use of inexplosive absorbents as equivalents. On this subject Judge Shepley said: "The word 'inexplosive' is applied, in the original patent, as a term of description to a substance only preferentially used. The other descriptions in the specification clearly apply to substances which, in one sense, may be explosive, but are inexplosive as compared with nitro-glycerine. The word 'inexplosive' appears clearly to have been used, in the original patent, to describe substances which, as compared with nitro-glycerine, were inexplosive by concussion, which would not, of themselves, explode under those conditions which rendered nitro-glycerine so dangerous and unsafe for practical use, and which, inexplosive of themselves under those conditions, when combined with nitro-glycerine, would make the combination a compound which would also be inexplosive, except under such conditions as were not inconsistent with substantial safety, in its use for blasting and similar purposes. In this sense, the mealed powder used by the defendants is inexplosive. It prevents, by the interposition of its particles, the explosion of the nitro-glycerine by any such concussion as would ordinarily explode it when uncombined with an absorbent. It makes the compound practically inexplosive under ordinary, fortuitous and accidental concussions, and practically explosive only under predetermined and prearranged conditions. The word is omitted in the reissue, and, we think, properly omitted, not for the purpose of including equivalents which were not within the scope of the original invention, as described, but as an ambiguous expression, not consistent with the other words in the specification, which clearly describe the absorbent, its properties and functions, all of which properties and functions, it is evident from a reading of the original patent, might appertain to a substance explosive under some conditions, but inexplosive under those conditions which made nitro-glycerine explosive by concussion, and dangerous and unsafe for practical use. The conclusion, therefore, I think, is a legitimate one, that, under the reissued patent, the owners of the patent are not limited to treat as infringements the use of such equivalents only as are actually inexplosive, but they are entitled to the exclusive use of such equivalents as are inexplosive as compared

with nitro-glycerine, and which, while complying with the other requisites of the infusorial earth in the combination, will also, when combined with nitro-glycerine, form, out of the two ingredients, a composition which, without losing the great explosive power of nitro-glycerine, is more safe and convenient for transportation, storage and use than nitro-glycerine."

The first of these cases was a final hearing, the other was a motion for a preliminary injunction. Comity would induce a following of the views of a co-ordinate court on questions so directly raised, considered and decided, especially where the decision was made by so careful and discriminating a judge. Independently of this the observations cited meet the full concurrence of this court.

It is contended, for the defendants, that what is claimed in No. 5,799 is described in a French patent and in an English patent, each previously issued. The French patent was taken out September 18th, 1865, [1863,] by Nobel, for 15 years, and was delivered to him November 5th, 1863. It was for "improvements in the manufacture of mining and shooting powders." The descriptive memoir annexed to the patent is dated, Paris, September 18th, 1863. The French text is not furnished to me. An English translation is furnished in these words: "The invention consists in the employment of explosive or easily decomposable substances, especially of explosive liquids mixed with ordinary powder, gun cotton or other analogous bodies. By this mixture one succeeds in tempering the breaking force of every fulminating substance, so as to heat it, if it is a liquid, to the degree of heat at which it explodes. There are many fulminating bodies that may be used for this purpose, such as nitro-glycerine, the nitrates of ethyle and methyle, &c. I use, by preference, nitro-glycerine, and I prepare it by introducing the glycerine slowly into a mixture of sulphuric acid and nitrate of soda or of potash, after having freed the liquor from the sulphate of soda or of potash, which is formed. This nitro-glycerine, mixed with or absorbed by the ordinary powder, communicates to it the following properties: 1. In appearance, it is dry like ordinary powder; 2. It is much stronger, without producing a more breaking effect; 3. It produces less debris; 4. The explosion is a little slower. If it is only wanted to obtain this last effect, I mix with the powder, or I make it absorb, if it is already prepared, any other fluid, such as oil, &c. With regard to mining powder, it may be mixed with nitro-glycerine until it is wet on the surface. Nitrate of soda may then be used with advantage for the powder, as the nitro-glycerine prevents it absorbing the water. The nitro-glycerine, to explode, must be heated to 170° Centigrade. It is evident, that, besides ordinary powder, there are many mixtures which may determine this heating, but the explosive liquid must always be absorbed by their mass, and equally distributed in it; if not, there will always be breaking effects. Thus it is, that, in a powder formed solely of charcoal and sulphur, the nitro-glycerine will in a manner replace the saltpetre." On the 19th of January, 1864, a certificate of addition to the French patent of September 18th, 1863, was taken out in France by Nobel, and was delivered April 1st, 1864. The descriptive memoir annexed to such certificate of addition is dated Paris, January 19th, 1864. The French text is not furnished to me. Two English translations of it are furnished. One of them is in these words: "The numerous experiments which I have made since my first application have demonstrated to me that I could employ the substances mentioned in my patent of September 18, 1863, (nitro-glycerine and others,) both as powder for war or sporting, and as mining powder, under the following forms: 1. Absorbed in the powder, as described by the first patent, for shooting powder. 2. Mixed with the powder, which they wet more or less. 3. In a cartridge, with or without powder; in the former case, the powder surrounds or environs the cartridge, which may be of wood, zinc or any other material. In mines, and especially in galleries, I make use of cartridges soldered hermetically; and, to avoid smoke, gun cotton replaces the powder. It is, then, the powder or the gun cotton, placed around the cartridge, which pierces its walls and communicates the fire to the interior. 4. Absorbed in charcoal or other porous substances, it is still, as in the preceding cases, the powder or an analogous agent, which determines the explosion. As the nitro-glycerine mixed with the powder is denser than the latter, it is often important to economize it. Wherever less force is wanted for breaking than for raising the rock, and the pressure of the gas is of more consequence than its volume, I close with wood or any other substance a part of the cylindrical hole, to the height filled by the powder, as showu in the annexed sketch. This method may also serve sometimes for ordinary powder. The introduction of hermetical cartridges, hitherto not in use, facilitates the employment, even alone, of the powder with nitrate of soda, being preserved from dampness, whence results a notable economy. I shall observe, in closing, that the proportions of the mixture of the powder with the nitro-glycerine may vary according to the nature of the applications, and that, consequently, nothing can be stated precisely with regard to them." The other translation is in these words: "The numerous experiments which I have made since my first application have demonstrated to me that I could employ the substances mentioned in my patent of September, 18, 1863, (nitro-glycerine and others,) as well for pow-

der for military purposes (or for hunting purposes) as for blasting powder, under the following forms:. 1st. Absorbed in the powder, as the first patent for gunpowder indicates. 2d. Mixed with the powder, which they moisten more or less. 3d. In a cartridge, with or without powder; in the first instance, the powder surrounds or encases the cartridge, which may be of zinc, wood or any other substance. In mines, and especially in galleries, I make use of cartridges hermetically sealed; and, to avoid all smoke, gun cotton replaces the powder. It is, then, the powder or the gun cotton placed around the cartridge, which perforates the walls and communicates the fire to the inside. 4th. Absorbed in charcoal or other porous substances, it is still, as in the preceding cases, the powder, or an analogous agent, which causes the explosion. As nitro-glycerine mixed with powder is more dense than this latter, it is often important to economize it. Where less force is needed to break than to carry away the rock, and where the pressure of the gas is of more importance than its volume, I close with wood or any other substance a part of the cylindrical hole, up to the height of which the powder fills it, as the sketch opposite indicates. This method may also sometimes serve for ordinary powder. The introduction of hermetically sealed cartridges, hitherto unemployed, facilitates the use, even by itself, of powder, being protected from moisture, whence results a noteworthy economy. I will remark, in conclusion, that the proportions of the mixture of the powder with the nitro-glycerine may vary according to the value of the applications, and that, therefore, one cannot be definite in this respect." The English patent was dated September 24th, 1863, and was sealed March 1st, 1864. It was granted to Alfred Vincent Newton for "improvements in the manufacture of gunpowder and powder for blasting purposes," and the invention was "a communication from abroad by Alfred Nobel." The provisional specification, dated September 24th, 1863, declared the nature of the invention to be as follows: "This invention consists in the employment of explosive substances, or of substances easily decomposed, especially of explosive liquids, mixed with ordinary gunpowder, gun cotton, or other analogous substances. By this mixture, the exploding force of every fulminating substance may be tempered or regulated; if it be a liquid, it may be heated to the degree necessary to cause explosion. There are many fulminating substances which may be used for this purpose, such as nitro-glycerine and the nitrates of ethyle and methyle. By preference, nitro-glycerine is used, and is prepared by introducing slowly glycerine into a mixture of sulphuric acid and nitrate of soda or potash, after having removed from the liquid the sulphate of soda or potash which is formed. This nitro-glycerine is to be mixed with or absorbed into the ordinary powder, in such proportion, that the appearance will still be preserved of dry ordinary powder, and it will then be much more powerful without producing a greater explosive effect, it will create less foulness, and the explosion will be somewhat retarded. If this last effect only is desired to be obtained, the powder is mixed with, or made to absorb, when prepared, some other fluid, such as oil, in such quantity as not to destroy its granular character. As regards the blasting powder, it may be mixed with sufficient nitro-glycerine to render it damp at the surface. Nitrate of soda may then be employed with advantage for the powder, as the nitro-glycerine prevents it from absorbing water. The nitro-glycerine, to cause explosion, should be heated to 170° Centigrade. It is evident, that, besides the ordinary powder, there are many mixtures that may determine the degree of heat, but it is always necessary that the explosive liquid should be absorbed by their mass, and equally distributed therein; if not, it will always have a bursting effect. It is thus, that, in powder formed solely of carbon and sulphur, the nitro-glycerine will replace, to some extent, the salpetre." The full specification, dated and filed March 23d, 1864, is in these words: "This invention relates chiefly to the utilization of certain substances known to chemists as organic nitrates or liquid nitrates, which are capable of being easily decomposed into gases, by combining the same with ordinary gunpowder or analogous substances, to produce an improved powder suitable either for ammunition or blasting purposes. By this mixture the exploding force of every fulminating substance may be tempered or regulated; or, if it be a liquid, the heat generated by ignition may be transmitted through the mass at the degree necessary to cause explosion. There are many fulminating substances which may be used for this purpose, such as nitro-glycerine and the nitrates of ethyle and methyle. By preference, nitro-glycerine is used. This substance may be prepared by introducing slowly glycerine into a cool mixture of sulphuric acid and nitric acid, or sulphuric acid and nitrate of soda or potash, the sulphate of soda or potash which is formed being removed from the liquid. This nitro-glycerine is to be mixed with, or absorbed into, ordinary gunpowder, in such proportion that the appearance will still be preserved, of dry ordinary powder, and the mixture will then act most efficiently without producing a greater explosive effect, it will create less foulness, and the explosion will be somewhat retarded. When the retardation only of the explosive action is desired to be obtained, the powder is mixed with, or made to absorb, when prepared, some other fluid, such as oil, in such quantity as not to destroy its granular character. As regards the blasting powder,

it may be mixed with sufficient nitro-glycerine to render it damp at the surface. Nitrate of soda may then be advantageously employed, for, as nitro-glycerine is neither hygroscopic nor even soluble in water, it will, by being made to surround the nitrate of soda, effectually prevent that substance from absorbing water. The nitro-glycerine, to cause explosion, should be heated to one hundred and seventy degrees Centigrade. It is evident, that, besides the ordinary powder, there are many mixtures that may determine the degree of heat, but it is always necessary that the explosive liquid should be absorbed by their mass and equally distributed therein; if not, it will always have a bursting effect. It is thus, that, in powder formed solely of carbon and sulphur, the nitro-glycerine will replace, to some extent, the salpetre." The claim is: "Producing explosive mixtures by treating gunpowder or analogous substances in the manner and for the purposes above set forth."

It is quite clear that these French and English patents set forth that nitro-glycerine is to be mixed with gunpowder, and that the resulting compound is to be used, in the shape of a dry powder, for shooting and blasting purposes. The nitro-glycerine is stated to be absorbed by the gunpowder. But, throughout these patents, there is no allusion to the explosion of the compounded powder by the detonation or percussion of the nitro-glycerine in it, or to the explosion of the gunpowder in it by the prior explosion of the nitro-glycerine in it. On the contrary, the suggested method of exploding the compounded powder, is by the ignition, first, of the gunpowder in it and the communication to the nitro-glycerine in it of the heat generated by the burning or exploding gunpowder, so as to cause the explosion of such nitro-glycerine. There is no allusion to the fact, that nitro-glycerine can be exploded by percussion or detonation, or that it ought to be so exploded, or that it is liable to be exploded by accidental concussion, or that it is, therefore, unsafe in being handled or transported, or that it is, when mixed with a suitable absorbent, less sensitive to shocks than when in a liquid condition, or that the proportions of nitro-glycerine and absorbent should be such that the absorbent will retain what it absorbs and not let it leak out, and that there should be sufficient nitro-glycerine to form an efficient explosive when designedly exploded by concussion.[2] These are all distinctively described features, in No. 5,799, of the powder there described, and they are none of them described in the French and English patents as features of the compound of nitro-glycerine and gunpowder there referred to. It was not until July, 1864, that it was suggested, so far as appears, that nitro-glycerine could be practically used by exploding it by detonation. In Nobel's English patent No. 1,813, the provisional specification of which was dated July 20th, 1864, he suggests the explosion of a percussion cap or detonating compound to explode a portion of the nitro-glycerine, and thus heat the rest of the mass to the exploding temperature.

It is equally clear that the rendrock powder of the defendants is not described in the French and English patents referred to, or in any of them. It is composed of nitro-glycerine and an explosive substance analogous to gunpowder, and so far it has a resemblance to the compound produced under the English and French patents referred to, but, in respect of the qualities, before pointed out, which it has in common with the compound patented by No. 5,799, no allusion to those qualities is found in the English and French patents referred to. The powder of the defendants contains enough nitro-glycerine to be exploded designedly by detonation or concussion, and not enough to yield up any by leakage after absorption. It is a safety powder against accidental explosion by concussion, and yet can be exploded by designed concussion at its place of useful service. The English and French patents referred to do not describe any such powder, or give directions whereby any such powder can be certainly made. If any one, seeking to compound a powder under those patents, had compounded a powder possessing the qualities of the powder set forth in No. 5,799, or the qualities of the defendants' powder, so far as the qualities of the latter powder correspond with the qualities of the powder of No. 5,799, the making of such powder would have been a matter of pure accident, and not the result of any directions in the English and French patents, either as to the qualities of the powder or the law of its composition. This leaves the invention in No. 5,799 a patentable invention, within the recognized decisions on the subject. Especially is this so, when it is not shown that any one had, in fact, before Nobel set forth the description in the original patent No. 78,317, made a powder possessing the qualities of the powder of that patent, or a powder possessing the qualities which the defendants' powder has in common with the powder of No. 78,317, by undertaking to follow the directions in the English and French patents referred to. In inventing what he patented in No. 78,317, Nobel did not merely find out a new property in an old compound. He invented a new compound possessing new properties, and pointed out how the new compound could certainly be made so as to possess such new properties.

The defence that No. 78,317 was void because the invention was patented in a foreign country more than six months before the application for No. 78,317 was made in the United States fails in one respect, when it is decided that the French and English

[2] [16 O. G. 87 gives "percussion."]

patents referred to did not set forth or patent such invention. If the English patent to Nobel, No. 1,345, be regarded as a patent for the same invention found in No. 78,317, and as having been granted more than six months before Nobel's application for No. 78,317, still No. 78,317 was not invalid, because it does not appear that the invention covered by it was introduced into public and common use in the United States prior to the application for No. 78,317. It does not appear satisfactorily that the Howden compound was the compound of No. 78,317 or of No. 5,799, by being prepared under the conditions prescribed in those patents, or by possessing the qualities of the compound of those patents; nor does it appear that the use made of it was an introduction of it into public and common use, in the United States, before April 27th, 1868, the date of the application for No. 78,317. Under these views, the question as to when No. 5,799 will expire is immaterial, in the present case, for it is still in force, even though its duration should hereafter be held to be only 14 years from the date or publication of the English patent No. 1,345.

Another defense is set up. A patent, No. 50,617, was granted to Nobel October 24th, 1865, for "substitute for gunpowder." This patent having been reissued as No. 3,380, April 13th, 1869, was reissued March 19th, 1872, in five divisions, to the United States Blasting Oil Co. One of those divisions is No. 4,818, division D. The defence is, that, if No. 5,799, being the reissue of a patent granted in 1868, claims that which is described in No. 4,818, then No. 5,799 is invalid, because No. 4,818 is the reissue of a patent granted in 1865. The basis of this proposition is, that No. 4,818 describes the invention patented by No. 5,799. No. 4,818 describes a method of promoting the explosion of nitro-glycerine by compounding with it other more easily explosive substances. The specification of No. 4,818 says: "There is a class of explosives long known, but not at the date of Nobel's invention applied to technical purposes, in consequence of practical difficulties in procuring their explosion. Such substances are nitro-glycerine, the nitrates of ethyle and of methyle and nitromanite. These substances are liquid at ordinary temperatures, and by that characteristic are distinguishable from solid explosives, such as gunpowder, gun cotton, &c.; and they have also the property that fire may be applied to them without their exploding. Nitro-glycerine, for example, if ignited in an open space, is slowly decomposed and takes fire, but the flame is apt to die out when the match is withdrawn. Hence, it cannot, under ordinary circumstances, be looked upon as a ready explosive agent, for, while gunpowder and other substances used as explosives prior to Nobel's invention always explode or deflagrate throughout their whole mass, when fire is set to them, nitro-glycerine and the analogous substances before named will not explode from the mere contact of flame. So, also, if a drop of nitro-glycerine be poured on an anvil, the blow of a hammer causes it to explode, but only that part is involved which has received the blow, so that, in this case, the explosion is merely a local one. A principal object of Nobel's invention consists in the removal of this obstacle to the use of nitro-glycerine and the analogous substances before named as explosives." The specification then states, that Nobel discovered that the difficulty referred to could be overcome by mixing or combining the nitro-glycerine and the other liquid substances with gunpowder, gun cotton or other similar substances, in proportions which "may be varied to suit the pleasure or convenience of the user or manufacturer." It says: "The nitro-glycerine may be mixed with gunpowder or gun cotton, either of which will absorb a considerable quantity of nitro-glycerine, say, thirty per cent., more or less, in such proportions as to make the compound either wet or comparatively dry. If mixed with gunpowder, it may be either absorbed with it, by pouring the nitro-glycerine on the mass of gunpowder, or the two may be mingled together by trituration. the powder in the nitro-glycerine. The effect of these combinations will produce an explosive especially suitable for certain blasting purposes, for example, in crevice rock, and greatly superior either to gunpowder or gun cotton in explosive force, and quite readily exploded, so that it may be fired and exploded by means of a match or electric spark, in like manner as gunpowder or gun cotton alone. By means of this combination with gunpowder, gun cotton, or other similar readily explosive substances, of nitro-glycerine and the analogous substances before named, which are liquid at the ordinary temperature, these substances, which had not, at the date of Nobel's invention, been applied to any technical use as explosives, owing to their difficulty of explosion, have been introduced from the domain of science into that of practical use in the arts, and have rendered of commercial value what was previously known as a mere chemical curiosity." The claims of No. 4,818 are in these words: "1. The utilization, as explosives, of nitro-glycerine, and the analogous liquid substances hereinbefore mentioned, by combining therewith gunpowder, gun cotton, or other similar substances developing a rapid heat on combustion, substantially as hereinbefore described. 2. The combination of gunpowder with nitro-glycerine, substantially as and for the purposes hereinbefore described. 3. The combination of gun cotton with nitro-glycerine, substantially as and for the purposes hereinbefore described." The construction hereinbefore given to No. 5,799 shows, that neither the invention covered by it, nor the defendants' powder, is described in No. 4,818. The description in No. 4,818 only describes

nitro-glycerine absorbed by gunpowder, so as to enable the nitro-glycerine to be exploded by igniting the gunpowder; and there is no hint in No. 4,818 of making a compound with a safety property of non-explosion by ordinary concussion, and with the ingredients existing in the proportions necessary to attain the result of certain explosion of the nitro-glycerine by designed detonation or percussion, and of freedom from liability to explosion by accidental concussion. This I understand to have been the view taken of No. 4,818 by Judge Shepley, on the hearing in the Goodyear case, No. 4,818 having been called to his notice in that case.

All the views urged on the part of the defendants have been carefully considered. The plaintiff's patent has been sustained by Judge Shepley, on final hearing, in the Mowbray case, and on a motion for a preliminary injunction, in the Goodyear case, and, in the latter case, against a compound to all intents like that made and sold by the defendants in this case, and nothing is now shown to justify a denial of the injunction now asked for. It is, therefore, granted.

[NOTE. See note to Atlantic Giant Powder Co. v. Mowbray, Case No. 624.]

ATLANTIC GIANT POWDER CO. v. TOWNSEND. See Case No. 623.

Case No. 627.

ATLANTIC INS. CO. v. CONARD.

[4 Wash. C. C. 662.] [1]

Circuit Court, D. Pennsylvania. April Term, 1827.[2]

SHIPPING — RESPONDENTIA — AFTER COMMENCEMENT OF VOYAGE—USURY—CONTRACTS RELATING TO SAME SUBJECT-MATTER—PRE-EXISTING DEBT —EVIDENCE.

1. A respondentia bond, given to secure a loan made upon a certain voyage, is not void because it was given and the loan made after the vessel had sailed. The principles of law relative to this subject fully examined.

[Cited in Greeley v. Smith, Case No. 5,750.]

[See note at end of case.]

2. Where the voyage described in the respondentia bond, and the real voyage are or are not the same.

3. Where the loan is or is not chargeable with being usurious.

4. The words "lost or not lost" omitted in the respondentia bond may be supplied by other equivalent expressions, so as to place the money loaned at the risk of the lender.

5. A loan on respondentia "upon the goods, to the amount of the loan, laden or to be laden on board the vessel, or which may be laden on board at any time during the voyage." Those words give to the lender a lien, and no more, on the homeward cargo, which cannot be opposed to the claim of preference of the United States, upon the estate of the borrower.

[See note at end of case.]

6. The respondentia bond, memorandum indorsed on it, and the outward bill of lading and assignment thereon, are all to be construed as one instrument for the purpose of discovering the intention of the parties, which when discovered must govern.

[See note at end of case.]

[As to the construction of different instruments relating to the same subject-matter, see Rutland & B. Ry. Co. v. Crocker, 29 Vt. 541; Gregory v. Marks, Case No. 5,802; Livingston v. Story, 11 Pet. (36 U. S.) 386; Lamb v. Davenport, Case No. 8,015.]

7. The agreement so obtained from the construction of this instrument being that the outward and homeward cargoes should be a collateral security for the loan; that the outward bill of lading should be assigned to the lender for that purpose; and that the homeward should be to order, with a blank indorsement, vested in the lender an equitable interest which could not be defeated by the subsequent right of preference of the United States.

[See note at end of case.]

8. A right of one person to a chattel, and possession in another under a contract which does not entitle the former to the present possession, is no badge of fraud.

[See note at end of case.]

9. The delivery to the lender of money on respondentia of the homeward bill of lading, after the arrival of the vessel, was equivalent to a direct consignment to him, and converted his equitable into a legal interest.

[See note at end of case.]

10. A respondentia bond given on a cargo at the risk of the lender, to secure a pre-existing debt, is valid.

[See note at end of case.]

11. No fraud practiced by the borrower or his agents, not participated in by the lender, can affect the validity of the respondentia bond.

12. A letter from one of the general assignees of the borrower to the captain of his vessel, respecting the manifest of the homeward cargo, cannot be given in evidence against the plaintiff, the lender of the money on respondentia.

13. Where, in a suit by an incorporate body, proof of their incorporation may be dispensed with.

14. Questions asked of the witness by the defendant's counsel, and pronounced to be improper, as they related to the acts of the borrower and his agent, being proved to have been without the participation of the plaintiff the lender.

15. The court would not admit in evidence the correspondence between one of the obligors in the respondentia bond, and one of the directors of the insurance company, the plaintiff in the suit, and with the borrower, impeaching the respondentia bond.

[At law. Action of trespass by the Atlantic Insurance Company of New York against John Conard] the marshal of this district, for seizing certain teas imported into Philadelphia by Edward Thomson, in the ships Addison and Superior, under an execution at the suit of the United States against said Thomson; to which teas, the

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

[2] [Affirmed by supreme court in Conard v. Atlantic Ins. Co., 1 Pet. (26 U. S.) 386.]

plaintiffs asserted a property in themselves. Under an arrangement made between the secretary of the treasury and the plaintiffs, these teas were given up to the plaintiffs, upon their giving bond and security to restore the same, in case the question as to the right of property in those teas should be decided against the plaintiffs in this action. This bond was accordingly executed under the corporate seal of the plaintiffs, and was accepted by the district attorney, and delivered over by him to the proper officer of the government. The following are the material facts attending this case: Edward Thomson of Philadelphia, being the owner of the ships, the Addison and Superior, despatched them on a voyage to Canton in the year 1825. The former sailed from Philadelphia on the 22d of April, and the latter, on the 6th of June of that year. The outward bill of lading of the Addison bears date the 21st of April 1825, and is for seven kegs containing three thousand Spanish dollars each, shipped by said Thomson for his account and risk, to be delivered at Canton to Mr. J. R. Thomson or assigns. The bill of lading of the Superior's outward cargo bears date the 6th of June 1825, and was for about thirteen thousand Spanish dollars shipped by said Thomson for his account and risk, to be delivered at Canton to J. R. Thomson. On the 21st of June 1825, the plaintiffs lent to E. Thomson the sum of $21,000 upon respondentia on the cargo of the Addison. They also lent to him $13,000, on the cargo of the Superior, on the 14th of July 1825. To avoid the necessity of further noticing the transaction in relation to this latter loan, it may be sufficient here to observe, that the only difference in the two transactions is, that the first loan was on specie on board of the Addison at the time she sailed, and the latter loan was in part payment of a former loan made by the plaintiffs to E. Thomson on another of his ships.

The respondentia bond on the cargo of the Addison, to secure the loan of the $21,000, bears date the 21st of June, and is in the names of Edward Thomson and three others. After reciting in the condition of this bond a loan this day made by the Atlantic Insurance Company to Edward Thomson of $21,000, upon the goods and specie to that amount laden, or to be laden, on board the Addison, or which may be laden on board at any time during the voyage on account of the said Edward Thomson; that the said intended voyage is to Canton, and back to Philadelphia; and that the plaintiffs take the hazard and adventure of the said sum so lent on said goods and specie, laden or to be laden on board the said vessel during the said voyage, so that it do not exceed twelve months from the 21st of April 1825: the condition is, that if the said ship, laden with said goods and specie, do, with all convenient speed, proceed on the said voyage and return to Philadelphia, having on board the above stipulated amount in value in specie or goods on the respective passages out and home, to end her voyage there by the end of the said twelve months, dangers of the seas excepted; and if the said obligors shall pay to the plaintiffs the said $21,000 immediately upon her arrival at Philadelphia, or upon the expiration of the said twelve months, together with the marine interest, amounting to $2205: or if the said obligors do, immediately on her said return, provided it happen within the said twelve months, give satisfactory security to pay to the plaintiffs the said principal sum and marine interest within three months from the time of said arrival, with lawful interest thereon from the time of such arrival, and shall pay the same accordingly at the end of the said three months; or if in the said voyage, and before the end of the said twelve months, the said goods, &c. shall be totally lost, and the obligors shall abandon, &c. to the plaintiffs, all said goods of said obligors so laden at Philadelphia, on board said ship, and all other goods which shall be acquired during said voyage by reason of, or from, the proceeds of the said goods, &c. and the net proceeds thereof, and account for and pay within four months from such loss, to the plaintiffs, any average they may obtain upon the same: then, &c. &c. Upon this bond is indorsed a memorandum, which recites the following agreement, viz. that the bills of lading for the goods, specie, &c. mentioned in the within bond, shall be indorsed to the plaintiffs as a collateral security for the within loan; that the property to be shipped homeward, as aforesaid, being the proceeds of the said loan, shall be for the account and risk of the borrowers, or some of them; and that the bills of lading therefor shall express the same, and shall also express that the said property shall be delivered to the order of the shippers; and that the same shall be indorsed in blank, and shall be placed in the hands of the plaintiffs, either before or on the arrival of the said ship at Philadelphia, to be held by them as a continuation of such collateral security; to the true performance of which agreement the parties bind themselves. The memorandum then proceeds: "now it is hereby declared, that such indorsement or consignment shall not exonerate the persons of the obligors, nor compel the plaintiffs to accept the goods, &c. which may arrive under such bill of lading and consignment, in discharge of said debt, but it shall be lawful for the plaintiffs to receive and hold said goods, &c. for ninety days after their arrival at Philadelphia, and if the principal debt, interest, and premium in said bond mentioned, be not paid within said time, to sell the same at public auction, and to charge the obligors with the balance, after deducting freight, duties, commissions, and other charges." The above memorandum is signed by all the obligors.

On the same day an assignment was in-

dorsed on the outward bill of lading, to the following effect, viz. "For value received, I do assign to the Atlantic Company the within bill of lading, and the specie, goods, &c. to be procured thereon or thereby, and any return cargo to be obtained by the within mentioned outward cargo and specie, or the proceeds thereof, and all the return cargo to be taken on board the within mentioned ship, by or for my account, as collateral security, according to an agreement executed and adjoined to a respondentia bond given by myself and, &c. (mentioning the names of the other obligors) dated the 21st of June 1825, for $21,000." Signed by E. Thomson. It was proved that the above sum of $21,000 was paid in two checks to F. H. Nicoll & Co. the said Nicoll being one of the obligors in the above respondentia bond. On the 29th of November 1825, E. Thomson became insolvent; and, on that day, made a general assignment of all his property for the benefit of his creditors, to Peter Mackie and Ruland Renshaw. The Addison left Canton in November 1825, with a bill of lading of the proceeds of the $21,000 consigned by Fisher, attorney for J. R. Thomson, to be delivered to —— or assigns. This bill of lading is indorsed in blank. The homeward invoice is of goods shipped by Fisher, attorney as aforesaid, on board the Addison, for Philadelphia, for account and risk of E. Thomson, and consigned to order, and indorsed blank by Fisher, attorney as aforesaid. Both of those papers bear date the 22d of November 1825. It also appeared, that Fisher delivered to the master of this vessel a manifest, stating the cargo to be consigned to E. Thomson.

The Superior brought a bill of lading of goods valued at $3393, consigned to Peter Mackie, and another, of goods valued at $1139, consigned to B. Arney. Before the arrival of these vessels at Philadelphia, the United States obtained judgment against E. Thomson, on certain custom house bonds, and on their arrival in Delaware Bay, an execution issued on the said judgment on the 13th of March 1826, and was levied on the cargoes of said vessels on the 15th of the same month. A day or two before the ships came up to Philadelphia, Mackie, one of the assignees of E. Thomson, delivered duplicates of the homeward invoice and bills of lading of the Addison's cargo to the plaintiffs' agent in Philadelphia, and, on her arrival, handed to him likewise those brought by the captain; and on the 22d of March, Mackie and Arney indorsed to the plaintiffs those which came to their order by the Superior. The reason assigned for there being a manifest and general bill of lading consigning the cargo to Thomson, was to enable him to enter it in his own name; after he had settled with the insurance offices, and paid the loans made by them.

For the plaintiffs it was contended, that the loan on the Addison was the common case of money lent on respondentia, and an assignment of the bill of lading as collateral security; that the cargo was thereby pledged for the repayment of the principal, with marine interest; that the goods being at sea, and not actually deliverable, this assignment passed the title so as to give a specific lien; that their right was therefore good against any but a bona fide purchaser without notice; but that the United States did not thus claim; but merely as a preferred creditor, having no lien, but only a right to be paid first out of property of Thomson's, at the time of his general assignment; but as he could not have claimed this property without first paying off the incumbrance, neither could the United States. That as to the loan on the Superior, the fact of its being applied in payment of a former loan, made no difference.

For the United States, it was admitted that they gained no lien by Thompson's insolvency; they only claimed under the priority given by law; which vests, they contended, in all cases except where there was sale to a bona fide purchaser, mortgage, or execution executed. That neither of the two first was pretended by plaintiffs, and the third the United States had themselves. That the question was, whether, when the public priority attached, the property belonged to the plaintiffs. That it did not, was argued: 1. Because these were not valid respondentia bonds; and therefore gambling contracts, and void by the laws of New York: for these loans not being made till after the ships had sailed, the money could not be applied to the purposes of the voyage. Nor was it proved that Nicoll & Co. received the moneys for Thompson, and therefore the consideration failed. 2. That the contract was not bottomed on any real adventure; that the voyage and risk must be the same described in the bond; which was not the case here, for the bond refers to an intended voyage; whereas, the ship had already sailed, and no part of the cargo belonged to Nicoll and others, though they were mentioned in the bond. Besides, the return cargo is mentioned as the proceeds of the loan, which was impossible, the vessel having sailed two months before the money was lent. 3. That marine interest was charged without marine risk: for that there was no risk at Philadelphia, as stated, the vessel having previously left that port; and moreover, interest was charged from the date of the bill of lading, several weeks before the lending of the money; which was clearly usurious. 4. That only a lien was created but there was no transfer of the property, and the public priority dislodges every lien not connected with the right of property. 5. That, at least, the plaintiffs gained no title to the return cargo, because it could not possibly be the proceeds of the loan, according to the terms of the assignment. 6. That the cargo left Canton the property of

Thomson, and that Mackie had no authority to transfer it, he being but a trustee for creditors; and lastly, that Thompson being the owner of the property when it arrived here, the sixty-second section of the revenue laws avoids all transfers before entry; and the right of the United States attaches.

It was said, in reply, that this right of the government was only a priority of payment out of the debtor's estate. That if the property be out of the debtor, absolutely or conditionally, the priority is subject even to the conditional property in another. That the loans in this case were to be repaid on an event which has happened, and there was a lien and property in the goods, to secure repayment. That the fact of the loan was sufficiently proved; for, as Nicoll & Co. must have had Thomson's bond, to deliver to the company, that alone was sufficient authority to receive the money as his agents. That the bond itself, or taken together with the agreement, assignment, and delivery of the bill of lading, gave a lien and property; and that, as to the impossibility objected, of the goods homeward being the proceeds of the loan, the plain meaning of all the documents taken together, was to give a lien on the goods shipped by Thomson, and on the goods homeward, being the proceeds of the outward cargo; and that the delivery of the homeward bill by Mackie was the performance of this agreement. It was added, that no authority had been adduced to show that a loan on respondentia, after the voyage was begun, was void. That the risk was a real one, and that the voyage performed was, clearly, the one intended to be described in the bond. That the description of the risk as beginning at Philadelphia, was usual in all policies; and that, as the principal was at risk, this was no gambling contract. That the consignment to Thompson was correct; he was the general owner or importer; and that even if any fraud were thus intended on the revenue, the plaintiffs were ignorant of, and ought not to be affected by, it.

Cases cited by defendant's counsel: 1 Mass. 482; 1 Emerig. 366; 3 Johns. Cas. 66, 266; 2 Cow. 678; 8 Johns. 84; 8 Serg. & R. 138; Whart. Dig. 538, pl. 29; Parker, 470, 477; 3 Bl. Comm. 159; 1 Wils. 260; 2 Term. R. 587; [Hamilton v. Russel,] 1 Cranch, [5 U. S.] 316; 3 Camp. 92; 2 Holt, Shipp. 61; 1 Term. R. 205; Abb. Shipp. 173, 174, 176; 1 H. Bl. 359; [The St. Joze Indiano,] 1 Wheat. [14 U. S.] 208; 8 Cranch, 253, 328, 354; [The Venus, 8 Cranch, (12 U. S.) 253; The Merrimak, Id. 328; The Frances, Id. 354;] [The Frances,] 9 Cranch, [13 U. S.] 183; 2 Holt, 74; 1 Johns. 215; 3 Bior. & D. Laws, 158, § 23; 1 Term. R. 745; 1 Bos. & P. 563; 3 Camp. 92; 2 Bl. Comm. 457, 458; Parker, 410; 2 Marsh. 733, 747, note, 736, 737, 743, 738, 820; Busk v. Fearon, 4 East, 319; Parker, 25; 1 Marsh. 332; [Thelusson v. Smith,] 2 Wheat. [15 U. S.] 396; [Blaine v. The Charles Carter,] 4 Cranch, [8 U. S.] 332; 1 Holt, 424; 2 Holt, 68; 5 Taunt. 36.

Hopkinson & Binney for plaintiffs.

The Attorney General of the United States, Mr. Wirt, Dist. Atty., C. J. Ingersoll, and Mr. Randall, for defendant.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

WASHINGTON, Circuit Justice, charging jury. The single question to be decided is, had the plaintiffs such a property in the goods in question on the 19th of November, 1825, when Edward Thomson made a general assignment of all his effects for the benefit of his creditors, as protected the goods on which the execution, at the suit of the United States, was levied, against the preference of the United States which accrued on that day? If they had, they will be entitled to your verdict; otherwise, not. The plaintiffs' title to this property commences with the respondentia bonds on the cargoes of the Addison and Superior, which have been laid before the court and jury. The claim of the plaintiffs, resting entirely upon the validity of those bonds, and the papers connected with them; their validity has been denied by the defendant's counsel on the following grounds:

1. Because they were given for money lent by the plaintiffs after the ships had sailed; of course the money was not lent for the purpose of enabling the borrower to make the voyage, nor was the money lent ever at risk, not having been put on board in specie, nor a cargo which it contributed to procure. It is insisted, that this security, when given for a loan after the vessel has sailed, and the risk has begun, is inconsistent with the nature, character, and design of this species of security. Let it be admitted, for the sake of the argument, that, strictly and correctly speaking, a loan upon the security of a cargo already at sea, is not a loan upon respondentia; and that the design of those securities in their origin, was to enable the borrower to engage in the contemplated enterprise. It may further be admitted, that loans like the present are unlike the pecunia trajectitia of the Romans; from whom it is quite likely this species of security was derived. But how does it follow from these concessions that the security is invalid as a marine contract, in cases where the vessel has sailed before the loan is made? There is no case, nor is there even the dictum of any respectable jurist, to my knowledge, which pronounces it to be so. Marshall, in his second volume on Insurance, page 747, states it to be a question upon which Valin and Emerigon had differed, whether money may be lent on a ship or goods already exposed to the perils of the sea; and this learned writer expresses his own opinion to coincide with that of Valin, who holds the affirmative of the proposition. And even Emerigon does not allude to this subject in reference to any

general principle of maritime law; but speaks of the lien created by a respondentia bond, under those circumstances, according to certain articles of the ordinances of France. 1 Emerig. 136, 137, 157. Marshall, (volume 2, p. 738,) states what are the essential requisites of this species of marine contract, be its form what it may. It must contain, he observes, 1. The names of the lender and borrower. 2. The names of the ship and master. 3. The sum lent, and the marine interest. 4. The voyage proposed, and duration of the risk. And lastly, the subject on which the loan is made, whether goods or both.

If it could be made out that the contract is usurious or gambling, where the sailing of the vessel precedes the loan, there might then be weight in the objection; but there is no case, nor is there any writer, who has attempted to maintain this proposition. "It is," says Marshall, (volume 2, p. 742,) "of the essence of this contract, that the money lent, or something equivalent to it, be exposed to the perils of the sea, at the risk of the lender." "If the borrower have no effects on board, or he borrow much beyond their value, and agree to pay high marine interest, this affords a strong ground to suspect fraud, and that the voyage will have an unfavorable end." The true test of its being a gambling contract is, there being no goods on board to the value of the loan, and at the risk of the lender; as fully appears by the French ordinances, and by the English statute of 19 Geo. II. c. 37, to prevent gambling marine contracts. 2. Marsh. 743. These quotations are sufficient to show what is, and what is not a gambling marine contract. Is the loan usurious, if it be made subsequent to the sailing of the vessel? "The marine interest," says Marshall, (2 Marsh. 749,) "however high it may seem, cannot be deemed usurious if the money lent be bona fide at risk." "If indeed the form of a bottomry or respondentia loan to be used as a cloak to an usurious contract; that, no doubt, would be usurious and void." The same principle governs contracts made on land, and without reference to maritime enterprises; as is abundantly shown by the cases of Roberts v. Trenayne, Cro. Jac. 507, and Chesterfield v. Janssen, 1 Atk. 301. If then this contract stands clear of the objection of fraud, gambling, or usury, upon what other ground can it be avoided? Is it contrary to good policy? This has not been shown in argument, nor is it maintained by any elementary writer. If the lender need not see to the application of the money lent, which it is admitted by all he is not bound to do; what difference can there be in sound reason between a loan made after the departure of the vessel and one made before; when, in the latter case, the borrower is at liberty to dispose of the money borrowed in payment of his debts, or in any other way he may think proper, without having employed one cent of it in the purchase of the cargo, on which the loan is made? The truth is, that in many instances, a loan made after the risk has commenced, and on the anticipated capacity which it will give to the borrower to pay for the cargo at risk, and purchased on credit, may be as beneficial to commerce, as if, in the strictest sense of the Roman law, it were pecunia trajectitia; as if the identical money lent, or goods purchased with it, had been put on board, and at the risk of the lender.

2. This contract is asserted to be invalid, because it is not founded on a real transaction; not on the precise voyage and cargo mentioned in it. The voyage described is at and from Philadelphia to Canton, and back to Philadelphia; and she is "to proceed and sail on said voyage;" which expressions plainly describe as well a voyage in progress as one which had not then commenced. There is no expression in the instrument which represents the vessel to be then in port, or that the voyage was to commence on or after the 21st of June. The voyage described then, and the real voyage were the same. As to the cargo, the loan is made on the goods laden, or to be laden, or which at any time during the voyage might be laden. It is in vain to contend that these expressions do not accurately describe the property mentioned in the outward bill of lading, as well as the proceeds of it in the homeward bill of lading.

3. The charge of usury is reiterated against this contract, because the marine interest, it is said, is allowed upon the loan from the sailing of the vessel, and consequently for about two months before any real risk was assumed by the lenders. The cargo was known to be safe at the time of the departure of the vessel. It is true, the property was not at the risk of the lenders until this contract was entered into. But the effect of it was to place it in that predicament, by an express stipulation, whilst the vessel was at Philadelphia, and from the instant of her departure. What influence her known safety at these periods had in diminishing the marine interest can only be conjectured; but it is certainly no objection to the contract, upon the ground of usury, that the property was known to be in safety at any particular period of the assumed risk by the lender. The real question for the decision of the jury is, whether, under all the circumstances of the case, the loan was bottomed upon a fair marine contract, the repayment of which was to depend upon the perils which the lender assumed to bear; or whether the contract was merely a device to cover an usurious loan? If the risk be inconsiderable, and for a small part only of the voyage, and the interest be high, these circumstances may justify a presumption of unfair or illegal conduct, sufficient to avoid the contract. But the mere circumstance of the known safety of the cargo at any particular period of the

voyage, or of the assumed risk, is not, per se, an objection to the contract on the ground of usury.

If Edward Thomson was to pay interest from a period antecedent to the loan, and this was the sum covered by the respondentia, there can be no question but that the contract was usurious; and it would be so, although the legal rate of interest only be reserved. How the fact is in relation to this point I know not, but leave it for the decision of the jury upon the evidence which has been laid before them. Some papers and parol evidence upon this part of the case were laid before the jury, from which they will draw their own conclusions. I allude to the papers annexed to Mr. Gracie's affidavit. Another reason assigned by the defendant's counsel why this loan was not at the risk of the lender during the whole voyage is, that the words "lost or not lost" not being inserted in the bond, if the vessel had been actually lost at the time this contract was entered into, the loss would not have been at the risk of the plaintiffs. The answer given to this position by the plaintiffs' counsel is conclusive. The words in the bond "if in the said voyage there be loss" are precisely equivalent to the expressions "lost or not lost" in ordinary policies of insurance. If this contract has been relieved from the objections which have been urged against its validity, the next inquiry is, what title to the property in question did it confer upon the plaintiffs?

There is no doubt that it gave a lien on the homeward cargo, being the produce of that on which the loan was made, but it conferred no other right. The loan is stipulated by the bond to be made upon the goods to the amount of the loan, laden, or to be laden on board the vessel, or which may be laden on board at any time during the voyage, on account of Edward Thomson. These latter expressions, which were not inserted in the bond in the case of U. S. v. Delaware Ins. Co., decided by this court, October, 1823, [Case No. 14,942,] operate to the extent mentioned. And if this case turned solely upon the right of the plaintiffs to a lien, it would present the question whether such a right could be opposed to the right of preference vested by law in the United States, which would seem to be decided by the case of Thelusson v. Smith, [2 Wheat. (15 U. S.) 396.] Our inquiries, therefore, must be extended to the memorandum and outward bill of lading, and the indorsement thereon; to see whether they apply to, and include the homeward cargo, and if they do, what influence they have on the plaintiffs' rights. There is no doubt but that those instruments, together with the respondentia bond, are to be construed and treated as if they all constituted one instrument. Considering them then in this light, the question is, whether they cover that part of the homeward cargo which was the investment of the outward cargo on which the loan was secured. The difficulty in solving the question arises from the expressions in the memorandum, "being the proceeds of the said loan." Now, the argument is, that since the loan was made after the departure of the vessel, the return cargo was not, and could not possibly be the proceeds of that loan; and consequently the memorandum could vest in the plaintiffs no right of any kind to the homeward cargo.

I must acknowledge that I was at first much struck by this objection. But it loses much, if not the whole of its weight, when those words in the memorandum are construed in connection with other parts of the same instrument, as well as with the other instruments of which it is only a part. Our object should be to discover from those papers what was the intention of the parties, and when this is accomplished, we must give effect to it. If there be an incongruity in one part of an instrument, it may be explained by others, so as to enable the court to give a consistent construction of the whole. Now, it appears by the condition of the bond that the loan was made on the 21st of June, after the Addison had sailed, and that it was made on the goods and specie laden, or to be laden, then or at any time during the voyage. The outward bill of lading, referred to in the memorandum, which was agreed to be indorsed to the plaintiffs as a collateral security for the loan, bears date the 21st of April, two months prior to the loan, and the assignment indorsed on that paper is of the bill itself, and of the specie, goods, &c. to be procured thereon or thereby, and any return cargo to be obtained by the outward cargo and specie mentioned therein, or the proceeds thereof; and all the return cargo to be taken on board the said ship, by or for the account of Edward Thomson, as collateral security, according to an agreement duly executed and adjoined to a respondentia bond, given, &c. Now there is no ambiguity in this assignment, which most clearly refers to a homeward cargo, the proceeds, not, as in the memorandum, of the loan, but of the outward cargo mentioned in the bill of lading. Since then, the homeward cargo might be the proceeds of the outward cargo, and could not possibly be so of the loan, those expressions in the memorandum ought to be construed to mean "the proceeds of the outward cargo on which the loan was made," in order to give effect to the obvious intention of the parties, and ut res magis valeat quam pereat. This difficulty being removed, the next question is, what was the nature and effect of the contract between the plaintiffs and Thomson, upon the above instruments taken together? The obvious answer is, that the bond, as has been before stated, created a lien on the homeward cargo and no more. But the memorandum and assignment on the bill of lading amount to an agreement. 1. That

the outward and homeward cargoes should be a collateral security for the loan. 2. That the outward bill of lading should be assigned to the plaintiffs for that purpose. And lastly, that the homeward bills of lading should be to order, with blank indorsements, and should be delivered to the plaintiffs as a security for the loan. The legal operation of this agreement was unquestionably to vest in the plaintiffs, an equitable title to the property in question, being the proceeds of the outward cargo. Edward Thomson, for whose account, and at whose risk the homeward cargo was to be shipped, and who had the sole management and possession of the property, was, for this purpose, a trustee for the plaintiffs; and nothing remained to be done, in order to vest in the plaintiffs the legal right to this property, but the delivery of the homeward bills of lading to order with a blank indorsement thereon. This delivery took place upon the return of those vessels, which perfected the plaintiffs' title to the property But it is contended that there was no consideration given for this security, the debt for which it was given being merely contingent. But surely $21,000, which were paid to Edward Thomson, must be considered as a very substantial consideration; and although the repayment was to depend upon a contingency, no sufficient reason has been assigned, why a valid security may not be legally taken for a contingent debt.

What then were the relative rights of the plaintiffs and of the United States, on the 19th of November, 1825, when the right of preference accrued to the latter by the insolvency of Edward Thomson? The answer is, that the former had an equitable title to the homeward cargo, and a right, by their agreement with Thomson, to call upon him for the legal interest, by delivering to them the bills of lading of that cargo. If this delivery had actually been made before the above period, as happened in the case of U. S. v. Delaware Ins. Co., [Case No. 14,942,] no question, as I apprehend, could exist, as to the superior title of the plaintiffs over the right of preference of the United States, upon the principles decided in the case of Thelusson v. Smith, 2 Wheat. [15 U. S.] 396. But do not the principles of that case apply as well to one where the equitable title has been parted with by the insolvent, as where the legal title has been? The right of property, was, by the agreement, divested out of Thomson, and vested in the plaintiffs, so as to leave the former a bare trustee to deliver over the evidences of the legal title to the latter. The great principle laid down in the case above referred to is, that the privilege of the United States to be first paid their debt is confined to a satisfaction out of the property of the insolvent. But surely it cannot be said that a trustee has any property in the subject matter of his trust. Equity considers the cestui que trust as the exclusive owner of the property. In this, as well as in some other respects, this case differs from that of U. S. v. Delaware Ins. Co., [supra.] In that, the legal title was in the lender before the insolvency of the debtor of the United States. In this, the equitable title only had been parted with. In that, the actual possession of the master was constructively the possession of the lender upon respondentia; in this, the possession was in Edward Thomson, but there it was the possession of a trustee, and a sale of the property by him to a third person without notice would have prevailed against the title of the plaintiffs. But in this, the delivery of the homeward bills of lading to the plaintiffs in pursuance of the agreement, no matter by whom, perfected their legal title. No creditor whatever, intervening before the agreement was specifically executed, can prevail against the plaintiffs.

It was asked by the defendant's counsel, how it was possible that an absolute right of property could co-exist in two persons? To which I feel no hesitation in answering, that it cannot, if the right of both be of the same nature. But an absolute legal right of property may exist in one person, and an absolute equitable right in another, at the same time; and the possession need be only in the trustee or legal owner. Again, it has been insisted, that where the property is in one person the possession being permitted to remain with another, is a fraud as well in respect to creditors as to purchasers. I admit the rule, that an absolute transfer of a chattel is fraudulent against creditors, unless possession accompanies and follows the deed. The reason is, that the separation of the possession from the title is incompatible with such a transfer. But if the sale or transfer is on a condition, or on trust as a security for a debt, or for any purpose which does not entitle the vendee to the immediate possession; the possession of the vendor until the said condition is performed, or the objects of the trust are fulfilled, is consistent with the transfer or deed, and is therefore no badge of fraud. This is precisely the present case.

It has been asked by the defendant's counsel, whether the plaintiffs could have insisted upon the possession of these goods at Canton, or at any other time or place previous to the insolvency of Edward Thomson? I answer that they certainly could not, because, by their agreement with Edward Thomson, he was to have the cargo brought to Philadelphia, and was there to deliver to the plaintiffs the muniments of title. But after the arrival of the cargo, the plaintiffs were at liberty to take possession of the property, or to recover it by suit, subject only to the claim of the United States for the duties on the same.

Much has been said at the bar, as to the real design and intention of the parties to this contract; as to which I would observe, that their intention can best be discovered from their agreement, all of which is in writing; and from their acts. That a loan was made; that it was at the risk of the lenders, on a real cargo to its value on board, and on a real voyage, and was intended to be secured by an outward and homeward bill of lading, the latter to be to order, and to be delivered with a blank indorsement to the plaintiffs, is perfectly manifest. Why it was agreed to be to order, and to be indorsed in blank, we know not. But this is clear, that the delivery of the homeward bill of lading to the plaintiffs, was equivalent to a direct consignment to the plaintiffs.

The last subject to be noticed is the loan on the cargo of the Superior. The only differences between this loan, and that on the cargo of the Addison, are, 1. That in this, the sum secured by the respondentia bond, and accompanying papers, was for a pre-existing debt, and not for money actually lent at the time. And 2. That in this case, the homeward bills of lading were filled up to Peter Mackie and Barclay Arny. As to the first difference, it is immaterial; if the principles already laid down in relation to the security on the cargo of the Addison be correct. If the lender is not bound to see to the application of the money lent, and if a valid security may be given on the cargo in a case where the loan is made after the departure of the vessel, it cannot be material whether the security be given for money actually lent and advanced at the time, or for a debt previously due; provided the essential requisites to constitute a valid respondentia contract, which have already been noticed, exist in both cases. As to the second matter of difference, there can be no doubt but that the filling up the bills of lading in the manner these are, was a violation of the agreement between the plaintiffs and Thomson, which was precisely the same with that which was made in relation to the cargoes of the Addison. But can this affect the right of the plaintiffs? If Edward Thomson, or his agent at Canton, thought proper to depart from the terms of his agreement with the plaintiffs as to the form of the homeward bills of lading, this cannot prevent the latter from opposing their equitable title to this property to the preference claimed by the United States. Mackie and Arny had no real title to those goods, and claimed none. They received the bills of lading as trustees for the plaintiffs; and as such, they assigned them to the plaintiffs.

As to the question whether the return cargoes of these vessels are the proceeds of the outer cargoes, you must decide upon the evidence which has been given to you. As to the charge of fraud, which it is insisted by the defendant's counsel taints this transaction throughout, I leave that for your decision, after an impartial and attentive consideration of the whole of the evidence. All that my duty requires of me is to state those legal principles which should accompany your inquiries upon that subject. These are, 1. That actual fraud must be proved, and ought never to be presumed. And 2. That no fraud which may have been practiced or attempted, by Edward Thomson, his captains or agents, can affect the validity of these contracts: unless it has been proved that the plaintiffs, in some way or other, have participated in it.

The jury found a verdict for the plaintiffs.

During the trial of this cause, the following points arose, and were ruled upon objections taken to evidence.

1. An objection was made by the plaintiffs' counsel to the admissibility of a letter from one of Edward Thomson's general assignees to the captain of the Addison, directing him to make his manifest to conform to the bill of lading.

WASHINGTON, Circuit Justice. This objection is made by the counsel, as they allege, for the sake of the principle involved in it, rather than on account of any importance which they attach to the particular paper offered in evidence. This cause turns upon a question of property, which the plaintiffs affirm and must maintain to be in them.

(After stating the plaintiffs' title as before set forth in the charge, the judge proceeded as follows:) The United States claim no right of lien to the goods in question, but claim as creditors of Edward Thomson, and as preferred creditors. They assert that the title to these goods was in Edward Thomson at the time their execution was levied on them. The question upon these facts then is, can the United States, or could Edward Thomson or his assignees, if they were now the defendants, set up his or their orders, or his or their acts, or those of their agents, fraudulent or otherwise; the plaintiffs not having participated in them, to defeat, or in any manner to affect the prior title of the plaintiffs, assumed for the present to have been fairly acquired. We feel no hesitation in giving a negative to this question. The evidence offered, is not to explain the original contract as in the case of Hibbert v. Carter, [1 Term R. 745.] Nor is it offered to taint that contract with fraud. It is not offered even to affect the homeward bills of lading and invoice, for they are in strict conformity with the contracts, except in the part as to the consignment of the cargo of the Superior. It merely respects the alteration of the manifest, so as to make it correspond with the bill of lading and invoice. But if the evidence were

applicable to the bills of lading, it would be improper to admit it to affect the plaintiffs' title, unless their participation were first proved. The evidence is rejected.

2. An objection was made by the defendant's counsel to the reading of the respondentia bond, until the plaintiffs should prove themselves to be a corporate body, by giving in evidence the act of their incorporation.

WASHINGTON, Circuit Justice. The written agreement of the real parties to this cause to try a particular question, viz. the right of property in these goods on the 19th of November 1825, and the acceptance by the district attorney of the plaintiffs' bond, executed under their corporate seal, to restore the property in case of a decision of that point against them, amount to an acknowledgement of the corporate capacity of the plaintiffs, and to a waiver of the usual evidence to prove that fact. Overruled.

3. To the following question by the defendant's counsel to Hidelius, the captain of the Addison, and now under examination, "did Mackie and Nicoll make out a new manifest, altering the destination of the Addison, and direct you to enter by it as the true manifest?" an objection was made and sustained by the court, upon the principle before laid down upon the first objection.

4. Similar objections were made to the following questions, asked by the defendant's counsel of the same witness, viz. "did you see Mackie pay money to the pilot for being the first to board the Addison?" "Whether part of a letter from Mackie to the witness was drafted by C. J. Ingersoll, signed by Edward Thomson, and countersigned by his assignees." The objections to these questions were sustained by the court.

5. The following questions put to Arny, another of the witnesses, by the defendant's counsel, were also objected to. "Do you know how the moneys lent by the plaintiffs on the cargoes of the Addison and Superior were applied by Edward Thomson?" "What did Edward Thomson do with the general homeward bill of lading by the Addison?" "Was the transaction with the plaintiffs in respect to the Scattergood (another vessel of Edward Thomson's, on the cargo of which security by respondentia had been given for other loans to him) negotiated in the same manner as that of the Addison?" The objections were all sustained upon the principles before laid down.

6. A question asked of Jones, another witness, by the plaintiffs' counsel, "whether Edward H. Nicoll, (one of the obligors in these bonds, and one of the directors in the Atlantic Insurance Company) ever took any part in the affairs of the company as a director?" was objected to, and the objection overruled.

7. The court refused to let the defendant's counsel give in evidence the correspondence between Edward H. Nicoll and Edward Thomson, respecting these bonds; as the plaintiffs ought not to be affected by it.

[NOTE. The judgment in this case was affirmed by the supreme court on practically the same points in Conard v. Atlantic Ins. Co., 1 Pet. (26 U. S.) 386; and, in delivering the opinion of that court, Mr. Justice Story said:

["The loan on the shipment in the Superior differs from that on the shipment in the Addison only in the circumstance that it was applied in discharge of a prior loan. In our judgment, that makes no difference as to the legal rights of the parties. * * *

["So far as the questions of usury or gaming or bona fides upon substantial risks are matters of fact, they were left fully open, and have been passed upon by the jury, who have found a verdict against them; so far as there are matters of law, apparent upon the record, proper to avoid the bonds, they are still open for inquiry. Two grounds have been relied on for this purpose: First, that the loans were made after the sailing of the ships on the voyage; and, second, that the money loaned was not appropriated to the purchase of the goods put on board, and was not the identical property on which the risk was run. In our judgment, neither of these objections can be sustained. * * * It matters not at what time the loan is made, nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming, or fraud; if the advance be in good faith, for a maritime premium,—it is no objection to it that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage. * * *

["It is contended on behalf of the United States that the priority thus created by law, if it be not of itself a lien, is still superior to any lien, and even to an actual mortgage, on the personal property of the debtor. * * * It is true that, in discussions in courts of equity, a mortgage is sometimes called a 'lien for a debt.' And so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. * * * It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and, according to the intention of the parties, as a qualified estate and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is therefore only in a loose and general sense that it is sometimes called a 'lien,' and then only by way of contrast to an estate absolute and indefeasible. But it has never yet been decided by this court that the priority of the United States will divest a specific lien attached to a thing, whether it be accompanied by possession or not. * * *

["The attention of the court will then be at once addressed to the question, what was the nature and extent of the interest of the insurance company in the shipments in question? The whole instruments must be taken together, and construed as one entire agreement. We must then examine the memorandum, the outward bill of lading, and assignments thereon, in connection with the bond. The bill of lading purports, on its face, to be a shipment by Edward Thomson of seven kegs, containing $21,000, for account and risk of the shipper; to be delivered at Canton to John R. Thomson, or his assigns. By the well-settled principles of the commercial law, the consignee is thus constituted the authorized agent of the owner, whoever he may be, to receive the goods; and by his indorsements of the bill of lading to a bona fide purchaser, for a valuable consideration, without notice of any adverse interests, the latter becomes, as against all the world, the owner of the goods. This is the result of the

principle that bills of lading are transferable by indorsement, and thus may pass the property. It matters not whether the consignee, in such case, be the buyer of the goods or the factor or agent of the owner. His transfer, in such a case is equally capable of divesting the property of the owner, and vesting it in the indorsee of the bill of lading. And, strictly speaking, no person but such consignee can, by an indorsement of the bill of lading, pass the legal title to the goods. But if the shipper be the owner, and the shipment be on his own account and risk, although he may not pass the title by virtue of mere indorsement of the bill of lading, unless he be the consignee, or, what is the same thing, it be deliverable to his order, yet, by any assignment, either on the bill of lading or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except such a purchaser for a valuable consideration, by an indorsement of the bill of lading itself. Such an assignment not only passes the legal title as against his agents and factors, but also against his creditors, in favor of the assignee. In the present case Edward Thomson was the owner of the goods, and the consignee was merely his factor. He therefore had full power, notwithstanding the consignment, to pass the title to the property in the bill of lading, by a suitable instrument of assignment and sale against anybody but a purchaser without notice from his consignee, without any actual delivery of the goods themselves if they were then at sea, and incapable of manual tradition. The question then is whether the indorsement upon this bill of lading constitutes such an instrument. We are of opinion that it does. It purports to be a transfer in presenti, and uses the appropriate phrases of grant. * * * There was a valuable consideration for it; and, as Edward Thomson was the legal owner of the goods, the words 'assign and transfer' are sufficient words of grant to pass his legal title to the same. * * * The obvious intention of the parties was to give a specific interest in the goods shipped, so as to make them secure against the claims of creditors; and to construe the instruments to create no more than a lien, liable to be defeated by the acts of either party, or to be overreached by any privileged creditors, would be, not to follow, but to frustrate, their intention. * * *

["It is said that this debt upon a respondentia bond is of too contingent a nature to uphold a mortgage as collateral security for the payment of it. We know of no principle or decision that justifies such a conclusion. Mortgages may as well be given to secure future advances and contingent debts as those which already exist, and are certain and due. The only question that properly arises in such cases is the bona fides of the transaction. Then, again, it is said that the papers here disclose a transaction fraudulent in its own nature. But we are of opinion that there is no necessary implication of law on the face of these papers, which stamps it fraudulent. For aught that appears, the agreement may have been entered into with the most sincere and scrupulous good faith, and whether fraudulent or not, in fact, was a question for the jury, upon the whole evidence, which was properly left to their consideration; and they have, by their verdict, negatived the fraud. * * *

["But the main object relied on, and which, indeed, constitutes one of the exceptions to the opinion of the circuit court, is that possession of the return shipment was not obtained until after the levy by the United States; and it is contended that the want of such possession is per se a badge of fraud. The circuit court on this point decided 'that the actual possession of the above return cargoes, by the masters of the Superior and Addision, until levied upon by execution at the suit of U. S. v. Thomson, 1 Pet. (26 U. S.) 388, is not per se, in law, a badge of fraud, which ought to invalidate or affect the title of the plaintiffs to these cargoes.' It appears to us that this decision is entirely correct in point of law, under the circumstances of the case. * * *"

[The rulings of the trial court on the objections, taken to evidence and questions were sustained by the supreme court on substantially the same grounds as given by the trial court.

[See, also, Conard v. Nicoll, 4 Pet. (29 U. S.) 291.]

ATLANTIC MILLING CO., (AMERICAN MIDDLINGS PURIFIER CO. v.) See Case No. 305.

ATLANTIC, M. & O. R. CO., (SKIDDY v.) See Case No. 12,922.

ATLANTIC MUT. FIRE INS. CO., (SMITH v.) See Case No. 13,005.

ATLANTIC MUT. INS. CO., (LUMA v.) See Case No. 8,605.

Case No. 628.

In re ATLANTIC MUT. LIFE INS. CO.

[9 Ben. 270;[1] 16 N. B. R. 541; 16 Alb. Law J. 453; 24 Int. Rev. Rec. 13.]

District Court, N. D. New York. Dec., 1877.

MUTUAL INSURANCE COMPANY—RECEIVER—POLICY-HOLDERS—ADJUDICATION IN BANKRUPTCY.

1. A receiver of a mutual life insurance company, a corporation, was appointed by a state court. Afterwards, on a petition in bankruptcy, filed in the name of the corporation, it was adjudged a bankrupt by this court. The holders of policies issued by the corporation were, by its charter, entitled to vote for trustees of it, and to share in its profits. The policy-holders were not notified of the meeting called for the purpose of authorizing the proceedings in bankruptcy: *Held*, That the receiver had a sufficient standing to move the bankruptcy court to set aside the proceedings in bankruptcy;

2. He could not be allowed to show that the corporation was not insolvent.

3. The policy-holders were corporators, within the meaning of § 5122 of the Revised Statutes, and that, as they were not notified of the meeting, the court had no jurisdiction to entertain the proceedings in bankruptcy, and they must be set aside.

[In bankruptcy. Heard on motion to set aside an adjudication in bankruptcy. Motion granted.]

Henry Smith, N. C. Moak, and William C. Ruger, for receiver.

Amasa J. Parker, George L. Stedman, and D. J. Norton, opposed.

WALLACE, District Judge. Upon the application of the attorney-general of this state, after opposition on behalf of the Atlantic Mutual Life Insurance Company, that corporation was restrained from the further prosecution of its business, by a decree of a court having jurisdiction in the premises, and a receiver was appointed by such decree, who has filed his bond, taken possession of the assets of the company, and continues in the discharge of his trust. The proceeding

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

was conducted conformably to chapter 902 of the Laws of New York, of 1869. Subsequently a petition in bankruptcy was filed in this court, in the name of the corporation, by a trustee thereof, upon which the corporation was adjudicated a bankrupt. The receiver now moves to set aside such adjudication, alleging that the proceedings in bankruptcy were not in conformity with the bankrupt law, and that the corporation was not insolvent.

(1) Among the several questions presented is one relating to the right of the receiver to be heard. I do not doubt that he has a sufficient standing in court for the purpose of the motion. He is in possession of the assets of the bankrupt, and, if he chooses to relinquish his lien upon the funds, he can doubtless prove a claim against the bankrupt for his expenses in executing his trust, and for his commissions or services.

(2) Whether or not the corporation was insolvent, is a question not open on this motion. The decisions are, that in the case of an individual who has been adjudicated a bankrupt on his own petition, the adjudication cannot be assailed by proof that he was not in fact insolvent; that, if he owe debts and resides within the jurisdiction, as specified in section 5014 of the Revised Statutes of the United States, the court has jurisdiction to entertain his petition and adjudicate him a bankrupt; that the filing of the petition is, per se, an act of bankruptcy, and is so declared by the section in question; and that the solvency or insolvency of the debtor is not material. There is no distinction in this regard between proceedings by individuals and by corporations.

(3) The serious and doubtful question, in my view, is, whether the policy-holders in the corporation are corporators, within the meaning of section 5122, of the Revised Statutes of the United States. If they are, they not having been notified of the meeting called for the purpose of authorizing proceedings in bankruptcy, and the proceedings not having been authorized by the vote of the majority of the corporators, the filing of the petition was not the act of the corporation, within the section, and a condition essential to the jurisdiction of this court does not exist; in which case, although the proceedings might not be assailed collaterally, the adjudication may be attacked in the proceeding itself, by a motion to set it aside.

A corporator is one who is a member of the corporation, one of the stockholders or constituents of the body corporate. The charter of this corporation provides, that every stockholder shall be entitled to one vote for trustees, for each and every share of the capital stock standing in his or her name on the books of the company, and every holder of a policy of the company for the whole term of life, or an endowment policy for five hundred dollars and upwards, and which has been in existence for one full year, shall be entitled to one vote for each five hundred dollars so insured. The charter also provides, that, in each year, after placing to the credit of the stock seven per cent. on the amount of the capital, and a further sum of one-fifth of the residue of the profits, as a reserve fund for retiring the capital stock, the remaining four-fifths shall be placed to the credit of the policy-holders, who, to that extent, shall participate in all the profits of the company, until the retirement of the capital stock, after which the whole profits shall be divided among the policy-holders. While the policy-holders are not holders of scrip which evidences their right to an interest in the assets of the corporation, and while their interests are not transferable like those of stockholders, in all other respects their position toward the corporation is the same as that of the stockholders. Neither are personally liable for assessments or otherwise, beyond the sum fixed by contract with the company, the stockholders' liability being that assumed in their subscriptions for stock, and the policyholders' that assumed in the policies issued to them. Both have a voice in the management, and a share in the profits, the extent of which is not material, in ascertaining their legal status. There is a community, though not an equality, of interest in the assets, and of control in the management, which constitutes both classes members of the corporation. I think it is the intent of the section of the bankrupt law under which proceedings in bankruptcy by corporations are authorized, that the voice of all who have a right to participate in the management of the corporation, and to share in its assets, shall be heard and obeyed before an adjudication, which is essentially a dissolution of the corporation, shall be obtained. It is ordered that all the proceedings in bankruptcy be set aside.

Case No. 629.

In re ATLANTIC MUT. LIFE INS. CO.

[9 Ben. 337;[1] 17 N. B. R. 368.]

District Court, N. D. New York. Feb., 1878.

MARSHAL—FEES—ATTACHMENT.

An officer of a corporation instituted proceedings in its name, to have it adjudged a bankrupt. The proceedings were afterwards set aside by the court, as not having been authorized by a majority of the corporators. The marshal, having served notices, as messenger, under a warrant on adjudication, applied to the court to enforce, by an order and an attachment against such officer, the payment of the fees for the marshal's services: *Held*, that he was not entitled to such remedy, but must proceed by action.

[Cited in Mallory Manuf'g Co. v. Fox, 20 Fed. 410.]

[See The Blanche Page, Case No. 1,524. Contra, as to the payment of fees to the

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clerk of court. Lee v. Patterson, Id. 8,198.]

[See note at end of case.]

[In bankruptcy. Heard on petition of the marshal for an order requiring payment of his fees. Denied.]

WALLACE, District Judge. The marshal of the United States moves for an order requiring Lemon Thompson, an officer of the insurance company, upon whose petition the company was adjudicated a bankrupt, to pay the fees of the marshal in executing the warrant issued in the case. After the marshal, as messenger, had served the notices required by the warrant, the adjudication of bankruptcy was set aside and the proceedings vacated, because the requisite majority of corporators had not authorized the proceeding. The marshal's bill, as claimed by him, exceeds by $300 the sum he has received, and he asks that an order for its payment be now made and enforced by attachment against the officer who instituted the proceeding.

I am not aware of any authority authorizing the remedy now asked for. No case has fallen under my observation, where any court in this state has issued an attachment at the instance of one of its officers, for the payment of fees recoverable by action of the person at whose instance they accrued. In some of the states this remedy has existed, and in such states the courts of the United States have enforced the same remedy (see Caldwell v. Jackson, 7 Cranch, [11 U. S.] 276;) but I am unable to find any theory upon which the practice can be sustained when sought to be invoked within this state. Unless authority to issue an attachment in this case can rest upon the power of the court to punish for contempt, a commitment would contravene the statute abolishing imprisonment for debt. The power of the courts of the United States to punish for contempt and to imprison for debt is substantially coextensive with that vested in the courts of this state. The power to punish for contempt is, possibly, somewhat more circumscribed than that conferred by the laws of this state, while the power conferred to imprison for debt is precisely that given by the laws of the state.

It may be said, that the court can make an order requiring the payment of the fees, and, upon refusal of the party to pay, can punish as for contempt of an order of the court. It is true, that the courts of the United States may punish as for contempt any disobedience or resistance by any person "to any lawful writ, process, order, rule, decree or command" of the court, but the power thus conferred is not to be construed as extending the authority to punish beyond that which has always inhered in courts of general jurisdiction, and does not include every order or decree which the court may see fit to make. Where the order is, in effect, a final judgment for the payment of money, whether the proceeding in which it is made is of equitable or legal cognizance, it cannot be enforced by imprisonment, upon the theory of a contempt.

In this case the marshal has an adequate remedy by action, and to that he must resort.

[NOTE. Rev. St. § 725, limits the power of federal courts to punish for contempt to cases involving the "misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice; * * * and the disobedience or resistance by any party * * * to any lawful writ, process, order, rule, decree or command of the said courts." Section 990 provides that "no person shall be imprisoned for a debt in any state, on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished." In proceedings for contempt for violation of an injunction in a patent suit, the defendant was ordered to pay the costs, master's fee, and certain assessed profits by a certain day. He failed to pay the master's fees, and the profits, both of which sums were to go to the plaintiff, and was committed to prison. After two weeks, the defendant was discharged upon his own recognizance, under the poor debtor law of Massachusetts, (the state in which the proceedings arose,) and the circuit court denied complainant's petition for a recommitment. Hendryx v. Fitzpatrick, 19 Fed. 810. See, also, U. S. v. Sowles, 16 Fed. 536.]

ATLANTIC MUT. LIFE INS. CO., (HOLABIRD v.) See Case No. 6,587.

ATLANTIC & G. R. CO., (BRANCH v.) See Case No. 1,807.

ATLANTIC & G. R. CO., (CITY OF SAVANNAH v.) See Case No. 12,385.

ATLANTIC & G. R. CO., (JESSUP v.) See Case No. 7,299.

ATLANTIC & G. R. CO., (STATE OF GEORGIA v.) See Case No. 5,351.

Case No. 630.

ATLANTIC & P. GUANO CO. v. The ROBERT CENTER.

[N. Y. Times. Aug 24, 1862.]

District Court, S. D. New York. Aug. 24, 1862.

SHIPPING — CHARTER-PARTY — REFUSAL BY CONSIGNEE TO RECEIVE—DISPOSAL OF CARGO—DAMAGES—DEMURRAGE.

[1. A contractor entered into an agreement with a guano company to charter vessels, and transport guano to market, and to deliver the cargo to consignees of the company which was entitled to the bills of lading, the cargoes to be subject to the payment of freight and charges, and to the payment of eight dollars per ton to the company at first out of the surplus. *Held*, that the district court had jurisdiction of an action by the guano company on the contract against a ship which had been chartered by the contractor to carry out the enterprise, as it was a general charter party, by which the cargo was to be put on board by a sub-freighter, who was entitled to bills of lading, and was to be consigned to agents of the sub-freighter at the port of destination.]

[2. Where the undertaking was to carry the cargo to Antwerp, and deliver it to the consignee of the guano company, and the master

of the chartered ship, on the refusal of the consignee at Antwerp to accept the cargo, left it in the absolute control of the contractor, instead of either delivering it to some responsible house, who would have received it on the same terms as the consignment, or storing it in Antwerp, subject to the order of the company, the ship was liable for the value of the cargo at Antwerp, after deducting freight and all proper charges, at least up to eight dollars per ton, provided the value should so far exceed the freight and charges.]

[Cited in Fox v. Holt, Case No. 5,012, note.]

[3. The agents of the guano company told the master of the chartered ship that they would guarantee nothing in the way of dispatch, but would deliver as fast as they could, and were about to send one of their ships to the guano islands with more laborers and boats to facilitate the loading. Both ships arrived at the islands at the same time, and the chartered ship was ready to take in cargo, but the ship sent out by the company took some days to get ready, and was loaded first. *Held*, that the chartered ship was entitled to demurrage at the rate specified in the charter party from the time of her arrival until she commenced loading.]

[In admiralty. Libel by the Atlantic & Pacific Guano Company against the ship the Robert Center, and Joseph H. Arnold, master, on charter party. Respondents claim demurrage. Referred to a commissioner.]

SHIPMAN, District Judge. In the winter and spring of 1858 and 1859, the libellants were the owners of guano on Swan island, in the Carribean sea. On the 18th day of December, 1858, they entered into a contract with one Geo. W. Cochran, by the terms of which the latter was to charter vessels, and transport guano to market, the cargoes to be subject to the payment of freight and charges, and out of the surplus the libellants were first to receive eight dollars per ton. The guano was to be delivered to the consignees of the libellants, and the latter were entitled to bills of lading. There were other stipulations in the contract, which it is not necessary to notice in this place, but which may be referred to hereafter, when I come to examine the claim of the respondents to demurrage.

In January, 1859, Cochran, in carrying out the enterprise in which he had engaged with the libellants, chartered the ship Robert Center, of and then lying in the port of New York. The ship was owned by Edw. C. Center, and Arnold, her master, the former owning three fourths, and the latter one fourth. Before the charter of the ship was concluded with Cochran, Capt. Arnold and Mr. Caldwell, the agent of Edw. Center, called at the office of the libellants at New York, for the purpose, as they allege, of ascertaining if the guano would be delivered to the ship under Cochran's charter, and what were the probable facilities of loading the cargo. They there saw the agents of the libellants, Mr. Fahens, the secretary, and Mr. Fowler, the president of the company. In the evidence before the court there are some sharp contradictions as to what took place in this interview, the great struggle between the parties being whether or not Capt. Arnold at this time knew, or admitted that he knew, what the terms of Cochran's contract with the libellants were. In determining the general question of the liability of the ship, however, I do not think it of great importance whether Capt. Arnold knew the terms of this contract or not, although the balance of the proofs is in favor of the claim that he did. It will be seen in the course of this opinion, that I rest the liability of the ship on other grounds:

1. The first question raised by the respondents is that the court has no jurisdiction. This objection is untenable. It is a plain case of a general charter party,—a well known form of maritime contract; the cargo being put on board by a sub-freighter, who was entitled to the bills of lading, and consigned to the agents of the latter, at the port of destination.

2. The undertaking was to carry the cargo to Antwerp, and there deliver to Marsily, the consignee of the libellants. There is no escape upon the evidence before the court from the conclusion that Capt. Arnold so understood it. He offered to sign bills of lading to this effect, although he refused to sign those tendered him, but his refusal rested wholly on other grounds. The ship proceeded on her voyage with the cargo on board as far as Flushing, within about seventy miles of Antwerp. Here Cochran, who had preceded the ship to Europe, met her, and both he and Capt. Arnold proceeded to Antwerp, leaving the ship at Flushing. They found Marsily, the consignee, and Capt. Arnold tendered him the cargo, or perhaps it would be more proper to say offered to tender it. Marsily refused to receive it. This refusal appears to be relied on, is formally alleged in the answer, and is proved by the evidence. Surely, all this trouble and formality of an offer to Marsily to deliver the cargo to him at Antwerp, would not have been gone through with if Capt. Arnold had not understood that he was bound to the libellants so to deliver it. If he was bound only to Cochran, the latter could have dispensed with any obligation due to him, as well at Flushing as at Antwerp. It was not necessary for Capt. Arnold to travel seventy miles to Antwerp, and make a formal tender to a third person, in order to have received valid directions from Cochran as to the disposition of a cargo which Cochran owned, or which he had the legal right to control. It would be doing injustice to the intelligence of any American ship master to impute to him any such absurd idea. Now it is quite clear that while Capt. Arnold felt it his duty, as it surely was, to offer the cargo to Marsily, the consignee of the libellants, he somehow imbibed the notion (probably through bad advice) that the refusal

of Marsily to receive it left it at the absolute control of Cochran. This was a snare and a delusion. He should, on the refusal of Marsily to receive it, have delivered it to some other proper and responsible house, who would have received it on the same terms as those on which it was consigned to Marsily; or if no such house would receive it on those terms, he should have stored it at Antwerp, subject to the order of the libellants. This was the duty which the maritime law imposes on him,—a duty founded in good sense, and enforced by considerations of convenience and safety to both ship owners and freighters. There is no evidence that Capt. Arnold intended to defraud the owners of this cargo, but it is clear he mistook his duty, and committed an error for which his ship is liable to the extent of the damages, which resulted to the libellants from that error. Now, what were those damages? It is claimed by the libellants that the rule of damages should be the eight dollars per ton which Cochran was in a certain event to pay them for the guano. But in the present state of the case no such rule can be adopted. This would be visiting upon Capt. Arnold and his ship a mere arbitrary penalty for his error, and would in effect make him an insurer of all possible profits, which might have accrued to the libellants out of their enterprise with Cochran. The profits of that enterprise, which were wholly contingent, would, by this error of Capt. Arnold, become wholly certain and absolute. If this rule were to be applied to the case, the libellants might well congratulate themselves that the act of Capt. Arnold, of which they formally and rightfully complain in their libel, had rendered the success of this somewhat dubious enterprise with Cochran complete. It may be that eight dollars per ton is the true rule of damages. That, however, depends upon the fact whether the libellants could have realized the sum from this cargo, over and above freight and charges, had Capt. Arnold done his whole duty, by delivering it at Antwerp. In other words, the damages for which the ship is liable are those, and those only, which the libellants suffered from the failure of Capt. Arnold to deliver the cargo at Antwerp, either to some proper and responsible house, who would receive it on the same terms, under which it was consigned to Marsily, or in store, subject to libellants' order. It may be that these damages amount to $8 per ton. They cannot amount to more unless the contract between the libellants and Cochran is to be deemed as having been rescinded, with notice to Arnold before the time when the delivery at Antwerp should have taken place, of which I see no evidence. They may amount to much less, or to nothing at all. What the fact is of course the court cannot know, until the matter is determined upon a proper reference. It follows from these views, that the ship must be held liable for the value of the cargo at Antwerp, after deducting freight and all proper charges, at least up to $8 per ton, provided the value should so far exceed such freight and charges.

3. This brings us naturally to the only remaining question, viz:—What are the charges proper to be deducted from the value of this cargo at Antwerp, before we begin to estimate the damages to the libellants? And the only difference between the parties here is, that which relates to the single item of demurrage. This item is a large one, amounting to $4,700. In determining this point in the case, I do not deem it necessary to go into the general law of demurrage, as I think the duties and obligations of both the libellants and the respondents must be determined by the contract between the libellants and Cochran, and the representations made by the former to Capt. Arnold, and for this purpose I hold Capt. Arnold must be charged with a knowledge of the contract. Now, the contract says the cargo was to be delivered as fast as the agent of the libellants could deliver it. From this it would appear that they did not intend to bind themselves to a particular number of lay-days within which the cargo should be delivered to the ship, but only bound themselves to use all dispatch with the force they might have at the island where the Robert Center should arrive. In addition to this both Mr. Fowler and Mr. Fahens, on behalf of the libellants, assured Capt. Arnold at their interview with him that they would render every facility in their power to load the ship, although they would give no guaranty as to time. They further stated to him that they were about to dispatch the Golden Lead to the island, with more laborers and boats, to facilitate these operations of loading. Now, taking this clause of the contract and these representations, and no one would imagine from either or all of them taken together that this vessel, the Golden Lead, was to be sent out there to be loaded in advance of the Robert Center, keeping the latter waiting thirty days before she could commence loading at all. The fair import of these representations was that the sending out of the Golden Lead would facilitate the operation of loading the Robert Center, and I think Capt. Arnold had a right to rely on that result. But what was the fact? The Golden Lead was required by the libellants to be loaded first, and the Robert Center was compelled to await thirty days before commencing. This was not facilitating the loading of the latter vessel, but hindering and delaying it. Neither was it in conformity with the spirit of the contract to deliver the guano to the chartered vessels of Cochran as fast as the company could do it. According to the claim of the libellants, they might have sent a dozen ships of their own chartering to the island, and loaded them all first, thus postponing the loading of Cochran's vessels to

their and his ruin. The only risk he was to take in regard to the time of loading was the possible absence of the libellants' men from the island when his vessels should arrive, and the necessary and inevitable delay that might take place while the libellants were doing their best to load their ships. To say that the libellants, upon the heel of the execution of this contract, could send out ships of their own to be loaded in advance of those chartered by Cochran, and thus ruinously postpone the loading of his, would be unwarrantable, and ill comport with the just and equitable principle of the maritime law. No ship could have been chartered by Cochran to engage in such an undertaking, subject to such a power in the company. Cochran, in his deposition, says something about the loading of the Golden Lead first, if she should arrive first being spoken of, but I attach as little importance to his statements as the counsel for the libellants does. I think the terms of the contract and the sworn statements of Mr. Fahens and Mr. Fowler, made on this trial, the better evidence on this point. But assuming the version of Cochran the true one, I still think the Robert Center should have been loaded first. It is true Capt. Johnson, of the Golden Lead, says that he arrived a few hours the first, but he also says, they came to the landing together, and that the Robert Center delivered her order and was ready to take in cargo at once, while the Golden Lead was not ready until some days to commence taking in her cargo. I am, therefore, of opinion that the libellants are liable to the ship for demurrage, at the rate specified in the charter party, for every day from the time of her arrival up to the time she commenced loading, and no more. Even if Capt. Arnold did not know of the stipulation in Cochran's contract, that the cargo was to be delivered only so fast as it could be done by the libellants, he was told that they would guarantee nothing in the way of dispatch. but would deliver it as fast as they could. There is no evidence of any remissness on their part after the Golden Lead was loaded, and therefore they cannot be held liable for the delay, which they informed Capt. Arnold they would not be liable for, before he concluded his charter party.

Something is said in the answer about the failure of the libellants to perform that part of the contract with Cochran by which they stipulate to deliver the guano "alongside and within reach of the vessel." If there was any material delay or expense, or either occasioned by any failure of the libellants in this particular, let it be gone into on the reference, and reported to the court by the same commissioner who may inquire into the value of this cargo at Antwerp, at the time when it should have been delivered by Capt. Arnold at that place. Let an order of reference be made to a commissioner in conformity with this opinion.

ATLANTIC & P. R. CO., (BAILEY v.) See Case No. 732.

Case No. 631.

ATLANTIC & P. R. CO. v. CLEINO.

[2 Dill. 175.][1]

Circuit Court, E. D. Missouri. 1873.

ILLEGAL TAXES — REPLEVIN — LEGISLATIVE CONTRACT TO EXEMPT PROPERTY FROM TAXATION.

1. Under the legislation of Missouri back taxes upon real estate cannot be collected from the personal property of a subsequent purchaser of such real estate; and if such personal property be seized by the tax collector the owner may maintain replevin against him to recover its possession. (See note.)

2. Replevin lies against the tax collector when the assessment of the taxes is void for which the property was seized. Per Treat, District Judge.

3. The plaintiff is entitled to the benefit of the legislative exemption from taxation contained in the act of the legislature of December 25, 1852. Per Treat, District Judge. (See note.)

[Cited in Bailey v. Atlantic & P. R. Co., Case No. 732.]

At law. This was an action of replevin [by the Atlantic & Pacific Railroad Company against Henry Cleino] to recover certain personal property of the plaintiff seized by the defendant as sheriff of Phelps county, for taxes assessed in 1868, against the South Pacific Railroad Company, upon lands which were then the property of that company, but are now the property of the plaintiff, another and distinct corporation. The plaintiff claims that the seizure was illegal: First, because the lands taxed were, by a valid legislative contract, exempt from taxation. Second, because the plaintiff was not liable, as the vendee, in 1870, for taxes levied on said lands in 1868. In support of the first ground, reliance is placed upon sec. 12 of the act of December 25, 1852, relating to the Pacific Railroad Company, of whose privilege in this respect the plaintiff claims to be entitled, as the successor of that company, under various legislative acts and the provisions of the constitutional ordinances of 1865, upon the subject of railroads. The act of December 25, 1852, § 12, provided that "The said Pacific Railroad, and the said Southwestern Branch Railroad shall be exempt from taxation, respectively, until the same shall be completed, opened, and in operation, and shall declare a dividend, when the road-bed, buildings, machinery, engines, cars, and other property of said completed road, at the actual cash value thereof, shall be subject to taxation at the rate assessed by the state on other real and personal property of like value. * * * Provided, that if said company shall fail for the period of two years after said roads, respectively, shall be completed and put in operation, to declare a dividend, that then said

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

company shall no longer be exempt from the payment of said tax." It is further provided in said section, that after said road is completed and declares a dividend, the president shall return the value of the road-bed, buildings, machinery, engines, cars, and other property appertaining to said completed road, to the auditor of state, who shall assess the tax, and if not paid as therein provided, an action is to be brought to recover the tax, and a penalty imposed for the failure. The road was not completed until May, 1870, and no dividends have ever been paid. As to the legislative history, see act of December 10, 1855, (Laws 1855, §§ 20, 21, 25;) Const. 1865, art. 11, § 16, and accompanying railroad ordinances; Act Feb. 19, 1866, (Laws 1866, p. 108;) Act March 20, 1866, (Laws 1866, p. 101;) Act March 17, 1868, (Laws 1868, p. 118.) On the 20th of October, 1870, the South Pacific Railroad Company, under legislative authority, (Laws 1870, p. 90,) sold and conveyed all its property and franchises to the plaintiff, a corporation chartered by congress, July 27, 1866. [14 Stat. 292.] By virtue of said several acts, and the proceedings and conveyances under them, the plaintiff became the owner of the lands and railroads taxed, and claims to succeed to the original exemption contained in the abovementioned 12th section of the act of December 25, 1852. The taxes in question were assessed against the lands granted to aid in building the road by the act of congress of June 10, 1852. [10 Stat. 8, ch. 15.] The other necessary facts appear in the opinion.

Baker & Jewett, for plaintiff.
Mr. Clover, for defendant.

Before DILLON, Circuit Judge, and TREAT, District Judge.

TREAT, District Judge. It is the purpose of the court to state briefly, the conclusions reached in these cases, without giving an elaborate analysis of the various statutes and conveyances mentioned, and without giving in extenso the reasons upon which the conclusions are based. The exemption from taxation contained in section 12 of the act of December 25, 1852, must be held to include all the property of the Pacific Railroad Company, whether pertaining to the main or branch road. By the terms of that act the exemption was to continue for two years after the roads were completed, etc. The main question argued is, whether, under the sales made pursuant to the ordinance of 1865, through which sales the plaintiff claims successorship to the Southwest Pacific Company and the South Pacific, the lands, etc., thus derived continued subject to the original exemption, or whether by force of the constitution of 1865 the exemption ceased, and did not pass to the grantees at said sales and their corporate successors. It is evident that the terms of the several acts and conveyances are broad enough to continue the exemption in full force. The railroad ordinance required that on the default of the company to pay the principal or interest of the state bonds issued to it, the general assembly should provide by law for the sale of the railroad and other property, and the franchise of the company, "under the lien reserved to the state." In the suit in this court, wherein the Iron Mountain Railroad Company was a party, [Trask v. Maguire, Case No. 14,145,] there was no lien on the franchise of the company reserved to the state. Section 5 of that ordinance provides what shall be done when the state becomes the purchaser of the "railroad and other property or the franchises sold," viz: that "no railroad or other property or franchises purchased by the state shall be restored to the company except upon the terms stated; and also that no sale or other disposition of any such railroad or other property or their franchises shall be made without reserving a lien upon all the property and franchises thus sold or disposed of." etc.

It seems that the ordinance was designed to, and did, empower the state to sell or purchase and reconvey all the franchises on which a lien had been reserved by the state, antecedent to the ordinance, including exemption from taxation as originally granted by the act of 1852. The provisions of the constitution of 1865 forbade the making of such exemptions thereafter; and when taken in connection with the ordinance of even date and of like obligatory force it must be held to except this railroad's franchises as previously granted. The general rule applies that when a special provision is made for an excepted class of cases, the general rule is to be read as if the exception were incorporated in it. In the case of the state to the use of the State v. Dulle, 48 Mo. 282, the supreme court of Missouri seems to hold that said twelfth section of the act of 1852 "makes provision for the ascertainment and payment of state taxes, but does not include county taxes;" but a careful examination of that case and of those to which it refers renders it very doubtful whether that court did intend to be so understood. That was an action of trespass against the collector for buying plaintiff's property for unpaid county taxes, and after referring to the general law concerning county assessments, that court says: "We think the statute sufficiently conferred jurisdiction; whether rightfully or wrongfully, it is not necessary now to decide, as nothing but the liability of the defendant is involved in this contest."

The statement to which reference is made is in the revenue law, (2 Wag. St. p. 1196, §§ 7, 6,) in which "express power is given to the several county courts to levy such sums as may be annually necessary to defray the expenses of their respective counties by a tax upon all property and licenses made taxable by law for state purposes, with certain exceptions."

That court, in the same opinion, says: "From the view we have taken it will be

unnecessary to decide whether the legislature, acting under the provisions of the constitution, intended by the general revenue law to repeal the alleged exemption from taxes." Hence, it would seem that the court waived the question which, in a former part of the opinion, appears to have been so definitely decided. It closes the opinion with the following views: "When the statute made all property liable to taxation, and empowered the several county courts to levy such sums as might be annually necessary to defray the expenses of their respective counties, by a tax upon all property made taxable by law for state purposes, it conferred the jurisdiction, and was a sufficient warrant for the collector to justify him in obeying the process and mandate placed in his hands." Acting in good faith, and what was deemed good authority on its face, he ought not to be compelled to litigate the legality of the law. This case differs widely from those where the officer has been held answerable in trespass for acting without any authority.

Giving to this decision of the Missouri supreme court its fullest scope, it does not cover the cases before us. True, it may be difficult to determine on what established rules it held the defendants in that case not liable if the property levied upon was exempt; for a manifest distinction exists between process resting upon erroneous proceedings and process without any authority —between a void and a voidable proceeding or between errors subject to review or correction in the proper forum, and the entire absence of jurisdiction over the subject matter. If the county had no authority to levy or assess for taxes except on property subject to state taxation, then if the property on which the assessment was made was not subject to state taxation, the assessment upon it was void. The decision referred to cannot be considered as going further than that trespass will not lie against a collector and his sureties when the assessment and levy are made under a general law, which, by its terms, seems to cover the case, though it be that on a careful analysis of various supposed exemptions, it should be found that an exemption did really exist. If not exempt, then replevin will not lie to take from the collector property by him seized as by distraint, though the mode of assessing the same was informal and irregular. In such a case, inasmuch as ample and proper modes for correcting errors in the assessment exist, and the process is not void for want of jurisdiction, neither replevin nor trespass will lie.

The facts in this case disclose that the assessment was made in 1868, for taxes due upon lands then owned by the South Pacific Railroad Company, and that subsequently a levy therefor was made on personal property belonging to the Atlantic and Pacific Railroad Company. Neither the act of 1870, nor any other act, authorizes a levy for back taxes on real estate, to be made on the personal property of any one, save the person who was the owner of the land at the time the assessment was made. The tax lien may still remain on the land, although its ownership has been transferred, but the personal property of the subsequent owner is not subject to seizure for back taxes due from the prior owner. This point is conclusive of these cases.

Although I am prepared to hold that the property of the Atlantic and Pacific Railroad Company, acquired under the sales made pursuant to the ordinance of 1865, was exempt from state and county taxation for the period named, and consequently the levy of the defendant was void, yet, as Judge DILLON has not looked into or examined that question, the decision of this court is not based on that proposition. It may be that an unauthenticated report of a recent decision by the supreme court of the United States—Railroad Co. v. Prescott, [16 Wall. (83 U. S.) 603,]—is decisive of these cases on grounds not presented in argument, inasmuch as all of the lands on which this assessment was made were subject at the time of the assessment to revert to the United States government.

Therefore the court finds for the plaintiff. on the ground that the personal property of the latter was not subject to levy for an assessment previously made on the lands owned at the time of the assessment by another party. In other words, the collector cannot levy back taxes on lands upon the personal property of a subsequent purchaser.

DILLON, Circuit Judge. I concur in the opinion that the plaintiff is entitled to recover, and I place my judgment upon the distinct and sole ground that I discover no authority in the legislation of Missouri, general or special, to levy upon the personal property of A, for taxes assessed against the real estate of B, although since the assessment such real estate may have become A's property: and in such a case, the owner whose personal property is thus seized may maintain replevin against the officer, the same as if his property had been levied upon by the sheriff on an execution against another person.

As this point is decisive of the case, I have not deemed it necessary to examine the question whether the lands against which the taxes were assessed were exempt in the plaintiff's hands under the 12th section of the act of December 25, 1852, and the subsequent legislation of the state, including the constitutional provision (article 11, § 16) and the railroad ordinances referred to in the statement of the case. Upon this subject I give no opinion.

Judgment for the plaintiff.

[NOTE. See, also, Dixwell v. Jones, Case No. 3,937. First Division St. P., etc., R. Co.

v. Parcher, 14 Minn. 297, (Gil. 224,) 1869, an immunity from taxation in the original charter of a railroad company was held to accompany lands transferred by the state (after a foreclosure of a lien in its favor) to a new corporation. See, also, County Com'rs v. Franklin R. Co., 34 Md. 159; Tomlinson v. Branch, 15 Wall. (82 U. S.) 460; Wilmington, etc., R. Co. v. Reid, 13 Wall. (80 U. S.) 264; Woodson v. Murdock, 22 Wall. (89 U. S.) 351.]

Case No. 632.

ATLANTIC & P. TEL. CO. v. CHICAGO, R. I. & P. R. CO.

[6 Biss. 158;[1] 6 Chi. Leg. News, 358.]

Circuit Court, N. D. Illinois. July, 1874.

RIGHTS OF TELEGRAPH COMPANY ON RAILROAD RIGHT OF WAY—CONSTITUTIONAL LAW.

1. Neither the acts of congress declaring railroads to be post-routes, nor the act of July 24, 1866, providing that telegraph companies may construct their lines over post-roads, authorize a telegraph company to establish its lines over the right of way of a railroad company without making compensation therefor according to law.

2. It is beyond the power of congress to authorize a telegraph company to construct its line over private property without making compensation.

In equity. Bill for an injunction, [by the Atlantic & Pacific Telegraph Company against the Chicago, Rock Island & Pacific Railroad Company,] setting forth that the defendant would not permit the entrance of complainant's engineers and workmen upon its right of way, for the purpose of establishing thereon a telegraph line according to its charter, and asking that defendant, its agents, etc., might be restrained from interfering with the construction of such line. [Bill dismissed.]

Dent & Black, for complainant.

Williams & Thompson, for defendant.

DRUMMOND, Circuit Judge. The only controversy here is as to so much of defendant's railroad as lies within this state. The plaintiff claims to be a corporation organized under the laws of New York for the purpose of constructing a telegraph line between the cities of New York and San Francisco; and that, in order to carry out that purpose, it is necessary to construct such line upon the right of way of defendant, between Chicago and Omaha, including that part of defendant's road lying within this state.

The authority to do this is claimed to exist under various acts of congress, some of which declare all railroads in the United States to be post-routes. By these acts I understand nothing more is meant than that the mails can be transported over railroads, as over ordinary public highways, with all those securities and safeguards thrown around the transit of the mails by various congressional enactments. It does not necessarily follow that because railroads are thus declared post-routes, [Act Cong. 1872; Rev. St. § 3964,] the United States can, therefore, without the connsent of the railroad companies, and without compensation, transport the mails over them. An act of congress of July 24, 1866, [14 Stat. 221; Rev. St. § 5263,] provides that any telegraph company then organized, or which should thereafter be organized, under the laws of any state, should have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, and over and along any of the military or post-roads of the United States, which had been or might thereafter be declared such by acts of congress. There can be no doubt of the plenary authority of congress over the public lands or military roads of the United States. It is also competent for congress, as it has frequently done, to make grants of public lands to railroads, upon such conditions as it may choose to annex thereto.

The main controversy in this case turns upon the true construction of this act of congress. The bill avers that the defendant has a right of way over which its railroad is constructed. There is nothing to show that this right of way was granted through the public lands by act of congress; on the contrary, the fair inference is, that the defendant acquired it, either by direct purchase from the owners of the land, or by condemnation of the land for the uses of the railroad in accordance with the laws of the state. In either case the railroad would own the property for its own special purposes, having paid for it either by express contract with the owners, or in accordance with the method provided by law. It is true that a railroad has certain public uses, and is, for certain purposes, subject to the control of the state; and in consequence of these public uses the law authorizes the condemnation of private property; but still, when the property has thus been acquired, it becomes private property, nothwithstanding the railroad has public uses; that is to say, the property can be used for the benefit of the shareholders of the company. The right of way can be so used, just as much as the road-bed itself, the ties, the rails, the locomotives or the cars; they are all to be used for the benefit of the shareholders, although such uses may be of a public character, and the public may have a certain limited control over them.

The right to construct a telegraph line implies the possession, control, and use of real property, and, in this case, of the possession, control and use of a portion of the right of way of the defendant. The question here is, whether congress intended that in such a case as is now before the court, any telegraph company could, without compensation to the railroad company, exercise these rights

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

of possession and ownership. I think that such cannot be considered the true construction of this act of congress of 1866. The act provided that telegraph companies might have the right to take and use from the public lands of the United States stone, timber and other materials for its posts, piers and stations, in the construction, maintenance and operation of lines of telegraph. There could be no objection to such a grant, as applicable to the public lands of the United States, but there seem to be insuperable objections to such a construction of the act as would authorize the taking and using by telegraph lines of land owned by railroad companies, and of which they seem to have the exclusive control for their own purposes. Such a construction will not be placed upon the act unless its language is inconsistent with any other meaning. And I do not think the true construction of it is, that it intended to authorize any telegraph company to work on the roadway of a railroad, or upon a post-road of a railroad of which it, and not the public, was the owner.

The rights of a railroad over its roadway are different from those which belong to the public at large in regard to the ordinary highways and roads of the country. Over the latter any person can travel; there is an absolute right of user in the public. In the case of public turnpikes and bridges, this right sometimes exists subject to the claim of the proprietors to exact a certain compensation for the privilege of passing over them, but the right to pass is absolute, subject to the payment of the requisite toll. Such rights do not exist on the part of the public in railroads, or in the right of way of railroads.

It could not be claimed that after a railroad company had purchased its land, constructed its road-bed, laid down its ties and iron, and placed upon the road its locomotives and cars, an act of the legislature of a state, or an act of congress, could authorize any other railroad company to pass its cars or locomotives over such railroad without compensation and without permission, unless, indeed, such right was reserved in the charter, or the grant was made subject to the same. The railroad itself, alone, has the right to pass its own cars and engines over its roadway, and to use it for the profit of its shareholders.

The right to construct a telegraph line would imply the right to construct another railroad, or to add indefinitely to the number of telegraph lines that might be placed over the right of way. The right of the telegraph company to construct its line over the right of way of the defendant, is a right inconsistent, in many respects, with that absolute right which the defendant possesses over its own road-bed and right of way. For example: the railroad has a right to take gravel and dirt throughout the whole extent of its right of way, or to use that right of way for the purpose of laying down additional tracks or side-tracks. But the right to construct a telegraph line thereon necessarily interferes with the absolute right of the railroad to its right of way. That is a right which cannot be taken without compensation. It is a right of property existing in the railroad company, which no person or other company can take from it without its consent, or without paying for it.

In view of these considerations, it is, I think, clear that this act of congress did not intend to confer on the plaintiff any such right as is contended for. And, granting that such was the intention, it is beyond the authority of congress to deprive the defendant of its rights of property without providing compensation, because the construction of the telegraph line involves necessarily the actual taking of the property. I am of opinion that plaintiff's claim is not maintainable in point of law; and that it has no right to establish a telegraph line upon defendant's right of way without making compensation therefor in accordance with law.

It is urged that the state statute authorizing the condemnation of private property for the use of a telegraph line only refers to companies existing under the laws of the state, and is not applicable to this company, a corporation created by the law of New York. If this be so, it furnishes no reason why the plaintiff should take the property of any corporation in this state without paying for it. It is one of those cases, omitted in the law, but because of that omission the plaintiff is not clothed with any additional rights. The motion for an injunction is overruled, and the bill dismissed.

ATLANTIC & P. TEL. CO., (WESTERN UNION TEL. CO. v.) See Case No. 17,445.

ATLANTIC ROYAL MAIL STEAM NAV. CO., (REMINGTON v.) See Case No. 11,695.

ATLANTIC WORKS, (BRADY v.) See Case No. 1,795.

Case No. 633.

The ATLAS.

[4 Ben. 27;[1] 3 Amer. Law T. Rep. U. S. Cts. 89.]

District Court,[2] E. D. New York. Feb., 1870.

COLLISION IN THE KILLS — LOOKOUT — RULES OF SUPERVISING INSPECTORS — TOW BOAT AND TOW — APPORTIONMENT OF DAMAGES — LOSS OF CARGO.

1. A collision occurred in the Kills on the night of March 18th, 1868, between two steam-tugs, the Kate and the Atlas, each having canal boats in tow. A canal boat in tow of the Kate,

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

[2] [Affirmed by circuit court in The Atlas, Case No. 634, but afterwards reversed by supreme court in Phoenix Ins. Co. v. The Atlas, 93 U. S. 302.]

was struck by a boat in tow of the Atlas, and sunk. Insurers of the cargo on the sunken boat filed a libel against the Atlas alone, to recover for the loss of the cargo. On the hearing, the court stayed the proceedings to enable either party to apply to have the Kate also brought in, but neither party made such application. The collision resulted from a faulty lookout on both of the steam-tugs: *Held*, That the libellants were entitled to a decree against the Kate for one half the damage to the cargo.

[Cited in De Las Casas v. The Alabama, 92 U. S. 696; The J. L. Hasbrouck, Case No. 7,324; The City of Hartford & The Unit, Id. 2,753; The Alabama & The Gamecock, Id. 123; The Hudson, 15 Fed. 164.]

[See note at end of case.]

2. A negligent lookout is no lookout.

3. The pilot rules of the supervising inspectors in force at the time of the collision were controlled by the act of congress of 1864, (13 Stat. 60,) and none of those rules inconsistent with that statute are effective.

[Cited in The B. B. Saunders, 19 Fed. 121.]

4. Courts of admiralty may with propriety, consider the fact of a vessel's deserting, without cause, another vessel which has been injured in a collision with her, as a circumstance tending to show consciousness of fault.

5. Cases of the D. S. Gregory, [Case No. 4,100;] The Bay State, [Id. 1,148;] and The Hanover, [Id. 6,034,] commented on.

[6. Cited in The Milwaukee, Case No. 9,626, to the point that, where a steamer departs from the statutory regulations, she assumes the entire risk of her signal being heard and understood by an approaching vessel, and of herself hearing and understanding the reply.]

[7. Cited in The Hudson, 15 Fed. 172, as a case in which a decree for half the damages was given, only after the libellant had declined to bring in the other vessel.]

[8. Cited in U. S. v. Miller, 26 Fed. 97, to the point that part regulations for the management of vessels, so far as they are in conflict with the statutory provisions. are null and void.]

This was an action brought by the insurers of the cargo of the canal boat A. E. Hurd, to recover of the steamboat "Atlas,"

[In admiralty. Libel in rem by the Phoenix Insurance Company, insurers of the cargo of the canal boat A. E. Hurd, against the steamboat Atlas, her engineer, etc., (the Camden & Amboy Railroad & Transportation Company, claimants,) to recover] the amount of the damage caused to such cargo by the sinking of the canal boat, in a collision which took place in the Kills on the morning of March 18, 1868, between the steamboat Atlas and the steam-tug Kate which was then towing the Hurd. The action which was instituted against the Atlas alone, proceeded to hearing upon the pleadings and proofs, and thereupon the court directed that the proceedings be stayed to enable either party to apply to have the tug Kate also brought into the action. Neither party availed themselves of the permission given and the court accordingly proceeded to determine the questions raised upon the pleadings and proofs as they stood. [Decree for libellants for one-half of the damage. This decree was affirmed by the circuit court in The Atlas, Case No. 634, but was afterwards reversed by the supreme court in Phoenix Ins. Co. v. The Atlas, 93 U. S. 302.]

T. E. Stillman, for libellants.
Sanford & Woodruff, for claimants.

BENEDICT, District Judge. As to some of the facts attending this collision there is no dispute. Others are in doubt and are to be gathered from a mass of contradictory and unsatisfactory testimony. It appears that the Kate, a small tug 52 feet long, left the dock at New Brighton on the day in question at about 3 a. m., having three vessels in tow upon a hawser, of which the canal boat, A. E. Hurd, was the starboard vessel. The wind was light and the night somewhat dark, but without fog. After getting clear of the dock, at New Brighton, the Kate according to the statement of the libel took a course about for Port Johnson on the Jersey shore. She had not proceeded far before her pilot heard a single blast of a whistle which at once fastened his attention upon a bright light approaching, which proved to be the steamer Atlas, bound down the Kills with the barge Julia in tow, upon her larboard side. Immediately upon hearing the single whistle the pilot of the Kate gave two blasts of his own whistle, at once stopped and reversed his engine, and starboarded his helm. Under the starboard helm the Kate swung to port, but had not time to change the direction of her tow, before she was struck upon her starboard side by the stem of the Atlas, while the barge Julia in tow of the Atlas struck the Hurd and sank her. The Atlas, as it appears, was running at the rate of some ten miles an hour, on a course down the Kills and her first knowledge of the proximity of the Kate, was noticing a light ahead which was supposed to be on a tow, also bound down the Kills. The pilot at once ported his wheel to pass to the right, and blew a single blast of his whistle, but, receiving the two blasts of the Kate in reply before he had materially changed the course of his steamer, at once hove his wheel hard a starboard and also stopped and reversed his engine. Before he could stop his headway however he was in contact with the Kate. As to these facts there can be no dispute, unless it be as to the course of the Kate, but her course, if not as broadly across the river as stated, was certainly crossing that of the Atlas.

Upon these facts it has been strenuously argued, on behalf of the Atlas, that the libel must fail, because the Atlas in porting her helm complied with the pilot rules of the supervising inspectors, while the Kate violated those rules by omitting to port, and so caused the collision. This argument is founded upon a misapprehension of the true rule of navigation applicable to such a state of facts.

The pilot rule of the supervising inspectors, with the accompanying illustration, of

what is called the fifth situation, is a rule which if held applicable in all cases of vessels "approaching each other in an oblique direction," is pregnant with danger. It embodies a manifest error which existed before the enactment of the international navigation regulations, and has even at times crept into interpretations of those regulations. This error has been the subject of much interesting discussion, and its dangerous consequences need not be explained here. They will be found clearly shown in Mr. Gray's "Remarks Respecting the Rule of the Road for Steamships," a pamphlet which has received the approval of the British admiralty, board of trade, and trinity house, as well as of the French government. See sections 39, 40, p. 9. But the pilot rules of the supervising inspectors are controlled by the subsequent legislation of congress in the enactment of the international navigation regulations of 1864. 13 Stat. 60. Since the passage of those navigation laws, no rule of the supervising inspectors inconsistent therewith can be effective. See Act July, 1866, § 9, [14 Stat. 228.] And accordingly, rule 2 of the pilot rules, which has been here relied on, in so far as it requires a port helm in all cases, manifestly inconsistent as it is with article 14 of the international navigation laws, is of no effect. Articles 14 and 18 of the navigation laws furnish the true rule of navigation, applicable when vessels are approaching each other obliquely, and give to the vessel having the other upon her starboard side an election as to porting or starboarding according to the direction of the respective courses. Under these two articles the responsibility of avoiding the Kate, in the present case, was cast upon the Atlas. She was at liberty to keep out of the way of the Kate by porting or by starboarding, as the case required, and it was a fault in her to port, if starboarding afforded the only opportunity of avoiding the disaster.

As I view the case, however, it cannot be made to turn upon the correctness of the manoeuvres of either vessel after they saw each other, for I consider it to be quite clear upon the evidence that there was then no time to make any material change in the courses. They could only stop and back, which they both did. That it was then too late to avoid the collision by changing the courses, is shown by the small effect which was produced by the action of the helms before the blow—by the fact that the Kate at once answered the whistle by two whistles—by the immediate stoppage of both engines—by the absence of all hails, by the contradictory statements as to the directions in which the two vessels were moving, and by other circumstances which appear in the testimony.

The question of the case then is, by whose fault was it that these two tows failed to discern each other until they were thus close together. That the Atlas is chargeable with fault in this respect is clear; for it is undisputed that she was running through a thoroughfare in the night without any lookout. The night was not so dark, but what, with due care, approaching vessels could have been seen in time to avoid them. Witnesses for the Atlas say, "it had been pretty dark, but had lit up then, so you could see quite a ways—could see lights plain enough." "A vessel without lights could be seen a quarter of a mile." I have no doubt, therefore, but that, with proper care, the Kate, a high pressure boat, could have been discerned in time to avoid her; for it is proved that she had a light at her flag staff, while the schooner in her tow had a light in her rigging; and I am satisfied that the failure to discover the Kate until the vessels were so near that, although both engines were promptly stopped and reversed, they came together, was owing to the absence of a proper lookout on the Atlas.

In addition to the fault of running without a lookout, another fault is charged upon the Atlas, namely: that she did not remain by the Kate to render assistance to the injured vessels, but at once departed on her way, leaving the sinking vessels to shift for themselves. Upon the evidence, putting the most favorable construction upon it, it is evident that the Atlas displayed no great solicitude in regard to the vessels, which she must have known to have been seriously injured, if she did not intentionally desert them.

But it is argued by the advocates for the Atlas that the subject of assistance is irrelevant to the question of damage. This is hardly so. The rules, which courts of admiralty lay down, often look beyond the mere question of remuneration for services rendered, or for loss sustained, and are intended not only to do justice between the parties litigant, but to prevent loss of life and preserve the ships, in the welfare of which as the instruments of commerce the whole community is interested. Therefore it is that the merchants' shipping act of England, (§ 33, Schedule Table C.), provides that in case of failure, on the part of a colliding vessel, to render assistance without reasonable excuse, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by her wrongful act, neglect or default; by which act a proceeding to recover damages may almost be said to be in certain cases, changed into a penal proceeding to punish an offence. See note to amendment of merchants' shipping act. Macl. Shipp. Append. p. 22. No such statute exists in the United States, but courts of admiralty, may with propriety consider the fact of deserting without cause a vessel which has been injured in a collision as a circumstance tending to show consciousness of fault; and as, in the admiralty, public policy may be considered in disposing of costs, (1 Coote, p. 63), punishment for such an act may be inflicted by withholding or

imposing them as the case shall seem to require, (The Celt, 3 Hagg, Adm. 321; The Caledonia, 1 Spinks, [Catalina, 2 Spinks,] 23; The St. Lawrence, 7 Notes of Cas. 556.) In the present case, the Atlas being found in fault, the circumstances, attending her departure from the scene of the accident, need only be referred to here as confirmatory of the opinion that she was in fault.

It is equally clear to my mind, that the Kate was also guilty of negligence which conduced to the collision and in the same particular, namely, want of a proper lookout. As before stated, the night was not so dark, but that lights could with care have been seen in abundant time, and, upon the evidence, it is manifest that the Atlas displayed bright white lights. I say nothing in regard to the side lights either on the Atlas or the Kate, for the reason that I hold the collision not to have occurred by reason of any mistake of courses, but because the bright lights, which should be seen before the side lights, were not seen by either vessel until the vessels were upon each other. It is true the evidence shows that the Kate had a man on deck to look out, but it also shows that neither he nor the pilot saw the Atlas' lights till just before they struck. A negligent lookout is no lookout. For this reason therefore I hold the Kate as well as the Atlas to have been in fault.

This then is the case of a collision produced by the concurrent negligence of two vessels, and the question next arising is as to the extent of the liability of these vessels respectively for the loss sustained by the cargo which was being transported. If this were an action brought in behalf of the Kate against the Atlas, no doubt would arise upon the question; for the well known rule of the admiralty is to apportion the damages between the two vessels when both are in fault. But here the case is a different one from that presented where the action is instituted in behalf of one of the colliding vessels, and the damages are sought to be apportioned between the parties to the action, who are found to be each in fault. This action is in behalf of the owners of cargo laden on board the canal boat A. E. Hurd, which boat was at the time being towed by the Kate; and it is instituted not against the Hurd, which was the carrier, nor against the Kate, which had assumed the duty of towing the Hurd with proper care and skill, nor against the vessel which actually inflicted the blow, for that was the barge Julia, herself in tow of the Atlas; but it is against the Atlas as one of the two colliding vessels responsible by reason of the negligence of her master and crew for the injury caused thereby. It cannot then be pretended that any act or omission on the part of the owners of this cargo conduced to produce the collision. The shippers of the cargo made no contract with the Kate. Their contract was with the Hurd, and they could take no part in the employment or the management of the Kate. Neither did those in charge of the Hurd have any control over the navigation or management of the Kate. The tug was an independent principal, so far as this collision and this cargo was concerned, charged with the duty of avoiding the neglect which caused the accident and responsible for the results of that neglect. There is no room therefore for the application of the principles of the law of agency, and it cannot be held that the libellants are chargeable or identified with the neglect of the Kate, and for that reason subject to the same rule which would be applied to her in regard to the amount of damages. Nor is this a case of joint negligence on the part of the Atlas and the Kate, in which the acts of the Kate are, in law and by reason of a common design, the acts of the Atlas, so as to render her responsible for all that occurred. The fault of the Kate, as well as that of the Atlas, was one of omission, and there would be neither justice nor sense in saying that the omission of the Kate to have a lookout could be imputed to the Atlas, who knew nothing of the existence of such a vessel till she struck her.

In a court of common law, then, upon the facts of this case, an action against the owners of these two colliding vessels, founded upon an allegation of joint negligence, could not, as I understand the law, be properly maintained; and although in an action against either, in such a tribunal, the whole amount of the loss would be adjudged, the reason is because the courts of common law hold it to be impossible to determine in such a case the proportion of the loss imputable to each offender, and therefore, from necessity, being permitted to consider legal liabilities only, give judgment for the whole amount in the one case, and refuse to permit any recovery in an action by one of the parties in fault. But while such is the rule of courts of common law, courts of admiralty, "where a mixture of public law and of maritime law and of equity are often found in the same suit" (Parsons v. Bedford, 3 Pet. [28 U. S.] 447), when the proceeding is to recover damages arising from a collision of ships, for reasons peculiarly their own, feel compelled to divide the loss. In a court of admiralty, the action may be instituted against both the colliding vessels, and the decree be against either one of them for the whole, or, by reason of the "great advantage" which the admiralty has of being able to do so, (The Friends, 4 Moore, P. C. 322), one-half the damages may be decreed against each; and the action may also be against one of two colliding vessels found equally in fault, and one half the loss decreed as the proportion of loss properly chargeable to the vessel proceeded against. In this instance, for example, the present proceeding might have included the Kate with the Atlas, and

such is the more common form of the proceeding; or the libellants might have joined with the owners of the Kate in an action against the Atlas, Coote, p. 11. The Commander-in-Chief, 1 Wall. [68 U. S. 43;] William & B. Adm. p. 67; The Hanover, [Case No. 6,034.] Or, if there had been an action by the owners of the Kate alone against the Atlas, and also an action by the owners of the Atlas against the Kate, all would have been heard together, perhaps even consolidated (Coote, p. 27), and such decrees made as the rules of maritime law and the course of the admiralty require. Sturgis v. Boyer, (The Hector,) 24 How. [65 U. S.] 110; The Catharine, 17 How. [58 U. S.] 177; Hay v. Leneve, 2 Shaw App. 395; The Anna Kimball, [Case No. 404;] The Marion, [Case No. 9,087;] and cases cited by Dr. Lushington in deciding The Milan, 1 Lush. 388; The Aurora, 1 Lush. 328; The Hector, [Case No. 6,317.]

If, then, in an action against one of two colliding vessels, in behalf of another found equally negligent, a court of admiralty is competent to ascertain and adjudge the amount of damage chargeable to the neglect of the vessel proceeded against, I see no reason why it is not equally competent to do the same in an action like the present, nor why the same rule should not be here applied. It will more clearly appear that such should be the law, if we advert to the reasons which are supposed to call for the application of the rule of apportionment. This rule of the admiralty is too venerable, and has been too often approved by great authorities, coming down to the present day, to admit of question or require defence. Its wisdom, as applied to modern commerce, appears fully demonstrated by the circumstance that when disturbed by the merchants' shipping act of England, passed in 1854, the rule proved too strong for statutory innovation, and it was found necessary to reinstate it in the merchants' shipping amendment act. 25 & 26 Vict. 63, 29. It is a rule of equity, but not of equity alone. It has also a foundation in expediency. In furtherance of equity, it compels a party in fault to share in the loss arising therefrom; and it refuses to permit a party to be charged with the whole of a loss shown to have been caused by another party as well. In the interest of commerce and of the community at large, this rule—as also the rule of limited liability, (The Carl Julian, cited in The Dundee, 1 Hagg. Adm. 113,)—seeks to distribute somewhat those losses which so frequently attend the navigation of the ships, and which result from a negligence on the part of masters and seamen, against which the most prudent owners cannot entirely guard; and which, owning to the imperfection of human tribunals, and the nature of the facts in dispute, may well be supposed liable to be sometimes cast upon the innocent. And it also aims to increase care and skill on the part of navigators, in order to diminish as much as possible the risk of life and of property which always attends navigation upon the seas.

Thus Lord Denham speaks of the rule as "growing out of an arbitrary provision in the law of nations, from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent therewith. De Vaux v. Salvador, 4 Adol. & El. 420. So Judge Ware speaks of it as "in conformity with the spirit of the maritime law, which generally aims more at practical utility and the interest of navigation than at a logical and scientific deduction of general and abstract principle;" and in The Scioto, [Case No. 12,508,] he says: "The maritime law, from considerations of public policy, divides the loss." The rule is applied by Drummond, J., because under it "there would be greater caution and vigilance in navigation, and less effort and less temptation by corrupt and unfair means to misrepresent and distort facts." The Swan, [Id. 8,588.] And the supreme court of the United States, by Nelson, J., says: "We think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance in navigation." The Catherine, 17 How. [58 U. S.] 178. These considerations have, from a very early period, and among many nations, been deemed to be controlling, and to require of admiralty courts the adoption of the rule in question, and they appear to be equally applicable to the vessels and cargoes composing a tow, whether considered to be in law one vessel, for the purposes of this rule, or whether considered to be separate independent interests. Applied to the vessels being towed, the rule tends to encourage the employment of competent tugs, navigated by competent men, and will cause the men on the tows to be more watchful to note and correct, as far as possible by their own vigilance, any neglect in the crew of the tug, as they may often do in the matter of lookout, hails, &c.

Applied in a case like this, it also works equity, for certainly there would be little justice in permitting these libellants to elect to charge the Atlas with the whole of this loss, which their own witnesses, called from the Kate, prove to have arisen from the fault of the Kate as much as from the fault of the Atlas. If the action had been instituted by the owners of the Kate to recover for the injury to this cargo, for which action the case of The Commander-in-Chief, 1 Wall. [68 U. S.] 50, would be an authority, the liability of the Atlas, upon this very claim would have been limited to one-half the amount of it. See cases cited by Dr. Lushington in The Milan. The Bay State, [Case No. 1,148.] It is not easy to see how in equity the liability of the Atlas can be permitted to be doubled by instituting the suit in the name of the present libellants, and calling upon the crew of the Kate to prove the case.

It was entirely competent for the libellants to have originally proceeded against the Kate, as well as the Atlas in this action, and so recovered their whole loss. Furthermore after the hearing had been had, opportunity was given to join the Kate, and it was declined without the suggestion of any facts existing to prevent that course. It certainly would not be just to permit the liability of the Atlas to be doubled by this mode of procedure, and for no other apparent reason than to save the Kate from her share of responsibility.

But it may be said the libellants are without fault, and should recover their whole loss, and the Kate may be sunk or beyond the reach of process, or of too insignificant a value to respond. No such facts appear, and not being suggested as a reason for declining the opportunity to join the Kate, they must be presumed not to exist. And whether the maritime law necessarily requires that the whole loss sustained by reason of collision should be recovered in an action against one of two offenders, is the question under discussion; and it might well be said here, if the case required it, as it does not, that the risk of an inability to recover of the Kate, recompense for loss arising from her negligence was a risk voluntarily assumed by the libellants and against which the Atlas could in no way provide, and that the maritime law looking to equity, and at the same time seeking to distribute losses of this character, when they occur, and to prevent their occurrence if possible, by creating a sense of responsibility in the minds of all persons engaged in commerce, will not permit those risks to be shifted to the shoulders of a single one of the parties in fault, but leaves them upon the party by whom they were in the first instance assumed. The rule of apportionment is a rule of limitation. It is adopted by maritime courts for the advantage of shipping among other reasons. Its object is to restrict the liability of each ship in cases of collision by mutual fault, to the injury arising from its own negligence. As to the ship herself, that proportion is always determined, and from necessity, by an arbitrary rule of equal division. The same division is possible in regard to the cargo. The same reasons there exist for the limitation, and the same rule should be applied,—certainly in a case like this, when no reason is shown for attempting to charge the whole loss upon one of the vessels. Furthermore the application of the rule of apportionment in actions brought by tows or their cargoes, will tend to compel the bringing before one and the same tribunal all the parties whose rights and liabilities are involved in the controversy and dependent upon the same facts, a result of no inconsiderable importance, when the nature of these controversies is considered. These considerations, it is believed, justify the conclusion to which I have arrived, that in an action like the present, the rule of apportionment should be applied, and the recovery limited to one half the amount of the damage to the cargo in question. I have not thus far alluded to any adjudged cases, where the question, in the form here presented, has been decided. I am aware of no such case in the courts of this country, and no case has been here cited by either party. In the case of The Bay State, [supra,] one half the cargo was adjudged, but there the owners of the Bay State were the libellants. They could hardly however have been considered as owners of the cargo. In the later case of The D. S. Gregory, [Case No. 4,100,] which was an action for damages, for injury to a passenger in a collision arising from mutual fault, the liability of each vessel—both being then able to respond—was limited by the decree to one half the damages. I am not aware that the particular provision as to the execution inserted in the decree in that case, was a subject of discussion, and it could not have been deemed important, each vessel having given ample security for its portion of the loss.

The case of The Hanover, [Case No. 6,034,] decided by the learned Judge Betts, in 1851, is more nearly in point. There were cross actions, one in rem brought for vessel and cargo lost by collision, the other in personam; and both vessels being found equally in fault, the decree directed the damages of both parties to be ascertained and divided equally, but directed that "the value of the cargo is not to be included in the estimate, unless the owners thereof have made themselves parties to this action, so as to be concluded by its decree."

There is on the other hand a remark by Mr. Justice Wayne, in the case of The New Philadelphia, 1 Black, [66 U. S.] 76, which should not pass unnoticed, although the case has not been relied upon as an authority here. There the action was against a tug, between which and the libellant a contract had been made to tow a boat with care and skill, and it may be that, in such an action, considerations arising out of the contract would require a decree for the full damages, as to which no opinion from me is called for. But in that case the court finds as a fact that the tug was solely in fault. There was therefore no occasion to consider, and the court cannot be supposed to have intended to adjudicate upon the question here involved.

In the English admiralty this question, in substantially the same form here presented, has been adjudicated and after full argument and consideration it was held in the case of The Milan, 1 Lush. 404, that in an action brought by the owners of cargo laden on board of one of two vessels, found to be equally in fault for a collision, against the other colliding vessel, the recovery in the admiralty must be limited to one half the amount of the injury to the cargo. This determination, so far as I can ascertain, has

been acquiesced in, and appears to furnish the rule of the maritime law as now administered in the English admiralty. McLachlan, [Shipp.;] Williams & B. Adm. p. 76; Lown. Col. p. 5. The importance of agreement upon questions of this class between two nations, so closely connected in their commercial relations as England and America, would, of itself, go far to justify the adoption by American admiralty courts, in cases like the present, of the rule of the English admiralty. In accordance with these views, the decree will accordingly be that the libellants recover of the steamboat "Atlas" one-half of their loss by reason of the collision in the pleadings mentioned, and that it be referred to a commissioner to ascertain the amount.

[NOTE. This decree was affirmed by the circuit court in The Atlas, Case No. 634; but upon appeal to the supreme court the circuit court decree was reversed. See The Atlas, supra, and note; Phoenix Ins. Co. v. The Atlas, 93 U. S. 302.]

Case No. 634.

The ATLAS.

[10 Blatchf. 459.][1]

Circuit Court, E. D. New York. Feb. 25, 1873.[2]

COLLISION—BETWEEN STEAMERS—MUTUAL FAULT — APPORTIONMENT OF DAMAGES — LOOKOUT — COSTS.

1. A collision occurred between the steamboat A. and a boat in tow of the steam tug K., in the night, in the Kills. A libel was filed, in the district court, against the A. alone, to recover for the damages. That court held both vessels in fault, and awarded to the libelants, against the A., only one half of such damages. Both parties appealed. *Held*, that the decree was right.

[See note at end of case.]

2. The K. was held in fault for not porting, when meeting the A. nearly end on, and for starboarding, and crossing the course of the A., and for not slowing and stopping.

3. The A. was held in fault for not having a lookout, in view of her speed, such want of a lookout having contributed to the collision. It ought to be clear that the want of a lookout has wrought no mischief, before it can be excused.

[Cited in The Coe F. Young, 49 Fed. 168.]

[See note at end of case.]

4. The A. and the K. being both in fault, if both had been sued, each would have been held liable for one half of the damages; and the libelant cannot, by suing the A. alone, deprive the A. of any rights she has in that respect.

5. Both parties having appealed, no costs of appeal were allowed.

[On appeal from the district court of the United States for the eastern district of New York.]

[In admiralty. Libel in rem by the Phoenix Insurance Company, insurers of the cargo of the canal boat A. E. Hurd, against the steamboat Atlas, her engines, etc., the Camden & Amboy Railroad & Transportation Company, claimants.] This suit was brought in the district court, against the steamboat Atlas, to recover for the damages sustained by the loss of a boat in tow of the steam tug Kate, through a collision between such boat and the Atlas. That court held both the Kate and the Atlas to be in fault for the collision, [Case No. 633,] and awarded to the libelants, against the Atlas, one half of the damages reported. The claimants appealed from the decree, to this court, on the ground that the Atlas was not in fault, and the libelants appealed on the ground, that the Atlas was wholly in fault, and the Kate not at all in fault, and that, even if both vessels were in fault, the decree was wrong in not awarding to the libelants a decree against the Atlas for the whole damages reported. [Decree affirmed. An appeal was subsequently taken to the supreme court, where the decree was reversed. Phoenix Ins. Co. v. The Atlas, 93 U. S. 302. See note at end of case.]

Thomas E. Stillman and Charles Donohue, for libelants.

Charles F. Sanford, for claimants.

WOODRUFF, Circuit Judge. Without going into the detail of the evidence in this case, it must suffice to say, that the negligence and mismanagement of the persons navigating the tugboat Kate are fully established. On the testimony of the witnesses called from her by the libelants, that mismanagement was so gross as to admit of no excuse or palliation. Her own seamen, as well as the master of one of her tows, prove, that, putting out from New Brighton on Staten island, bound westwardly, up the Kills, she had crossed diagonally towards the New Jersey side, and had passed the middle of the Kills, and taken her course westward, still slightly quartering on the New Jersey shore. The witnesses generally say she was two thirds over towards the New Jersey shore. Some make it from one half to two thirds over, and one of her hands says she was within 100 yards of the New Jersey shore, which was more than two thirds of the whole distance. She was proceeding up the Kills, when the steamboat Atlas came from the other direction. All of the witnesses agree, that the Atlas was running in, or very nearly in, the middle of the Kills. This, if true, shows, that there was an erroneous assumption in the opinion of the court below, namely, that the Atlas had the Kate and her tows on her starboard side. It proves the contrary. This is not all. Every witness from the Atlas testifies, positively, that they sighted the Kate and her tows, or so many of them as they saw, on their port or larboard side. They are not contradicted by other witnesses, nor by any facts or circumstances not in harmony with

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

[2] [Affirming The Atlas, Case No. 633. Reversed by supreme court in Phoenix Ins. Co. v. The Atlas, 93 U. S. 302.]

their statement. I must regard that fact as proved beyond any doubt, and corroborated by the testimony from the Kate herself. It was, therefore, erroneous to say, that the rule of navigation placed upon the Atlas the burthen and duty of keeping out of the way of the Kate. But, if the Atlas had been within the operation of that rule, it would in no wise save the Kate from the imputation of gross fault and negligence; for, the same rule required her to keep her course, which she did not do nor attempt to do.

The Kills are narrow, not so narrow but that the vessels might pass each other, with great ease, in safety, but so narrow that vigilance and care were due from both vessels, and in the night season especially, and the pressure of the proper rules of navigation was more than usually stringent. In the course and direction of the two vessels, it is possible, that, if neither had done anything, they would have passed without colliding. Such is the opinion expressed by some of the witnesses; but, it is clear, I think, that their approach to each other was so nearly end on as to bring them under the rule which required each to pass to the right. In accordance with that rule, the Atlas ported, and signified her conformity to the rule, by one whistle. The Kate disobeyed the rule. She assumed to say, that she would go to the left, across the bows of the Atlas. She had no right to do this, upon any ground. The proof as to the depth of the water shows, that the suggestion that it would have been imprudent to draw a few fect nearer the New Jersey shore is a mere pretense; but, if not, then, surely, she had no right to assume, that, in the short interval following her two whistles, the Atlas, which was acting in obedience to what the Kate knew to be her duty, could herself go there in safety, and in season to avoid her. If, in the judgment of her master, it was not prudent to incline more to starboard, she should not have gone the other way, but should instantly have slowed, and, by signals indicating inability to conform to the rule, notified the Atlas of that judgment, thus leaving the Atlas the benefit of her own porting, and enabling her to pass, as, according to the evidence, she would, to the southward of her. If the Atlas had then failed, the Kate would, at least, have been free of the charge of thwarting her endeavor by her active misconduct. But, her blowing of two whistles was a double assurance to the Atlas, first, that the Kate was about to cross to the southward, and, also, that, in the judgment of the navigator of the Kate, it was proper for the Atlas to arrest her swing to starboard and go to port. Instantly putting her wheel to starboard, the Atlas rang to slow, stop and back, and it was done, but too late to avoid the collision.

It is said, that the Kate, on her starboard wheel, had swung but little to the southward, across the bows of the Atlas. It was to be expected, that her witnesses, in view of the manifest fault in that maneuvre, and in the endeavor which, in obvious concert with the libelants, they make, to exonerate the tug, would be tempted to make this representation. The proof in relation to their lights, greatly preponderating against them, further tends to impair confidence in their testimony; and, in any view, it is clear, that their movement to the south—to their left—whether greater or less, and their wholly unwarranted arresting the southerly movement of the Atlas, were the fatal and inevitable causes of the collision. On the other hand, the instant the two whistles were blown by the tug, the Atlas did all that it was possible to do to avoid the consequence of the mismanagement of the latter, namely, stopped and backed, and, by starboarding, made the best effort to turn, (under some headway,) to pass by the stern of the tug, then on her swing to the southward.

The case is, therefore, this: The vessels were approaching nearly end on, the tug already on the port bow of the Atlas. Every rule of navigation required them to pass to the right of each other—port to port—and their position and courses were such, that, even without change by either, they would have passed clear. If the tug could not have inclined further to her right, she could, at least, have refrained from a movement in direct defeat of the intention of the Atlas to conform to the rule and pass to the southward. Instead of doing either, and without stopping, or even slowing, she turns across the course of the Atlas, to the left, and, by her signal, apprises the Atlas she was doing so, thus arresting and thwarting the proper movement of the Atlas, and placing herself and her tow in the way of the latter. To the tug there was no proper confusion of signals. She herself needlessly created it, by her two whistles, and yet did not even slow. The Atlas gave the proper signal and made the proper change, and, on the instant the two whistles, improperly blown by the tug, apprised her of the faulty movement of the latter, she stopped and reversed, and did all that was possible to avoid collision. Had the tug ported, or, even, had she done nothing, the Atlas was passing to the right of her, and would have passed with entire safety to both. In this state of the case, the collision was clearly and chiefly owing to the mismanagement and fault of the tug.

If it were material, I should say, that the large preponderance of the evidence is, that the tug had not, at the time, proper lights. The proofs greatly impair confidence in the witnesses whose testimony tends to the contrary; and the uniform testimony of the other witnesses is, that no lights on the Kate were visible, save, perhaps, one very low, either near her deck—possibly there—or, possibly, at the rear end of her hawser, on the staff of one of her tows. But, however great this fault, and though clearly subjecting her to liability, if the want of sufficiently early sight-

ing of the vessels by either had been the cause of the collision, the observations already made show, that it was not caused so much by the want of her lights, as by her mismanagement, when each vessel had seen the other in full time for doing whatever it was proper each should do. Whether the Atlas would have seen her sooner if her lights were up and burning, or not, the proof is conclusive, that the lights of the Atlas were burning and bright; and the tug cannot claim, at all, that she had not the fullest opportunity and time for what she ought to have done. She can allege no hurry or unexpected approach of the Atlas, excusing the want of deliberation or judgment, or justifying her faulty mismanagement.

But, on the other hand, it was held, in the district court, that the Atlas, also, was in fault, and that such fault on her part contributed to the collision. That she was in fault cannot be denied. Indeed, the counsel for the claimants hardly insists that she was acting in compliance with the statute requiring a lookout. Act April 29, 1864, art. 20; 13 Stat. 61. She is not chargeable on the ground that her conduct after the tug was seen was not, in all respects, judicious and proper, and such as would have avoided a collision, if the tug had not improperly done what she did; but, on the ground that she ought not to have come down through the Kills, in the night, at the speed with which she was moving, without a lookout at the bow, vigilant in the performance of his duty. There is no evidence that her speed was itself an unusual or improper speed for such a night, where vessels without any light could be seen at a very considerable distance. Indeed, the evidence does not show what her speed was at the time. It is only claimed to be presumptively fixed by a computation based on the time when she left New Brunswick, and the distance she had run at the time of the collision. The proof also establishes, fully, that her own proper lights were set and were burning and bright.

She was, nevertheless, navigating the Kills without a proper lookout, in violation of the rules of navigation; and thereupon, the question arises—did her fault in that respect contribute to the collision? Upon that question there is room for doubt and difference of opinion. The claimants, with great plausibility, insist, and, I think, the testimony shows, that her officers did see the tug in season to do what it was the duty of the Atlas to do in order to avoid her, and in season to do what would have avoided the tug if the latter had conformed to the rules of navigation, by porting her helm, or, even, if she had done nothing. The claimants further insist, that the Atlas did, in fact, what she ought to, and would, have done, had she seen the tug at a greater distance, and however far off; that there was no danger of collision when the Atlas ported as the law required, and none, in fact, until the last moment, when the tug starboarded and threw herself in the way; that there was abundance of room to pass; that, had the Atlas seen the tug at a distance of a mile or more, she would have approached, and might properly approach, as she did, near the middle of the Kills, and, when drawing near, would have ported, to pass to the right, as the rule required; that this is just what she did do; that she would have signaled her intention to pass to the right, by one whistle; that this, also, she did; that, in either case, she would have passed in safety by, had not the tug violated every rule governing her situation, and thrown herself in the way; that, at the very instant the intention of the tug to do this was signaled, the Atlas slowed, stopped and reversed, and made every possible effort to avert the consequences of the other's fault; that she could not have known that intention any earlier; that not one of the movements of the Atlas would have been earlier, nor ought it to have been earlier, or different, if she had had the tug under observation for a mile or more; and that the measures to avert the consequences of the fault of the tug could not have been taken before that fault occurred.

There is much force in the argument of the counsel for the claimants on this point. The liability of the Atlas to contribute is not to be tested by the inquiry, whether she ought to have had a lookout, as an abstract question. Her want of a lookout is not to operate to release the tug from the consequences of her own fault. Such want of a lookout must be found to have contributed to the collision, or the fact is not material between these parties. Suppose, then, the Atlas had had a lookout, in the vigilant discharge of his duty, who had seen and reported the tug at a distance of a mile or more, and yet the Atlas had done just what she did do, and at the very time when, in fact, she did it, could it be said, upon the evidence, that she was in any fault? This question is, at least, a doubtful one. See The Pennsylvania, [Cases Nos. 10,947 and 10,950.] If she did what it was right to do, and this was done when and as it ought to be done, and her seeing the tug sooner would have only made it more certain, that, acting wisely and skilfully, she would do just what in fact she did, then, in truth, it would be difficult to say that her want of a lookout contributed at all to the collision.

But, this view of the responsibility of the Atlas proceeds upon somewhat dangerous ground. She was in fault. Although her speed, in itself, was not improper, moving at her ordinary and proper speed, in the night, without a lookout, was improper. Such a lookout might, certainly, have discovered the tug earlier, and would have a better opportunity to discover what she was and which way she was going. The evidence is, that, even without lights, a vessel could be seen, that night, at a much greater distance than the tug was seen. When, in fact the pilot saw and reported the tug to the captain, they

were in doubt what the object in view was and what was its course. They did not see her at all until very near. Had a lookout been in the performance of his duty, their information would have been earlier and, presumptively, more full. The act of congress requiring a lookout assumes this, as the general rule. There would have been more time for observation and for deliberation, and I think that early measures by porting would have been taken, which would have tended to avoid the collision. This might even have prevented the faulty attempt of the tug to pass to the southward of the Atlas. The rule is a very important one, and it should be clear that its nonobservance wrought no mischief, before it should be excused. It is difficult to avoid the conclusion, also, that such early sighting of the tug would have subjected the Atlas to the rule requiring her to slow, until it became clear that she could pass safely by. Early precaution is the most useful, and, it is safe to say, that, in such a channel, it was peculiarly important, that, by a vigilant lookout, the Atlas should be apprised, at the earliest moment, when this precaution was called for.

Upon the question raised by the appeal of the libelants, I am disposed to concur with the district court, and upon the grounds assigned in the opinion there delivered. 4 Ben. 27, [The Atlas, Case No. 633.] It is an interesting and important question. I add to what was said in that opinion: The Kate and the Atlas, upon perfectly well settled principles, were, for the reasons above given, bound to contribute to the loss. Had the libelants, instead of joining hands with the Kate, to visit the consequences upon the Atlas alone, brought both into court, to be dealt with upon those settled principles, each must pay one half of the damages to which the libelants were entitled, (unless, possibly, in cases supposable, both of the offending vessels were injured in such unequal degree that an equal apportionment of the loss would give rise to a different equity.) The libelants came into this court with full knowledge of the rules governing courts of admiralty in cases of contributing fault. Those rules gave the Atlas rights of which the libelants could not deprive her, by electing to proceed against her alone. Even if it be conceded that the libelants, if contribution by the Kate could not be enforced, might then have recourse to the Atlas therefor—which concession is said to be called for by the decree made in the case of The Washington and The Gregory, 9 Wall. [76 U. S.] 513, where the point does not appear to have been made, and where all that can fairly be said of the decision is, that the court thought no wrong was done to the libelant by the decree—if, I say, such concession be made, it is still true, that the libelants, by proceeding in this court, eminently a court of equity, could not deprive the Atlas of the protection which results from such a provisional decree; and it is just and equitable that they be held to an election to take the contribution to which, with all the parties concerned before the court, the Atlas would have been subjected. Upon the distinct authorities cited, and the reasons, also, given by the district judge, and, also, because it is in accordance with what is equitable and just, the decree in this court must proceed in affirmance of the decree appealed from, and award to the libelants the one half of the damages reported. As both parties appealed, no costs of appeal should be allowed to either.

[NOTE. An appeal was taken to the supreme court, where the parties duly filed a stipulation agreeing that the collision occurred through the mutual fault of the two steamboats, thereby waiving all questions except the disputed right of libelants to recover for their full loss from the Atlas instead of the moiety decreed them by the circuit court. Mr. Justice Clifford, in delivering the opinion of the court, referred at length to the authorities supporting the principle that the damages should be apportioned where the fault is mutual, and remarked that two pertinent admissions were made in one of the cases, The Milan, Lush. 401, to wit: "(1) That the owner of the cargo, in such a controversy, could recover for his whole loss in an action at law; (2) that the owner of the cargo, in such a case, is to be considered as a perfectly innocent party." The learned justice further said that "nothing is more clear than the right of a plaintiff, having suffered such a loss, to sue, in a common-law action, all the wrongdoers, or any one of them, at his election; and it is equally clear that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss * * * Goods shipped as cargo, and their owners, as in the case before the court, are innocent of all wrong. The owners of the cargo may sue the owners of one of the ships, or both, and they may sue at law or go into the admiralty, at their election, and, having proved their case, they are as much entitled to full compensation in the admiralty as they would have been if they had elected to pursue their common-law remedy, saved to them by the proviso contained in the ninth section of the judiciary act. 1 Stat. 77. Co-wrongdoers, not parties to the suit, cannot be decreed to pay any portion of the damage adjudged to the libelant. Nor is it a question in this case whether the party served may have process to compel the wrongdoers to appear and respond to the alleged wrongful act." The decree was reversed, and the cause remanded, with directions to reverse the decree of the district court, and enter a new decree in favor of the libelants for the entire damages as ascertained by the commissioner. The Atlas, 93 U. S. 302. See, also, The Juniata, Id. 340; The Virginia Ehrman, 97 U. S. 309; The City of Hartford, Id. 325; Leonard v. Whitwill. Case No. 8,261; The City of Paris, Id. 2,767; The Eleanora, Id. 4,335; The Charles Allen, 11 Fed. 319; The Golden Grove, 13 Fed. 699; The Wm. Murtagh, 17 Fed. 263; The Canima, Id. 272; The St. Lawrence, 19 Fed. 331; The Annie Williams, 20 Fed. 868; Gray v. Philadelphia & R. R. Co., 24 Fed. 169; The Troy, 28 Fed. 864; The Galileo, 29 Fed. 540.]

ATLAS, The. See Case No. 2,769.

Case No. 635.

ATLAS NAT. BANK v. F. B. GARDNER CO. et al.

[8 Biss. 537;[1] 19 N. B. R. 213.]

Circuit Court, E. D. Wisconsin. June, 1879.

CORPORATION—BANKRUPTCY OF STOCKHOLDER AND OFFICER—OFFICER DE FACTO—POWER TO ACT.

1. The individual bankruptcy of a person, who is a stockholder in, and a director and officer of, a corporation which is not in bankruptcy, does not incapacitate him from exercising his functions as such officer of the corporation, nor render inoperative and void as to third parties the acts and conveyances of the corporation done and executed through him as its representative.

2. Where by the law under which a corporation was created, it was required that the directors and officers should be stockholders and be elected for one year, and the president became bankrupt and subsequently acted as the president of the corporation: *Held*, that notwithstanding his bankruptcy, he was the president de facto of the corporation, and as such his acts were, in the absence of fraud, the acts of the corporation.

In equity. This was a creditor's bill. The leading facts in the case were these: In 1876, and for a considerable time prior thereto, the F. B. Gardner Company was a corporation organized under a law of Wisconsin, owning a large quantity of real estate and personal property, and was engaged in the manufacture of lumber, at Pensaukee, in Wisconsin. In 1875 the corporation executed a mortgage to one White upon a large part of its lands and real property to secure certain indebtedness, which mortgage was afterwards transferred to and held by complainant, and was during the year 1876 foreclosed in this court, the bill to foreclose being filed March 11, 1876. After sale of the mortgaged property and at the October term, 1876, a judgment for a deficiency amounting to twenty-one thousand one hundred and six dollars and eighteen cents was rendered in favor of the complainant against the defendant company, upon which execution was issued and returned nulla bona. On the 10th day of March, 1876, the stock of the defendant company consisted of five thousand shares of one hundred dollars each; of which the defendant, F. B. Gardner, held four thousand nine hundred and eighty-nine shares, one John Spry held ten shares and one J. C. Gardner held one share. These three parties constituted the board of directors; F. B. Gardner being the president and J. C. Gardner being the secretary of the company, and until the 4th day of September, 1876, the books of the corporation showed the ownership of stock as above stated. On said 10th day of March, 1876, a petition for the adjudication of F. B. Gardner as a bankrupt was filed in the district court of the United States for the northern district of Illinois, and on the 28th day of March, he was adjudicated bankrupt. On the 29th day of April, 1876, an assignee in bankruptcy was appointed. On the 2d and 31st days of August and the 2d day of September, 1876, the defendant company, F. B. Gardner acting as president and J. C. Gardner acting as secretary, made conveyances of numerous tracts and parcels of lands, then owned by the company and not covered by complainant's mortgage, to E. O. Grosvenor, H. C. Durand, Herman Ruther, Elijah M. Haines, George Schecht, Geo. L. Tracy, Martin Ryerson, E. Meyer, the heirs of Robert McMullen and one Mrs. Ross (all of whom are defendants in the present bill), to secure the payment of indebtedness then owing by the company to said parties respectively, the conveyance to Durand being in trust for the benefit of other parties who were then creditors of the corporation, and who were also defendants in this bill; all of which conveyances purported to be and were executed as the deeds of the corporation. On the 4th day of September, 1876, there was a sale at public auction by the assignee in bankruptcy of F. B. Gardner of the four thousand nine hundred and eighty-nine shares of stock he held in the defendant corporation, such sale having been originally advertised to take place on the 3d day of August, and having been postponed until the 4th day of September. It was claimed by complainant that the adjudication of F. B. Gardner as a bankrupt by the district court in Illinois, the appointment of an assignee and the assignment to him of the bankrupt's estate on the 29th day of April, 1876, operated to extinguish his ownership of the stock in the defendant company, and to transfer such ownership to the assignee, and therefore, to disable Gardner thereafter to act as a director and officer of the corporation, and as a consequence take from him the power to make for the company the conveyances of property before mentioned; that the parties receiving the conveyances had knowledge at the time, that Gardner had been adjudicated a bankrupt; that such conveyances were made when the defendant company was insolvent, and when it was expected that there would be a deficiency arising on the sale of the premises covered by complainant's mortgage which was then in process of foreclosure, and that these conveyances were fraudulent and void.

The defendants answered the bill, alleging that the conveyances of real estate to them by the defendant company were made to secure the payment of just and bona fide indebtedness then owing to them, and that the same were made in good faith, and denying all charges of fraud or fraudulent intent in their several transactions with the defendant corporation.

W. T. Burgess, for complainant.
Luther S. Dixon, for defendants.

After disposing of other questions in the case, the opinion of the court proceeded as follows:

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

DYER, District Judge. There remains for consideration another question, and which was the principal one discussed at the bar, namely, the effect of the bankruptcy of F. B. Gardner upon his power to act in the transaction sought to be anulled, as a director and as the president of the defendant company. The position is taken by complainant's counsel that the effect of the bankruptcy proceedings instituted against Gardner, in Illinois, in March, 1876, was to transfer his ownership of stock in the company to the assignee in bankruptcy, and that thereafter he was disqualified from acting as an officer of the company, and consequently that he had not the power to make for and in behalf of the company the conveyances to the defendants which the bill seeks to set aside, [nor to make the settlement with Baker on the 31st of August, 1876.][2] The testimony does not show when the stock held by Gardner came into the actual possession and control of his assignee in bankruptcy, but it tends to show that after the bankruptcy of Gardner, the business of the corporation, so far as it had business to do, proceeded as it had done before. The stock was advertised to be sold by the assignee, as part of the assets of Gardner, on the 3d day of August, 1876; but the sale was postponed to the 4th day of September. It is charged that this postponement was procured by Gardner, and as part of a scheme to enable him to consummate the transactions complained of, before there should be a sale. The testimony I think fails to sustain this charge. The only testimony on the subject is that of Gardner himself, who says that some of his creditors suggested a postponement in order to ascertain something further about the value of the stock; that he had some idea of bidding on the stock, and that he made suggestions to others to bid; that he thought the stock would bring more if other parties were prepared to bid, but they did not then interest themselves in it, and the sale was adjourned thirty days. He says further, that he might have had some influence in having the sale postponed, but the circumstances as they are disclosed by the testimony fail to establish a fraudulent purpose in procuring the postponement.

It seems not very material why the sale was adjourned, if the position is sound that by virtue of the bankruptcy proceedings, and by operation of law, Gardner was divested of the right and power to act as an officer of the defendant company, after the assignment in bankruptcy. Now the question fairly stated is, does the individual bankruptcy of a person who is a stockholder in and director and officer of a corporation which is not in bankruptcy, to such extent incapacitate him from exercising his functions as such officer of the corporation as to render inoperative and void, as to third parties, the acts and conveyances of the corporation when done and executed through him as its representative. A further feature of the case, in connection with the question, is, that Baker at the time of his settlement, and most of the other defendants at the time they took their conveyances and mortgages, had knowledge or information in a general way that Gardner was in bankruptcy, some of the parties being creditors of both the corporation and Gardner. By the statute under which the corporation was organized, it is provided that the stock, property, affairs and business of the corporation shall be under the care of at least three directors to be chosen annually by the stockholders, and who shall be stockholders, and shall hold their offices for one year, and until others shall be chosen in their stead. Further, that the directors shall choose one of their number president and such other officers as may be required, who shall hold their offices one year, or until a majority of the stockholders choose others in their stead. Power is given the corporation to acquire, mortgage and dispose of real and personal property, and the stock is declared to be personal property, transferable only on the books of the corporation. And it is to be observed, that there is no statutory declaration of a vacancy in the office if an officer ceases to be a stockholder. The question that is presented for solution may perhaps, in view of the manner in which it arises, be said to be one of first impression. In the absence of fraud, I can hardly think that its determination is to be affected by the fact that the third parties dealing with the corporation knew that Gardner was in bankruptcy. Complainant's case must stand or fall upon the proposition that Gardner had not power to act as a director or representative of the corporation, because the ownership of his stock had passed to his assignee in bankruptcy, and therefore that his acts were void. If the affirmative of this proposition be sound, it would seem that the individual bankruptcy of Gardner absolutely vacated his office of director and president of the corporation, so that he could not thereafter be such officer either de jure or de facto. I cannot bring my mind to such a conclusion. For even if the legal title to the stock passed to the assignee in bankruptcy by virtue of the bankruptcy proceedings, still, up to that time Gardner had been an officer of the corporation, duly chosen. His term of office had not yet expired. The statute under which the corporation was created, provided that he should hold his office till another should be chosen in his stead, and it would seem that, so far as third parties were concerned, if he did not continue to be an officer de jure, he was thereafter an officer de facto, whose acts would be binding on the corporation, and would be the acts of the corporation. It is true the statute of incorporation provides that the officers shall

[2] [From 19 N. B. R. 213.]

be stockholders, but that provision is directory, and, as before observed, there is no statutory declaration that a vacancy shall be deemed to exist if the officer, before his term expires, shall cease to be a stockholder. It has been held that one who is elected an officer in a corporation by the body in which the power to elect is vested, but by a less number of that body than the charter authorizes, is an officer de facto, and that his acts, as respecting third persons, are valid.

In the case of Bank of U. S. v. Dandridge, 12 Wheat. [25 U. S.] 64, where it appeared "that the directors of the parent bank, empowered to establish offices of discount and deposit, subject to such rules and regulations as they should deem proper, passed a by-law, directing 'that the cashier of each office shall give a bond * * * with two or more approved securities with condition for his good behavior and faithful performance of his duties to the corporation,' and a fundamental article of the constitution of the bank directed 'that each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond,' etc., it was held that a cashier appointed and permitted to act in his office, without giving such bond, or any bond whatever, was a legal agent of the corporation; that his acts and contracts within the scope of his authority were valid, whether in favor of the bank or against it in favor of third persons, and that the charter and by-law were directory in this particular, and the taking of the bond, not made a condition precedent. It was admitted, however, that if the statute had prescribed that the cashier should not be deemed for any purpose in his office until an approval of his official bond by the proper board, his acts would have been utterly void unless his bond had been given and approved." Ang. & A. Corp. § 285. Just so, it may be said, would be the fact in the case at bar, if the statute declared that upon ceasing to be a stockholder, the office of director should be deemed vacant. Before his bankruptcy, Gardner was an officer de jure; afterwards he continued to act under color of right, and so was an officer de facto. If a corporation elect a person a director who is ineligible to that office and permit him to act as such, the corporation will be bound by the acts which he performs within the scope of the authority possessed by a director. Despatch Line, etc., v. Bellamy Manuf'g Co., 12 N. H. 205. And as his acts cannot be questioned by the corporation, they cannot be by those who claim under the corporation, or collaterally. And it is to be borne in mind that the power of Gardner to act as an officer of the corporation is questioned, not by direct proceeding to vacate his office, but by a party who stood originally in the position of secured creditor, in a proceeding against other creditors, whose demands, presumably bona fide and valid, have been secured through the acts and instrumentalities, the validity of which is questioned. And so far at least as such creditors are concerned, their equities seem to be equal to those of complainant, provided their transactions with the corporation are untainted by fraud. On the whole, the only satisfactory conclusion I can arrive at is, that, notwithstanding his bankruptcy, Gardner was director and president de facto of the corporation, and as such, in the absence of fraud, the acts performed by him were the acts of the corporation, and that the transactions of the corporation, consisting of the settlements, conveyances and mortgages in question, were valid and should not be disturbed. Bill dismissed.

ATLEE, (NORTHWESTERN UNION PKT. CO. v.) See Case No. 10,341.

Case No. 636.

ATLEE v. POTTER et al.

[4 Dill. 559;[1] 11 West. Jur. 617.]

Circuit Court, D. Iowa. 1877.

REMOVAL OF CAUSES—ACT OF MARCH 3, 1875—TIME FOR REMOVAL.

1. The act of congress of March 3, 1875, [18 Stat. 471,] § 3, requires the petition for the removal of causes from the state court to the circuit court to be made "before or at the term at which the cause could be first tried, and before the trial thereof." The Code of Iowa provides that law actions "shall be tried at the first term after legal and timely service has been made:" *Held*, that this provision limits the time in Iowa at which the application for the removal of law actions, under the act of March 3, 1875, can be made.

2. Accordingly, an application in Iowa, by the defendants, for the removal of a law action which was not made at the return term, nor at the next term, when the defendants entered their appearance, nor yet at the next succeeding term, is not in time, under the act of March 3, 1875, although it was made at the term at which the answer was filed and the issues of fact completed.

3. In view of the specific provisions of the Code of Iowa, definitely fixing the time for the trial of law actions, the time for the removal, under the act of March 3, 1875, cannot be extended by the circumstance that in point of fact the issues are not made up at the first term. It might be different in the absence of statutory regulation as to what shall be the trial term.

[Cited in Chrissenger v. Democrat, 22 Fed. 754.]

At law. On motion to remand cause to the state court. The petition, which was at law, was filed in the state court November 25, 1875. At the August (1876) term of the state court, the defendants appeared and moved for a more specific statement of the cause of action. The motion was sustained, and the case continued. At the February term, 1877, the plaintiffs filed an amendment to their petition, and the defendants demur-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

red, and at the same term the demurrer was overruled, and the cause went over. The defendants filed an anwer in vacation, May 9, 1877. No replication was necessary, and the answer completed the issues. At the next term, viz., the August term, 1877, an application for removal to this court was made by the defendants, under the act of March 3, 1875, on the ground of citizenship, and the removal was ordered. In this court the plaintiffs move to remand the cause to the state court, because the application for the removal was not made in time.

B. J. Hall, for motion.

E. S. Huston, contra.

Before DILLON, Circuit Judge, and LOVE, District Judge.

DILLON, Circuit Judge. This case was removed to this court by the defendants on the ground of citizenship, under the act of March 3, 1875, [18 Stat. 471.] The only question presented is whether the removal was applied for in time. The application for removal was not made at the term at which the original notice was returnable, nor at the term at which the defendants entered their appearance, nor yet at the next succeeding term, but was made at the term at which the answer was filed and the issues completed. The action is one at law, and not in equity.

The Code of Iowa, in respect of the time of the trial of actions, contains the following provisions: "Section 2744. Except where otherwise provided, causes shall be tried at the first term after legal and timely service has been made. Section 2745. The appearance term shall not be the trial term for equitable actions, except those brought for divorce, to foreclose mortgages, and other instruments of writing whereby a lien or charge on property is created, or to enforce mechanic's liens." Section 2744, supra, is the one which applies to this case, and it not being elsewhere otherwise provided, the cause was triable at the first term after due and timely service of the original notice (which stands in the place of a summons) had been made. It was therefore triable at the August term, 1876. The act of congress of March 3, 1875, requires the petition for removal to be made "before or at the term at which the cause could be first tried, and before the trial thereof."

The cause could, under the local statute above referred to, have been put at issue one or two terms before this was actually done, and it could have been tried, and under the Iowa statute it was triable, at the term at which the issues could have been made up. The provision of the Iowa statute which has been referred to, definitely fixing the term "at which the cause could be first tried," limits the time at which the application for the removal can be made. The time for the removal cannot be extended under the specific provisions of the Code of Iowa, by the circumstance that, in point of fact, the issues are not made up at the first term. A different rule might apply in the absence of any statutory provision as to what shall be the trial term.

The act of 1875 gives the right of removal to either party on the ground of citizenship, without requiring prejudice or other cause to be shown, and it was evidently the intention of congress, by the language quoted, to require the party to apply for the removal at the trial term, even if the cause should not be in fact put at issue, or be actually reached for trial at that term.

The effect of a removal, ordinarily, if not always, is to occasion delay, and it was to prevent this, as far as practicable, that this provision in the act of March 3, 1875, was enacted. Hence it gives the right to apply for the removal before the term, and requires that it shall be made, not simply before the time when the cause can be tried, but before or at the term at which the same can be first tried. Under the Iowa statute, the first term after due service is the trial term for law actions. In equity causes, with the exceptions specified, the first term is the appearance term, and not the trial term. In law actions the removal must be applied for at the trial term, whether the issues are then made up or not. This is all that it is now necessary to decide.

The conclusion we have reached has the merit of fixing a certain and definite rule as to the time in which the application for the removal of law actions in this state must be made. It has the added merit of preventing delay, which experience shows to be one of the ordinary abuses of the right of removal. It has, also, the further merit of preventing a party from experimenting with the state court by demurrers and motions, with a view to remain if the outlook is favorable, or to apply for a removal if that course offers a more hopeful prospect. Under the act of July 27, 1866, [14 Stat. 369,] and March 2, 1867, [14 Stat. 558,] both of which, as carried into the Revised Statutes (section 639), are probably yet in force, the removal may be applied for down to the time of final trial or hearing, but the right of removal thereunder is much more restricted than under the act of 1875, and there is more reason for the enlarged time than exists under the last named act, which extends the right to either party, simply for the asking, if the cause is one which is removable at all. The motion to remand is sustained.

LOVE, District Judge, concurs.

Cause remanded.

NOTE, [from original report.] As to the time in which equity suits in Iowa must be removed under the act of March 3, 1875, see Palmer v. Call, [Case No. 10,686.] As to the time in which application must be made, under the act of March 3, 1875, to remove suits pending when that act was passed, see Baker v. Peterson, [Id. 776.]

Case No. 637.

The ATTACAPAS.

[3 Ware, 65.] [1]

District Court, D. Massachusetts. 1856.

SALVAGE—DERELICT—PRINCIPLES UPON WHICH SALVAGE IS ALLOWED.

1. Any vessel is not derelict until abandoned by the master, without an intention of returning and resuming the possession.

2. Principles on which salvage is allowed. Twelve hundred dollars given under the circumstances of this case.

In admiralty.

Mr. Jewett, for libellants.
Mr. Prince, for claimants.

WARE, District Judge. The Attacapas, a brig of about 149 tons burthen, sailed from Port Haven, on the North river, with a ship's company in all of five hands, on the 17th of November last, having a cargo of 238 tons of coal, bound for Bangor. Her ground tackle was good but her running rigging was indifferent, though thought to be sufficient for the voyage. On her passage down the river and through the sound, she met with a good deal of bad weather and leaked badly, requiring to be pumped once in half an hour, when the sea was rough, and once an hour in favorable weather. She stopped several times on her way, and in running down Cape Cod she came to anchor off Newcombe Hollow, in about three fathom water, Nov. 24, at about 8 o'clock A. M., the wind then blowing a gale. Another vessel at the time was lying near her, but, under the pressure of the gale, soon dragged her anchors and went to sea. The crew went below to breakfast, but soon finding the vessel drifting they let go another anchor. The condition of the vessel was now undoubtedly one of great danger. She was so deeply laden that in a smooth sea the water was within three or four inches of the level of her deck, and in rough weather it constantly washed over. In the high waves she was in danger of striking the bottom where she lay, and her position was so near the outer sand bar, that the heavy ground swell might have carried her upon it with the wind, as it was off shore, and if it should haul out she would be very sure to ground on the bar. The master finding his peril, lying as he did on a treacherous coast, determined to weigh anchor and proceed to sea, but such was the strength of the gale, that the crew were unable to raise their anchors. It was then determined, for the safety of all, after putting the brig in the best condition to ride out the gale, to leave for the shore. The crew took out their clothes, bedding, and some other articles, and trusted themselves to the boat. In passing through the breakers the boat capsized and was destroyed, but the crew escaped to land, the mate badly wounded and two of the men slightly. Their clothing drifted on the beach. This was between ten and eleven o'clock, and by this time, it being known that a vessel was lying off in distress, the salvors and a number of other persons were collected on the shore. Two of the salvors, Rich and Swett, took the master and crew to their house, gave them a dinner and furnished them with dry clothing. After dinner and again in the evening, the master and crew with some of the salvors, and at twelve o'clock, Rich, Swett, and some others without the crew, went to the beach, but such was the state of the weather that it was not safe to attempt to board the brig. From this time the evidence becomes contradictory, and, to a considerable extent, irreconcilably so. Without going into a critical analysis of the great volume of testimony, and without entering on a fruitless attempt to conciliate what is irreconcilable, or undertaking the invidious office of comparing and deciding on the credibility of conflicting statements, I will give what appears to me to be the fair result of the whole evidence.

The salvors with the master and crew assembled on the beach early Sunday morning, and the wind had now so much moderated that it was determined to board the vessel in a whale boat belonging to Rich. Rich took the command, and the boat being prepared, six persons, as many as it was supposed could safely go in her, and among whom was Capt. Haskell, were arranged in their places ready for a favorable opportunity to pass the breakers. The orders were to jump in when the word was given. At that moment Capt. Haskell's attention was diverted to some person on shore, and as the launching of the boat was the work of an instant, he was left behind. But, after they had passed the breakers, Rich hailed Haskell and offered to go back in the boat and take him, but the noise of the water prevented his being heard. After boarding and examining the vessel Swett was left on board, and Rich, with the rest of the boat's crew, returned to the beach. At this time there were from fifteen to twenty persons, including the crew, present. Rich now proposed to return with a company of eight men and attempt to save the brig, but he said that having boarded her he should not give up his claim to salvage. The crew all declined, and of the whole company present only four volunteered to engage in the enterprise. Capt. Haskell, finding his crew failed him, now told Rich that he might take the vessel and do the best he could. He returned with four men who, with himself and Swett, six in all, with a good deal of hard labor, attended beyond doubt with considerable danger, after being prevented, by a change of the wind, from making Province Town harbor, navigated the ship to Boston and immediately gave notice to the owners in Salem.

The libellants claim salvage as for a der-

[1] [Reported by George F. Emery, Esq.]

elict, but the vessel, I think, cannot be considered as a derelict in the strict and proper sense of the word. The master never abandoned the spem recuperandi until, his crew failing him, he consented to transfer his authority to Rich. The claimants, on the contrary, deny all right to salvage on the ground that the master was wrongfully dispossessed by the salvors, and that they obtained possession by a tort, not to say a crime. This ground of defence is entirely displaced by the evidence. The salvors, in my opinion, performed a highly meritorious service, and there was nothing in their conduct that should debar them from a fair reward. What that is, must be determined by all the circumstances of the case taken in connection with the principles on which courts award salvage. As the vessel lay Sunday morning, with the wind as it then was, leaking badly and the water ankle deep on deck, she had but a small chance of surviving the day without relief, and as the wind veered around in the course of the day, it seems to be all but a certainty that she would be lost on the bar. The crew refused to go on board unless a new boat was obtained for the vessel. None could be obtained nearer than Wellfleet, and it was far from certain that one could be had there ready for the use of the vessel before the next day. Such appears to me to be the real state of the case as well as I can infer it from the great mass of testimony, often contradictory, and mostly coming from witnesses on both sides under influences that more or less sway the minds of most men, but some of it from disinterested and unsuspected sources. That anything was saved for the owners, appears to me with a high degree of probability, was due to the salvors. That the attempt to save the vessel appeared at the time to be an enterprise of very considerable danger and hardship, I think, may be safely inferred from this, that out of about twenty persons present, all accustomed to the sea, only four could be induced, by the prospect of a salvage reward, to engage in the undertaking. The service, though laborious and hazardous, was not of long duration. They started from Newcombe Hollow in the morning and arrived at Boston the following night. The vessel was without provisions, and the personal expense of the salvors must have been something, and to these should be added the expenses of vindicating their claim, which has been strenuously resisted from the beginning. And a line of defense has been adopted by the claimants, which has not only led to expensive and protracted litigation, more than a week having been consumed at the hearing; but which, if sustained, would have seriously compromised the character of the salvors.

The general principle which governs courts of admiralty in awarding salvage is to give a liberal reward, not merely a compensation pro opere et labore, but such a reward as will be an inducement to men accustomed to the dangers of the sea, to adventure on these perilous enterprises, by which not only property but often lives are saved. For saving life, at whatever risk, the courts can give no reward, for there is no common measure between life and money; but the merit of saving property may be measured by a pecuniary compensation. Another reason for liberality is to make the compensation such as will in some measure guarantee the honesty of the salvors, so that they shall not be tempted to pay themselves by the embezzlement of property left without protection; and farther, to ensure the good faith of salvors, embezzlement is always visited with the entire forfeiture of salvage. There is not, indeed, much danger of embezzlement of a cargo like this. But if I do not misjudge, there is another consideration belonging to this case that ought not to be overlooked. This vessel was rescued from the perilous shores of Cape Cod, a coast as much dreaded by mariners as the infames scopulos Acroceraunia of antiquity. For the interests of humanity as well as those of commerce, it is certainly desirable that the inhabitants of such a coast should understand, that if they will hazard their lives in relieving vessels in distress, they will not be dismissed with a parsimonious reward, such as will the next time put them to a calculation of the relative value of a gallant and hazardous salvage and the plunderings of a wreck.

There is, in all cases, a difficulty in holding the scales exactly even in salvage, and this is increased when it occurs on a dangerous coast where frequent losses happen, and where the inhabitants calculate to gain part of their living by acting as salvors of vessels in distress. They engage in the service for profit, and the roughness and dangers incident to the service, contribute to give them, together with the expectation of a reward, somewhat of a mercenary character, as well as one of gallantry. Habit comes in to make them put a low estimate on the personal dangers, both of the crew and themselves, compared with the expected reward. But they never forget that, and the owners, though they might be generous when the danger is before them, when it is passed and their goods are saved, remember that what is saved after salvage is paid is saved for them.

The value of the vessel and freight are agreed to be $3,500, and, with these views, I have come to the conclusion to allow $1,200 salvage, with costs taxed against the residue of the vessel and cargo. The salvage is divided into fifteen shares and to be distributed as follows: To Capt. Rich, who was the leader of the enterprise, and furnished his boat for the service, four shares; to Capt. Swett, who was the first that boarded the vessel in the morning, three shares; and to the other salvors, two shares each.

Case No. 638.

ATTERBURY et al. v. GILL.

[2 Flip. 239;[1] 3 Ban. & A. 174; 13 O. G. 276; 10 Chi. Leg. News, 22; 6 Amer. Law Rec. 193.]

Circuit Court, N. D. Ohio. Oct. Term, 1878.

ABATEMENT AND REVIVAL—DEATH OF PARTY.

Case is not revived unless order to that effect. Action against administrator survives, if there has been an infringement; the latter being held as a trustee for the owner.

[Cited in Atwood v. The Portland Co., 10 Fed. 284.]

[See Root v. Lake Shore & M. S. Ry. Co., 105 U. S. 189.]

In equity. Bill filed [by James S. and Thomas B. Atterbury] against respondent [Joseph G. Gill, administrator of Andrew J. Beatty, deceased,] for infringement of patent, [No. 39,027,] which was on an improved jelly glass. Respondent answered. Testimony was taken and a hearing had. Complainant had a decree establishing the validity of the patent and also the fact of infringement by defendants. There was a reference to commissioners to take an account of profits and damages. The respondent died before the account was taken. After expiration of rule day to answer a bill of revivor under rule 56, the administrator of respondent filed a demurrer to that bill, when motion was made by complainant to strike such demurrer from the files. Rule to amend had now expired, and prior to the filing of the demurrer no order had been made reviving the suit against the administrator, nor had the administrator obtained leave to file the demurrer. Heard on demurrer to bill of revivor and motion to strike demurrer from the files. [Demurrer overruled, and order of revivor entered.]

Bakewell & Christy, for plaintiff.

Prentiss, Baldwin & Ford, for defendant.

WELKER, District Judge. Under rule 56, the case was not revived unless an order to that effect was made, and in this particular case the demurrer was allowed to stand as if filed on rule, and the motion was overruled. The demurrer raises the question of the survival of actions for infringement of patents, against the administrator of the infringer after a decree of infringement and reference to master or commissioner to assess amount for which decree was to be entered.

1. Although as a general rule, actions for torts do not survive against the representatives of deceased defendants pending the suit, yet these proceedings in equity for infringement of patents are not strictly proceedings for torts. The respondent who infringes a patent is held in equity as a trustee of the owner of the patent and compelled to account to him for the profits realized from the manufacture of the infringing machine or product. The infringer is also liable to the patentee for damages for such infringement, and both of these causes of action are combined in the case in equity, as well as the prayer for perpetual injunction.

2. In this case, the decree having settled the question of infringement, and the case having been referred to the master, before the death of respondent, to ascertain the amount for which the decree should be rendered, which will embody either both or one of these claims of claimant, therefore the action does survive. The demurrer is overruled and order of revival entered.

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

ATTERBURY, (MARRETT v.) See Case No. 9,102.

ATTILA, The, (KNIGHT v.) See Case No. 7,881.

ATTORNEY GENERAL, (CHICAGO, B. & Q. R. CO. v.) See Case No. 2,666.

Case No. 638a.

ATTORNEY GENERAL v. RUMFORD CHEMICAL WORKS.

[This case, decided by the circuit court of Rhode Island, May, 1876, is reported in 32 Fed. 608.]

ATTORNEYS' FEES IN CIVIL CASES. (See Costs in Civil Cases, Append.)

Case No. 639.

ATWATER v. HADLEY et al.

[Syllabi, 117.]

Circuit Court, D. Minnesota. Dec. Term, 1876.

EQUITY—RESCISSION AND CANCELLATION OF CONTRACTS—FIDUCIARY RELATION—UNDUE INFLUENCE.

The rule that courts will carefully scrutinize all transfers of property between those occupying fiduciary relations, and vacate any such transfer that is not entirely fair and equitable on the part of the person holding a position of trust and confidence, applied to the facts in this case.

In equity. Julinah P. Atwater was the owner in June, 1875, of notes and mortgages of the value of $3,100, which she placed in the hands of "Hadley's Law and Collection Agency" for collection; R. S. Hadley assuming to act for the same. On the death of one Seely, a brother-in-law, she claimed to own with her brothers and sisters an interest in the farm and farm property previously occupied by the deceased. A claim to the same was also made by the father and brothers of deceased. Propositions and consultations for settlement were frequently had and made during the summer of 1875, and for an amicable adjustment between the claimants, in which R. S. Hadley participated, acting as

the attorney and adviser of Julinah P. Atwater representing herself, and the interest adverse to the Seely heirs. C. W. Hadley acted at one time in giving advice to Julinah P. Atwater, and in July the firm of Cogswell & Johnson were also employed as counsel to aid Julinah in a settlement. No arrangement was consummated, although concessions were made by the Atwater claimants, and on the night of July 30th or 31st, Julinah had agreed to an adjustment whereby the interest she represented would be satisfied with the amount of $2,500, and a contract on that basis was ready to be prepared for execution, which was finally objected to by the Seelys. When this last interview had broken off, it was communicated to the plaintiff and her brother, that a purchase of this adverse interest would be made by C. W. Hadley for the sum of $2,500, including the notes of the value of $3,100, and the claim to the other property represented to be of the value of about $5,000. This purchase was finally completed, and as it appears from the testimony, R. S. Hadley was a party to the purchase, although not appearing in the papers drawn up. He and C. W. Hadley were to take the property upon the following terms arranged between themselves: R. S. Hadley was to contribute $1,300, taking as his share the notes and mortgages admitted to be of the value of $3,100, and C. W. Hadley to have the interest in the land for the sum of $1,200. The terms of the sale were $1,000 cash, the notes and mortgages to be assigned to C. W. Hadley immediately, and a certificate of deposit in the First National Bank of Owatonna for the sum of $1,500, payable when a quit claim deed was delivered to the bank, executed by the Atwaters, brothers and sisters, and also a power of attorney from Julinah to C. W. Hadley to take possession of the farm and other property. The $1,000 cash was paid, and the certificate of deposit, as above, specifying on its face the conditions, was given to the plaintiff, and the other papers were drawn up and taken to be executed by the other parties who were absent. It appears that this sale was not entirely satisfactory at the time of the transfer of the notes and mortgages by the plaintiff, and is charged to have been assented to on account of the anxiety of mind and distress the plaintiff was in from the repeated failures to accomplish an amicable adjustment with the Seely heirs, and from apprehension of a criminal proceeding being instituted against her by these heirs. Cogswell & Johnson were not consulted in regard to this purchase by the Hadleys, and whenever their advice had been previously given in regard to the manner of a settlement with the Seely heirs, they had not approved of any concessions being made by the plaintiff of her rights, and of those of her brothers and sisters to the Seelys; and they regarded her claim undoubtedly valid to all the property. C. W. Hadley in his interview with the plaintiff gave her to understand that the Seely heirs could recover from her the notes and mortgages which she owned, and that there had been so much talk against her that she did not stand very well in the community. He also intimated that if the Seelys had him for their adviser, he would find a way to obtain possession of the property. R. S. Hadley at the time of the transfer of the notes and mortgages expressed himself as regretting the purchase by his son C. W. Hadley, when in fact he was a party to the purchase, as above stated. The plaintiff after the bargain was closed paid the "Hadley Agency" $50 for services rendered as her attorneys and advisers. She seeks in this suit to set aside this sale to the Hadleys.

It is urged by the defendants: 1st. That the fiduciary relation between the parties had ceased when the purchase was made. 2nd. That the sale was a fair and equitable one, and made by the plaintiff with a full knowledge of all her rights, and with no idea of obtaining any advantage over her on the part of the defendants.

Chas. A. Clark, for plaintiff.
Gordon E. Cole, for defendants.

NELSON, District Judge. It must be conceded that the relationship of attorney and client, or principal and agent, existed, and was so understood by the parties, up to the time of the purchase. The burden is on the defendants to establish the fairness and equity of the transaction. The careful scrutiny which is bestowed by courts upon sales of this character between persons occupying fiduciary positions and their confidants is in accordance with public policy to prevent public mischief. The testimony in this case in my opinion brings it within the principle where the strict rule should be applied, and calls upon the defendants to establish the following characteristics without which this transaction cannot be sustained. The sale must have been fair, the price adequate, and the conduct of the defendants equitable; unless such was the case, the decision cannot be doubtful. That the price paid is wholly inadequate must be conceded. The value of the notes and mortgages is admitted to be $3,100, and the title to the realty was evidently considered good by the defendants. The letter of C. W. Hadley written immediately after the sale expresses a disappointment that the deed upon which it was expected the plaintiff's title could be enforced failed to be in conformity with the laws of the state of Minnesota, and shows that at the time of the purchase he regarded it conclusive upon the title. R. S. Hadley participated in the last effort between the plaintiff and the Seelys to settle the controversy, and it is stated by her that she would have yielded to a small demand on the part of the Seelys which broke up the interview, had not opposition been made by him. The defendants knowing the firm of Cogswell &

Johnson had been employed to aid in bringing about an amicable arrangement with the Seelys, never informed them of a contemplated purchase of the property, and did not consult at all with them as to the fairness and equity of the transaction. It was incumbent on the defendants to have fully communicated to these counsel their determination, and a failure to do so was unfair to the plaintiff, and not in accordance with the relationship existing between the parties. There can be no doubt that an advantage was obtained by the defendants, and so regarded by them.

The plaintiff regretting the step taken, offered to pay a bonus for the surrender of the notes and mortgages and cancellation of the sale, but this was declined for the reason that the notes had been taken by R. S. Hadley to be sold, and had at that time probably passed out of the control of the defendants or either of them. The testimony conclusively shows this statement to have been untrue. Without further comment I am satisfied upon a full examination of the evidence the complainant is entitled to the relief asked for. Authorities consulted: 9 Pick. 231; Gibson v. Jeyes, 6 Ves. 266; 40 Barb. 521; 2 Hare, 60; White & T. Lead. Cas. Eq. (3d Amer. Ed.) 202; 1 Story, Eq. Jur. §§ 311–314; 63 Me. 17; 3 Edw. Ch. 369; Howell v. Ransom, 11 Paige, 538.

ATWILL, (FERRETT v.) See Case No. 4,747.

Case No. 640.

ATWILL v. FERRETT et al.

[2 Blatchf. 39.][1]

Circuit Court, S. D. New York. Dec. 2, 1846.

EQUITY PLEADING—SPECIAL DEMURRER — MULTIFARIOUSNESS—DISCOVERY—COPYRIGHT—AUTHORSHIP — ACT FEB. 3, 1831 — COMPILATION — INFRINGEMENT—REMEDIES — ACTION ON THE CASE —DAMAGES.

1. A special demurrer to a bill in equity is insufficient unless it points out specifically, by paragraph, page, or folio, or other method of reference, the parts of the bill to which it is intended to apply.

[Cited in Chicago, St. L. & N. O. R. Co. v. Macomb, 2 Fed. 20.]

2. Where an action at law for the infringement of a copyright was brought against G., and then the plaintiff filed a bill in equity against G., F. and A., charging them, as copartners, with having committed the acts for which G. was sued at law, and seeking a discovery from all of them in aid of the suit at law; *Held*, that G. could not, by demurrer, object to the bill as multifarious in respect to his co-defendants, especially as it appeared by the bill that they resided out of the jurisdiction of the court.

3. It seems, too, that the charge in the bill that the defendants committed the acts complained of as copartners, would be an answer to the objection of multifariousness, provided the bill contained other proper allegations connecting them with the object and purpose of the discovery prayed.

4. A defendant cannot be compelled to make discoveries in answer to a bill which seeks to enforce penalties and forfeitures against him by means of such discoveries.

5. Where a bill in equity claimed a forfeiture of pieces of music under section 7 of the act of February 3, 1831, (4 Stat. 438,) and also sought a discovery from the defendants of the number of pieces printed by or for them, and of the number on hand: *Held*, that the bill was bad, on special demurrer.

6. If the forfeiture had been waived in the bill, the discovery might be compelled in aid of the recovery of damages in a suit at law.

7. And it seems that, on such discovery, equity might compel the defendants to deliver up to the plaintiff the forfeited copies.

8. But the defendants cannot be directly required to convict themselves of the act which carries with it the forfeiture.

9. The objections which may be taken by general demurrer to a bill founded on a copyright, and seeking a discovery in regard to its infringement, in aid of a suit at law, are: (1.) That the plaintiff sets forth no title in himself to the subject matter of the copy-right: and (2.) That the bill lays no legal foundation for the discovery sought.

[Cited in Lawrence v. Dana, Case No. 8,136.]

10. To constitute a person an author under the copy-right act of February 3, 1831, (4 Stat. 436,) he must, by his own intellectual labor applied to the materials of his composition, produce an arrangement or compilation new in itself.

11. He may arrange or compile a new production from materials before known, or obtained for him by the labors of others, but he cannot obtain a copy-right for those materials in the same state in which they are furnished to him.

[Cited in Schuberth v. Shaw, Case No. 12,482.]

[See Pierpont v. Fowle, Case No. 11,152. Compare Reed v. Carusi, Id. 11,642.]

12. A person cannot appropriate as his own, by copy-right, alterations and improvements made in a musical composition by others at his procurement and for him.

13. Where a bill in equity contains allegations which constitute an assertion of authorship under the copy-right act in terms sufficiently explicit to constitute a perfect title at law in the plaintiff, the bill will be held good on general demurrer, notwithstanding the defectiveness and inconsistency of other allegations in the bill as to the authorship.

14. An action on the case is the proper form of remedy to recover damages for the violation of a copy-right, and trespass will not lie for such violation.

15. To obtain a discovery in equity in aid of a suit at law, the bill must show it to be necessary for the plaintiff, and that, when made, it can be used to his advantage.

16. Such a discovery will not be granted where it is sought in aid of an action of trespass for the violation of a copy-right.

17. And a bill seeking such discovery will be held bad, on general demurrer.

18. It seems, too, that such a bill is defective in substance, where it seeks a discovery from three defendants, and the action at law is against only one of them.

19. Where a bill in equity against three defendants showed title in the plaintiff to a copyright, and a wrongful violation of it by all the

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

defendants, and injuries inflicted and apprehended from such violation, and prayed for an injunction against all the defendants, and also for a discovery from all in aid of a suit at law against one for the same violation: *Held*, on general demurrer to the whole bill, that the relief by injunction was not dependent on the discovery prayed, and that, although the bill was bad as a bill of discovery, yet it was good as an injunction bill, and that the demurrer must be overruled.

20. A general demurrer to the whole bill must be overruled if any independent part of the bill is sufficient.

21. Nor will a formal protestation accompanying the demurrer avoid the force of the rule.

In equity. The bill in this case was filed by the plaintiff [Joseph F. Atwill] against Edmund Ferrett, Timothy S. Arthur and Elijah B. Galusha, copartners in Philadelphia and New York, under the name of Ferrett & Co. It set forth that, in December, 1844, an opera was produced at the Park Theatre in New York, for the first time in America, entitled "The Bohemian Girl," the music of which was composed by one Balfe, in Europe; that, soon afterwards, the plaintiff undertook to adapt, arrange and publish such music, and, in doing so, gave to particular pieces of the music titles differing from those they bore as composed and represented in Europe and in New York, and made many alterations of and additions to said music, and arranged trios as duetts, and duetts as solos, and gave names to nameless waltzes and gallops; that six pieces of music in the opera, whose titles were given, were expressly adapted and arranged for or by the plaintiff for publication; that the whole of the music of the opera, as written and published in Europe and performed in New York, was adapted, arranged and published by or for the plaintiff, and, as adapted by him, was essentially different from the music as arranged and published in Europe and performed in New York; that, prior to the publication by him of the several pieces of music of the opera so arranged and adapted by or for him, and with such additional matter, new titles, and new names, the plaintiff caused a printed copy thereof to be deposited in the clerk's office of the district court for the southern district of New York, in which district he then resided, and obtained from said clerk's office a copy of the record of said titles, and caused a copy of such record to be inserted at full length upon the title-page or frontispiece of each of the copies of each of the editions of each piece of music, by causing to be printed, in a conspicuous place, on each piece, the following words: "Entered according to act of congress, A. D. 1845, by J. F. Atwill, in the clerk's office of the Dist. court of the southern Dist. of New York;" that within three months after the publication of the same, a copy thereof was delivered to the secretary of state of the United States, to be preserved according to law; and that thus the plaintiff secured a copy-right for the said piece of music, and for the titles of the same. The bill then averred that the defendants had, without permission, sold at New York, to a considerable extent, copies of the several pieces of music so copy-righted, printed from and in exact imitation of the music as arranged and published by the plaintiff, and with the plaintiff's original matter introduced therein, and with his titles to some of them, and in violation of his copy-right; that the defendants had on hand a large quantity of said infringing pieces of music; that the plaintiff had sustained damages to the amount of fifteen thousand dollars; that, in July, 1845, the plaintiff brought a suit at law in this court against the defendant Galusha, (the only one of the partners residing in New York,) in a plea of trespass to recover damages for the said infringement, in which said Galusha was held to bail in $5,000; that said suit was still pending, and the plaintiff intended to bring the same to trial, and expected to recover heavy damages therein; and that a discovery from Galusha and his partners was necessary in order to enable the plaintiff safely to try said cause. The bill then called on the defendants to answer the specific allegations contained in it, and also to discover how many of the infringing pieces of music they had sold. and how many they had on hand, and to set forth an account of their sales, with the rate at which each piece had been sold, and of the number of copies printed by or for them. The prayer of the bill was, that all the infringing copies in the possession of the defendants, and the plates from which they were printed, might be delivered to the plaintiff; that the discovery prayed for. when made, might be used by the plaintiff as evidence on the trial of the action at law; and that the defendants might be enjoined from further infringements. The defendant Galusha demurred to the bill on the grounds set forth in the opinion of the court.

Marshall S. Bidwell, for plaintiff.

Randolph W. Townsend, for Galusha.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. Three separate demurrers are filed to the bill in this case by the defendant Galusha. The other two defendants have not entered their appearance. and it does not appear that they have been served with the subpoena. The defendant attempts to call in question distinct parts of the bill by severing his demurrers, and also takes objection to the whole by general demurrer. The special causes of demurrer are excepted to by the plaintiff as informal and insufficient, in not pointing out precisely the parts of the bill intended to be embraced by them. They adopt the general formulary, "that, as to so much of the bill as seeks," &c., without specifying, by paragraph, page, or folio, or other method of reference, where the objectionable matter is to be found. We think this mode of demurring to the state-

ments of a long and involved bill is too obscure and indefinite to be admissible. Mitf. Pl. 214; Robinson v. Thompson, 2 Ves. & B. 118; Wetherhead v. Blackburn, Id. 121. The business of a special demurrer is to point out, by the clearest indications, the features alleged to be defective in the pleading, and to relieve the court from the labor and delay incurred by repeated searches for the parts to which the demurrer may apply. Story, Eq. Pl. §§ 457–459; Devonsher v. Newenham, 2 Schoales & L. 199. In the present case, the court have abridged the bill paragraph by paragraph, and in that way have been enabled to select various statements which were undoubtedly intended to be embraced by the special demurrers; but we are not inclined to sanction so loose a mode of pleading. We, therefore, hold the special demurrers to be informal and insufficient, except in respect to the multifariousness of the bill, and to its demand of discoveries involving penalties and forfeitures against the defendant. In those particulars we think that the causes of demurrer assigned designate, with sufficient explicitness, the parts of the bill to which they are intended to apply.

(1.) The bill is objected to as multifarious by the defendant Galusha, on the ground that it makes charges against and exacts answers from his co-defendants in regard to matters involved in the suit at law commenced against him, which do not concern them, they not being parties to the suit at law. But the matters referred to concern him, and he cannot make the objection of irrelevancy in respect to his co-defendants, more especially as it appears, on the face of the bill, that they reside out of the jurisdiction of the court. Story, Eq. Pl. § 544, note 3. Another feature of the bill might also probably rescue it from this objection, inasmuch as it charges the acts complained of to have been committed by the three defendants as partners and in their copartnership character, provided they are all connected by other proper allegations with the object and purpose of the discovery prayed for. Mitf. Pl. 181, 183. The demurrer for multifariousness is overruled.

(2.) It is an incontrovertible principle of equity law, that a defendant cannot be compelled to make discoveries in answer to a bill which seeks to enforce penalties and forfeitures against him by means of such discoveries. Story, Eq. Pl. § 521, note 3; Id. §§ 522, 575, 598; Mitf. Pl. 194–197. In this case, the bill claims a forfeiture, under section 7 of the act of February 3, 1831, (4 Stat. 438,) of the plates and pieces of music on hand. Had the forfeiture been waived by the plaintiff, the defendants might be compelled to disclose the number of their publications, the quantity on hand, and the amount realized from sales, in aid of the recovery of damages in a suit at law. So, probably, on such discovery, equity might compel the defendants to deliver up to the plaintiffs the forfeited copies. But the bill is clearly faulty in directly requiring the defendants to convict themselves of the act which carries with it the forfeiture sued for.

The decision of these two points leaves untouched, however, the principal features of the bill which are supposed to be brought in question by the demurrers, and to the discussion of which the argument was mainly directed; and it, therefore, remains to be considered whether advantage can be taken of those matters by general demurrer.

The objections which may be taken on general demurrer are: 1. That the plaintiff sets forth no title in himself to the subject-matter of his alleged copyright; and 2. That the bill lays no legal foundation for the discovery sought.

1. The insufficiency of the plaintiff's title on the face of the bill is claimed to be this—that he alleges the musical composition, or considerable portions of it, to have been arranged, adapted, printed, and published by or for him, instead of averring that it was composed by himself. The plaintiff, on the other hand, contends, that even admitting this to be so, his title is complete, upon the legal adage, qui facit per alium facit per se, and that he can appropriate as his own the alterations and improvements of the music made by others at his procurement and for him.

The act of congress, (4 Stat. 436, § 1,) secures by copyright to any person who is the author of any musical composition the exclusive property in his composition for a term of years. The statute contains a more detailed description of the subjects of copyright than is given in the English acts of 8 Anne and 54 Geo. III., (Gods. Pat. Append. 384, 422;) but the construction given to those acts by the English courts makes them include, under the name of books, pieces of music, &c. So that our system has no broader operation in this respect than the English, and, no doubt, a just construction of both statutes will render their provisions concurrent. The counsel for the plaintiff insists that the doctrine of the English law enables a man to secure to himself as his own composition whatever he has had prepared for him by the labors of others. We think, however, that the cases of Tonson v. Walker, 3 Swanst. 672, 680; Nicol v. Stockdale, Id. 687; Cary v. Longman, 3 Esp. 273, 274; and Mawman v. Tegg, 2 Russ. 385,—rest upon wholly different principles. They recognize the right of authorship, although the materials of the composition were procured by another, and also an equitable title in one person to the labors of another, when the relations of the parties are such that the former is entitled to an assignment of the production. But, to constitute one an author, he must, by his own intellectual labor applied to the materials of his composition, produce an arrangement or compila-

tion new in itself. Gray v. Russell, [Case No. 5,728.] And the rules of the common law and of equity are the same upon this subject. Cary v. Longman, 1 East, 358; Sayre v. Moore, Id. 361, note; Jeremy, Eq. Jur. 322. The title to road-books, maps, &c., rests upon this principle, (2 Story, Eq. Jur. § 940;) and the cases cited by the plaintiff's counsel have relation to new productions arranged or compiled from materials before known, or obtained by others for the author, and not to the appropriation by copy-right of those materials in the same state in which they are furnished.

If, therefore, the plaintiff's title rested only upon the allegation referred to, we should hold the bill to be defective on general demurrer. But we find repeated averments in the bill, to the effect that "he made many alterations of and additions to the said music"—that "he added new matters of his own, not in the original opera"—that he affixed a copy of the record on the title-page "of each piece of music composed, arranged and adapted by him for publication"—and that a copyright was taken out for such pieces "as arranged, adapted, and published by the plaintiff, with the new titles and original matter introduced therein by him," whereby he became entitled to vend the music "as arranged and adapted by him, and to the original matter introduced by him therein;" and the bill charges the defendants with having sold such music "printed from and in exact imitation of the music so arranged and adapted and published by the plaintiff, with the original matter introduced therein by him, and with his titles to some of such pieces of music." These allegations amount to an assertion of authorship in terms sufficiently explicit and full to constitute a perfect title at law, and, the facts being admitted by the demurrer, we must hold the right of the plaintiff established upon these averments, notwithstanding their defectiveness and their inconsistency with others contained in the bill. Mitf. Pl. 212. Such imperfect pleading is matter of form, and can be taken advantage of only by special demurrer. The general demurrer in this behalf must, therefore, be overruled. Verplank v. Caines, 1 Johns. Ch. 57; Higinbotham v. Burnet, 5 Johns. Ch. 184; Kuypers v. Reformed Dutch Church, 6 Paige, 570.

2. The discovery prayed for is to aid the plaintiff in his suit at law prosecuted against the defendant Galusha; and the averment in the bill is, that he has commenced an action of trespass against that defendant for the violation of his copyright. The demurrer raises the question whether the bill alleges such a suit at law as will afford foundation for the discovery sought, no relief consequent on the discovery being prayed for. It is clear that the plaintiff has adopted a form of action at law which cannot be supported. The English statute of 54 Geo. III. § 2, gives specifically an action on the case as the remedy for the violation of a copyright. Our act (4 Stat. 438) only indicates the form of action when a manuscript is published without the consent of the author, (section 9,) or when a suit is brought to recover the pecuniary penalty given by the sixth section. On general principles of law, however, it is clear that trespass cannot be brought for an injury merely consequential in its character, unaccompanied by force as against the person or property, or by wrongful intermeddling with the possession of property. 1 Chit. Pl. 126, 127. The act of 8 Anne, c. 19, did not designate the form of action, yet no doubt was ever expressed that case was the appropriate one. Beckford v. Hood, 7 Term R. 620; Cary v. Longman, 1 East, 358; Roworth v. Wilkes, 1 Camp. 94. To obtain a discovery in aid of a suit at law, the bill must show it to be necessary for the plaintiff, and that, when made, it can be used to his advantage. Jeremy, Eq. Jur. 161; Story, Eq. Pl. §§ 319, 321. It necessarily follows, from these principles, that a discovery will not be decreed in aid of an action at law, where it is manifest that the plaintiff cannot avail himself of it in the suit he is attempting to prosecute. It is, perhaps, also to be regarded as a substantive defect in the bill that it seeks a discovery from three defendants to aid a suit instituted against one alone. In so far, then, as the maintenance of the bill depends upon the plaintiff's right to a discovery, we think it defective in substance, and bad on general demurrer.

The bill, however, prays for an injunction, and, making title on its face in the plaintiff to the copy-right set forth, and showing a wrongful and wilful violation of the copyright by the defendants, and serious injuries inflicted by and apprehended from such violation, it is sufficient in substance and form to entitle the plaintiff to an injunction. This relief is not dependent upon the discovery prayed, but rests on the equities set forth in the bill, and may be refused or granted, irrespective of the discovery. A general demurrer to the whole bill takes exception, therefore, to this branch of it, and the principle of equity pleading is universal, that a general demurrer to the whole bill must be overruled if any independent part of the bill is sufficient. Higinbotham v. Burnet, 5 Johns. Ch. 184; Kuypers v. Reformed Dutch Church, 6 Paige, 570; Story, Eq. Pl. § 443. The formal protestation accompanying the demurrer is of no avail to protect it against this defect, as it cannot serve the purpose of a plea or answer, or form an excuse for not putting in the one or the other. Story, Eq. Pl. §§ 452. 457, 458. We think, therefore, that the general demurrer must be overruled on both points. As faults in pleading have occurred on both sides, each party may amend without paying costs to the other.

Case No. 641.

ATWOOD v. KITTELL et al.

[9 Ben. 473;[1] 17 N. B. R. 406.]

District Court, D. Vermont. April, 1878.

BANKRUPTCY—TITLE OF ASSIGNEE — CONVEYANCE OF REAL ESTATE—RENT.

K. furnished money to B., his son-in-law, and took a conveyance of a farm therefor; then K. conveyed the same farm to B. and his wife, conditioned upon the annual payment of a sum of money which was equal to the interest on the purchase money, to K. during his life-time and that of his wife, which sum was to be in full of the share of B. and his wife in his estate; further clauses conveyed the property to B. and his wife, their heirs, executors, and administrators, in consideration of an acquittance which B. and his wife gave to K. of all claims upon K.'s estate, and directed K.'s administrators to re-deed if the conditions were fulfilled. The annual payments were made up to 1867, but part of the amount due thereafter was not paid. B.'s wife died in 1867; her mother and her father, K., in 1874. Before K.'s death B. went into bankruptcy; and his assignee having filed a bill to determine his rights to the farm, making the heirs of B.'s wife and the administrators of K.'s estate parties: *Held*, that the conveyance to B. and his wife made them joint tenants as at common law, and conveyed a life estate to them for the lives of the lessor and his wife: that the clause conveying the real estate in consideration of the acquittance conveyed the whole remainder after the expiration of the life estate; that the clause directing the administrators of K.'s estate to re-deed the premises, was no part of the agreement of the parties, but a mere covenant for conveyance by his representatives; that the intention of the conveyance was to have the annual payments made and the estate holden for fulfillment; that the assignee was entitled to the farm, subject to a lien in favor of the administrators of K., for the amount of the annual payments due at his decease, with interest from the dates at which payment should have been made.

In bankruptcy.

WHEELER, District Judge. This cause has been heard upon pleadings, proofs, and argument, from which it appears that William Buck, now a bankrupt of whose estate the orator is assignee, owned the farm in question, subject to some incumbrances, and that he and his then wife, who was the daughter of Jonathan C. Kittell, now deceased, and of whose estate the defendants Lewis H. Kittell and William F. Willey are administrators, conveyed the farm to him for the purpose of procuring sixteen hundred and sixty-six and two-thirds dollars, with which to pay off the incumbrances, and of having it reconveyed to them, subject to the payment of an annual sum equal to the interest advanced, during his life and the life of his wife, which sum was to be in full of their share of his estate; that pursuant to this arrangement they joined in a conveyance of the farm to him, and he immediately executed the instrument of conveyance set forth in the bill of complaint to them, and delivered to them the money and they executed an acquittance of all claim to his estate and delivered it to him. The wife of the bankrupt died in 1867, her mother in October, 1874, and her father on the 24th day of November, 1874. The annual sum was paid up to 1867, and part or all of that due since has not been paid. Perhaps the elder Kittell had before made advances to his daughter on account of which he required the acquittance, and perhaps not; whether he had or not is quite doubtful upon the evidence and not at all material here.

This bill is brought by the assignee to ascertain what rights he has to the farm, and the heirs of the wife of the bankrupt, as well as the administrators of the estate of her father, have been made parties. As the assignee stands upon the rights of the bankrupt, it becomes necessary to ascertain what rights remained to the bankrupt after the transaction and conveyances stated, and how they have been affected by subsequent occurrences.

The wife of the bankrupt was under the disabilities of coverture, but her husband and father were under none. She had no vested rights in her father's estate, and her acquittance of it formed no consideration in law for either of the conveyances. The bankrupt and her father were each the owners of what they conveyed, and had full power over the direction in which the conveyances would take the property.

It has been said in argument that the transaction showed the conveyance from the bankrupt to be a mere mortgage to secure repayment of the money advanced, and that it should be so construed now, and a lien declared for the money in favor of the representatives of the elder Kittell. But the transaction shows that the money was not to be repaid but was to remain, so there was no debt for any mortgage to secure; and without a mortgage debt there can be no subsisting mortgage. There are no extrinsic facts that have any weight to control the ordinary construction of these instruments. They were made upon valid consideration, by persons competent to make them, and are operative according to their legal construction and effect. The deed from the bankrupt was an absolute conveyance of the farm, and there is no room for construction upon it. The conveyance to him and wife is somewhat anomalous, and must receive interpretation. Whatever it carried was conveyed to them, "their heirs, executors, and administrators." At the common law this would have made them joint tenants without their being husband and wife. Co. Litt. 180; 2 Bl. Comm. 179. The nature of this joint tenancy is that the survivor takes the whole, according to the estate he would have if the tenancy continued, and either may alien his share according to the same estate. Brooke, Abr. "Cui in Vita," 8; Litt. Ten. § 288; Co. Litt. 186a. They hold by entireties for seisin,

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

possession and survivorship, and by shares for feoffment, forfeiture, or default in a real action. Greeneley's Case, 8 Coke, 71. But when a conveyance is taken to husband and wife on account of their legal identity and attendant disabilities, they take differently. They take by entireties, but neither can alone alienate to create a moiety, so they do not take by moieties. In Brooke, Abr. "Cui in Vita," 8, it is laid down as per curiam, "ou le baron et femme purchase terre, et le barron alyen et devye, la femme poet aver cui in vita, et recouver l'entiere, car ne sont moyties entre la barron et femme durant le couverture, et ideo n'est bone pour ascun moytye, mes si les purchase devaunt le couverture, et puis ent'mary, et le bar' alyen tout et devye, la femme avait cui in vita de l'moyty et recouver ceo et l'alienac' est bon' del aut' moity q'd nota diversitie, car patet." 39 Hen. VI. 45.

The statute of this state of 1797 severed all joint tenancies not created in express terms; but this did not include the peculiar joint estate created by a conveyance to husband and wife, (Brownson v. Hull, 16 Vt. 309,) and it seems to have been the policy of the legislature of the state to preserve that kind of estate with its characteristics; for by the Revised Statutes, the former statute was expressly limited so as not to apply to such conveyances, and so the law remains still, (Gen. St. c. 64, §§ 2, 3.) So by the law of the state, this conveyance to husband and wife stood as at common law, and under it the survivor, the husband, as the common law has always been, took the whole. Litt. Ten. § 291; 1 Thom. Co. Litt. 576; Beaumont's Case, 9 Coke, 138b; Co. Litt. 187; 2 Bl. Comm. 182; Doe v. Parratt, 5 Term. R. 654; 4 Kent, Comm. 362; Brownson v. Hull, 16 Vt. 309. The instrument was executed with all the formalities required by the statute for the execution of a deed to convey full title to lands. No particular form of words is necessary to constitute such a deed. All that is required is that "there must be words sufficient to specify the agreement and bind the parties." 2 Bl. Comm. 297. The statute prescribes the mode of execution but not the form.

The first part of the instrument is plainly a lease of the premises during the lives of the lessor and his wife, provided the lessees pay the annual sum of one hundred dollars to them or the survivor, and pay all rent, which meant public rent, and taxes. The annual payment was not called rent in the instrument, but merely a sum of money. This conveyed a life estate, for the lives of the lessor and his wife, and the life of the survivor of them, to the lessees. Further on in the instrument it says: "And I the said Jonathan C. Kittell of Sheldon aforesaid, for and in consideration of an acquittance this day signed by the said William and Charlotte Buck to any right of claim to any portion of my estate after my decease, I do hereby give, grant, convey, and confirm all the before-named and described premises to the said William and Charlotte Buck, their heirs, executors, and administrators, with all the privileges and appurtenances belonging, from and after the time of my own decease, and the decease of my wife Elizabeth Kittell, so that no one claiming under me shall have or enjoy any right to any part or portion of said premises forever." These words are sufficient to make a conveyance of the whole remainder after the expiration of the life estate. As to that it was to take effect in futuro, but if livery of seisin was necessary, this would not defeat it, for livery of the particular life estate to the same parties under the same instrument would uphold it.

But under the registry system, a conveyance in futuro, without any particular estate to uphold it, may be made valid. Gorham v. Daniels, 23 Vt. 600. There is nothing in the instrument to show any different intent, except the last clause which directs and empowers the executors and administrators of the grantor to re-deed the premises "if the said William and Charlotte Buck faithfully on their part fulfil the conditions of" the instrument.

But this is not repugnant to the grant, further than it requires fulfillment of the conditions. It is in accordance with it, and only shows that the grantor may not have understood the full effect of the previous grant, and have inserted this clause for greater certainty. And further, this clause is no part of the agreement of the parties, but is merely a direction to his representatives, not binding on the other parties unless it be in respect to the part they were to fulfill. The instrument must be so construed as to give effect to all parts, according to the intention as gathered from the whole. And as it commenced with a proviso that the annual payment be made, and ended with a condition that conveyance be made if they fulfilled, the intention is plain to have the estate holden for fulfillment.

This construction is the same in effect as to hold that this part of the instrument was a mere covenant for conveyance by his personal representatives. For the covenant would run to the same persons in the same form, and would require conveyance to be made or decreed to the same persons.

The result is that the orator is entitled to the farm, subject to a lien in favor of the administrators of Jonathan C. Kittell, for the amount of the annual payment due at his decease, and to the exemption, if any, of the bankrupt. The annual payment was really interest on money and can be computed for the fractions of time, even if otherwise it could not be apportioned.

There is controversy on the evidence as to how much was due; upon which it is found that at his decease there was due all that accrued after February 10th, 1867, except

the sum of $89.31 paid just before February 10th, 1868, in baled hay, which left $10.69 balance unpaid of the instalment due that day.

As these instalments were quasi interest and became due annually, they were like annual interest in respect to forbearance after they were due; and in analogy to that kind of interest, each instalment should bear interest from the time it should have been paid until paid, or until the time of reckoning, according to the law of the state. As reckoned to the time of entering the decree, the instalments amount to $938.29.

Let a decree be entered that upon payment by the orator, as assignee in bankruptcy of William Buck, to Lewis H. Kittell and William F. Willey, as administrators of Jonathan C. Kittell, the sum of nine hundred and thirty-eight dollars and twenty-nine cents, with interest from the 2d day of April, 1878, to the time of payment, the orator is to have and hold said farm free and clear of any claim in favor of said administrators, or any of the heirs of said Jonathan C. Kittell or of said Charlotte Buck who are parties to this cause.

Case No. 642.

ATWOOD et al. v. LOCKHART. et al.

[4 McLean, 350.][1]

Circuit Court, D. Indiana. May Term, 1848.

PARTNERSHIP—INCOMING PARTNER—LIABILITY FOR OLD DEBTS.

1. A purchase of goods made by two individuals, who take a third partner. An action against the three cannot be maintained by the seller of the goods, who had no knowledge of the contract.

[See Edmondson v. Barrell, Case No. 4,284.]

2. There was no implied promise by the third partner, on which an action can be sustained.

[At law. Heard on demurrer to the amended declaration. Demurrer sustained.]

Mr. Yandes, for plaintiffs.

Mr. Barbour, for defendants.

OPINION OF THE COURT. This suit is brought to recover the amount for the sale of certain goods, wares, and merchandise. Leave was given to amend the declaration, under which three counts were added, alleging that the goods, etc., amounting to fifteen hundred dollars, were sold to Yarborough & Lockhart, who afterward sold them to Yarborough, Lockhart & Shoemaker, etc. To these counts there was a general demurrer.

This is not a case of guaranty. The sale was made originally to Yarborough & Lockhart. Before the commencement of the action, the sale was made of the same goods, to themselves and Shoemaker; and the assumpsit of the company is then alleged to the plaintiff. It does not appear that the sale was made by plaintiffs to Shoemaker, or that they had any knowledge of the fact. It was not competent for Yarborough & Lockhart, who made the original purchase of the goods by their own act, thus to change the first contract. This might have been done with the agreement of the plaintiffs; but this is not alleged in the declaration.

If A sell goods to B, who, at the request of A, agrees to pay C, to whom A is indebted the amount, C may maintain an action in his own name—the agreement having been made at the time of the purchase. But this is not the case before us. The plaintiffs may recover against Lockhart & Yarborough on the general counts. Demurrer sustained. 6 Blackf. 347. The indebtment of A to B is not, of itself, any consideration for a subsequent promise by the former to C, to pay C the amount of the debt.

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

ATWOOD, (SANCHO v.) See Case No. 12,291a.

ATWOOD, (SMITH v.) See Case No. 13,006.

Case No. 643.

AUBREY v. AUBREY.

Circuit Court, District of Columbia.

[Cited in Hyde v. Liverse, Case No. 6,972. Nowhere reported; opinion not now accessible.]

AUBREY, (UNITED STATES v.) See Case No. 14,476.

AUDENRIED, (CROOK v.) See Case No. 3,412.

AUDENRIED, (KEEN v.) See Case No. 7,639.

Case No. 644.

AUDENRIED v. RANDALL et al.

[3 Cliff. 99;[1] 7 Amer. Law Reg. (N. S.) 659.]

Circuit Court, D. Maine. April Term, 1868.

SALE—CONTRACT—DELIVERY—WHEN TITLE PASSES—STOPPAGE IN TRANSITU—SALE BY CONSIGNEES—STATUTE OF FRAUDS.

1. It is a general principle that if parties have contracted to sell and buy a specific article of personal property, of which weight, price, measure, and fitness are definitely prescribed, or if the terms of the contract provide suitable means by which those qualities, or conditions may be ascertained, and the articles are in the state, for which the parties contracted, the property passes eo instanti, by virtue of the contract, without delivery.

2. Where the terms of an executory contract of sale are agreed, and everything the seller has to do is complete, the buyer is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said as to the time of delivery or payment.

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

3. If the goods are sold on credit, and the contract silent as to time of delivery, the vendee is entitled to immediate possession, and the right of property vests at once in the buyer, subject to the vendor's right of stoppage in tran situ, if exercised before possession by the buyer.

4. As between parties, when the contract is complete, the property vests in the buyer; as to every one except the vendor, delivery of possession is necessary to every valid conveyance of personal property.

[Cited in Waring v. Mayor, etc., of Mobile, 8 Wall. (75 U. S.) 120.]

5. Where actual delivery is impracticable, or impossible, symbolical delivery will be equivalent in its legal effect.

[Cited in Waring v. Mayor, etc., of Mobile, 8 Wall. (75 U. S.) 120.]

6. Mere words, however, in case of the impracticability of actual delivery, will not suffice to constitute delivery and acceptance of goods. Added to the language of the contract, there must be some act of the parties tantamount to a transfer and acceptance, as where by some act dominion over the goods is relinquished by the vendor, and they are put in the power of the vendee.

[Cited in Waring v. Mayor, etc., of Mobile, 8 Wall. (75 U. S.) 120.]

7. As against subsequent purchasers or judgment creditors, delivery is necessary, but where actual manual occupation is impossible, from the character or situation of the goods, it cannot be admitted that no legal delivery can be made.

8. Under such circumstances valid sale is sufficient to take the case out of the operation of the statute of frauds if it appear that the title becomes absolute in the buyer discharged of all liens of the vendor.

9. The right of stoppage in transitu attaches to goods sold on credit, where nothing is agreed as to time of delivery. Then the vendee is immediately entitled to the property and the right of possession, but the latter is not absolute, being liable to be defeated if he becomes insolvent before he obtains absolute control.

10. Where there has been a sale by the consignee, which would, independently of the indorsement of the bill of lading, as against the consignor, give title to the vendee, the effect of the indorsement would be to take away the right of stoppage in transitu, in cases where otherwise it would exist.

11. Parties in Philadelphia consigned a cargo of coal to parties residing in Boston, to be delivered at Portland, and the consignees named in the bill of lading indorsed and delivered the same to the defendants, at their request, at a certain price per ton for the coal, with the right in the plaintiffs to draw for the amount at any time. *Held*, the terms of the sale were absolute, as also was the indorsement and delivery of the bill of lading, and defeated the right of stoppage in transitu, as against the purchaser.

[Cited in Waring v. Mayor, etc., of Mobile, 8 Wall. (75 U. S.) 120.]

12. It would make no difference in this case, if the consignees named in the bill of lading were only agents of the shippers of the coal, because two days after the arrival of the vessel, and after the master notified the defendants that he was ready to deliver, the plaintiff approved the sale, and insisted that defendants were bound by the contract.

13. It makes no difference in such case whether the consignee be the buyer of the goods or a factor. His transfer is equally capable of divesting the property of the owner, and vesting it in the indorsee of the bill of lading.

14. Where there is no actual delivery, a sale of goods may be valid at common law, and the contract be within the statute of frauds; but if there be a delivery, though symbolical, sufficient to transfer the property even as against the creditors of the seller and subsequent purchasers, and to the exclusion of the right of stoppage in transitu, there need not be anything more than would be sufficient to constitue a delivery, and to change the property at common law.

15. Mere delivery of a bill of lading is not enough, without a distinct acceptance of the same by the purchaser, but anything which was intended to be so, and received as such, which actually puts the goods within the reach and power of the buyer; and among the instances of such delivery cited by legal writers, is that of the indorsement of a bill of lading.

16. This case is wholly different from that of the holder of an ordinary order, as the consignee of a bill of lading has such a property that he can assign it over, and acceptance in such a case is acceptance of the goods. takes the case out of the operation of the statute of frauds, and vests the absolute dominion of the goods in the buyer. If it were otherwise, still in this case, the plaintiff would be entitled to judgment, because the delivery of the bill of lading and the bill of coal were made at the date of the contract, and the defendants subsequently offered to pay the plaintiffs a certain sum per ton to take back the goods, and release them from the contract, after which the defendants still retained the bill of lading and the bill of goods.

At law. Special assumpsit, together with the common counts for goods sold and delivered, and for money had and received. The substantial charge of the special counts was, that the plaintiff at the request of the defendants, on the 16th of March, 1865, bargained and sold to the defendants a certain quantity of coal called "Broad Top Coal," being the cargo of the brig Russian, then on her voyage from Philadelphia to Portland, as per bill of lading of the 30th of the same month, amounting to 289 tons, and that the defendants subsequently, when the vessel arrived with the coal on board, refused to receive it and pay for the same, as they had agreed to do. The contract price of the coal was $11.50 per ton, and the freight $6.50 per ton. The plea was the general issue, but the parties, after the evidence was introduced on both sides, withdrew the case from the jury by consent, and submitted the same to the court, under the act of congress in such case made and provided. Most of the material facts were undisputed, and they may be stated in a very few words.

Plaintiff was a merchant doing business in Boston, and the defendants were citizens of Maine doing business in Portland. Wanting to purchase coal, the defendants, on the 16th of March, 1865, called on the plaintiff at his place of business, and inquired if he, the plaintiff, had any soft coal on the way from Philadelphia, or, if not, whether he would not ship them a cargo of such coal; and being told that the plaintiff had just received

a bill of lading for a shipment of such a cargo, bound to Portland, the defendants inquired if it was for sale, and if so, at what price the plaintiff would sell the coal. The price asked was $12 per ton for the coal, and the frieght was $6.50 per ton; but, as finally agreed, the price including freight was $18. Defendants agreed to purchase at that price, and the consignees—named in the bill of lading, A. C. Morse & Co.—indorsed and delivered to the defendants the bill of lading, which was introduced as evidence by the plaintiff. The bill of lading bore date on the 13th of March, 1865, and appeared to have been duly executed at Philadelphia on that day; and the bill of coal given by the plaintiff bore the same date, but the proof showed that it was written and delivered at Boston at the time the bill of lading was indorsed and delivered by the consignees, and that it was a part of that transaction. Payment was to be made in cash, and the plaintiff proved that he had a right to draw for the amount at any time. Freights immediately declined, and the agent of the plaintiff, one of the consignees, about a week after the indorsement and delivery of the bill of lading, being in Portland where the defendants resided, they requested him to sell the cargo to some other party, and offered to give him one dollar per ton if he would take the coal off their hands; the reason assigned for the request by the defendants was, that they should make a loss if they took the coal, but the agent of the plaintiff declined to accept the proposition. The proofs also showed that the vessel arrived at Portland, March 29, 1865, with the coal on board, in good condition, and that the master notified the plaintiff by telegraph of her arrival, and that the defendants refused to receive the coal. On the last day of March, one of the defendants called at the plaintiff's place of business and informed him, or one of the consignees, that the vessel had arrived, and requested him to come to Portland and take care of the coal or to sell it, and at the same time stated that if the plaintiff would do so, they would bear a part of the loss, and that they would make up the residue in other purchases of him in the course of the year. The plaintiff refused the proposition, and the defendants informed him that they, the defendants, would have nothing to do with the coal. The response of the plaintiff to that suggestion was, that if the defendants refused to receive the coal, he would sell it on their account, and charge them the difference. He also wrote them to that effect on the same day, in consequence of a telegram from the master that the defendants still refused to receive the coal. Some other correspondence between the parties was also introduced in evidence, but it contained nothing which is very material. The letter of the plaintiff to the defendants, dated March 31, of the same year, showed that they received the telegram from the master; and a telegram[2] from the defendants to the plaintiff, dated the 1st of April following, showed that the defendants on that day enclosed to the plaintiff the bill of lading of the cargo, and the bill of the coal which they received at the time the contract was made. The defendants refused to receive the coal, and thereupon the plaintiff advertised and sold the coal at public auction.

Davis & Drummond, for plaintiff.

Rand & Rand, for defendants.

CLIFFORD, Circuit Justice. The principal defence is, that the contract was within the statute of frauds, and void. The contract was made in Massachusetts, and the statute there provides that no contract for the sale of goods, wares, or merchandise for the price of $50 or more shall be good or valid until the purchaser accepts or receives part of the goods so sold, or gives something in earnest, to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain is made and signed by the party to be charged thereby, or by some person by him thereunto lawfully authorized. Gen. St. 327. Where the statute does not apply, it may be laid down as a well-settled general principle, that if the parties have agreed, one to buy and the other to sell specific articles of personal property, of which the price, weight, measure, and requisite fitness are definitely prescribed, or if the terms of the contract provide suitable means by which those qualities or conditions may be ascertained, and the articles which are the subject of the negotiation are in the state for which the parties contracted, the property passes eo instanti, by virtue of the contract of sale, and without delivery. Repeated decisions have affirmed the rule, that when the terms of sale are agreed between the parties, and everything the seller has to do with the goods is complete, the contract of sale becomes absolute, as between the parties, without actual payment of the price or delivery of the articles, and the property and the risk of accident to the goods vest in the buyer, subject to certain qualifications. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery or the time of payment. But if the goods are sold upon credit, and the terms of the contract are silent as to the time of delivery, the vendee is entitled to the immediate possession, and the right of property vests at once in the buyer, subject to the seller's right of stoppage in transitu, if exercised before the former actually obtains possession. Leonard v. Davis, 1 Black, [66 U. S.] 483; Tome v. Dubois, 6 Wall. [73 U. S.] 548; 2 Kent, Comm. (11th Ed.) 658; Hinde v. Whitehouse, 7 East, 571; Homes v. Crane, 2 Pick. 607; D'Wolf v. Harris, 4 Mass. 515, [4 Mason,

[2] [7 Amer. Law Reg. 659, gives "letter."]

Case No. 4,221;] Grosvenor v. Phillips, 2 Hill, 147.

Executory contracts only are the subject of remark on the present occasion, as it is clear that when the contract has been in fact fully performed, the rights, duties, and obligations of the parties resulting from such performance stand unaffected by the statute. Stone v. Dennison, 13 Pick. 4; Browne, St. Frauds, p. 118, § 116. Although it is true, as between the parties, that the property vests in the buyer without delivery, when the bargain is complete, and everything is done by the seller which the terms of the contract prescribed, yet it is equally true, as is perfectly well established, that as against every one, except the vendor, a delivery of possession is necessary in every valid conveyance of personal property. Lanfear v. Sumner, 17 Mass. 110; Caldwell v. Ball, 1 Term R. 205. Actual delivery, however, is often impracticable from the cumbrous nature of the article, and sometimes impossible on account of the situation, or because not present, as in the case of goods or ships at sea. Symbolical delivery will in such cases be sufficient, and equivalent, in its legal effect, to actual delivery without the actual manual occupation by the purchasers. Leonard v. Davis, 1 Black, [66 U. S.] 482; 2 Kent, Comm. (11th Ed.) 671; Frostburg Min. Co. v. New England Glass Co., 9 Cush. 118. Delivery of the key of the warehouse in which goods sold are deposited, or transferring them on the books of the warehouseman or wharfinger to the name of the buyer, is in general sufficient to transfer the property, under the terms of a proper contract to that effect. Chaplin v. Rogers, 1 East, 194; Dodsley v. Varley, 12 Adol. & E. 632. So the delivery of the receipt of the storekeeper for the goods, being the documentary evidence of the title, has been held to be a constructive delivery of the goods. Wilkes v. Ferris, 5 Johns. 335.

Timber, logs, or other lumber floating in the water, are only in the constructive possession of the owner, and under such circumstances only a symbolical delivery in case of sale is all that can be expected, and is amply sufficient to pass the title, as between the parties. Ludwig v. Fuller, 17 Me. 162; Boynton v. Veazie, 24 Me. 288; Macomber v. Parker, 13 Pick. 175. Mere words, however, even in the case of cumbrous articles, are not sufficient to constitute a delivery and acceptance of goods, such as the statute requires. Superadded to the language of the contract, there must be some act of the parties amounting to a transfer of the possession, and an acceptance thereof by the buyer, as where the seller does some act whereby he relinquishes dominion over the property, and puts it in the power of the buyer. Shindler v. Houston, 1 Comst. [N. Y.] 266. Examples put in that case as illustrations are, where the key of the warehouse was delivered to the buyer, and where the bailee of the goods was directed to deliver them according to the contract. Words only do not constitute an actual or symbolical delivery within the meaning of the statute of frauds. The extent of the rule as there laid down is, that there must be some act of the parties superadded to the language of the contract, which amounts to a transfer of the possession of the goods; but the court do not deny that a valid delivery may be made symbolically, in cases where an actual delivery is impossible or impracticable. Undoubtedly a delivery is necessary to give validity to a sale, as against subsequent purchasers or judgment creditors; but it cannot be admitted that in cases where an actual manual occupation of the articles is impossible, as in case of goods or ships at sea, or in case of cumbrous articles, no legal delivery can be made. Such a delivery is legal and sufficient to pass the title, when made in the usual manner, and by the usual symbol, fitted to prevent fraud, and give certainty to the transaction. Valid sale of personal property, as against subsequent purchasers and judgment creditors, is sufficient to take the case out of the operation of the statute of frauds, if it appears that the title becomes absolute in the buyer, and discharged of all liens on the part of the seller. When goods are sold at sea, the indorsement and delivery of the bill of lading to the buyer, and the acceptance of the same by him under the contract, are the proper substitutes for an actual delivery and acceptance of the goods, and have the effect to vest a perfect title in the buyer, discharged of all right of stoppage in transitu, on the part of the seller and indorser of the bill of lading. Newson v. Thornton, 6 East, 41; Pratt v. Parkman, 24 Pick. 42.

The right of stoppage in transitu was conceded to the seller, in order to prevent the injustice which would take place, if in consequence of the vendee's insolvency, while the price of the goods was yet unpaid, they were to be seized and appropriated in satisfaction of his other liabilities, to the prejudice of the rights of his unpaid vendor. The vendor's right in respect of his price is not a mere lien, which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. Such a right attaches to goods sold on credit, where nothing is agreed on as to the time of delivery. In that state of the case, the vendee is immediately entitled to the possession, and the property and the right of possession vests at once in him; but his right of possession is not absolute, because it is liable to be defeated, if he becomes insolvent before he obtains the absolute control of the goods. Bloxam v. Sanders, 4 Barn. & C. 948; Tooke v. Hollingworth, 5 Term R. 215. Goods may be stopped in transitu so long as the transit continues, whether by land or water, from the consignor to the consignee, and whether they are in the hands of the carrier, ware-

housekeeper, wharfinger, or any other individual connected with the transportation; but the right of stoppage ceases when the goods have reached the place of destination, and have come to the actual or constructive possession of the consignee. Covell v. Hitchcock, 23 Wend. 613; Mottram v. Heyer, 1 Denio, 487; Smith, Merc. Law, 683. Possession actual or constructive defeats the right of stoppage in transitu, and the bill of lading becomes functus officio as soon as the goods are landed and warehoused in the name of the holder, as he then becomes possessed of the goods themselves in the eye of the law, and derives his power, not from the bill of lading, but from such possession. Nothing can be more certain than the rule that, as between the consignor and the consignee on the one side, and third parties on the other, the indorsement and delivery of the bill of lading by the consignee of goods at sea, and the acceptance of the same by the buyer under a contract, made in good faith, defeats the right of stoppage in transitu by the consignor. The settled rule is, that in such cases, where there has been a sale by the consignee which would give a title to the vendee, as against the consignor independently of the indorsement of the bill of lading, the effect of the indorsement would be to take away that right even in cases where it would otherwise exist. Gurney v. Behrend, 3 El. & Bl. 622; Pennell v. Alexander, 3 El. & Bl. 283.

Regarded as consignees, therefore, it is clear that the plaintiffs never had any right of stoppage in transitu, as the terms of the sale were absolute, and the indorsement and delivery of the bill of lading by Morse & Co. were absolute and unconditional. The suggestion may be made that Morse & Co. were only agents of the plaintiffs, and that the latter were in fact the shippers and owners of the coal. Suppose that to be so, and suppose that they are not estopped to deny that the bill of lading expresses their true relation to the goods, still it can make no difference in this case, as the vessel had arrived, and the master had notified the defendants that he was ready to deliver the cargo, and the plaintiffs, two days after, affirmed the sale, and insisted that the defendants were bound by the contract. Rowley v. Bigelow, 12 Pick. 307; Craven v. Ryder, 6 Taunt. 433. Bad faith is not imputed in that case, and the supreme court, speaking to the precise point under consideration, say that, by the well-settled principles of commercial law, the consignee in the bill of lading is constituted the authorized agent of the owner, whoever he may be, to receive the goods, and by his indorsement of the bill of lading to a bona fide purchaser, for a valuable consideration, without notice of any adverse interest, the latter becomes, as against all the world, the owner of the goods. It matters not whether the consignee in such a case be the buyer of the goods or the factor or agent of the owner. His transfer in such a case is equally capable of divesting the property of the owner and vesting it in the indorsee of the bill of lading. Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 445. The same court held in Gibson v. Stevens, 8 How. [49 U. S.] 399, that where personal property is, from its character or situation at the time of the sale, incapable of actual delivery, the delivery of the bill of sale or other muniments of title is sufficient to transfer the property and possession to the vendee. Transactions of that character, say the court, if in the usual course of trade, and free from all suspicion of bad faith, have the effect to transfer the legal title and constructive possession of the property to the purchaser; and the court expressly affirms the doctrine that, ships at sea may be transferred to a purchaser by the delivery of a bill of sale, and that goods at sea may be transferred by the indorsement and delivery of the bill of lading. Taney, C. J., adds, that it is hardly necessary to refer to adjudged cases to prove a doctrine so familiar in the courts. Grove v. Brien, 8 How. [49 U. S.] 436.

Actual delivery is a manual transfer of the commodity sold to the vendee, and operates to transfer the title in all cases, unless it be made upon a condition which prevents such a consequence. So a delivery to a common carrier in the usual course of business, is a sufficient delivery to the vendee, but the right of stoppage in transitu remains in the vendor. Stanton v. Eager, 16 Pick. 467. But the bona fide transferee, for value, of a bill of lading indorsed by the consignee of the shipper, takes an absolute title to the goods, free from the equitable right of the unpaid vendor to stop the goods in transitu, as against the purchaser. The obvious reason of the rule is, that by reason of such a transfer of the bill of lading the transitu is regarded as ended, and the right of stoppage therefore is gone. See Story, Sales, 214, 244; Dows v. Greene, 24 N. Y. 641; Dows v. Perrin, 16 N. Y. 325; Gurney v. Behrend, 3 El. & Bl. 622–637. The views of Mr. Browne are, that in order to work an acceptance and receipt of goods purchased, it is not necessary that there should be an actual manual possession of them by the buyer, and he affirms that the statute requires no other act of acceptance and receipt than such as are consistent with the nature, locality, and condition of the goods. The substance of his proposition is, that the statute will be satisfied with symbolical acceptance and receipt of the goods when the case admits of no other delivery, and he expressly states that, in case of a ship or cargo at sea, the delivery and acceptance of the bill of sale or the bill of lading will suffice to perfect the transfer. Browne, St. Frauds, 318; Badlam v. Tucker, 1 Pick. 389; Gardner v. Howland, 2 Pick. 599; Brinley v. Spring, 7 Greenl. [7 Me.] 241. Acceptance and receipt of inaccessible and ponderous or bulky articles may be legal-

ly accomplished, in the view of that commentator, by the performance of any act which shows that the seller has parted with the right and claim to control the property, and that the purchaser has acquired that right. Boynton v. Veazie, 24 Me. 288; Bailey v. Ogden, 3 Johns. 420; Edan v. Dudfield, 1 Adol. & E. (N. S.) 302.

The proposition of the defendants is, where manual possession of the goods is not taken by the buyer, there must be something more than would be sufficient to constitute a delivery and to change the property at common law; and if by that it is only meant that a sale may be valid at common law, as between the parties, and the contract still be within the statute of frauds, the proposition may well be admitted. Subject to that qualification, the proposition is doubtless correct in cases where there is no actual delivery; but if the proposition is understood to include sales by parol contract where there is a delivery, though symbolical, yet sufficient to transfer the property, not only as between the parties, but against the creditors of the seller and subsequent purchasers, and to the exclusion of the right of stoppage in transitu, then the correctness of the proposition cannot be admitted. Possession as matter of law is not in abeyance; it is somewhere, and if not in the seller, it must, in contemplation of law, be in the buyer, and if so, it is clear that the case is not within the statute of frauds. Recent English decisions, it is contended by the defendants, assert a different doctrine, but the cases cited, upon careful scrutiny, do not appear to support any such conclusion. Take, for example, the case of Meredith v. Meigh, 2 El. & Bl. 365, which is the first of the cases referred to as maintaining the proposition. The statement of the case shows that the defendants, at Handley, on the 12th of April, 1850, verbally ordered from the agent of the plaintiff a cargo of china-stone clay, requesting the agent to send it by sea, consigned to certain public carriers at Liverpool, for the defendants, and to be insured by the plaintiff on their account. Plaintiffs resided at Cornwall, and the ordinary mode of transportation was by sea to the Mersey, and thence by inland navigation. Both parties knew that the company named as carriers were engaged in transporting goods from the Mersey to the defendants' place of business. Pursuant to the order, the cargo was sent by a vessel selected by the plaintiff, and on the 18th of April an unsigned copy of the bill of lading was forwarded to the inland carriers, with directions that when they received the bill of lading they should forward the cargo. The shipment was completed the 22d of April, and the bill of lading, duly signed, was sent as directed in the order. On that day the vessel sailed, and on the 26th of the same month she was lost. Notice of shipment was given to the defendants, but they remained silent, and there was no evidence that they ever saw the bill of lading. Held, that a delivery to the master of the vessel selected by the plaintiff was not a delivery to the defendants; and that the silence of the defendants did not alter their situation, as there was nothing in the circumstances which required them to take any action in the premises. Some of the judges thought that the case might have been different if the bill of lading had been received by the defendants themselves, and especially if they had dealt with it, or had in any respect acted as the owners of the goods. Erle, J., said: "I have no doubt that the bill of lading, which is the symbol of property, may be so received and dealt with as to be equivalent to an actual receipt of the property itself; and the court of queen's bench, in the case of Currie v. Anderson, 2 El. & El. 593, subsequently so held, although the bill of lading was made out in the name of the plaintiffs. Adjudged cases may be found which seem to imply that there cannot be such an acceptance and receipt of the goods by the buyer as will take the case out of the statute of frauds, unless he has examined the goods, or done something to preclude him from contending that they do not correspond with the contract, but the converse of that proposition is now well-settled law. Morton v. Tibbett, 15 Adol. & E. (N. S.) 428; Parker v. Wallis, 37 Eng. Law & Eq. 26; Fitzhugh v. Wiman, 5 Seld. [9 N. Y.] 565.

The next case cited by the defendants is that of Bill v. Bament, 9 Mees. & W. 36, which is a case where the sale was for ready money, in which the plaintiff was not bound to deliver until the payment of the price; and inasmuch as there had been no delivery, the court held that there was no evidence to go to the jury to satisfy the statute of frauds. Reference is also made to the case of Norman v. Phillips, 14 Mees. & W. 278, which was a verbal order for timber, directing it to be sent to a railway station, and forwarded to a described place, as had been the practice between the parties in previous dealings. The timber was sent, and arrived at the place of destination, but the defendant, when notified of its arrival, refused to take it. When it arrived it was unaccompanied by any invoice, but one was sent in a few days, which was received by the defendant, and he kept it for a period exceeding a month, and then informed the plaintiff that he declined taking the timber. The verdict was for the plaintiff. A rule to set it aside, and enter a nonsuit was granted, which was made absolute, as the evidence was not sufficient to warrant a verdict. Reliance is also placed upon the case of Farina v. Home, 16 Mees. & W. 119, although its application is not apparent. Plaintiff shipped goods upon the verbal order of the defendant to his own agent, who stored them, and indorsed the warehouseman's receipt to the defendant, who kept it for some months, but denied that he had ordered the goods, and refused to

pay the charges on them. Held, that there was no delivery, the warehouseman's possession being considered to be that of the consignee, notwithstanding the indorsement of the receipt, until the warehouseman attorned to the vendee. Comment need not be made upon adjudged cases where it appears that the goods remained in the possession of the vendor, as it is evident that they do not support the proposition of the defendants in this case. Castle v. Sworder, 5 Hurl. & N. 281. Certain other cases are also referred to, which decide that a delivery of goods ordered to a carrier, without more, is not such a delivery to the buyer as will take the contract out of the operation of the statute of frauds, which is doubtless correct, as in that state of the case there is no acceptance of the goods, actual or symbolical, and they are still subject to the right of stoppage in transitu by the seller, and every objection as to quality or quantity by the buyer. Coombs v. Bristol & E. R. Co., 3 Hurl. & N. 510; Outwater v. Dodge, 6 Wend. 400; Howard v. Borden, 13 Allen, 300. Decided cases, where it appears not only that the defendant did not accept the goods sent under an order, but that he refused to do so, need no comment; and if it appears that he merely examined the goods to ascertain their quality or quantity, it cannot make any difference, as in such case there is no evidence of acceptance. Kent v. Huskinson, 3 Bos. & P. 233.

When goods are in custody of a third person, an order for delivery with notice to that person is sufficient to pass the property, even as against the attaching creditors of the vendor. Tuxworth v. Moore, 9 Pick. 347; Carter v. Willard, 19 Pick. 1; Burge v. Cone, 6 Allen, 412; Boardman v. Spooner, 13 Allen, 357; Whitaker v. Sumner, 20 Pick. 405. Assent by the party, however, in whose custody the goods are, it is said, is necessary to constitute acceptance and receipt under the statute of frauds; but if the parties agree that he shall, as between them, be considered the bailee of the buyer, it is not perceived how the acts of the bailee can defeat the sale. Bentall v. Burn, 3 Barn. & C. 423; Farina v. Home, 16 Mees. & W. 119. Text-writers agree that a mere delivery of a bill of lading is not enough without a distinct acceptance of the same by the purchaser; but anything amounts to a delivery and acceptance, says Parsons, which was intended to be so, and received as such, and which actually put the goods within the reach and power of the buyer; and, among the cases enumerated by the author, where symbolical delivery is sufficient, is that of the indorsement and delivery of a bill of lading. Pars. Merc. Law, 75. Most recent text-writers in England also maintain the same views, and there is no decision to the contrary. Macl. Shipp. 341; Maude & P. Shipp. 143; Chitty, C. & M. 403; Lickbarrow v. Mason, 6 East, 20. The argument of the defendants is, that there is no difference between the case at bar and an ordinary order; but it is not possible to adopt that suggestion, as a different rule prevailed for a century before the Revolution. "The consignee of a bill of lading," said Holt, C. J., "has such a property that he may assign it over." Evans v. Martlett, 1 Ld. Raym. 271. If the goods are bona fide sold by the factor at sea (as they may be, where no delivery can be made), the sale, said Lord Mansfield, will be good, and the vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered. Wright v. Campbell, 4 Burrows, 2046; Davis v. Bradley, 28 Vt. 121. Indorsement and delivery of a bill of lading passes no title if the instrument was stolen, or if the consignor was not the owner of the goods; but if the assignment was bona fide at the transfer, delivery and acceptance of this symbol will transfer everything which it represents. Newsom v. Thornton, 6 East, 19. Acceptance in such a case is the acceptance of the goods, and has the effect to take the case out of the operation of the statute of frauds, and vests the absolute dominion of the goods in the buyer, and the right of stoppage in transitu ceases from that moment. Dows v. Greene, 24 N. Y. 642.

Even suppose it were otherwise, still the plaintiff would be entitled to judgment in this case, in view of the special circumstances set forth in the statement. Delivery of the bill of lading, together with the bill of the coal, was made at the date of the contract. The subsequent conduct of the defendants clearly shows that they regarded the transfer of the property as complete, as they offered to pay the plaintiff one dollar per ton to take it back, and release them from the contract. Although the plaintiff refused to do as requested, still the defendants retained the bill of lading and the bill of parcels, without any intimation that they should not receive the cargo. They substantially repeated the request after the vessel arrrived, and the same being again refused, they still retained the instruments of title, until the 1st of April, when they were returned as described in the statement. Due notice was given of the time of the sale of the cargo, and it was properly sold, as is required in such cases. Plaintiff is entitled to judgment.

AUDLEY, THE STRATTON. See Case No. 13,529.

AUGUR, (DIBBLE v.) See Case No. 3,879.

AUGUST, Ex parte. See Case No. 12,979.

Case No. 645.

In re AUGUST et al.

[19 N. B. R. 161.]

District Court, S. D. New York. April 21, 1879.

BANKRUPTCY — COMPOSITION PROCEEDINGS — DISCHARGE OF ASSIGNEE—TAXING REGISTER'S FEES.

[1. Where a composition between a bankrupt and his creditors has been confirmed, and its terms complied with, any question as to what amount the assignee should pay over to the bankrupt as the balance in his hands should be determined by the register under a special order of the court, and not upon a final accounting or creditors' meeting pursuant to Rev. St. § 5096.]

[2. The confirmation of such composition, and the bankrupt's compliance with its conditions, suspends the functions of the assignee as to the administering of the estate, subject to revival by an order of the court setting aside the composition; and the delivery of any property to the bankrupt, pursuant to the terms of the composition, completely discharges the assignee from further liability therefor, since the creditors have waived their right to call him to account for it as long as the composition remains in force.]

[3. If any question arises in respect to the register's fees, they must be taxed by the clerk, pursuant to general order No. 30, before they can be allowed, and an order therefor should be made on application of the bankrupts.]

[In bankruptcy. On motion by August and others, bankrupts, a composition with their creditors having been confirmed, that it be referred to the clerk of the court to ascertain the amount due from the assignee to the bankrupts. Order referring the matter to the register.]

Prescott & Butler and E. W. Bloomingdale, for bankrupts.

W. T. Carlisle, for assignee.

CHOATE, District Judge. In this case a composition has been accepted and confirmed, which provides for the payment of ten per cent. in cash, and twelve and a half per cent. more to be secured by the notes of the bankrupts, payable in six or twelve months. The cash instalments having been paid and the notes given conformably to the resolution, and the assignee having filed his account with the register, he gave notice to the creditors, in conformity with Rev. St. § 5096, that he would apply for a settlement of his account and for a discharge from his liability as assignee. In pursuance of this notice, a meeting of creditors has been convened for the purpose of passing the assignee's account. At that meeting the bankrupts objected to the regularity of the proceedings, on the ground that the creditors have no interest in the funds in the hands of the assignee; that, since the confirmation of the composition, the bankrupts alone are entitled to whatever of their estate is in the hands of the assignee; and that any question arising between the bankrupts and the assignee, as to what amount of money the assignee should pay over as the balance in his hands, should be determined under a special order of the court, and not upon a final accounting or a creditors' meeting, pursuant to Rev. St. § 5096. The bankrupts now move, on notice to the assignee, that it be referred to the clerk of this court to ascertain the amount due from the assignee to the bankrupts.

The position taken by the bankrupts in respect to the meeting of creditors called to pass the final account of the assignee is correct. Such meeting should not have been called. The creditors have in fact consented, by adopting the resolutions of composition, that the entire estate be delivered to the bankrupts to enable them to perform, on their part, the agreement of composition. Thereupon it became the duty of the assignee to hand over any balance of money remaining in his hands to the bankrupts, and also any other assets belonging to the estate. His functions, so far at least as the administering of the bankrupts' estate is concerned, are, by the confirmation of the composition and the bankrupts' compliance with the conditions thereof, which were precedent to the delivery of the property to them, suspended, subject, however, to being revived in case, under the power reserved by the statute to the court, an order shall hereafter be made setting aside the composition. The delivery by the assignee of any money or property to the bankrupts, pursuant to the terms of the composition, completely discharges him from further liability therefor; the creditors having consented that he pay over the money in his hands to the bankrupts having necessarily waived any right which, but for this agreement, they would have had to call him to an account therefor, at least so long as that agreement remains in force. The account to be taken at a creditors' meeting under section 5096 is professedly preparatory to the declaring of a dividend, and no such dividend is now possible.

The court has power to enforce the terms of the composition, and therefore will, upon the application of either party, determine any questions that may arise in such a case between the assignee and the bankrupts as to what is the balance of the estate in the assignee's hands to which the bankrupts are entitled. The proper mode of doing this is to refer it to the register in charge of the case, by special order, to take account of the money received and disbursed by the assignee, and to report what amount he still holds, if any, which the bankrupts are entitled to. It is urged that as this is not a duty specially imposed on the register, by the statute, the court may refer the matter to the clerk. Doubtless it is within the power of the court to dispense with the assistance of the register in this or any other matter; but the evident design of the statute is, that when the court needs the aid of such an officer in the performance of duties of this general character in the administration of the bankrupt law, it shall call to

its assistance the registers. Rev. St. §§ 4993, 4998; General Orders 5 and 19. No cause is shown for not referring this matter to the register. It would not, therefore, be proper to refer it to any other person. It is suggested, however, that questions are likely to arise in the settlement of the account in respect to charges of the register paid by the assignee, and which he asks to have allowed as disbursements. This constitutes no reason for withholding the order referring the account to the register. In respect to the register's fees, if any question arises, they must be taxed by the clerk, pursuant to General Order No. 30, before they can be allowed; and an order therefor will be made on application of the bankrupts.

Order referring the matter to the register.

Case No. 646.

The AUGUSTA.

SMITH v. The AUGUSTA.

[2 Adm. Rec. 273.]

Superior Court, S. D. Florida. May 29, 1839.

PILOTS—PILOTAGE IN NATURE OF SALVAGE—COMPENSATION.

[A brig which, with its cargo, was valued at $12,000, got in among certain dangerous shoals, off the Florida coast, during very stormy weather, and came to anchor; and a wrecker in his vessel piloted her into port with considerable danger to himself and vessel. *Held*, that the wrecker should be awarded $900 for pilot services in the nature of salvage, as such services, when rendered by wreckers under extraordinary circumstances, should be liberally rewarded.]

[Cited in The Calcutta, Case No. 2,298, and in Curry v. The Loch Goil, Case No. 3,495.]

[In admiralty. Libel by John P. Smith against the brig Augusta and cargo for pilot services in the nature of salvage services. Decree for libellant.

[The brig and cargo, valued at about $12,000, during very stormy and violent weather, got in among the Washerwoman shoals, and came to anchor; and libellant, in his sloop Reform, under circumstances of considerable danger to himself and sloop, piloted her to the port Key West.]

Charles Walker, proctor for libellant.

Adam Gordon, proctor for respondent.

MARVIN, J. The libellant in this case is not entitled to salvage eo nomine, as salvage is only decreed for saving property exposed to certain and imminent marine perils, or for such perils as create a reasonable probability that if the property be not rescued by foreign assistance it will be lost. I am not satisfied in this case of the certainty of the perils. But the libellant is entitled to a liberal compensation for his services, and which should be so great as to induce the rendition of like services under like circumstances. I shall decree the sum of nine hundred dollars as a reasonable compensation to the libellant for his services; which is to be paid to the libellant in the molasses of the cargo, at the rate of 20 cents a gallon, duties paid; and the molasses may be redeemed by the master by his paying the salvage in money, or any part thereof, at the rate of 20 cents a gallon.

The clerk will make up the decree in form.

Case No. 647.

The AUGUSTA.

[5 Amer. Law T. Rep. 495.]

District Court, D. Oregon. Nov., 1872.

MARITIME LIENS—LIBEL FOR REPAIRS—MATERIALMEN.

[1. A person who puts work and materials into the ship of another as a mere trespasser or intruder does not thereby become a materialman, and entitled to a lien; and a libel by employes of a contractor against a vessel and her owners which fails to allege that the contractor had authority to make the repairs or employ the libellants thereon is insufficient.]

[Cited in The City of Salem, 10 Fed. 846.]

[2. The effect of admiralty rule 12, as amended in 1872, is to make all ships, domestic as well as foreign, liable for repairs, supplies, or other necessaries furnished at the express or implied request of the owner or master, whether in home ports or not.]

[Cited in Whittaker v. The J. A. Travis, Case No. 17,599.]

[See note at end of case.]

[3. Ship-carpenters employed to repair a vessel by a person contracting with the owners for that purpose, without notice that they must look to the contractor for payment, work with the implied consent of the owners, and have a lien for their wages, unless the dealings of the parties show that an exclusively personal credit was given to the master or owners.]

[In admiralty. Libel against the brig Augusta, and James Terwilliger and Walter Moffet, her owners, by D. McLeod and 14 others, employes of John Rutter, for work done in repairing the brig. Held insufficient, because an allegation that John Rutter was authorized to make the repairs was lacking. Heard on the amended libel against the vessel alone. Decree for libellants.]

DEADY, District Judge. On September 7, 1872, D. McLeod and fourteen others brought suit against the brig Augusta and her owners, James Terwilliger and Walter Moffet, to recover certain sums of money alleged to be due the libellants respectively, which in the aggregate amounted to $942.42, for work and labor, as ship-carpenters, done on said vessel in July, 1872, at the request of John Rutter; and that said work was done by libellants upon the credit of said vessel as well as upon that of the said owners. On September 24 the respondents excepted to the libel for various causes, and upon the argument thereof, on October 12, the libel was held to be insufficient, because it did not appear therefrom but that said Rutter was an intruder upon said vessel, and without au-

thority to repair the same or employ libellants to work thereon. Leave being granted, the libellants on October 14 filed an amended libel against the vessel alone, alleging as above, and also that said libellants did said work and labor with the knowledge and approbation of said owners; and that said Rutter was duly authorized by said owners to make certain changes and repairs on said vessel, and employ libellants thereon; and that said libellants relied upon "the lien on said vessel, which would accrue to them, for doing said work, and upon the credit of the owners, and not upon the credit of said Rutter." On October 19 the owners answered the libel, admitting that the libellants did work and labor upon said vessel, but denying all knowledge of the time so occupied by them, or that libellants did said work with the knowledge and approval of respondents, or that said Rutter was the agent of respondents, or authorized to employ libellants upon the credit of the vessel or that of the owners thereof; and alleging that on May 31, 1872, respondent, Moffet, made a contract with said Rutter to make certain alterations and repairs in and upon said vessel for a certain price, said Rutter thereby agreeing to furnish all the materials and labor necessary to comply with said contract; and that said Rutter afterwards performed said contract, and was fully paid therefor before the commencement of this suit; and that if said libellants did work upon said vessel, it was as the employes of said Rutter, and not otherwise.

On November 6 the cause was heard and submitted.

It also appeared from the pleadings and evidence that said alterations and repairs were made upon the Augusta at her home port, where her owners reside—the port of Portland—and that she is engaged in trade between that port and the Sandwich islands; and that respondents did not employ libellants, but that the work was done by contract with said Rutter, as alleged in the answer herein, for the sum of $1,350, and that libellants did the work aforesaid at the request of said Rutter, and the value and quantity thereof are truly stated in the schedule to the libel herein; and that libellants did not demand said money of respondents until after Rutter left the country. Have the libellants, under the circumstances, a lien upon the vessel for their work done upon her?

The judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction." Const. U. S. art. 3, § 2. Of course what are cases of admiralty and maritime jurisdiction must finally be determined by the supreme court. The question involves the construction and interpretation to be given to the constitution of the United States. Neither congress nor the states can increase or diminish the jurisdiction.

By section 6 of the act of August 23, 1842, (5 Stat. 517,) congress, among other things, authorized the supreme court to prescribe and regulate the form and modes of proceedings in admiralty. In pursuance of this authority and in accordance with the undoubted jurisdiction exercised by the district courts from the formation of the government, and affirmed by the supreme court in The General Smith, (1819) 4 Wheat. [17 U. S.] 438; The Planter, (1833,) 7 Pet. [32 U. S.] 324; The Orleans, (1837,) 11 Pet. [36 U. S.] 175,—that where a local law attaches a lien to a maritime service, as for repairs furnished a vessel engaged in maritime commerce, a suit in admiralty lies to enforce it, the supreme court in 1844, in revising the admiralty rules, prescribed in effect, by rule 12, that where by the local law a lien is given to materialmen for supplies, repairs or other necessaries furnished a domestic ship, they may proceed in admiralty to enforce such lien, as in the case of a foreign ship. In 1859 the supreme court amended this rule, so as to confine the remedy of materialmen in cases of domestic ships to a suit in personam—thus, in effect, prohibiting the enforcement of a lien in such cases, if any existed. Professedly, the rule as amended in 1859 only regulated "the character of the process to be used" in such cases, and did not touch the right; for a right in rem, without proceedings in rem to enforce it, is practically no right at all. For the same reason the rule, in effect, changed the law, and excluded such cases from the jurisdiction of the district courts. After thirteen years of unfavorable experience under the amendment of 1859, and many unsatisfactory attempts to account for the reason or existence of it, the supreme court, in May, 1872, amended the rule, so as to make it read as follows: "In all suits by materialmen for supplies, or repairs, or other necessaries, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam."

I think the effect of the rule in its present form is to do away with the distinction which prevailed after the decision in the case of The General Smith, supra, between foreign and domestic ships and ships in home or other ports, and to make all ships, as such, liable for repairs, supplies, or other necessaries, furnished at the express or implied request of the owner or master. Ben. Adm. § 272, says: "The civil law, and the general maritime law, and the particular maritime codes, without exception, extend this lien or privilege to all ships and vessels, without any distinction between foreign and domestic ships. Indeed, it is not easy to see how any difference can exist in principle; if one is a ship or vessel, so is the other; and the same law and the same reason which gives a lien in the one case gives it in the other. It is for service, labor, materials, and supplies furnished to the ship,

and in some sort made a part of her, for her benefit, and the lien attaches to her." After stating the fact of the distinction made between foreign and domestic ships in the case of The General Smith, supra, the same author (Id. § 272) goes on to say: "It is, however, believed that whenever the question shall come before the supreme court, and be fully considered by that court after argument, the distinction between foreign and domestic vessels will be found to be no part of the law of admiralty. The mere residence of the owner would seem to have even less relation to maritime subject-matter than the pretexts of the time of Lord Coke." In a learned note to The Harrison, [Case No. 5,038,] Mr. Justice Hoffman concludes: "It is thus evident that by the principles and analogies of the maritime law, and the 'good customs of the sea,' ('les bonnes coutumes de la mer,' as they are called in the Consolato,) and on grounds of equity and natural justice, the lien of the materialman who has constructed, repaired, or supplied a vessel, ought to be recognized and enforced as a maritime lien by courts of admiralty. And this whether the work has been done in a port of the state in which the owner resides or elsewhere; and whether upon the employment of the master or of the owner, or of his agent—excepting in those cases where the lien has been clearly waived, or 'notice has been given to the workmen and other materialmen, in order that they may not be deceived.'" In the adoption and promulgation of rule 12, (1872,) without noticing or providing for any distinction between foreign and domestic ships and home or other ports, as in the rules of 1844 and 1859, it must be presumed that the supreme court considered this question, and concluded that the distinction was "no part of the law of the admiralty." In accordance with these premises, I conclude that the rule on the subject of liens in favor of materialmen has finally rested where it always should, upon the general maritime law, as administered even in England before it was there restrained by the courts of the common law in the time of Charles II.

If, then, the libellants are materialmen within the signification of that term as used in rule 12, they have a lien, and are entitled to maintain this suit to enforce it. Indeed, upon the argument, it was tacitly conceded by counsel for respondents that the case was narrowed down to the inquiry, are the libellants materialmen or not? No reason has been given, and none occurs to my mind, why the term materialmen should be used in the rule in another or more limited sense than in the general maritime law, from which it is taken. Benedict says: "Those are called materialmen who, at the time of the building of a vessel, or during her subsequent existence as a vessel, supply her, at the express or implied request of the master or owner, with necessary materials to build, fit, outfit, furnish, or repair." Ben. Adm. § 267. Parsons says: "The persons employed to repair a ship, or, in general, to do any work about her, and those who furnish for her use supplies of things necessary to her equipment and safe navigation, are known in the law of shipping as materialmen." 1 Pars. Shipp. & Adm. 141. In The Neptune, 3 Hagg. Adm. 129, 142, Lord Stowell cites a report made by that learned judge, Leoline Jenkins, to the king, in which he says: "Those are commonly called materialmen whose trade it is to build, repair, or equip ships, or to furnish them with tackle and provisions necessary in any kind." But it is insisted that libellants did not work on this vessel at the request of respondents; that there is no privity of contract between them and the latter; and therefore the law allows them no lien, and they must look to the contractor, Rutter, who employed them, for their compensation.

As at present advised, I think the libellants could not make the respondents their debtors and acquire a lien upon the vessel therefor, without the consent of the latter, either expressed or implied. Ben. Adm. § 267. A person who puts work or materials into the ship of another, as a mere trespasser or intruder, does not thereby become a materialman, and entitled to a lien thereon for the value of such work or materials; and so this court ruled upon the exception to the original libel herein. But the consent of the owner may be implied from the circumstances of the case. For instance, when the respondent contracted with Rutter to repair the vessel, it was necessarily implied that he might employ libellants, and they might be so employed to work thereon. They are therefore not intruders on or strangers to this vessel, but persons employed to work thereon with the implied consent of the owners. This conclusion is in accordance with general principles of law. The owner of any structure or premises impliedly consents that a person with whom he contracts to do work thereon may use any lawful and convenient means to perform his contract; and the employment of the libellants in this case seems to be within this rule or general principle. And upon authority it appears clear that, according to the general maritime law, where an owner makes a contract with another to build, repair, or supply a vessel, those who work thereon at the request of the contractor do so with the implied consent of the owner, and are entitled to a lien thereon for the value of their labor "unless the dealings of the parties show that an exclusive personal credit was given to the master or owners," or unless they have notice that they must rely upon the contractor for payment. Ben. Adm. § 267; 2 Pars. Shipp. & Adm. 322. Emerigon, in his Commentary on the Consolato del Mare, as cited by Mr. Justice Hoffman in his note to The Harrison, observes: "The carpenters, caulkers, and other workmen em-

ployed in building, together with the creditors for the timber, cordage, and other articles furnished, ought to enjoy the privilege allowed to them, unless they have been warned in due time that if they do not secure the payment of their claims against the contractor they shall have no lien on the ship." In this case it is not claimed that the libellants had notice in any manner that they must look to the contractor for the payment of their wages, and they are entitled to a lien therefor.

This being so, it is unnecessary to consider whether upon the evidence the libellants or any of them and respondents understood from the first that the former would rely upon the vessel as security for their wages. Rutter gave bonds with security in the sum of $2,500 for the faithful performance of his contract. Duncan Ferguson, one of the libellants, swears that before he was employed Moffet asked him if he was going to work on the vessel. Witness asked M. about the pay. Moffet replied that vessel was good for it, that Rutter had a contract to do the work, and he, M., had a bond for twice the amount of work. It does not appear directly from the evidence, but it is probable that Rutter, about the completion of the contract, absconded. Moffet states that the men did not demand their wages of him until after Rutter "left," and that he did not remember the conversation with Ferguson.

A decree will be given for the libellants for the amounts severally claimed by them.

[NOTE. The doctrines laid down in this case touching the existence under admiralty rule 12, and, in the absence of state legislation, of a maritime lien for repairs and supplies furnished in the home port, were distinctly overruled in The Lottawanna, 21 Wall. (88 U. S.) 558, (decided in 1875.) In that case a libel for repairs and supplies furnished in the home port was filed in the district court for the district of Louisiana. Certain mortgagees intervened, and, by the decree of the district court, their claims were given precedence over those of the repair and supply men. On appeal the circuit court decreed the latter's claim superior to the mortgage, on the ground that they had a maritime lien. The amendment to admiralty rule 12, on which the decision in the principal case rests, was urged in argument. The decree of the circuit court was reversed. Mr. Justice Bradley, in delivering the opinion, said: "The principal question presented by the appeal, therefore, is whether the furnishing to a vessel on her credit, at her home port, needful repairs and supplies, creates a maritime lien. * * * This very question was decided by this court adversely to the lien more than fifty years ago, in the case of The General Smith, reported in 4 Wheat. (17 U. S.) 438, and that decision has ever since been adhered to, except occasionally in some of the district courts. A solemn judgment relied on so long by the commercial community as a rule of property and the law of the land ought not to be overruled except for very cogent reasons. If, however, in the progress of investigation, and with the new lights that have been thrown upon the whole subject of maritime law and admiralty jurisdiction, a more rational view of the question demands an adverse ruling in order to preserve harmony and logical consistency in the general system, the court might, perhaps, if no evil consequences of a glaring character were likely to ensue, feel constrained to adopt it. But, if no such necessity exists, we ought not to permit any consideration of mere expediency or love of scientific completeness to draw us into a substantial change of the received law. * * * The ground on which we are asked to overrule the judgment in the case of The General Smith, supra, is that, by the general maritime law, those who furnish necessary materials, repairs, and supplies to a vessel, upon her credit, have a lien on such a vessel therefor, as well when furnished in her home port as when furnished in a foreign port, and that courts of admiralty are bound to give effect to that lien. The proposition assumes that the general maritime law governs this case, and is binding on the courts of the United States. But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. * * * The proposition, therefore, that, by the general maritime law, a lien is given in cases of the kind now under consideration, does not advance the argument a single step, unless it be shown to be in accordance with the maritime law, as accepted and received in the United States. It certainly has not been the maritime law of England for more than two centuries past; and whether it is the maritime law of this country depends upon questions which are not answered by simply turning to the ordinary European treaties on maritime law, or the codes or ordinances of any particular country. * * * And, according to the maritime law as accepted and received in this country, we feel bound to declare that no such lien exists as is claimed by the appellees in this case. The adjudications of this court before referred to, which it is unnecessary to review, are conclusive on the subject; and we see no sufficient ground for disturbing them." Mr. Justice Clifford dissented.

[Other authorities to the same effect are The Rapid Transit, 11 Fed. 322; Stephenson v. The Francis, 21 Fed. 715, (where it was held that, in the case of several equal co-owners residing in different states, no lien will arise for supplies furnished in the state of the known residence of either:) The Thomas Fletcher, 24 Fed. 375; The Mary Morgan, 28 Fed. 196; The Pirate, 32 Fed. 486; The Samuel Marshall, 49 Fed. 754.]

AUGUSTA, The, (The CUBA, v.) See Case No. 3,459.

AUGUSTA, The, (UNITED STATES v.) See Case No. 14,477.

AUGUSTA INSURANCE & BANKING CO., (HUGG v.) See Case No. 6,838.

Case No. 648.

AUGUSTINE v. McFARLAND et al.

[13 N. B. R. (1876,) 7; 1 N. Y. Wkly. Dig. 318.]

District Court, D. Kansas.

BANKRUPTCY—FORECLOSURE BY MORTGAGEE IN STATE COURT—RATIFICATION.

[A mortgagee cannot proceed in a state court to foreclose a mortgage executed by a bankrupt, except by consent of the bankruptcy court; but the bankruptcy court may approve and ratify such unauthorized proceeding, and where the assignee voluntarily appeared in the state court, had his lien adjudicated, permitted the property to be several times appraised and offered for sale, and made no objections to the

proceedings for more than two years, and it did not appear that the estate would be injured by the foreclosure, the assignee is not entitled to an injunction.]

In bankruptcy.

Z. E. Britton, for complainant.
Clough & Wheat, for defendants.

FOSTER, District Judge. The complainant files his bill in this court, asking to restrain the defendants from taking a confirmation of a sale of certain real estate of said bankrupt in the district court of Dickinson county, and from further proceedings in said court. John M. Hodge was adjudged a bankrupt on the 27th day of December, A. D. 1872. The complainant, Jacob Augustine, was elected assignee of said estate on the 27th day of January, 1873, and received the assets of the estate on the 3d day of February, 1873. On the 23d day of September, 1871, the bankrupt and his wife had executed to Jas. B. Shane and T. C. Henry a mortgage on certain real estate to secure two promissory notes of five hundred and thirty-two dollars and five hundred dollars. There was also a second mortgage made on said real estate by said bankrupt and wife, October 29th, 1872, to Augusta Emmons, for five hundred dollars. Noah C. McFarland became the owner of one of the notes secured by the first mortgage, and on the 8th day of August, 1873, without authority of this court, commenced proceedings in the district court of Dickinson county to foreclose said mortgage, making Jacob Augustine, the complainant, who had become the owner of the other first secured note, a party as an individual, and also in his capacity as assignee, and also making the subsequent mortgagee, and other parties, indorsers on the notes, defendants. Jacob Augustine appeared in his individual capacity and filed an answer in said suit setting up his said claim. He also entered his appearance as assignee and waived the issuing of process, but filed no answer as assignee, nor made any objection to the proceedings. On December 4th, 1873, the said court of Dickinson county rendered a judgment and decree of foreclosure in said cause, and made an order of sale of said premises. There were subsequently several orders of sale issued on said decree, and several appraisements had, each being less than the preceding one, until it was finally sold to T. C. Henry, in March, 1875, for the sum of eight hundred and sixty dollars. During all this time the assignee made no objection to the proceedings in the state court, nor did he take any steps to foreclose said mortgage, or liquidate the liens in this court. He now files his bill in equity to restrain further proceedings in said state court for want of jurisdiction of the subject-matter in said court.

It is too well settled by a long line of decisions that the federal courts have general jurisdiction and control of all the assets of bankrupt estates, to be any longer questioned. The defendants, however, maintain that the jurisdiction of the federal court is not exclusive, and that the complainant, by making a voluntary appearance as assignee in said suit in Dickinson county, and permitting the proceedings to go on for so long a time without objection, is estopped from now invoking the aid of this court to enjoin the parties. The defendants also raise a question of limitation, but upon that point I need not express an opinion.

The case resolves itself into this:—First. Is the jurisdiction of the bankruptcy court exclusive in cases of this kind? Second. If not exclusive, if the state court had, or can have jurisdiction, should the assignee be permitted now to invoke the aid of this court?

There seems to have grown up a perplexing and somewhat incongruous line of decisions of different courts upon this question of jurisdiction between the state and federal courts in matters appertaining to bankruptcy. While it is almost the universal opinion of all the courts, both federal and state, that all matters appertaining to the administration or settlement of the estate of bankrupts belong to the bankruptcy court, and that parties may be enjoined from proceeding in the state court if its jurisdiction is promptly challenged, it is not so easy to understand the exact grounds on which these decisions rest. Several of the cases proceed to argue that the United States courts have the exclusive jurisdiction in matters of this kind, and then speak of the state courts having the right to exercise the powers if the federal court gives its consent thereto. Now, if the jurisdiction is vested by law in the bankruptcy court exclusively, how, on any known legal principle, can that court divest itself of that jurisdiction and confer it on any other tribunal? It seems to me the jurisdiction must be just where the law has placed it, and it must remain there. Neither the order of the court, nor the consent of the parties themselves, can transfer that jurisdiction to any other court. As well might it be claimed that the state district court could send parties into the probate court to foreclose a mortgage, or to a justice's court to obtain a divorce, or that parties could by consent give jurisdiction to those courts over such matters. It seems inexplicable to me, when it is held that the jurisdiction is exclusive in the United States court, that it can then be asserted that those courts may exercise it or not, or may transfer it to a state court or not, just as the whim may strike them. For instance, in the case of Phelps v. Sellick, [Case No. 11,079,] Judge Longyear holds that where a mortgagee proceeded to foreclose his mortgage in the state court after the mortgagor had been adjudged a bankrupt, the proceedings were a nullity, that is, they were

absolutely void for want of jurisdiction, and yet he holds in the same case that the mortgagee might have foreclosed in the state court if the consent of the bankruptcy court had first been obtained; and he says, "It is competent for the bankruptcy court to treat such process and proceedings as valid and binding upon the estates and persons interested therein." Then it results, that a judgment absolutely void can be treated by another court as valid and binding upon the estate and persons interested therein if it sees proper to do so. This is what might be called a shifting or transferable jurisdiction. It can be laid off or put on as easily as a mantle. The federal court can withhold or confer jurisdiction as it may see proper, and the estate and parties are bound thereby.

In Re Anderson, [Case No. 351,] the court scouts the idea that an assignee can be sued in a state court concerning the bankruptcy matters; and a decree rendered therein, although by his written consent, is held a nullity. In the case of Brigham v. Claflin, [31 Wis. 607,] decided by the supreme court of Wisconsin, the court held that jurisdiction in bankruptcy cases was solely and exclusively in the federal courts, and uses this language: "And I cannot but think that congress has in fact vested in those courts the complete and exclusive jurisdiction over all acts, matters, and things to be done under and in virtue of the bankruptcy." In Re Brinkman, [Case No. 1,884,] the court says, "The jurisdiction of said courts sitting as courts in bankruptcy is superior and exclusive in all matters arising under the statute" * * * "Any lien upon the property of the bankrupt, as long as the property is in the possession of the court or its officers, the assignee or trustee, can only be enforced in the district court sitting as a court in bankruptcy." Then in the same opinion it is said: "No person can enforce a specific lien, such as a mortgage or a judgment in a state court, while the proceedings in bankruptcy are pending, unless an assent thereto shall first be given by the assignee as an officer of the court." Now, here is a matter said to be vested by law exclusively within the jurisdiction of the bankruptcy court, and yet the assignee can by consent confer jurisdiction where the law has not given it.

I have referred to these cases more for the purpose of calling attention to what seems to me inexplicable on any legal principle, rather than authority for my decision in this cause; and in giving my opinion in this matter I find myself making an argument for the one side and deciding for the other. Were there no objectionable cases on this question, and were we compelled to go back to the bankrupt act itself for its meaning, I should be compelled to hold the jurisdiction of the bankruptcy court exclusive as to all the matters enunciated in the first section of the act, among which are the adjustment and liquidation of liens, "and all acts, matters, and things to be done under and in virtue of the bankruptcy," etc., etc. This jurisdiction being exclusive, neither the bankruptcy court, nor the parties to the proceedings could divest that jurisdiction, or confer it on any other tribunal, either by consent or by laches, and that all proceedings in the state court on any of the matters enunciated in said section were absolutely null and void. That congress having the constitutional power to establish uniform laws on the subject of bankruptcy, has seen proper to select the federal courts as the tribunals in which such laws should be administered, and has expressly conferred that power on those courts, and by no implication can the state courts take any of that jurisdiction. See Ex parte Christy, 3 How. [44 U. S.] 292; Brigham v. Claflin, [31 Wis. 607.] The several courts of this state have such powers as are defined by law, and no lawyer would contend that the district courts of this state have jurisdiction to settle estates of deceased persons because the law has nowhere said that they should not exercise that power. There has been a tribunal brought into existence, and that particular jurisdiction has been in terms conferred upon it, and that of itself is an implied exclusion of that power from other courts.

With this statement as to what my own views of the law would have been, aside from any decisions, I come back to the question as to what has been decided by the courts. It seems that the general current of authorities, and even those that hold the jurisdiction exclusive in the bankruptcy court, agree that the state courts may exercise the power when leave of the bankruptcy court is first obtained. Then there are other decisions which hold that the bankruptcy court may approve and ratify proceedings commenced in the state court without leave, if the estate will not be materially injured thereby, or if the assignee has been guilty of laches in objecting to such proceedings. It would seem to stand to reason, if the power can be conferred on the state courts by leave had prior to any proceedings, that it can by the same authority be approved and made good after the proceedings have been commenced.

The following cases hold that the jurisdiction of the United States district court in matters appertaining to bankruptcy is not exclusive of the state courts. In re Bowie, [Case No. 1,728;] Norton's Assignee v. Boyd, 3 How. [44 U. S.] 426. In this case the circuit judge used this language: "I agree fully in the opinion that upon the ground of expediency the jurisdiction of the district court of the United States over all the property of the bankrupt, mortgaged or otherwise, should be exclusive, but I do not understand the bankrupt law to render it so." The court then holds that parties may foreclose a mortgage against a bankrupt in the state courts,

and that the federal courts will not interfere except to prevent wrong or injustice to the estate. The supreme court affirmed this decision, but declined to express any opinion as to the exclusive jurisdiction of the federal court. In Mays v. Fritton, 20 Wall. [87 U. S.] 414, a foreclosure of a mortgage was had against the bankrupt in the state court. The assignee was made a party defendant, and entered his appearance and made a contest for the surplus proceeds of the sale, and did not object to the jurisdiction of the court. On appeal to the supreme court, it was held that he could not then be heard to object to the jurisdiction, as he had acquiesced in the proceedings in the state court. A still later case is Scott v. Kelly, [22 Wall. (89 U. S.) 57.] It was a case decided by the supreme court, and the opinion is delivered by Waite, C. J. It is very brief, and the substance of it is contained in these words: The assignees in bankruptcy voluntarily submitted themselves and their rights to the jurisdiction of the state court. Being summoned, they appeared without objection and presented their claim for adjudication by that court. No effort was made to remove the litigation to the courts of the United States. "It is now too late to object to the power of the state court to act in the premises and render judgment." And cites the case of Mays v. Fritton, before referred to. These decisions of the highest court in the land have recognized the power of the state courts to proceed under certain circumstances in these cases, and although it is to be regretted that the views of that court and the reasons for its decision have not been given, it is nevertheless binding upon this court.

As to the other question, it is necessary to say but little. The assignee voluntarily appeared in the case and submitted to the jurisdiction of the state court, and asked for, and took a judgment in his own favor as an individual, and had his lien adjudicated on the real estate. He permitted the property to be repeatedly appraised and offered for sale without objection, and was present at the sale and advised about the proceedings therein. The various proceedings have extended over a period of more than two years, and never, until now, has the assignee made any objection thereto. The incumbrances on the real estate are more than it will bring at public sale, and there can be no surplus for the general creditors. There is no reason to believe that the assignee can sell it for more than it has already been sold for, and I cannot see that the estate is now going to be injured by permitting the state court to proceed to a final conclusion of the matter. The temporary injunction will therefore be denied.

AUJA, (UNITED STATES v.) See Case No. 14,478.

Case No. 649.

AULD v. AULD.

[4 Cranch, C. C. 84.][1]

Circuit Court, District of Columbia. May Term, 1830.

DIVORCE—ALIMONY—PENDENTE LITE.

A bill having been filed for alimony,—

THE COURT, upon the petition of the complainant, for a temporary support pendente lite, ordered two dollars a week to be paid to her until the further order of the court.

AULD, (BRECKENRIDGE v.) See Case No. 1,824.

AULD, (HEPBURN v.) See Case No. 6,389.

Case No. 650.

AULD v. HEPBURN et al.

[1 Cranch, C. C. 122.][1]

Circuit Court, District of Columbia. June Term, 1803.

PLEADINGS—TENDER—RIGHT TO OPEN AND CLOSE—PAROL EVIDENCE TO VARY WRITTEN AGREEMENT—ADMISSIONS BY DEMURRER IN ANOTHER SUIT.

1. On a plea of tender, &c., the defendant holds the affirmative, and has a right to open and close the cause.

2. Parol evidence will not be received to explain a written agreement, until it is first shown that the expressions of the agreement are equivocal.

3. A demurrer in one cause between the same parties, whereby a particular fact is considered in law as admitted, is not evidence of that fact in another cause between the same parties.

[See Auld v. Hepburn, Case No. 651.]

At law. Debt [by Auld, as agent for Dunlop & Co., against Hepburn & Davis] for the penalty of an agreement, $45,000. The defendants pleaded a tender of a deed of assignment.

THE COURT was of opinion, nem. con. that the defendants held the affirmative of the issue, and had the right to open and close the cause.

Mr. Keith's evidence was objected to, because parol evidence cannot be given to alter the written agreement.

Mr. E. J. Lee cited Meres v. Ansell, 3 Wils. 275.

THE COURT was of opinion, nem. con. that in order to let in parol evidence to explain the agreement, the party must first show that there are equivocal expressions in the contract, and that the evidence is to explain those equivocal expressions.

Mr. C. Lee, for the plaintiff, offered the record of the case of Hepburn v. Auld, [Case No. 6,389,] decided in this court, and in the supreme court, [1 Cranch, (5 U. S.) 321; 5 Cranch, (9 U. S.) 262,] upon a writ of error,

[1] [Reported by Hon. William Cranch, Chief Judge.]

to show that by the demurrer in that case, the fact is admitted that the tender was not unconditional.

THE COURT refused to permit the record to be read for that purpose, or to prove any other fact admitted by that demurrer.

The jury could not agree after being out three days.

Case No. 651.

AULD v. HEPBURN et al.

[1 Cranch, C. C. 166.] [1]

Circuit Court, District of Columbia. June Term, 1804.

PLEADINGS—DEMURRER—NOT EVIDENCE OF FACTS ADMITTED IN ANOTHER SUIT.

An admission of facts by a demurrer in one suit, is not evidence of those facts in another suit between the same parties.

[See Auld v. Hepburn, Case No. 650.]

The record of the suit of Hepburn v. Auld [Case No. 6,389, 1 Cranch, (5 U. S.) 321, and 5 Cranch, (9 U. S.) 262] was offered in evidence by the plaintiff to show that by demurring to Auld's plea, in that case, the defendants have admitted the fact, that the release was required.

E. J. Lee, for plaintiff, cited Lee v. Boothby, 1 Keb. 720; 12 Vin. Abr. 82. Admissions upon record in other cases between the same parties, may be given in evidence.

Mr. Swann, contra, cited Grills v. Mannell, Willes, 380.

THE COURT was of opinion (nem. con.) that the admission of facts by a demurrer cannot bind the party in any other plea, or in any other cause where the facts are put in issue.

Case No. 652.

AULD v. HOYL.

[1 Cranch, C. C. 544.] [1]

Circuit Court, District of Columbia. June Term, 1809.

LIMITATION OF ACTIONS—WHEN APPLICABLE—TREATY OF 1794.

A British subject who, before the treaty of 1794, [8 Stat. 116,] took a bond in the name of a citizen of the United States, cannot avoid the statute of limitations, by claiming the benefit of the clause of the treaty which removed all legal impediments in the recovery of British debts.

At law. Debt on bond [by Auld, as assignee of W. Wilson, against Hoyl, as administrator of Deakins,]—plea that the bond was of twelve years standing, and barred by the statute of limitations. Replication that the bond was taken for a debt due to Dunlop & Co., British creditors, before the war, and that the British treaty removed that lawful impediment.

THE COURT (DUCKETT, Circuit Judge, absent) adjudged the replication to be bad; observing that if a British creditor covers his debt under the name of a citizen he must take citizen's law.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 653.

AULD et al. v. MANDEVILLE.

[2 Cranch, C. C. 167.] [1]

Circuit Court, District of Columbia. April Term, 1819.

NEGOTIABLE INSTRUMENTS—DEMAND—LAST DAY OF GRACE.

Notice to the indorser on the third day of grace, although after bank hours, is too soon.

[See note at end of case.]

At law. Assumpsit, against the indorser of Griffith's note. Demand of payment from the maker was made before three o'clock on the last day of grace, and payment being refused, the notary gave notice to, and demanded payment from, the defendant after three o'clock of the same day.

THE COURT, upon the authority of the cases decided in Washington, viz: Lindenberger v. Beale, [Case No. 8,359,] and Beeding v. Pic, [Id. 1,227,] rendered judgment for the defendant upon the case stated and referred to in the verdict of the jury.

[NOTE. This decision was evidently in recognition and enforcement of the usage of the banks in the District of Columbia to demand payment of commercial paper the day after the last day of grace. Other cases to like effect are Coyle v. Gozzler, Case No. 3,312; Bank of Alexandria v. Wilson, Id. 856; Brent v. Coyle, Id. 1,837; Hill v. Norvell, Id. 6,497; Bank of Columbia v. McKenny, Id. 874; Mills v. Bank of U. S., 11 Wheat. (24 U. S.) 431; Adams v. Otterback, 15 How. (56 U. S.) 539; Bank of Washington v. Reynolds, Case No. 954; Bank of Columbia v. Lawrence, Id. 872; Patriotic Bank v. Farmers' Bank, Id. 10,811; Renner v. Bank of Columbia, 9 Wheat. (22 U. S.) 581. This usage was changed in 1818 by all of the banks of Washington and Georgetown "so as to conform to the general commercial usage of demanding payment on the last day of grace." Cookendorfer v. Preston, 4 How. (45 U. S.) 317. This change in usage or custom was also recognized in the following cases, requiring demand to be made on the last day of grace: Beeding v. Pic, Case No. 1,227; Auld v. Peyton, Id. 654; Lenox v. Roberts, 2 Wheat. (15 U. S.) 373; Bank v. Walker, Case No. 903; Bank of Washington v. Triplett, 1 Pet. (26 U. S.) 25.]

Case No. 654.

AULD et al. v. PEYTON.

[2 Cranch, C. C. 182.] [1]

Circuit Court, District of Columbia. Nov. Term, 1819.

NEGOTIABLE INSTRUMENTS—DEMAND—LAST DAY OF GRACE.

Demand of payment of a note must be made on the last day of grace.

[See note to Auld v. Mandeville, Case No. 653.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

At law. Assumpsit, against the indorser of a promissory note. No demand of payment was made until the day after the last day of grace, on which day payment was demanded and the note protested.

THE COURT (nem. con.) said that there must be evidence of a demand upon the last day of grace. Verdict for the defendant.

AULD, (SCOTT v.) See Case No. 12,523.

Case No. 655.

AULT v. ELLIOT.

[2 Cranch, C. C. 372.][1]

Circuit Court, District of Columbia. April Term, 1823.

JUDGMENT—SETTING ASIDE—IRREGULARITY—QUASHING SCIRE FACIAS.

Upon motion of the special bail, at the return of the scire facias, the court will set aside the original judgment against the principal, for irregularity, and will quash the scire facias against the bail.

[Cited in Jones v. Kemper, Case No. 7,472.]

At law. Upon the return of the scire facias against Elliot, who was special bail of Morte, Mr. Redin, for the bail, obtained a rule upon the plaintiff to show cause why the original judgment against Morte should not be set aside for irregularity, and the subsequent proceedings against the bail, quashed. The original judgment was rendered in December, 1819, by confession without any declaration, or rule to declare, or to plead.

In support of the rule, Mr. Redin cited Tidd, Pr. 242, 1093, 1094. 1146; Hayward v. Ribbans, 4 East, 310, 313; Barlow v. Kaye, 4 Term R 688; Hardy v. Moore, 3 Har. & McH. 389; and Bowie v. State of Maryland, Id. 408.

On the 22nd of June, 1824, THE COURT made the rule absolute, and ordered the original judgment to be set aside, and the continuances entered up, and all the subsequent proceedings to be quashed.

Case No. 656.

AULTMAN v. HOLLEY et al.

[11 Blatchf. 317;[2] 6 Fish. Pat. Cas. 534; 5 O. G. 3; Merw. Pat. Inv. 673.]

Circuit Court, S. D. New York. Oct. 27, 1873.

PATENTS FOR INVENTIONS — INFRINGEMENT—NECESSARY PARTIES—CONSTRUCTION OF CONTRACT—REISSUES—EXTENT OF CLAIM — BROKEN MODEL—ABANDONMENT.

1. The reissued letters patent No. 2,608, granted to Philo Sylla and Augustus Adams, September 14th, 1867, and the three reissued letters patent Nos. 723, 724 and 726, granted to C. Aultman & Co., assignees of said Sylla and Adams, May 17th, 1859, each for an "improvement in harvesters," (the original patent having been granted to said Sylla and Adams, September 20th, 1853,) and which four reissued letters patent were severally extended for seven years from the 20th of September, 1867, are valid.

[Cited in Wheeler v. McCormick, Case No. 17,499.]

2. Under an objection that the reissued patent includes devices not shown or suggested in the record of the original, the proper tests to be applied, in considering whether a reissued patent is for the same invention as the original, stated and illustrated.

[Cited in Kerosene Lamp Heater Co. v. Littell, Case No. 7,724; Dederick v. Cassell, 9 Fed. 307.]

3. In a certified copy of the model on file, certified from the patent office, the precise construction, in the particular in dispute, was not shown, for the reason that parts were broken and other parts were missing. But the original specifications and drawings were not inconsistent with the construction necessary to sustain the reissue; and, in view of the necessity of the feature, and of evidence, that, before the model was filed, such necessity was understood and acted on, in practice, by the inventors, and of the fact that the patent office granted the reissue after referring to the model, on a question being raised before it as to the particular in dispute, it was *held* sufficiently proved that the model, as filed, contained the feature.

[Cited in Kerosene Lamp Heater Co. v. Littell, Case No. 7,724; Dederick v. Cassell, 9 Fed. 307.]

4. The question of infringement, considered. Abandoned experiments, commented on.

5. Devices contrived and employed in such experiments do not, on their abandonment, become, per se, public property, in such sense that they can be used to defeat the patent of a new and independent inventor.

[6. The owners of conflicting patents entered into an agreement which defined their respective rights and provided a fund for maintaining the patents and for purchasing as joint property patents deemed necessary for their mutual protection. A patent which had been previously purchased by one of the parties was subsequently assigned to the original inventors and after having been extended was reassigned to the same party. *Held*, that the agreement operated at most as a license to all the parties to use the patent so owned by one of them and that the others were not necessary parties to a suit at law on the patent by its owner.]

[Cited in Wheeler v. McCormick, Case No. 17,499.]

[In equity. Bill by Cornelius Aultman against Henry C. Holley and Edwin H. Fitts] on reissues Nos. 723, 724, 726, and 2,608, of the patent originally granted Philo Sylla and Augustus Adams, September 20, 1853, [and numbered 10,038.] On May 17, 1859, the original patent was reissued to C. Aultman & Co., assignees, in six divisions, Nos. 721, 722, 723, 724, 725, and 726. No. 722 was afterward again surrendered, and reissued as No. 2,608, and on September 19, 1867, reissues 2,608, 723, 724, and 726 were extended for seven years. The suit was defended on various grounds, stated fully in the opinion, but the principal defense, and the one

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. Syllabus taken from Blatchford's Reports, and statement from Fisher's Patent Cases. Merw. Pat. Inv. 673, contains partial report only.]

most fully considered by the court, was that the reissues were not for the same invention as the original. It seems that the reissues all describe the ends of the finger-bar as free to vibrate perpendicularly, so as to conform to the undulations of the ground. The original specification and claims nowhere speak of the ends vibrating, but do frequently speak of the finger-bar as vibrating perpendicularly, and the drawing of the original shows a construction for allowing the whole bar to rise and fall perpendicularly. In the patent office model, the parts showing the connections of the finger-bar were broken and destroyed. It is moreover shown that the patentees were familiar with the need of a bar that would rise and fall at either end, and that the file-wrapper of the reissues disclosed the fact that the office, during the pendency of the reissues, pointed out to the applicants the fact that the specification and drawing of the original showed no manner in which either end of the finger-bar would rise without the other; whereupon the applicant referred to the model, and afterward the reissues were granted. The facts on this point, with quotations from the original patent and the claims of the reissues, are fully given in the opinion of the court. [Decree for complainant.]

George Harding, for complainant.

B. F. Thurston and Henry Baldwin, Jr., for defendants.

WOODRUFF, Circuit Judge. On the 20th of September, 1853, Philo Sylla and Augustus Adams received letters patent from the United States, for an "improvement in harvesters." On the 17th of May, 1859, on a surrender of the said patent, new letters were issued to C. Aultman & Co.. assignees, intended severally to cover different parts of the same invention, or different devices included in the original machine. These reissues were numbered respectively 721, 722, 723, 724, 725, and 726. Thereafter, reissue No. 722 was assigned to the original alleged inventors, was by them surrendered, and, on the 14th of September, 1867, new letters patent were issued to them, professedly for the same invention, which last named reissue is numbered 2,608. The several reissued patents numbered 2,608, 723, 724, and 726, were, on the 19th of September, 1867, extended for seven years from the expiration of the original terms, namely, to the 20th of September, 1874, and by assignment from the original patentees, the title thereto is vested in the complainant in this suit, who charges the defendants with an infringement of these extended reissued patents. The defendants have raised the preliminary objection, that the suit is defective for want of necessary parties; and, on the merits, they insist upon varous objections to the relief sought, the chief of which are, that the reissued patents are void, because they "are not for the same invention as the original patent from which they have sprung, but claim substantial and material matters not indicated, suggested, or described in that original patent;" that, if the reissued patents embrace no devices but such as are shown or suggested in the record of the original, or if they can be sustained so far as to embrace what is shown in such original and nothing more, then the defendants' machine is no infringement; and, finally, that the invention shown or indicated by the original patent, its specification and model, in any particular in which the defendants can be deemed to use any device or devices shown therein was not new when such original patent was granted.

[2] [1. The objection that the suit is defective for want of necessary parties (then considered by the court and overruled) is founded upon a certain agreement entered into on the 27th of December, 1860, by and between Cyrenus Wheeler, Jr., and several others of the first part, and this complainant and others, (composing the firm of C. Aultman & Co.,) and Sears, Adriance & Platt of the second part, which recited the ownership of sundry patents for improvements in grain and grass harvesting machines by Wheeler, and the interest of others of the parties of the first part therein, and the ownership of the original patent hereinabove mentioned and the reissues thereof, and of sundry other patents by C. Aultman & Co., and that they have assigned exclusive rights in certain territory within the United States to Sears, Adriance & Platt. The agreement then proceeds to declare that each party licenses the other party for the term of ten years from January 1, 1861, to make, vend, and use the respective patented improvements, and to license others to make, vend, and use their respective separate machines, but only such machines as correspond with an agreed sample of the machines of each, each party reserving to themselves and to their licensees the right to make their own machines, illustrated by such sample, and not to make or license others to make, vend, or use machines corresponding substantially to the sample of the other party. Among other things thereinafterward following, they fix the minimum license fee which each party shall charge licensees for each machine licensed corresponding with such party's sample machine; they provide for the payment of one dollar to a common agent for each machine sold by either party or by the licensees of either party as a common fund. Certain outstanding contracts with other parties are then recognized and affirmed. It is then declared that any persons selling machines other than the specified sample machines, and using any of the patents of either party, are to be deemed infringers. The agreement, then, ninthly, declares that any patents which shall

[2] [From 5 O. G. 4.]

be deemed necessary by the parties hereto for the protection of either machine, upon joint consent, may be purchased, the expense being borne equally by the parties of the first and second part. * * * The special agent is to be paid the one dollar for each machine above mentioned, and all sums received for infringements are to be paid to him; he is to be the general agent of both parties to settle claims for infringements, and to do such other acts as the parties see fit to authorize him to do, the parties to report to him the number of machines built by them, the names, &c., of their licensees, and the number of machines made by the latter, respectively. The common fund to be paid into the hands of the agent is to be used for expenses in transacting any business provided for in the agreement, and in defending and maintaining the patents of either party, and if there be any surplus it shall be divided. "Thirteenth. The title to the patents now owned by either party shall remain as now vested, and such as shall hereafter be acquired shall become the joint property of the parties hereto, subject only to such transfers as may be hereafter made by mutual consent.

* * * * * * * * *

"This contract shall be in force and continue to the full end of ten years from the first day of January, 1861, unless otherwise dissolved by mutual consent." The claim that the parties to the agreement are necessary parties is mainly founded upon the provision therein that such patents as should thereafter be acquired should become the joint property of the parties. The extension of the patents originally granted to Sylla & Adams was made to the original patentees, and was assigned to Cornelius Aultman after the making of this agreement. But I am satisfied, upon a consideration of the design and object of the agreement and an examination of all its details that such extension of one of the patents, owned by one or some of the parties when the agreement was made, and the acquisition thereof by assignment from the patentees, was not intended by the clause in question. It was not the purpose to change the title of the respective parties, but to bring the machines manufactured by either party or by their licensees, corresponding with the respective samples, under the operation of the agreement, and so to prevent competition among themselves, and provide a common fund, which might be availed of by either, to maintain their respective patents. The party of the second part was, perhaps, bound to treat all machines, made substantially like the sample machine during the ten years, as within the scope of the agreement, and could not avail themselves of the extension as a ground for withdrawing such machines therefrom. That was, in respect to the extension and the assignment to the complainant, the extent, at most, to which the other parties to the agreement could assert any interest in the extension. Besides, the patents which were to become joint property were only those the purchase of which was warranted by the agreement itself. Those were described in the previous ninth clause of the agreement—viz., patents deemed necessary for the protection of either machine, purchased upon joint consent, the expense thereof being borne equally by the parties of the first and second part. It was to those patents that the thirteenth clause referred. It was not placed in the power of each and any person included among the parties to the agreement to purchase any patents he might choose with the joint funds, and there was nothing to prevent his purchasing any patents he might choose for his own benefit, subject, at most, to the right of all who were parties to the agreement to make their respective sample machines during the ten years, and to treat all machines during that time made by the others corresponding with such samples as within the provisions of the agreement. And it is by no means clear that if the parties of the first part to the agreement departed from their sample machine and made machines corresponding with the sample machine of the other party, using therein the inventions whereof the latter, or one of them, owned the patents, such last-named patentee, although a party to this agreement, might not treat the former as an infringer, and maintain an action at law for such an infringement. As to the influence of this so-called consolidation agreement generally, upon the question of parties to a suit for the infringement of a patent acquired by one of the individuals included within one of the parties, even conceding, as above hypothetically assumed, that his ownership subjected the machines made under it during the ten years to the operation of the agreement, it was not the intent or effect of the agreement to affect the title to the patents or the right to sue thereon. The agreement operated as a license among the parties, and placed the parties themselves under contribution for mutual support and defense. The most that can be claimed is that in the prosecution of suits for the infringement of either patent, the party holding the title thereto was quasi trustee for all in respect of the proceeds of recovery. And the suggestion that these defendants need protection against any suit by the other parties, and so have a right to insist that they be brought in as parties is answered by the fact that such other parties could not sue on the complainant's patent, and any equitable interest of theirs is fully represented by the complainant. If, on the other hand, the complainant be deemed to hold the extension as a new grant, not included in the provisions of the agreement, then, of course, the objection that the others should be parties, is wholly groundless. The suggestion is further made that it appears by the recitals in the agreement that Sears, Adriance & Platt were, when the agreement

was made, the assignees of exclusive rights in certain territory within the United States, from C. Aultman & Co., then owners of the original patent to Sylla & Adams; that it also appears by certain bills of complaint filed by Sears, Adriance & Platt, in suits begun by them, that the territory thus referred to included New York, within which the infringement now in controversy was committed. Hereupon it is argued that, if the objection already made that all the parties to the before-mentioned agreement should be parties to this suit do not prevail, then the complainant has no right to sue at all; that in respect to the state of New York, Sears, Adriance & Platt are assignees of the patent, and suits for an infringement within that state should be brought by them. Besides the consideration that the declarations of Sears, Adriance & Platt are not evidence against this complainant, and that without such declarations it does not appear that they ever had any exclusive territorial rights which included New York, it is not shown that any interest held by them gave them title, legal or equitable, beyond the term of the original patent; and if not, they have no title to the extension and no interest in this suit, as the result of any prior assignment. These considerations require that the objection above stated, that the persons who entered into the so-called consolidation contract, and those who, by supplemental agreement, became parties thereto, are necessary parties to this suit, be overruled.]

2. The claim that the reissued patents on which this suit is founded are void, because they are not for the same invention as the original, but claim substantial matters not included in the former, nor shown, suggested, or described in the original record, is most urgently pressed, and is sustained by very able, elaborate, and greatly extended arguments, by the distinguished counsel representing the defendants on the hearing. The legal proposition, that a party cannot, by the surrender of a patent and the reissue thereof, obtain an exclusive right to devices not shown or claimed in the specification, drawings, or model of the original patented invention, is not disputed. But the application of that rule of law to the present case is resisted, and the controversy thereupon embraces the disputed question of fact, as to what was disclosed by the record of the original patent, including therein the specification, drawings, and model; and, next, the question, whether the reissued patents here sued upon do embrace devices not thus shown. I cannot hope to do more, than to make these questions, in their relation to the case, intelligible, and to state my conclusion thereon. To follow the arguments of counsel through all their details, and attempt, satisfactorily, to answer those arguments, however gratifying and, possibly, useful, in the future history or progress of the case, as a vindication of my conclusion, must be left to greater leisure and to the duty of arguing rather than deciding.

It is always to be borne in mind, in considering the validity of a reissued patent, in the face of the objection before us, that the object of a reissue, and the purpose of the law in permitting the surrender of a patent and a reissue thereof, are, to correct, or rather perfect, a defective or insufficient description or specification, including the claim which the patentee makes to the devices described and which he alleges are his invention. The reissue is, therefore, not to be tested by the mere language of the original specification, for, the fact of reissue proceeds upon the ground, that such language is defective or insufficient. So, also, something is due to the fact of reissue itself, as presumptive evidence of the facts justifying the reissue in manner and form in which it is granted. Indeed, this alone has been held, in some cases, conclusive, unless there be a clear excess of authority, or there appears to be fraud therein, (Allen v. Blunt, [Case No. 216, Id. 217;] Battin v. Taggert, 17 How. [58 U. S.] 74;) while, on the other hand, it is agreed, that the reissued patent must be for the same invention, and the patentee cannot thereby secure to himself a new or different subject of patent, even though it be, in truth, his own invention. In the original specification annexed to the patent granted to Sylla and Adams September 20th, 1853, [1873,][1] they state, that the nature of their invention "consists in fastening the sickle-bar or stock" (elsewhere and often called the "cutter-bar" and "finger-bar," it being the bar which supports the knives, and on which they slide, in cutting grass or grain) "to the ends of two levers, so as to allow it to vibrate perpendicularly, and accommodate the sickle to uneven ground, in cutting grass, the weight of the sickle-bar being properly counterbalanced by weights upon the opposite ends of the levers, which levers may be made permanent, by bolts or otherwise, when cutting grain, the sickle-bar being connected to the carriage frame by a strong link, which is hinged to the sickle-bar and to the carriage near the crank shaft, so as to allow the bar to vibrate perpendicularly and to prevent it from being traversed longitudinally by the motion of the sickle." And, in describing the construction of the machine, it is said, "the bar B" (part of the frame near the crank shaft) "being connected to the sickle-bar * * * by the link, * * * which link is hinged to both bars by strong staples, so as to allow the sickle-bar * * * to vibrate perpendicularly and accommodate itself to uneven ground, in cutting grass, and to prevent it from being traversed endways by the motion of the sickle * * * and the action of the grass or grain, as it is pressed against the sides of the fingers, * * * as it is severed by the sickle. * * * The sickle-bar

[1] [From 6 Fish. Pat. Cas. 538.]

* * * is fastened to the levers, * * * which are hung so as to vibrate freely, * * * and the weight of the sickle-bar and sickle are counterbalanced to the extent required, by the weights * * * fastened to the rear ends of the levers, when cutting grass, and, when cutting grain, the rear end" may be fastened, so as to carry the cutter-bar at a proper elevation. The patentees claim, 1st, "The weighted levers, * * * or their equivalents, substantially as described, which carry the sickle-bar and sickle, and allow them to vibrate perpendicularly and accommodate the sickle to uneven ground, in cutting grass, which levers may be made permanent, when cutting grain, substantially as described and represented;" 2d. "The link or hinged brace, * * * or its equivalent, in combination with the weighted levers, * * * which brace * * * prevents the sickle-bar from being traversed longitudinally by the action of the sickle, but allows it to vibrate perpendicularly and accommodate itself to uneven ground, substantially as described." These parts of the specification are all that are material to the point now to be considered. The drawings annexed show a machine, a frame projecting sidewise to the extent of the swath to be cut, and two parallel levers, one at each end of the finger-beam, hinged at their centres to the frame, and projecting forward to receive the sickle or finger-bar, and backward of the hinges to receive the counterpoising weights. The finger-bar appears, in the drawing, to be attached to the ends of the levers by tenons at the end of the former, entering mortises in the ends of the latter, and the under sides of these ends are curved upwards, to adapt them to slide over the ground when the finger-bar is suffered to rest thereon for mowing. The link or coupling arm is also shown hinged to the inner end of the finger-bar, and from it extending crosswise to the further corner of the main frame, where, near the crank shaft which oscillates the pitman moving the knives or cutters, it is hinged, obviously, so as to move up and down freely as the inner end of the finger-bar shall rise and fall, and so as to hold such inner end of the finger-bar in proper relative position to the crankshaft and pitman, for the free transverse action thereof and of the cutters, whether the finger-bar at that end be raised or lowered. A certified copy of the model remaining in the patent office was produced in evidence, that exhibited the general structure of the machine in admitted conformity to the specification and drawings, so far as it had been preserved, but the model was in a very broken state, and parts of it were wholly missing, and it is much to be regretted that portions were missing, which showed the precise character of the connection made between the sickle or finger-bar and the ends of the levers, which, in the discussion of this case, was deemed of great importance by the counsel.

In there issued [reissued] patent number 2,608, the only claim material to this controversy, and the only claim which it is urged that the defendants are infringing, is as follows: 1st. "The combination of a finger-beam with slotted guard fingers, a reciprocating scolloped cutter, a double hinge connection between the finger-beam and the main frame, and a driving shaft for the cutting apparatus, parallel or nearly so to the ground." Whether there be any other objections to this claim or not, and whether the defendants have violated this claim or not, may pertain to other points discussed in this case, but the claim itself is not liable to the objection now under consideration. All of the elements embraced in the combination do manifestly appear in the specification, drawings and model of the original patent. Finger-beam, slotted guard fingers, reciprocating scolloped cutter, and a driving shaft parallel with the ground, are plainly shown. The finger-beam is, with equally obvious distinctness, shown and described as doubly hinged to the main frame, as well as by the hinges at each end of the link piece or coupling bar, as by the hinges by which the levers are connected to the main frame. If, therefore, this reissue is liable to the objection that it embraces what does not appear in the record of the original patent, it must be because of something inserted in the descriptive or reciting portions of the specification preceding this claim, with reference to which it is insisted this claim must be construed, and by which it is controlled. That involves substantially the same review of the specification which is involved in the consideration of one or more of the other reissues, and may be discussed in connection with them.

In reissue number 723, the patentees declare that "what is claimed under this patent, as the invention of Sylla and Adams, is the short finger-beam in combination with the yielding connection with the main frame, or its equivalent, substantially as herein set forth." It is obvious that to this claim, as to the last named, the same observations are pertinent. The combination is of the short finger-bar, which is the finger-bar shown in the original, and the yielding connection of the bar by hinges, before referred to, which permits such motion on the coupling arm or link, and the hinged attachment to the main frame, above described. This is a more limited combination than the former, and must be deemed to embrace such coupling arm, and the hinged levers, or their equivalent. Unless, therefore, the reference to the preceding specification, by the words, "substantially as described," or the duty to construe the claim with reference to the preceding specification, brings this reissue into reach of the objection urged, and makes it embrace what is not shown in the original, then this reissue is also free from that criticism.

In reissue number 724, it is stated, that

"what is claimed under this patent, as the invention of Sylla and Adams, is the combination of the finger-beam with the hinges by which it is drawn, arranged above the plane of the cutter, substantially as herein set forth." This language is not, perhaps, the best that might be chosen to express its meaning, but I think it is sufficiently intelligible. It is not every combination of the finger-beam with the hinges which is here claimed, nor even though, in other respects, the machine should be such as is described in the preceding specification; it is only such combination when arranged above the plane of the cutters, substantially as previously set forth. This seems to me a very narrow claim, embracing an arrangement of the hinges connecting a cutter-beam to the main frame above the plane of the cutters. The description of a machine in which this is shown to be practicable and useful, whether the other parts of the machine be the invention of the patentees or not, does not enlarge this claim, but only serves to illustrate a mode of its application. The device itself is single; it is found in the original model; it is shown in the drawings furnished me as copies of those annexed to the original patent. The reissue seems, in that respect, free from the objection now under consideration.

What is claimed under reissued patent number 726, as the invention of Sylla and Adams, is "the combination of a stop with the mechanism for connecting the finger-beam with the main frame, and allowing it to rise and fall, substantially as herein set forth." Here, again, the device claimed is single, and was shown in the original. In the reissue, the machine which the patentee describes, in order to illustrate the application of the stop to practical use, is not necessarily the invention of the patentee. For the purpose of such illustration, any machine might be described, and, therefore, it is not material, so far as the validity of the patent for the mere combination of a stop with the mechanism connecting the finger-beam with the main frame is involved, to inquire whether the machine by which the patentee illustrates the practical use of the stop was or was not correctly and fully described in the original application for a patent, or the specification thereof, or even in any patent whatever. For example, let it be supposed that a patent for such a combination had once been granted, and the patentee had, in his specification, attempted to show its application to use, by describing its construction, location, and adaptation to a particular machine, but, through mistake or error, he had failed sufficiently to indicate the manner of its application, or made his description of the device otherwise imperfect, I know of no rule which, on obtaining a reissue, would forbid his selecting a machine of a different construction, and even one invented by and patented to another person, and, describing that, show also the application of his newly invented combination thereto, as an illustration of its practical utility and the manner of employing it; provided, always, that his description of the stop and its application, and his claim thereto, did not embrace anything more than the combination of the stop with the mechanism connecting the finger-beam with the main frame. He would not, of course, thereby acquire the exclusive right to the machine described, nor (if it had been patented to another) any right to use it, but he would secure the exclusive right to the stop itself, in the combination stated. Whether this reissued patent be or be not liable to any other criticism, it is not invalid on the ground that the device patented was not shown, suggested, or indicated in the original patent.

If, however, the claims in either of these last two patents be deemed to draw to themselves the description of the machine described by the preceding specifications, as illustrations of their use and mode of operation, then the observations yet to be made in respect to reissues 2,608 and 723 will apply to these also.

Recurring now to reissues numbers 2,608 and 723, it remains to inquire how far there is anything in the specification preceding the claims alleged to be infringed that makes them invalid, as including what is not shown in the original patent. It has already been seen, that the claims on their face disclose no such departure from the original patent. It may be here properly suggested, that exaggerated statements of the utility and general capacity of the machine described in the reissues, do not expose the reissues to this objection, so long as the specifications correctly describe the construction and manner of operation of the thing invented, and a practicable mode of applying it. The object of a specification is to describe the thing invented, so as to enable a mechanic of ordinary skill to construct it and apply it to practical use; and the claim declares what the patentee claims as his invention. Beyond this, all essays eulogistic of its utility, and assertions of its capacity, are immaterial and useless. If fraudulently inserted to mislead, and if they operate to deceive others in regard to the actual construction of the thing claimed and the mode in which it may be applied to use, they may render a reissue void on that ground, but that is not the point now before us; and where, notwithstanding such apparent exaggerations, the thing is correctly described, so as to serve the above stated objects of a specification, and the claim is limited to what is shown in the original record, the objection now under consideration has no force. These observations seem pertinent, in view of the criticisms, made at some length on the hearing, of the somewhat extended essays and of the vaunted

utility of the inventions, found in the specification.

The main feature, however, in which these reissues were supposed to include something not shown in the original record, and the feature chiefly pressed upon the attention of the court is, that the specifications represent the connection between the finger-bar and the frame as such that the finger-bar can rise and fall at either end, without the rise or fall of the other, thus practically adapting itself to undulations of the ground in the direction of its length. Confessedly, the finger-bar, as described and shown in the specification, drawings, and model of the original patent, could rise and fall perpendicularly, by the free play of the hinges of the coupling arm and of the hinged levers which resisted the backward thrust; but. it is denied that such finger-bar, as there described, had any other motion or capacity of motion, and it is insisted that neither the specification, drawings, or model exhibited a construction which permitted one end thereof to rise or fall without the other.

The specification annexed to the reissues assigns to the finger-beam this capacity, and describes one mode of construction which allows it. One example will suffice: "The forward ends of both the yielding bars are connected with the finger-beam, one of them, at least, not rigidly, but both strongly, so as to give the requisite support to the beam, without preventing it from swaying freely within certain limits, or rising and falling at either end unrestrained by the opposite end. One mode of securing the requisite freedom of the connection is by providing for play in the joint between the bar" (lever) "k and the finger-beam, as shown in figure 7." It will be perceived, that the question is not whether there was or is, according to the specification, drawings or model of either patent, an instrument or device which, by its action on the finger-bar, brought it to the ground, or compelled it to conform to the undulations thereof. The construction, at most, allowed it to rest on the ground, and, by its own weight, conform to the undulations. We have, then, at the outset and at the end, it may be, of the discussion, the question of fact—Do the specification, drawings or model of the original patent indicate a construction which allowed, by not preventing, the finger-bar resting on the ground, in mowing, to sway up and down at either end within certain limits, to conform to undulations which tend to raise one end without the other? It seems to me obvious, that a finger-beam attached at each end to a hinged lever vibrating freely up and down, would certainly, when resting on uneven ground, sway or incline to some extent conformably to the undulations, unless the attachment to the levers and the close working of the hinges were of extraordinary firmness and rigidity, and that this would be suggested at once to the ordinary mechanic; and, in view of the great importance and even necessity of such conformity to the surface of the ground, it seems improbable that such a construction could be described without suggesting to the mind that such swaying or inclination was intended.

It is certain, that the original specification is not very full or precise upon this point. As above quoted, it speaks of "fastening the sickle-bar or stock to the end of two levers, so as to allow it to vibrate perpendicularly, and accommodate the sickle to uneven ground;" and again, in describing the construction and the connection between the frame and sickle-bar by the link or coupling-arm at one end of the sickle-bar, it states, that such "link is hinged to both bars by strong staples, so as to allow the sickle-bar to vibrate perpendicularly and accommodate itself to uneven ground, in cutting grass." Do those expressions import an accommodation to uneven ground by vibrating perpendicularly, and by that vibration only? or do they import both a vibration perpendicularly, and also an accommodation to uneven ground generally? The first would seem to satisfy the language, and yet the language is not such as to exclude the latter meaning. The most that can, I think, be said, is, that this specification is not inconsistent with a construction which permits the finger-bar to sway or incline at either end. If such construction was elsewhere indicated, and the invention actually embraced that feature, then the want of clearness in this specification is not only no objection to the validity of a reissue, but it furnished a just and proper occasion therefor. Similar observations are due to the drawings annexed. They do not, on their face, very clearly indicate a loose tenon in the mortises shown, and yet the double lines may indicate that the tenon does not fill the mortise, but has some play therein, and the drawings are not plainly inconsistent therewith. Great importance, therefore, necessarily belongs to the model, which, in a device that, when reduced to the small scale used in the drawings, might be left in doubt, would furnish a distinct exhibition of the truth. And here I repeat the regret that those portions of the original model which contains these points of connection of the finger-bar to the hinged levers are lost. We must, therefore, resort to other evidence, and to collateral circumstances, to ascertain the fact.

In the first place, we have the great importance of this feature in a mowing machine, one quite necessary to its success. We have the before-mentioned obvious tendency of the hinged finger-bar, when attached to the ends of the lever, moving freely in hinges, to sway, when resting on the ground, in the manner in question, and, without motion or play at the points of connection, to wrench the parts and break or split them. We have the testimony that, in the first experimental use of the machine, in 1852, that

wrenching or splitting occurred, either because there was no such motion or play, or because it was not sufficient to make the machine practically useful on uneven ground. We have it established by evidence which, notwithstanding some discrepancy, I think, preponderates, that, in the fall of 1852, the machine which was then tried was altered, so as to give play, or to give more play, in those points of connection, for the express purpose of enabling the finger-bar, with more freedom, to rise and fall at either end, to accommodate lateral undulations. The importance of this feature being thus practically demonstrated to the eyes of the inventors, it would seem most natural that it would not be lost sight of, and when, in the following month of May, they filed the model, those circumstances warrant the belief that it would show that feature, unless we assume that they were greatly devoid of ordinary care in the exhibition of an essential feature of the machine they desired to patent. If, to these facts and considerations, even a little weight is given to the presumption arising, from the fact of reissue, above referred to, that the patent office had before it then the facts justifying the reissue, we should feel constrained to say that the evidence establishes that this feature of the invention was disclosed and shown in the original model.

But, the foregoing is not all of the proof bearing on this precise question. The defendants have put in evidence copies of the files of the patent office containing the applications for the reissues, the proposed new specifications and claims, the marginal criticisms made at the office, and the correspondence leading to the granting of the reissues. This was in 1859. From these it appears, that the officers observed the want of distinctness in the original specifications and drawings, and suggested that it did not appear that, according to the description thus given, the finger-bar would rise and fall at one end without the other. Whereupon the applicants, insisting on the contrary, referred them to the model itself, then, no doubt, complete, and the result was the granting of the reissues in the form in which they now appear. This is strong, very strong, persuasive evidence of the correctness of the complainant's claim in this respect. It was the very point in discussion, and appears to have been disposed of on the fact that the model showed this free connection of the finger-bar to the levers, which permitted the play therein, so that either end of the finger-bar would rise and fall without the other, "within certain limits."

Other criticisms of the reissues, as compared with the original patent, were made by the defendants' counsel. It is impossible for me to follow through all the details, and discuss them in this opinion. I have considered the arguments urged, and, as I trust, given them the weight to which they are entitled, but my conclusion is, that the reissues ought to be sustained; that there is no sufficient evidence of fraud; and, as to the actual construction of the devices claimed, that nothing is embraced in the patents which was not suggested or shown in the original.

3. I do not think there is serious doubt upon the question of infringement. The invention of Sylla and Adams has brought into use a class of machines which are distinguished by the manner in which the short finger-bar is suffered to rest upon the ground and conform to the undulations thereof, while the relation of the cutters to the operating mechanism is preserved by a crank shaft arranged parallel with the ground, and a link or coupling-arm holding the finger-bar while it moves forward, supplied with another vibrating arm or arms, which sustain the backward thrust. The attachment of one end of the coupling-arm to the frame at or near the crank shaft causes the rise and fall of the inner end of the finger-beam to be in substantially the same arc of a circle as the rise and fall of the end of the pitman hinged to the sickle or knife plate. Hence, there is due relation between the motion of the pitman and the motion of the finger-bar, and the knifes are, therefore, moved freely, however the finger-bar be affected by the undulations of the ground. By this means, there is free action of the mechanism moving the pitman, and free action of the knives in the finger-bar, without torsion or friction. In short, a result is produced which, in other machines, is effected by making the driving mechanism itself vibrate up and down around a gear centre.

The defendants' machine plainly belongs to the same class of machines, and, although it differs in some details, which, I think, pertain to form rather than to the substance of the construction, it embodies the principle and the substantial means of operation characteristic of the complainant's patented machine. True, they have enlarged the hinge of the coupling-arm, so as, no doubt, by the intervention of a different form of shoe from that shown on or formed by the end of the complainant's hinged lever, to aid more effectively in sustaining the finger-beam against backward thrust, and to dispense with a hinged lever at the outer end; and the attachment of the remaining hinged arm, which serves, like the complainant's, to sustain the backward thrust, is carried diagonally to the frame. These changes may be improvements. They render the machine more compact and convenient. But, the essential ingredients of the combination are present—the short finger-bar, the reciprocating scolloped cutters, the double-hinged connection between the finger-beam and the main frame, and the driving shaft, parallel, or nearly so, to the ground. It seems to me, that, independently of the doctrine of equivalents, the defendants' machine is, in these re-

spects, substantially like the patented invention, and, if the changes made by the defendants be deemed improvements, that is all that can be claimed for them. And, if the doctrine of equivalents be applied to the subject, then, clearly, the substitution of the hinged arm running obliquely from the inner end of the finger-beam to the main frame, and the enlarged hinge at the end of the coupling-arm, are a mere substitute for the complainant's hinged levers which sustain the finger-beam against the backward thrust. In view of the limited claims of the reissued patents, the omission of counterpoising weights cannot be regarded as relieving the defendants from the charge of infringement. They are neither of the essence of the invention nor of the claims of the patentees alleged to be infringed. These observations are pertinent to each of the reissues, if each be deemed to include, by implication or reference, the device specially claimed only when used upon a machine of the class to which, as before stated, the complainant's patented invention belongs. They are, however, especially applicable to reissues numbers 2,608 and 723.

As to reissue number 724, which, as above stated, claims the device of combining the finger-beam with the hinges by which it is drawn, arranged above the plane of the cutters, the use of the same combination is plainly exhibited in the defendants' machine.

As to reissue number 726, what is claimed is the combination of a stop with the mechanism for connecting the finger-beam with the main frame, and allowing it to rise and fall, substantially as in the specification set forth. I think the combination used by the defendants cannot be held to infringe this claim. It will be seen, that the claim is not broadly for any stop which may prevent the finger-bar from falling too low, in passing over ditches or other abrupt depressions in the surface of the ground. Such a claim would doubtless be liable to two objections: first, as being too broad, and, second, as not being of itself alone the subject of invention, but rather the suggestion of an obvious necessity. It could, in that aspect, only be permitted to patent the means or instrument devised to supply that obvious want, in any machine wherein the finger-bar is permitted to fall by its own gravity. The claim here avoids the suggestion of invalidity, by being confined to the specific combination of a stop with the mechanism for connecting the finger-beam to the main frame. That is the combination shown in the complainant's patent. The defendants have no such combination. Let their finger-beam be detached from the hinge which, through the coupling-arm and hinged lever or brace, connects it with the main frame, and that coupling-arm and hinge will then fall indefinitely; no stop is combined with them, which restrains their motion, and yet these are the mechanism which connects their finger-beam with the main frame. The defendants attach a flexible chain to the finger-beam itself. It is adjustable by the driver, so as to sustain the finger-beam, when desired. True, it accomplishes the same result as is effected by the combination claimed, but it is not within the words of the claim, nor, as I think, an equivalent in the combination, when the combination stated in the claim is viewed as a definite mechanical device.

4. On the subject of the novelty of the inventions embraced within the claims alleged to be infringed, no discussion would be satisfactory or useful which did not take up, one by one, the very numerous patents, applications for patents, machines, attempted machines, models, partial models, and experiments made or devised or attempted, in the endeavor to make a successful mowing machine, prior to the date of the inventions in question. Some, and, I think, all, have been before me on a former occasion, and some of them several times. I have, on these occasions, given them careful consideration. I have renewed and revised my examination of them in this case, with a view to the particular devices here claimed by the complainant. Nor would any discussion of their respective characteristics be satisfactory, that did not follow the argument of counsel through their full, minute, and extended presentation of these patents, machines, models, attempts, and experiments, and, professedly, at least, meet or discuss their several suggestions. This is chiefly the duty of opposing counsel, a duty which judges often undertake in vindication of their opinion, and, sometimes, when confined to what is necessary for the elucidation thereof, may profitably be done. I fear I may have trespassed upon that limit in the preceding discussion. I cannot attempt it on this point. As to two of the machines or supposed machines relied upon—one alleged to have been invented by Hazard Knowles, and the other by Ogden Randall—I deem it proper to say, that there are several grounds upon which I deem the proofs not sufficient to invalidate the claims of the original patentees, Sylla and Adams, to be held the first inventors of the subjects embraced in the claims alleged to be infringed by the defendants. I am not satisfied that the combinations and devices so claimed were included in those machines. I deem whatever was done by either of those parties to have resulted in unsuccessful and abandoned experiment, constituting no impediment to the invention of Sylla and Adams or to the validity of their patents. The suggestion, that, where such experiments are made without resulting in a useful machine, and the product thereof is abandoned on that ground, whatever devices it contained become public property, and can be dug up in after years and produced to defeat the patent of an independent and successful inventor, is not, I think, sound, or warranted by the law. And, finally, I place

no confidence in the testimony of the principal witness as to each machine, tending to show the nature, character, and even limited success of those inventions. As to other machines, models, and experiments, it is manifest, that there were very many attempts to produce useful mowing machines; some of an entirely different class in respect to construction and mode of operation; some successful, but not embracing the principle or plan of Sylla and Adams, e. g., what were called on this hearing, the Wheeler type, involved in the case of Wheeler v. Clipper, etc., Co., [Case No. 17,493;] some only partially successful; and some, of various different kinds, failures. But I am not satisfied, that, by any, Sylla and Adams were anticipated by the successful invention and application to machines for mowing or reaping, of the devices claimed to be their invention, and to have been infringed in this case. The complainant must have a decree in conformity with this opinion.

[NOTE. So far as ascertained, there are no other cases involving this patent reported prior to 1880.]

Case No. 657.

AULTMAN v. JONES.

[1 Woolw. 99.][1]

Circuit Court, D. Minnesota. June Term, 1865.

WHEN AN AGENT TO SELL ON CREDIT, TAKING A MORTGAGE, MAY BID IN, AND HOLD THE PROPERTY AGAINST HIS PRINCIPALS.

1. An agent to sell property on credit, taking a mortgage to secure the deferred payments, is not thereby authorized to foreclose the mortgage.

2. He can buy the property in, on the foreclosure, for himself, and hold it, only when so expressly authorized by his principals.

3. If he be so authorized, and so bids in the property in his own name, he does so for the benefit of his principals. He is liable to them for the amount which he may have realized on a sale of the property by him. But he should be allowed his costs, and the expenses of the foreclosure sale and re-sale.

At law. This was a writ of error to the district court for Minnesota. The plaintiffs were manufacturers of threshing and reaping machines. They had employed the defendant as their agent to sell their machines. Under their instructions, he had sold certain of them partly on credit, taking, to secure the deferred payments, mortgages on the machines sold. These mortgages empowered the plaintiffs, or their agents or assigns, to take possession of the property, and foreclose them by sale, if default should be made in the payment of any instalment of the purchase money secured thereby. The defendant foreclosed several of these mortgages, bid in the machines in his own name, and sold them again for prices averaging about four times his bid. On demand, he refused to account for more than his bids. The plaintiffs brought assumpsit for the recovery of the amounts realized by the defendant on the re-sale of the machines by him. To this the defendant pleaded the general issue, with notice of special matter. The cause was tried to a jury. On the trial, testimony was introduced, tending to show a special authority in the defendant to foreclose the mortgage and bid the property in for his own benefit. This was denied by the plaintiffs.

Mr. Lamprey, for plaintiffs.

Mr. Otis, for defendant.

Before MILLER, Circuit Justice, and NELSON, District Judge.

MILLER, Circuit Justice, (charging the jury.) There are in this case two principal matters of dispute, which must be settled by you as the foundation of your verdict.

1. Had the defendant any authority to foreclose the mortgages, which have been offered in evidence?

If you find that he had not, then he has wrongfully possessed himself of the plaintiffs' property, and is liable to them for the value of the machines.

2. If you find that he had authority to foreclose these mortgages, you will next inquire whether he was authorized by an express agreement to buy in for himself the property which he was thus authorized to sell.

If you find that he was authorized by the plaintiffs to act at the sales both as seller for them, and buyer for himself, then he is liable to the plaintiffs for the amounts bid by him, subject to a deduction of all sums paid on such bids, and the necessary costs and expenses of foreclosure paid by him. He is not entitled to compensation for personal services.

If you find that he was authorized to foreclose the mortgages, but was not authorized to bid in the property for himself, then the purchases must be considered as made for the benefit of the plaintiffs. The defendant must be treated as their agent in making the purchases, and in afterwards selling them again. As he has refused, on demand, to account as agent, or to pay to the plaintiffs the money and notes which he received from sales of the machines, he is liable to the plaintiffs for the amount for which they were sold. But if he is held as agent, he is entitled to the sums which he has paid on his bids, a reasonable compensation for his services in foreclosing and re-selling, and the expenses incident to both these sales. These sums should be deducted from the sums realized by him from the sales to third parties.

The verdict of the jury was founded on the latter hypothesis. Judgment for the plaintiffs.

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

AULTMAN & TAYLOR MANUF'G CO., (SAWYER v.) See Case No. 12,397.

Case No. 657a.

AUMACH v. The QUEEN OF THE SOUTH.

[N. Y. Times, March 30, 1864.]

District Court, S. D. New York. 1864.

PLEADING—WAIVER OF OBJECTIONS—COLLISION—BETWEEN SAILING VESSELS.

[1. Exceptions in the answer to a libel will be deemed to have been waived if not determined before proof is taken at the trial of the cause.]

[2. A sailing vessel which mistakes the position and course of another sailing vessel, and luffs, thereby causing a collision, is liable for damages when, by keeping her course, she would have cleared such other vessel in safety.]

[In admiralty. Libel by John Aumach and others against the schooner Queen of the South for damages caused by collision. Decree for libelants.]

The libelants were the owners of the schooner J. E. Clayton, which was injured by a collision with the Queen of the South in the night of Nov. 26, 1856, off the lower end of the Cedars, on the New Jersey coast. The libel was filed March 5, 1857, and the answer Nov. 30, 1860. Two exceptions were taken in the answer, one alleging a non-joinder of one part owner of the Clayton, and the other that the circumstances of the collision and the manoeuvers and faults which caused it were not set out with sufficient detail. The exceptions were not brought to argument until the trial of the cause.

Beebe, Dean & Donohue, for libelants.
Benedict, Burr & Benedict, for claimants.

SHIPMAN, District Judge. At this late stage of the case the court will deem all questions arising on the exceptions to have been waived. They should have been determined before the proofs were taken. On the proofs, although the evidence is very conflicting, the weight of it establishes the fact that the Clayton was coming up the coast close hauled; that the Queen of the South was going down the coast with a free wind; that at the time when those in charge of the Queen of the South ought to have discovered the Clayton—the former was to leeward of the latter; that had she kept her course she would have passed the Clayton to leeward and cleared her with safety; and that those in charge of the Queen of the South mistook the position or course of the Clayton, or both, and luffed, striking the latter on the starboard side, and causing the damage complained of. This luffing was a mistake for which the Queen of the South should be held responsible. Decree for libelants, with a reference.

AURELIUS, The, (FAIRCHILD v.) See Case No. 4,609.

Case No. 658.

The AURORA.

Kentucky.

[Cited in The Rapid Transit, 11 Fed. 327. Nowhere reported; opinion not now accessible.]

Case No. 659.

The AURORA.

CURRY v. The AURORA.

Superior Court, S. D. Florida. Nov. 28, 1840.

SALVAGE—COMPENSATION—FORFEITURE.

[Cited in Marv. Wr. & Salv. 232, as having held that where wreckers had unnecessarily lightened the bark of 205 bales of cotton, in order to magnify their services and obtain a larger salvage than that to which they were justly entitled, their whole salvage should be forfeited, notwithstanding they had rendered important services.]

[Note. Nowhere reported; opinion by MARVIN, J., not now accessible.]

Case No. 660.

The AURORA.

[4 Hall, Law J. 473; Car. Law Repos. 204.][1]

District Court, D. Rhode Island. Feb. 4, 1813.

PRIZE—TRADING UNDER ENEMY'S PASS.

[Where an American ship-owner pays for, and obtains from an authorized agent of Great Britain, a British license of pass and trade, as protection for a voyage on the high seas, without the permission of his own government, the two countries at the time being at war, the ship is subject to capture and confiscation as prize of war.]

[In admiralty. Libel by the United States against the ship Aurora for condemnation as prize of war. Judgment of condemnation.]

HOWELL, District Judge. This was a libel against the ship Aurora, of Newburyport, prize to the privateer Governour Tompkins, of New York, found sailing under a British license. The principal documents produced on the part of libellants were—a consular copy of a letter from Admiral Sawyer, commanding on the Halifax station, referring to a previous correspondence between the admiral and Andrew Allen, Jr., British consul at Boston, on the subject of supplies from America, reciting the necessity and policy of maintaining a constant supply of provisions from America to the British West India islands, with assurances to the consul, that his majesty's vessels of war would be directed to permit to pass and fully to protect all American vessels so laden and bound, and which should have on board the pass or license of the consul, with a copy of the admiral's letter authenticated by the consul at Boston with such authenticated copy annexed; also, a pass of the consul from New-

[1] [Car. Law Repos. contains partial report only.]

buryport to Norfolk, the port where the Aurora was to take in her cargo for the West Indies.

The official papers explicitly stated the intention to be a supply of the British West India islands, although the ship's papers purported a voyage to a neutral port.

John Woodward, for libellant, contended that the statutory forfeitures of congress had no bearing on the case, excepting so far forth as a binding municipal regulation was auxiliary to the provisions of international law; that "the obtaining from an authorized agent of Great Britain, paying for sailing under, and exhibiting on the high seas, as protection for the voyage, a British license of pass and trade, by an American citizen, without the permission of his own government, the two countries being at war, are in themselves cause of capture and condemnation, as prize of war." To support this proposition, a variety of grounds were taken, among which were that licenses were factitious, and not a part of the law of nations, but the creatures 1 of prerogative, and that confined to municipal regulations, or 2 of compact, or 3 of parliamentary provision; that the licenses in question were against the nature and law of war, as they put it in the power of particular individuals to relax or abate the rigour of the war; against the obligations of allegiance; and that the stipulations of such licenses could not be enforced by any known law. That the obtention and possession of those licenses to pass and supply, and the sailing under them, knowing of the war, was a trading with the enemy, independent of the port of destination and of the right of property, which may be the subject of trade; that the case of a license to trade to a citizen or subject from his own sovereign, was distinct from that of a license to a citizen or subject of one of the belligerents from the enemy, without the sanction of his own government; and so would be the supposed case of the neutral, for no question like the present could arise between the neutral citizen or subject and his own nation, as that nation would not be a party to the war; and the description of rights here involved would not in that case be in question.

"The question," said Mr. Woodward, "whether the property be American or British, matters not, provided the indirect or direct trading with the enemy be established. If you use your property so as commercially to benefit and carry into effect the prescribed and stipulated commercial views of the enemy, and under a formal license of protection or supply, this is as much trading with the enemy, as if the subject of the trade were the property of the enemy, and the destination an enemy port. In the latter case you trade direct—in the former indirect. If a different doctrine prevailed, national right would be sacrificed at the shrine of the meanest artifice. But if you pay the enemy, for such license, the case is still stronger, as the transit of the medium of commerce stamps a commercial character upon the transaction, and in this light alone converts it into a supply." As to the locality in the inception of this transaction, it is the known legal rule of construction, that the deleterious character is communicated to the ship, the cargo, and the voyage, for which the transaction is intended to provide, and which are described on the face of the licenses." "Much, as to the interpretation and application of the rules of the law of nations, will depend upon the character of war in which we are engaged. The war of the United States with Great Britain is a war between two maritime and commercial nations, in support of an independent commerce. The rules of decision which have applied the law of nations to the conduct of the citizens of each belligerent, have always been so construed and applied as to effectuate the notorious reasons and avowed policy of the war. This is not a theory, but has been emphatically pronounced by the decisions, to which I have referred; and it will be found by those decisions, that the principles of the law of nations have always been, under legal discretion, restrained or enlarged so as to effectuate and not intercept the notorious and avowed policy of the war. And more particularly has this principle been enforced upon questions arising upon the conduct of a citizen of one of the belligerents with his own nation; which is the present case,—To trade with or hold a commercial intercourse, whether by person or property, with the enemy, without the license of one's own government, is proven, by all the writers upon the law of nations, and all decisions touching this point, as adverse to the policy of a war waged for the purpose of commerce—that it amounts to a misdemeanor, and is cause of confiscation and condemnation. Suppose our citizens be permitted thus to obtain, pay for, and act upon these licenses; they would be in the practice of all the evils and derangements which the law of war is intended to prevent. They would facilitate treacherous correspondence, information and supplies to the enemy—the very evils assigned for the prohibition of all commercial intercourse; or, in the language of Sir William Scott, (in the case of The Jonge Pietre,) "all communication, direct or indirect, without the license of government," with the enemy. The anomaly of a citizen at peace and his nation at war, would emphatically exist; nay—the absurdity of that citizen making his peace and his fortune by the disposition of the enemy, obtained adversely to that of his own government. It is also easy to perceive, that by these licenses it would be in the power of the enemy to destroy or counteract the internal commercial policy, and relations of the states, or politically to distract the union, by concentrating the trade into some par-

ticular state, or casting it into the hands of a particular party. It is the language of a finished civilian, that, "there is no such thing as a war for arms and a peace for commerce."

"If we silently permit our citizens to traverse the ocean under such licenses of pass and supply from the enemy, it has been already proven, that by basest collusion between American citizens and the British government, we enable the enemy to take by stealth a portion of our national sovereignty, and if this high principle of national honour thus bear the touch, it would be better to surrender the whole. In a commercial war, which is always preventive and restrictive, by such licenses of pass and supply, the enemy would assume the right of regulating the commerce and directing the capital of our own citizens. The independence and integrity of one of the belligerents would be lost in the dependence and prospects of its citizens or subjects upon the authority or courtesy of the other. The civil relation, the national pride, and the boasted morals of our countrymen would be corrupted or destroyed by the deleterious influence of foreign gain; and that distinguishing and repellant point of character which marks the American citizen, both at home and abroad, and which now stamps our national character upon the fears and the admiration of the world, would be found at the feet of our enemy or lost in the mazes of British corruption."

The Attorney-General Burrell, and Mr. Boss of Newport, as counsel for the claimants, Clark and Wheelwright of Newburyport. having closed their argument, Mr. Robins, United States' district attorney, was about to begin, when the court superseded an argument on his part, by pronouncing judgment, condemning the ship and cargo to the captors. The judges' opinions were in complete coincidence with the doctrines and arguments above set forth.

AURORA, The, (AERTSEN v.) See Case No. 95.

AURY, (HERNANDEZ v.) See Case No. 6,413.

Case No. 661.

AUSTEN et al. v. MILLER.

[5 McLean, 153.][1]

Circuit Court, D. Ohio. Oct. Term, 1850.[2]

NEGOTIABLE INSTRUMENTS—NEGOTIABILITY—CERTIFICATE OF DEPOSIT—DEMAND AND PROTEST—NOTICE—NOTARY—CONFLICT OF LAWS.

1. A certificate of deposit. by the cashier of a bank, for a sum named, payable at a future period, with five per cent. interest, to the order of the individual for whose benefit the deposit was made, is a promissory note.

[See note at end of case.]

2. A justice of the peace, in Mississippi, ex officio, is a notary public to make demand and protest of a note, and give notice to the indorser.

3. The next mail after the protest is sufficient notice.

4. A decision of a state court on the character of the paper, does not constitute a rule of decision for the federal courts.

5. It is a question of common or mercantile law, rather than the construction of a statute.

[At law. Action of assumpsit by David Austen, William S. Wilmerding, and David Austen, Jr., against Henry Miller, on a certificate of deposit. Verdict and judgment for plaintiffs. Affirmed by the supreme court in Miller v. Austen, 13 How. (54 U. S.) 218.]

Chase & Ball, for plaintiffs.

Mr. Fox, for defendant.

OPINION OF THE COURT. On the 1st of February, 1840, the Mississippi Union Bank issued the following certificate:

"I hereby certify, that Hugh Short has deposited in this bank, payable twelve months from 1st of May, 1839, with five per cent. interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order, upon the return of this certificate. (Signed) William P. Grayson, Cashier."

On which the following indorsements were made:

"Pay to George Lockwood, or order. Henry Miller, Cincinnati, Ohio."

"Pay Austen, Wilmerding & Co., or order, without recourse. George Lockwood."

On the 4th of May, 1840, L. V. Dickson, justice of the peace, and ex officio notary public, presented the paper declared on at the counter of the Mississippi Union Bank, at Jackson, and demanded of the teller payment in specie, or its equivalent, which that officer, after consultation with the other officers of the bank, refused; but offered to pay in the notes of the bank, which the notary would not accept. The defendant Miller was duly notified as indorser, by a written and printed notice, directed to him at Cincinnati, and deposited in time for the first mail of the next day.

In July, 1847, the plaintiffs brought this action against Miller, as indorser. The declaration contained three counts. 1st. Alleging it to be a promissory note of the Union Bank, payable to the order of Henry Miller, and by him indorsed to George Lockwood, who indorsed it to the plaintiffs. 2d. Alleging it to be a draft drawn by Henry Miller, on the Mississippi Union Bank, at Jackson, requesting the bank to pay to George Lockwood, and by him indorsed to the plaintiffs, and charging a due presentment for payment, and notice of nonpayment. 3d. On a common count for money lent and advanced, paid, laid out, and expended, money had and received, and on an account stated.

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

[2] [Affirmed by the supreme court in Miller v. Austen, 13 How. (54 U. S.) 218.]

The plea was non-assumpsit. In the defense it was contended that the instrument declared on was not a promissory note in a mercantile sense, so as to pass by indorsement under the statute of Ohio. It provides, "that all bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or order, or to any person or bearer, or to any person or assigns, shall be negotiable by indorsement thereon; but nothing in this section shall be construed to make negotiable any such bond, note, or bill of exchange, drawn to any person or persons alone, and not drawn payable to order, or bearer, or assigns." A check and certificate of deposit are not mentioned in the statute as being negotiable.

And it is alleged that the supreme court of Ohio has decided that this identical paper is not a promissory note, negotiable under the laws of Ohio, as appears from the fourth volume (page 527) of the Western Law Journal. Suit was brought by these plaintiffs against Miller, on the same certificate, and was decided at the May term, 1847, against the plaintiffs. This is claimed as conclusive of the case, as it was made in this state under the statute of the state, which construction is claimed as a rule of decision by the courts of the United States, according to [Slacum v. Pomery,] 6 Cranch, [10 U. S.] 225; [Wayman v. Southard,] 10 Wheat. [23 U. S.] 50; 13 Pet. [38 U. S.] 739; [Wilcox v. Hunt, 13 Pet. (38 U. S.) 379;] [Shelby v. Guy,] 11 Wheat. [24 U. S.] 367; and [Green v. Neal,] 6 Pet. [31 U. S.] 297. But independently of that decision, it is urged that the instrument is not a promissory note, and that it is not negotiable under the well settled rules of law. To constitute a promissory note, it is said there must be an express promise to pay a certain amount, as an implied promise will not answer. That where there is no more than a simple acknowledgment of the debt, with such a promise to pay as the law will imply, it is not a promissory note. Patterson v. Poindexter, 6 Watts & S. 231. In that case this question was fully examined, by the supreme court of Pennsylvania, on a certificate of deposit, exactly like the one before the court, and which was held not to be a promissory note, after two arguments. That court referred to Horne v. Redfearn, [33 E. C. L. 790,] as conclusive on the subject. In Fisher v. Leslie, 1 Esp. 426, it was held that a slip of paper, I O U eight guineas, is not a promissory note, but merely the acknowledgment of a debt.

An instrument acknowledging the receipt of two hundred pounds in drafts for the payment of money, and promising to pay the money specified in the drafts, is not a promissory note. Williamson v. Bennett, 2 Camp. 417. It was also objected that it was not a promissory note, because it was payable upon a contingency, and not at all events. It was payable only upon the order of Henry Miller, and upon the return of the certificate. A promissory note, it was said, must not depend upon a contingency. Story, Prom. Notes, 22; Williamson v. Bennett, 2 Camp. 417; Roberts v. Peake, 1 Burrows, 323. This point was decided in the case above cited from 6 Watts & S. That case is said to have been well considered, and in which the above points were ruled.

It is asked whether the consideration of a promissory note in the hands of an assignee, can be inquired into. If it can, it seems to be a negotiable promissory note. And it is claimed that the consideration of the certificate may be inquired into. In a suit against the Mississippi Bank, it might show, it is urged, that instead of money, worthless bank notes were deposited, and that an offer was made to return them. If this be a promissory note, it is asked, to whom is it payable? The words, for the use of Henry Miller, only indicate the equitable rights of the parties, and do not in any way affect the legal character of the paper, &c. In reply it was said that in McCoy v. Gilmore, 7 Ohio, pt. 1, p. 268, it was held that no special form of words is necessary to constitute a promissory note. It is enough if the intent appear, and the sum can be made certain by calculation, &c.

And the court said the certificate had all the essential requisites of a promissory note. The cashier being the active agent of the bank, acknowledged the deposit of fifteen hundred dollars, payable thirteen months from the 1st of May, 1839, with five per cent. interest, for the use of Henry Miller, and payable only to his order, on the return of this certificate. Signed by the cashier. There is no want of certainty on the face of this paper. It was payable on presentation, as notes are often made, which is not a contingency that affects the character of the paper. There is a promise to pay to the order of the person for whose benefit the deposit was made. This is sufficient.

This is not a case in which the rule established by the state court, is followed by the courts of the United States. It is not a question as to the construction of a state statute, but rather a principle of the common or mercantile law which governs the case; and in this view the federal courts rather than the courts of the state, should fix the rule of decision. We can entertain no doubt on the subject. By a proper construction of the certificate, it is in principle a promissory note, and the jury being so instructed, found a verdict for the plaintiff.

Under the statute of Mississippi, a justice of the peace officiates as a notary public, in making a demand, and giving notice.

There was judgment entered on the verdict.

[NOTE. In affirming this decree, the supreme court, by Mr. Justice Catron, held: "The established doctrine is that a promise to de-

liver or to be accountable for so much money is a good bill or note. Here the sum is certain, and the promise direct. Every reason exists why the indorser of this paper should be held responsible to his indorsee that can prevail in cases where the paper indorsed is in the form of a promissory note; and as such note the state courts generally have treated certificates of deposit payable to order, and the principles adopted by the state courts in coming to this conclusion are fully sustained by the writers of treatises on bills and notes." Miller v. Austen, 13 How. (54 U. S.) 218.]

Case No. 662.

In re AUSTIN et al.

[16 N. B. R. (1878,) 518.]

District Court, E. D. Michigan.

BANKRUPTCY—INVOLUNTARY PROCEEDINGS—CONTEST OF ADJUDICATION — RIGHTS OF GENERAL CREDITORS.

[A general unsecured creditor has a right to intervene and contest an adjudication in bankruptcy.]

[In bankruptcy. Petition by the People's National Bank of Jackson, as a general creditor of the firm of Austin, Tomlinson & Webster,] for leave to intervene and contest the petition of a creditor of the firm for an adjudication in bankruptcy. Petition granted.

Mr. Wilson, for the intervening creditor.

Mr. Peck, contra.

BROWN, District Judge. It is now well settled that any creditor, whose interests are affected by an adjudication, has a right to intervene and contest all the allegations of the creditors' petition. The difficulty is to determine when the interests of the creditor are likely to be jeopardized by the proceeding. In every case in which leave to intervene has been granted, the creditor had an interest peculiar to himself, either by way of attachment, preference, or the institution of proceedings by him in another district. In re Boston, H. & E. R. Co., [Case No. 1,677;] In re Derby, [Id. 3,815;] In re Mendelsohn, [Id. 9,420;] In re Bergeron, [Id. 1,342;] In re Hatje, [Id. 6,215;] In re Jack, [Id. 7,119;] In re Williams, [Id. 17,706;] In re Stafford, [Id. 13,274.]

It has not yet been decided that a general unsecured creditor is entitled to be heard, but I think it follows logically from the reasoning in the cases above cited. He certainly has an interest in knowing whether the proper number and amount of creditors have joined in the petition, for if the debtor voluntarily becomes bankrupt, he could not obtain his discharge without the assent of one-quarter in number and one-third in value of his creditors. Precisely the same proportion being necessary to put a debtor into bankruptcy, the inference naturally follows that the petitioning creditors are regarded by the act as assenting to the discharge, in like manner as if they had expressly signified their assent in a voluntary case, provided the bankrupt has been guilty of no fraud or misconduct. In re Scull, [Case No. 12,568;] In re Wilson, [Id. 17,784;] In re Duncan, [Id. 4,131.] It thus becomes a matter of considerable importance to every creditor that the requisite number does in fact join. To this extent, also, the act itself seems to contemplate their being heard, by providing that if the allegation as to number and amount be denied, the court shall ascertain, "upon reasonable notice to the creditors," whether one-fourth in number and one-third in amount have petitioned that the debtor be adjudged bankrupt. If then they are entitled to notice, and may be heard upon a denial filed by a debtor, I see no reason why they may not intervene and be heard in their own behalf, even if the debtor interposes no objection. Clinton v. Mayo, [Case No. 2,899.] Though a general creditor may derive no special advantage to himself from defeating an adjudication upon the merits, as all will share alike in the general distribution of the assets, I think he has a substantial interest in the liberty of pursuing his common law remedy for the collection of his debt, which he loses by an adjudication. From the language of the petition in this case, "if not impeded by such proceedings, your petitioner will be able to collect its said claim in the courts of this state," I judge this to be the object of this proceeding. It is true the petitioner may thereby gain a preference over other creditors; but the bankrupt law does not frown upon preferences lawfully obtained, or interpose any obstacle in the way of a diligent creditor. If the court may lend its aid to protect liens already acquired, which would be held unlawful preferences if bankruptcy proceedings were successful (and it is upon this theory the above cases are decided), it is not easy to see why it should refuse to listen to a creditor who may anticipate hereafter the acquisition of such liens. The desire of a creditor to pursue his lawful remedy in the state court cannot be made the subject of censure or criticism here. Indeed, his right to do this is a substantial interest for which he may fairly claim protection. It is only when the connivance of a debtor contributes to a preference gained by legal proceedings that the law pronounces it a fraud.

While, as before observed, the view here taken finds no positive support in the authorities, there is no reported case holding that a general creditor may not be heard. In more than one the intimation is in this direction. Speaking of a creditor's petition, the late Judge Woodruff, whose eminent legal abilities entitle even his dicta to respectful consideration, observed, (6 N. B. R. 213), [In re Boston, H. & E. R. Co., Case No. 1,677:] "It is not a mere suit inter-partes, it rather partakes of the nature of a proceeding in rem, in which every actual creditor has a direct interest." In re Walker, [Id. 17,061,]

Judge Lowell, entertained a petition by an unsecured creditor, to vacate an adjudication for want of jurisdiction although no objection seems to have been taken to the creditor's right to be heard. In Fogarty v. Gerity, [Id. 4,895,] the learned judge for the district of California remarks: "But all other creditors are parties to and bound by the proceeding. If it be sustained, the ordinary remedies against the debtor will be suspended, the whole of his property will pass into the hands of an assignee, and they will be obliged to come into court to prove their debts, enforce their lien, adjust their accounts, and receive dividends, and the unsatisfied claims may be forever barred by the discharge of the bankrupt. They have, therefore, a clear right to be heard, and to resist the proceeding, on the ground that the court is without jurisdiction." Though the creditor in this case had a lien by attachment, the decision does not seem to have been placed on this ground. See, also, In re Mendelsohn, [Case No. 9,420.] Though the question is not free from doubt, I think a general creditor may make himself a party to this petition, and the prayer of the petitioner is therefore granted.

Case No. 663.

The AUSTIN.

[3 Ben. 11.][1]

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

COLLISION IN NORTH RIVER—VESSEL AT ANCHOR—LIGHTS—APPORTIONMENT—COSTS.

1. Where a towboat was coming down the Hudson river, with a heavy tow, and her pilot saw lights ahead, which appeared to be arranged as if on a tow coming up, but which, when he approached, were changed, but he was not then able to avoid the object, which proved to be two wrecking vessels fastened together by beams, and anchored over a wreck: *Held*, that the towboat was in fault in approaching the object so near that she could not avoid it;

2. The wrecking vessels were substantially a single object, and, whether they were called on to exhibit the light provided by article 7, or that provided by article 9, of the act of April 29th, 1864, should have exhibited but one light, or, if they exhibited two, the two should have been similarly arranged;

3. Both vessels were in fault, and the damages must be apportioned, and the libellant must recover costs.

[Cited in The Mary Patten, Case No. 9,223; Vanderbilt v. Reynolds, Id. 16,839; The Hercules, 20 Fed. 205.]

[In admiralty. Libel in rem for damages caused by a collision. Decree apportioning the damages between the parties, with costs to the libellants.]

W. J. Haskett, for libellants.

Benedict & Benedict, for claimants.

BLATCHFORD, District Judge. This is a libel for a collision, filed by Justin F. Talmage and Thomas Kivlin, the owners of two wrecking vessels, for damages caused to those vessels by a collision which occurred between them and the steamboat Austin, at about seven o'clock in the evening of the 23d of November, 1865, in the Hudson river, off and a little above Teller's point. The wrecking vessels were boats connected together by timbers running from one to the other. They were arranged over a sunken sloop, which they were employed in raising. One of the boats had a cabin in which the wreckers lived. That boat had a mast. The other boat was an open boat. The structure, composed of the two boats and the connecting timbers, was substantially a single object. It was anchored in its position, and was considerably over on the eastern side of the channel, and to the eastward of the middle of the river. The weather was clear, so that lights could be seen two or three miles off, the tide was ebb, and the wind was northeast. The Austin was going down the river, toward New York, towing thirty-two boats, four on each side of her, and twenty-four attached to her by hawsers behind, in five tiers. That one of the wrecking vessels which had a mast, had a light in a lantern, suspended in the air some fifteen feet above the deck, and about the same distance from the mast, upon a rope which ran from the gunwale to the mast-head. In addition to this light, there was another light, in a movable lantern, on the deck of one or the other of the two wrecking vessels. This latter lantern was not intended to be stationary, nor was it in fact stationary, for, not long before the collision, it was moved from a position on one boat to a position on the other boat, but still it was kept visible to approaching vessels, equally with the suspended lantern. The pilot of the Austin testifies, that he saw the lights on these wrecking vessels at a distance, and that the appearance presented by them was such as to lead him to suppose that the object on which they were was a steamboat coming up the river with a tow, the arrangement of lights, as exhibited to his eye, being the same as was then shown on his own vessel, and used by other steamtugs when towing tows; that, when he had reached within about half a mile of the lights, there was a change in their positions relatively to each other, caused by the movement of the lower light; that he then concluded that the object must be something other than a steamtug towing; that he then saw that the only chance of avoiding a collision was to try and go to the eastward of the object; and that he sheered the Austin accordingly, and she passed in safety, but some of the boats in tow of her struck the wrecking vessels. It is clear, from the evidence, that the movement of the light from the deck of one of the two wrecking vessels to the deck of the other, was seen by the pilot of the Austin, and led to his change of course. But the difficulty in the case, on the part of the

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

Austin, is, that she ought not, with her unwieldly tow, subject as it was to the action of the tide and of the wind, to have approached so near to the object, whether it was supposed to be a tow, or something else, as to be unable to avoid it. It appears from the testimony of the pilot, that when he first saw the light at a distance, he could not tell what it was, and came nearer to it, and thought it was a tow, and remained of that opinion till the light on it moved. He ought not, in uncertainty, to have approached, with his bulky and helpless tow, so near. How he was going to avoid her, if she was a tow, does not appear, unless he relied upon her avoiding him. I cannot resist the conclusion that the Austin was in fault. But I think the wrecking vessels were also in fault. Whether it be claimed that the wrecking vessels were required to exhibit the light provided for vessels at anchor, by article 7 of the act of April 29, 1864, or the light provided for open boats at anchor, by article 9 of the same act, they should have exhibited but one light, or, if they exhibited two, the two should have been similarly arranged. The actual arrangement was calculated to deceive an approaching vessel, and, I think, did contribute to induce the pilot of the Austin to think that the object carrying the lights was a steamtug towing, and to approach nearer than he otherwise would.

There must be a decree apportioning the damages equally between the parties, and giving costs to the libellants.

AUSTIN, (CAHART v.) See Case No. 2,288.

AUSTIN, (HALL v.) See Case No. 5,925.

AUSTIN, (HEATH v.) See Case No. 6,305.

Case No. 664.

AUSTIN v. O'REILLY.

[8 N. B. R. 129.]

District Court, S. D. Mississippi. 1873.[1]

BANKRUPTCY—PREFERENCES—RENT.

[In Mississippi a landlord is not entitled to preference for rent in a fund arising from the sale, by the tenant's assignee in bankruptcy, of personal property found on the demised premises; since, under the Mississippi statute a landlord has no lien until he seizes the property, and since the claim does not come within any of the preferences created by the bankruptcy act.]

[In bankruptcy. Petition by J. E. Austin against H. E. O'Reilly, assignee of Steele & Co., to have paid to him, as a preference, a claim alleged to be due for the rent of a plantation leased by Austin to Steele & Co. for the year 1871. Petition refused. On petition of review, the circuit court reversed this decree, in Austin v. O'Reilly, Case No. 665.]

[1] [Reversed by circuit court in Austin v. O'Reilly, Case No. 665.]

HILL, District Judge. The question presented for decision, arises upon the petition of said Austin to have paid to him as a preference a claim of one thousand eight hundred dollars, claimed to be due for the rent of a plantation leased by him to the bankrupts, Steele & Co., for the year 1871, and upon which it is alleged there was remaining upon the plantation at the time of the adjudication of bankruptcy, crops, mules and other property, more than sufficient to pay said sum, which have been sold by the assignee, and the proceeds thereof now in his hands. To this application the assignee demurs. It is claimed by the petitioner that he had a lien for this rent, if not a priority by that name; that the assignee stands in the place of a sheriff with an execution to be levied on the personal property on the premises, who, under the statute, is prohibited from removing the property upon the leased premises until he shall have paid to the landlord his claim for rent for one year, if so much remain due, and that the assignee, having sold the property, is required first to satisfy the rent out of the proceeds; and for authority cites the decisions made by the courts in bankruptcy in Pennsylvania, Maryland, Virginia and South Carolina, in which the statutes in relation to rents are very similar to our own.

The argument of petitioner's counsel has been ingenious and able, and has presented the question at least in a different form from that heretofore presented and urged upon the court on behalf of similar claims; but, upon examination of the decisions made by the courts in the states referred to, it will be found that they hold the claim for rent to be a lien created by the statute. Our statute was carefully considered by me in the case of Cleary v. Martz, [Case No. 2,873,] in this court, and again in Burtin v. Carne, [Id. 2,213,] in the northern district, some years since, and then decided that no lien is created by the statute; that only a summary proceeding is given to the landlord for the collection of his rent; that the seizure of the property creates a lien, and until that is done the title to the property is entirely unaffected by the claim for rent; that the tenant has as complete a right to dispose of it as though no rent was due. Since that time this ruling has been sustained by the supreme court of this state, first in Mary v. Dyche, 42 Miss. 347, and Mason v. O'Brien, Id. 420, and still more recently in the case of Stamps v. Gillman, 43 Miss. 456. This statute, being so construed by the supreme court of the state, is binding on this court, although I might not concur in its correctness, but I see no reason for dissent, or a reversal of my former ruling. It is the duty of this court to take the bankrupt estate just as it stood at the time of filing the petition for adjudication, and protect and enforce all the rights attached to it at that time.

The petitioner at that time had failed to take the necessary steps to secure his lien

on the property for the payment of the rent due; the bankrupt might then have sold it, and the purchaser would have received a good title as against the claim for rent, whether he knew of its existence or not, if otherwise valid. The assignee took the property in the same condition for the benefit of the general creditors, only subject to liens then existing upon it by contract or operation of law, and also subject to the priorities or preference claims provided under the bankrupt act, none of which embrace petitioner's claim for rent. So that this claim was neither a lien upon the property or entitled to be paid in preference to those of other creditors out of the proceeds.

The policy of the bankrupt law is an equal distribution among the creditors, in proportion to the respective amounts due, and this will be maintained in all cases, except when a lien exists, either by contract or by operation of law, upon the property at the date of the commencement of the proceedings in bankruptcy, and the preferences specified. On a careful review of the question submitted, which, though not in form, is in substance the same heretofore considered, I am satisfied that the petitioner's demand must share pro rata with the general creditors, and is not entitled to the preference claimed; and upon general principles of equity it is difficult to perceive any superior claim in favor of the man who furnishes the land over the man who furnishes the food to the tenant and his family, and the means furnished to make the crop upon the land; as in this case either may, if he choose, require security before giving credit, and if he fail to do so cannot justly complain to share equally with other creditors in case of the bankruptcy of the debtor.

Case No. 665.

AUSTIN v. O'REILLY.

[2 Woods, 670;[1] 12 N. B. R. 329; 2 Cent. Law J. 455; 1 N. Y. Wkly. Dig. 36.]

Circuit Court, S. D. Mississippi. May Term, 1875.[2]

BANKRUPTCY—LIENS PROTECTED—RENT—ATTACHMENT.

1. All liens, except such inchoate ones as arise upon an attachment, are protected by the bankrupt law.

2. The right to distrain for rent does not give the landlord, strictly speaking, a lien upon the goods subject to distraint.

3. But such right may fairly be classed as a lien, within the intent and meaning of the bankrupt act.

4. In Mississippi, the landlord is obliged to sue out an attachment for the purpose of effecting a distress for rent, but when the attachment is sued out, his rights are the same as those of a landlord at common law.

5. Although the high court of errors and appeals of Mississippi has held that the landlord's right does not constitute a lien, and that a bona fide mortgage or sale will displace it, nevertheless, these decisions are not sufficient to deprive the landlord, in bankruptcy proceedings, of his right of priority of payment over the general creditors, out of the proceeds of goods subject at the time the proceedings in bankruptcy were commenced, to his right of attachment.

[Petition of review to revise an order of the district court of the United States for the southern district of Mississippi, sitting in bankruptcy.

[In bankruptcy. Petition by J. E. Austin against H. E. O'Reilly, assignee of Steele & Co., to have paid to him, as a preference, a claim alleged to be due for the rent of a plantation leased by Austin to Steele & Co. for the year 1871. The petition was refused by the district court in Austin v. O'Reilly, Case No. 664. On petition of review, this decree was reversed.]

E. D. Clark, for petitioner.

W. B. & A. B. Pittman, for assignee.

BRADLEY, Circuit Justice. This case depends on the question, whether, in the state of Mississippi, a landlord, whose tenant becomes a bankrupt before any attachment has been issued for rent, is entitled to priority of payment over the general creditors. This question must be decided in view of the provisions of the bankrupt law, and the peculiar rights of landlords, in reference to enforcing payment of rent in Mississippi. The bankrupt act (section 14) declares that the assignment shall relate back to the commencement of proceedings in bankruptcy, and that by operation of law, the title to all property and estate, both real and personal, of the bankrupt, shall vest in the assignee, although attached on mesne process, and shall dissolve any such attachment made within four months next preceding. The inchoate lien obtained by an attachment, and not perfected by judgment, is thus rendered null by the proceedings in bankruptcy. But perfected liens are protected. It is provided by the same section that the assignee, under authority of the court, may redeem or discharge any mortgage, pledge, deposit, or lien, and tender performance of the condition thereof, or sell the property subject thereto; and section 20 of the bankrupt act provides that when a creditor has a mortgage, pledge, or lien, for securing his debt, he shall be admitted as a creditor against the general estate only for the balance due him after deducting the value of the property on which he has such security, unless he consent to release it.

These provisions show that all liens, except such inchoate ones as arise upon an attachment, are protected by the law. But how do these provisions operate upon the peculiar lien, or right of distress, given to a landlord for his rent? That right, at common law, was founded on the principle that the landlord retained his ownership, not only in the

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

[2] [Reversing Austin v. O'Reilly, Case No. 664.]

land, but in so much of the produce thereof as was reserved by him for its use. Such reserved portion, or reditus, was considered as belonging to him by virtue of his original ownership; but not being separated from the rest of the profits, he could only seize a reasonable amount as a distress or security to compel the payment or appropriation of his stipulated portion. When the render consisted of personal service, such service was regarded as in lieu of the profits of the land, to which, until the service was rendered, the landlord's qualified property and right of distress extended, as in case of actual rents. The legislature afterwards extended the right of distress to other things besides the profits of the land; and, as far as the right extended, the principle of the latent or qualified property of the landlord in the subject of distress accompanied it. Other legislation enabled him to sell the goods distrained, in order to realize the amount of his rent, if the tenant proved refractory. In some states it is provided that, instead of making the distress himself, the landlord must procure a warrant from a magistrate or court, to be executed by an officer. But this regulation of the mode of exercising his right does not affect the nature of the right itself.

It is common to call the right a lien, and yet it is not strictly such; for it does not attach to any specific article of property. The tenant, if a farmer, may, in due course of business, sell produce or cattle or other things; and if a merchant, he may in the same manner sell merchandise; and the sales, if made in good faith, will be valid, and the property sold will be free from the landlord's right of distress, if removed from the demised premises, and, in most states, without such removal. But if the sale be made for the purpose of depriving the landlord of his right, he may, by the English statutes and by the statutes of most states, follow the property within a reasonable time after its removal. Now if the landlord's rights were a strict lien, no valid sales could be made at all. Still, being commonly called a lien, and being a peculiar right in the nature of a lien, which is greatly relied on as an essential condition of all leases, and the subversion of which would work great injustice, and would in the end operate prejudicially to the interests both of the tenants and their creditors, by inducing landlords to require onerous conditions for their security, the supreme court of the United States, and most of the district and circuit courts, have regarded it as fairly to be classed as a lien within the true intent and meaning of the bankrupt act, and have allowed the landlord a priority over the general creditors to the extent of the goods subject to his right of distress. This right of the landlord has been regarded as peculiarly entitled to priority when by statute an execution creditor of the tenant is prohibited from removing the goods until he has paid the landlord's rent, or a reasonable amount (generally a year's rent), which may have accrued. Thus in Longstreth v. Pennock, 20 Wall. [87 U. S.] 575, the supreme court places special emphasis on this fact.

In Mississippi, it is true, the landlord is obliged to sue out an attachment for the purpose of effecting a distress for rent; but when the attachment is sued out, his rights are the same in effect as those of the landlord at common law. That they are founded on and grow out of those rights is evident from the fact that he is not compelled to pursue his claim to judgment like other creditors. The attachment in his case is in the nature of an execution; or, more properly speaking, of a distress. He has the same right of priority over execution creditors, and the same right to prevent the removal of goods and to follow goods clandestinely removed, which exists in England and most of the other states. It is true that the supreme court of this state has held that the landlord's right is not a lien; and that a bona fide mortgage or sale by the tenant will displace it. I do not think, however, that these decisions are sufficient to deprive the landlord in bankruptcy proceedings of his just right of priority over the general creditors. They gave credit with the understanding that the landlord's right was superior to theirs. He, therefore, has an equity to be preferred. With regard to them, he stands in precisely the same position and invested with the same rights, as if his common law right of distress remained. A decree will be made, declaring the right of the landlord to be preferred before the general creditors upon the proceeds of all goods subject to his right of attachment, at the time the proceedings in bankruptcy commenced.

AUSTIN v. O'RIELLY. See Case No. 664.

Case No. 666.

AUSTIN v. PEASLEE.

[20 Law Rep. 443;[1] 15 Leg. Int. 12.]

Circuit Court, D. Massachusetts. Sept., 1857.

CUSTOMS DUTIES — TARIFF OF 1846 — APPRAISAL — LOSS OF WEIGHT DURING VOYAGE.

1. Under the tariff of 1846, ad valorem duties are to be paid on the quantity of goods actually imported, not on the amount put up in the foreign country.

[Cited in Weaver & Sterry v. Saltonstall, 38 Fed. 494.]

2. Where such quantity is measured by weight, a loss of weight on the voyage, whether by drainage or evaporation, will proportionally diminish the duties, notwithstanding what is lost in weight may be gained in value.

[Cited in Weaver & Sterry v. Saltonstall, 38 Fed. 494.]

At law. This was an action to recover from the collector of customs moneys alleged

[1] [Reported by S. M. Quincy, Esq.]

to have been illegally exacted for duties on a quantity of hemp imported from Manilla. It appeared that a quantity of bales were put up in Manilla, each containing two piculs, and that the picul is a Manilla weight of 140 pounds. On weighing the hemp at the custom-house, it appeared to have lost weight during the voyage at the rate of about ten pounds per bale; nevertheless duties were assessed on the number of piculs originally put up, at the Manilla value, although to make out this number it was necessary to rate the picul at 135 pounds. Verdict was rendered for the plaintiff, and defendant moved for a new trial.

P. W. Chandler and G. O. Shattuck, for plaintiff.

B. F. Hallett, Dist. Atty., for defendant.

CURTIS, Circuit Justice, held, that this case could not be distinguished from the cases of Marriott v. Brune, 9 How. [50 U. S.] 619, and U. S. v. Southmayd, Id. 637, which were cases of loss of weight by sugars from drainage. The tariff act of 1846 levies a duty of 40 per cent. ad valorem on this article. To assess this duty the collector must ascertain the value of a picul in Manilla, and dividing this by 140, he will obtain its value per pound. But dividing it by 135, will not give him this value. Or if the collector preferred to assess by the picul, he could divide the number of pounds reported by the weigher by 140. Under the decisions referred to, the merchant is to pay duties on what is actually imported, not on what is put up for export in the foreign country; and if the sum on which the ad valorem duty is to be cast depends on weight, a loss of weight on the voyage will diminish that sum, whether such diminution of weight be caused by drainage or evaporation. It is argued that the evaporation of weight has not diminished the quantity. But the measure of quantity is not bulk, but weight,—the pound, or the picul; and if the number of these is diminished, the quantity is lessened. It is also argued that the value of this importation has not been diminished; that what it has lost in weight it has gained in quality. But the revenue laws do not provide for any such set-off of loss and gain. The quality of some wines is much improved by a sea voyage. But this has not prevented congress from making full allowance for breakage and leakage. Lawrence v. Caswell, 13 How. [54 U. S.] 488. The question here is not of dutiable value, but whether the collector could assess a duty on a greater number of piculs than were bonded, upon the assumption that those which were bonded would have been worth as much in Manilla as the whole number in the state in which they were put up. There is no law allowing such an assumption or making the amount to be paid dependent on an inquiry as to that fact. Motion for new trial overruled, and judgment on the verdict.

AUSTIN, (SHELTON v.) See Case No. 12,752.

AUSTIN, (TRECOTHICK v.) See Case No. 14,164.

AUSTIN, (UNITED STATES v.) See Case No. 14,479.

AUSTIN, The, (UNITED STATES v.) See Case No. 14,480.

Case No. 667.

The AUSTRALIA.

[3 Ware, 240.] [1]

District Court, D. Maine. Oct. 28, 1859.

SEAMEN—SHIPPING ARTICLES—UNUSUAL TERMS—ADMIRALTY—WITNESSES.

1. If a seaman proves unfit for the service for which he shipped, the master may degrade him to another duty.

2. When unusual terms are introduced into a contract, courts of admiralty require that it be explained plainly to the men, or it will be set aside and they must be presumed to be engaged on the usual terms.

[See The Sarah Jane, Case No. 12,348; Brown v. Lull, Id. 2,018; The Cypress, Id. 3,530; The Almatia, Id. 254; The Samuel Ober, 15 Fed. 621; Trecartin v. The Rochambeau, Case No. 14,163.]

3. The law of the U. S. of 1790, requires every contract to be in writing, and if not, the law is not binding on the men. They may leave the ship at any time, and demand wages at the highest price paid at that port at any time within three months before their engagements.

4. The act of Maine, admitting parties to be witnesses, does not apply to the admiralty.

5. The practice is to allow either party to examine the other on interrogatories, and the answers they give are evidence in the case. But the answers, though under oath, are not properly evidence.

[In admiralty. Libel in rem by Michael De Lory against the Australia for wages. Decree for libellant.]

Mr. Sewall, for libellant.

M. Smith, for respondent.

WARE, District Judge. Michael De Lory, about 21 years of age, engaged at Boston to go in the Australia to an eastern port for her cargo, and thence to Jacksonville in Florida and some port in the West Indies and to her port of discharge in the United States. He engaged to go as cook, provided his services were satisfactory in that office. He made the voyage to Wiscasset, assisted in loading the cargo, and was dismissed for want of competency as a cook. He was a native of New Brunswick, entirely uneducated, as he could neither write nor read, and he was shipped without signing shipping articles. He brings this action for his wages, for damages in being dismissed in a strange port, and suing as well for the United States as himself, for the penalty of twenty dollars provided in the first section of the act of 1790, [1 Stat. 131.]

On all the evidence I am disposed to admit

[1] [Reported by George F. Emery, Esq.]

that he was incompetent as a cook for such a vessel, though he had been employed in that capacity in fishing voyages. In this case, had he been shipped regularly, the rule of the maritime law is well settled that the master might have displaced him and put him to other duty. Every person is presumed fit for the duty for which he engages. Quisque spondet puritatem artis suae is a rule of common sense that is found in every system of law. The owner who engaged De Lory has been examined on interrogatories, and says that he was engaged on trial with liberty to dismiss him from the vessel if he proved unacceptable. The libellant has been examined in the same way, and though he acknowledges that he was to serve as cook on trial, and to be dismissed from that employment if he proved not satisfactory, yet that he was to go in the vessel absolutely. It is not probable that he would engage for a voyage eastward, on trial, to be dismissed and find his way home at his own expense, though he might engage as cook on those terms, and he swears positively that he was engaged for the whole voyage. There is a repugnance in the testimony, but in this circumstance only; and in this discrepancy I am disposed to take his word. That he so understood the engagement I have no doubt.

The law of the sea favors a written contract without, perhaps, making it indispensable. But the men are notoriously inattentive to its terms, and oftener than otherwise, sign without reading it. They trust to usage and the law. For this reason, on general principles, if there is anything unusual in the terms, that should be explained to the men in such a manner that they shall understand it and it should be balanced by an adequate compensation, otherwise it will be set aside and the men presumed to be engaged on the usual terms, or those required by law. This is the general law, adapted to the common character of seamen; but that of this country goes farther.

In controversies between the master or owner and the mariners, whether arising on contracts or torts, it is sometimes difficult to hold the balance evenly between them. The former being usually men of education, and always conversant in business, are astute in providing for themselves. But the men, born, perhaps, with a temper naturally choleric and impatient, that natural infirmity augmented rather than checked by a want of education, quickened by the ungovernable and contentious nature of the element to which, by their calling, they are exposed, and always necessitous, think little of the future. They are thoughtless and incautious in these contracts as well as in their general behavior, and it is not uncommon for their precipitancy to be taken advantage of to their injury. But at the same time there are among them some of depraved dispositions, bent on mischief, who watch their opportunity to exasperate their officers and to stir up the crew to disorder and sedition. But they are persons of incautious and hasty tempers, and the truth generally comes out in the testimony. Courts do not fail to mark a disposition radically bad, but they have no right to presume this without proof, and in this case all natural presumptions are in favor of the man, as well from his admitted want of education, as from the appearance of honesty and simplicity when under examination.

By the act of 1790, (1 Stat. 131,) every master of a vessel of fifty tons burthen or more, before he starts on a foreign voyage, or one to a port other than in an adjoining state, is bound to have an agreement in writing containing a description of the voyage and the terms of the engagement, and in default, he is bound to pay his men the highest rate of wages that have been given for three months in that port for the like service, and in addition thereto, a penalty of twenty dollars, to be equally divided between the person suing for the same, and the United States. But by the act of 1840, [5 Stat. 397, cl. 19,] he is subject to a penalty of $100 for a violation of any of the provisions of that act, (No. 19,) one of which, in connection with the act of 1790 and 1803, [2 Stat. 203,] is the having a contract in writing.

How do the owners in this case expect to escape the penal obligations of this act? The only mode is by setting up an agreement to take this man on trial. There is in the act of 1790, § 1, an exception of servants and apprentices. But it is not pretended that De Lory was either, and with every other man must be made a contract in writing. It may be questioned whether the statute does not, by implication, negative the right of taking any other man on trial. Be this as it may, we have the declaration of De Lory himself, taken on interrogatories, that he was engaged for the whole voyage, and the proviso only applied to his officiating as cook. The law of Maine, admitting parties to be examined, (Rev. St. c. 82, § 9,) does not in its terms apply to proceedings in the admiralty, and has been decided not to extend to this court; but according to the course of the admiralty, parties may always be examined on interrogatories on the demand of either party. Though the answer is not properly evidence, being drawn up by the proctors on the statement of the party,—Hutson v. Jordan, [Case No. 6,959;] The Crusader, [Id. 3,456;] Sherwood v. Hall, [Id. 12,777;] Cushman v. Ryan, [Id. 3,515;] Jay v. Almy, [Id. 7,236,]—the answers to the interrogatories, subject as they are, to pass under the ordeal of a cross-examination contrary to the rule of the civil law, are,—1 Ware, 410, [Hutson v. Jordan, supra;] Pothier, Des Obligations, No. 910. De Lory very fairly admits that he was to be removed from the office of cook if, on trial, he proved unsatisfactory. But he is equally positive that he was engaged for the whole voyage. And his answer, supported as

it is by probability, is, I think, true. My opinion is, that he must be allowed his wages, for the time that he served, at the highest rate that was given at that port for three months before his employment, and that, according to the proof, is sixteen dollars a month. He must be allowed damages also for the breach of his contract.

Damages by the common law, and this is the decision of natural law, are given as an indemnity, that is, a sum which would put the person in the same situation as he would have been if the damage had not been done. They are matters of calculation for the most part, if not, are of necessity left to the discretion of the tribunal that awards them, and are sometimes increased and sometimes lessened, according to the nature and circumstances of the injury and of the person who suffers. 2 Pars. Cont. p. 432; Domat Lois Civiles, lib. 3, tit. 5, praeambule; Id. lib. 1, tit. 2, No. 18. If the injury is wanton, that is, if done intentionally, without opening the question on which the authority of great names is arranged on both sides, whether exemplary, vindictive, or penal damages may in any case be given, (2 Greenl. Ev.,) it will be admitted by all that full damages ought to be allowed. The dismissal of a seaman without cause is an injury of this character. If De Lory was not qualified as a cook, he was fit for some employment on the vessel; and this is apparent from the master putting him to other duty besides that of cooking. The case of a seaman thus unexpectedly being thrown out of employment does not call for aggravated damage, but the loss of time is something. It is greater when he is a foreigner, when his natural home is not among us, and he is without friends and is dependent on his own resources. And because in any way in which they are viewed they are small, is no reason why they should be withheld. Besides ordering his wages to be made out at the highest price paid for a cook, I shall allow $10 damages for the breach of contract.

The penalty of $20 is as expressly awarded by the statute as the increased pay, and I see no difficulty in allowing it in a libel for the wages. The libellant has sued for it in the name of the United States as well as his own. Decree $33.51 and costs.

Case No. 668.

AUTHER et al. v. The ATLANTIC.

Circuit Court, E. D. Louisiana. May 4, 1853.

MARITIME LIENS UNDER STATE LAWS — JURISDICTION—SALE.

[The sale of a vessel under a decree of a state court in satisfaction of a lien under the law of the state extinguishes prior maritime liens; and courts in other states, where similar liens have been created, are bound by such disposition of the vessel.]

[Disapproved in The N. W. Thomas, Case No. 10,386.]

[See, contra, The Henrietta, Case No. 6,121; James v. The Pawnee, 19 Mo. 517.]

[In admiralty. Libel by J. W. Auther and others against the steamboat Atlantic. Dismissed.]

CAMPBELL, Circuit Justice. The libellants are merchants of the city of New Orleans who had furnished to the steamboat Atlantic, at the request of the master and owner, stores, materials, and supplies from the year 1850 to May, 1851, while she was plying between the ports of New Orleans and St. Louis. The owner is a non-resident of Louisiana, and his boat is a foreign vessel registered at St. Louis. The libellants claim that by the laws of Louisiana, as declared in the Civil Code, as well as under the general admiralty law, there is a lien existing on this boat, in their favor, to the extent of these demands. The claimants respond that the boat, in the month of May, 1851, and posterior to the creation of the debts in the libel, was at St. Louis, and that, while there, tradesmen, mechanics, and the officers and men who had manned her, proceeding under the act of the legislature of Missouri [1] which affords to such classes of creditors a lien upon vessels and boats navigating the waters of the state, for debts like this, caused the boat to be attached, and by the decree of the court of common pleas of St. Louis county, at their suit, she was condemned to be sold, and was sold to their vendors. They plead that the court was competent, and the proceedings of the court regular and valid.

The record of the proceedings in that cause is in evidence, and sustains the averments of the answer: the sale to the vendors of the plaintiff was made by the sheriff of St. Louis county in June, 1851, under a valid order, in a cause arising under the [* * *.][2]

There are several questions of interest arising in this suit: (1) Was there an existing lien in favor of the libellants on the 30th August, 1851.—the date of the attachment of the boat in this cause,—under the Code of Louisiana? (2) Was there a lien under the admiralty law, the boat having left here in May without any attachment, and returning only in August of that year? (3) Does the admiralty law recognize a lien in favor of a running account created between material men and the officers of boats for supplies or service continuing from trip to trip for sev-

[1] [Rev. St. Mo. c. 20, § 13, provides that "when any boat or vessel shall be sold under the 11th section of this act, the officer making the sale shall execute to the purchaser a bill of sale therefor, and such boat or vessel shall, in the hands of the purchaser and his assignee, be free and discharged from all previous liens and claims under this act."]

[2] [Concerning the omissions in this opinion indicated by asterisks, Mr. E. R. Hunt, clerk of the United States circuit court for the eastern district of Louisiana, states, under date February 20, 1893: "The copy has been compared with the book of opinions from which it was taken, and corresponds exactly. A careful search in the records fails to find the original opinion, and therefore I cannot supply what was apparently left out in the opinion."]

eral months, and when semi-monthly trips are made? (4) Does there exist any lien superior or different from that given by the municipal law in favor of merchants domiciliated here, and contracting in this place with a vessel frequenting this port, as above stated? I shall not decide either of these questions, conceding that there was a valid lien, and that but for a change of ownership it might have been enforced. I propose to consider the question, what is the effect of this change of ownership upon such a lien?

The principle is clear that an existing and operative lien, as a general rule, is not divested by the voluntary disposition of the ship or boat by the owner. In the case of The Bold Buccleugh, 14 Jur. 134, the admiralty judge says: "No one can reasonably contend that a sale after a collision, with a knowledge of it, would produce that effect, because, if so, the owners of a vessel doing damage would have nothing to do but to sell her, for the purpose of taking from the parties aggrieved their best security for compensation. Therefore, as a general precedent, I am prepared to deny that a mere transfer of a vessel, which has been guilty of doing damage, can at all diminish the liability of that vessel to be arrested." The rule, when the transfer is a forced one, is the reverse; in that case the purchaser takes the property discharged or pre-existing [* * *.] The right of a party to attach a vessel is a right conferred by law, and its enforcement is dependent upon judicial interposition. The property is taken into its custody, and the courts are subsequently the vendors; the courts in this are but the depositories of the sovereign authority and act in obedience to it. Public policy requires that a disposition of the property under such circumstances, and in a form so [* * *,] should be obligatory upon all; the statute of Missouri expressly provides that the operation of such a sale as this shall be to discharge all other liens and incumbrances.

The enquiry arises whether the courts of other states where similar liens have been created are also bound by such a disposition. The answer is that properly they should be so bound. The property was within the control of the state and of its courts at the date of the condemnation, and the decree of condemnation and sale was not arbitrary nor confiscating, but regular, judicial, to the end of settling private rights according to a legal ascertainment. The effect of the act of sale was to create new proprietary interests, upon considerations that the laws approve and encourage. In the case before us the privileged creditors, who now attach, have no higher claim upon the favor of a court of admiralty than those who have already asserted and established their rights in the vessel; the purchasers have extinguished such claims under the sanction of a court from which they derive at once title and the possession of the property. Such being the facts, all other courts must consider the justice of their title, and should submit to the jurisdiction which lawfully conferred it. This principle is enforced in the high court of admiralty in Great Britain, (2 W. Rob. Adm. 453;) [* * *] was applied in the case of The Globe, [Case No. 5,483,] by Judge Nelson, and by the supreme court of Missouri, (10 Mo. 614;) and is recognized in 2 La. Ann. 599. The same principle has been found appropriate in analogous cases appearing in the decisions of the supreme court of the U. S. It was applied to settle the conflicting claims of execution [* * *] issuing from federal and state jurisdictions within the same state.

The court says a most injurious conflict of jurisdiction would be often likely to arise between the federal and state courts if the final process of the one could be levied on property which had been taken by the other. No such case can exist; property once levied on remains in the custody of the law, and it is not liable to be taken by another execution in the hands of a different officer, and especially one acting under a different jurisdiction. The same court, at its last term, applied the doctrine to the adjustment of the relative claims of judgment creditors, each having liens, and that of the judgment creditor in the judicial court being the superior, but that in the state court having been the first asserted by a seizure of the property. Wiswall v. Sampson, 14 How. [55 U. S. 52.] My conclusion is, that the answer having been sustained by proof, the prayer of the libel cannot be allowed.

AUTHORITY of MARSHALS to ADJOURN UNITED STATES COURTS. See Append.

AUTOCRAT, The. See Case No. 8,958.

Case No. 669.

The AUTONA.

[Sometimes cited for The Antona, Case No. 492.]

AVERILL, (SMITH v.) See Case No. 13,007.

Case No. 670.

AVERILL v. TUCKER et al.

[2 Cranch, C. C. 544.][1]

Circuit Court, District of Columbia. Dec. Term, 1824.

ATTACHMENT—WHO LIABLE AS GARNISHEES—PUBLIC AGENTS OF THE GOVERNMENT.

[A government agent for the payment of salaries and the treasurer of the United States

[1] [The following is the syllabus of this case, as reported by Hon. William Cranch, Chief Judge: "Quaere, whether the treasurer of the United States can be obliged to appear as garnishee and is liable to judgment for money in his hands as treasurer. An agent for the payment of the salaries of the clerks in an executive department of the government is bound to appear as garnishee when summoned. Quaere, whether the salary of an officer of the United States is liable to attachment."]

are public agents, and as such are not liable as garnishees on a judgment against an employe of the government, since such employe could not, on his part, maintain an action for his salary against such officers.]

[See Fischer v. Daudistal, 9 Fed. 145; Clinton's Case, 10 Op. Atty. Gen. 120; Derr v. Lubey, 1 MacArthur, 187. See, also, 5 Op. Atty. Gen. 759; 7 Op. Atty. Gen. 661.]

At law. Attachment upon a judgment under Act Md. 1795, c. 56. The attachment was laid in the hands of Lewis Edwards, agent for payment of the salaries of the officers in the department of war, and in the hands of Thomas Tudor Tucker, treasurer of the United States. The defendant, Nathaniel Cutting, was a clerk in the war department at a salary of $1,600 per annum payable quarter-yearly on the 1st of January, April, July, and October. The garnishees Edwards and Tucker were summoned on the 1st of April, 1823, before which day Mr. Cutting had drawn bills on Edwards, which he had accepted for the whole amount which would become due to Mr. Cutting on that day.

CRANCH, Chief Judge. This cause comes before the court on a motion by Mr. Swann, attorney of the United States for this district, ex officio, to quash or dismiss the attachment, no other garnishee being warned, and no other effects attached. On the part of the United States, it is contended that the garnishees are public agents, and as such received the money; for which they are accountable to the United States, and for which they are not liable to the suit of any individual. On the part of the plaintiff it is contended, that the act of Maryland has no exception. That the public character of the treasurer of the United States does not exempt him from obedience to the summons, nor from liability to pay to the plaintiff the money due by the United States to the defendant, if such should be the judgment of the court. The question depends, not on the official character of the person, but upon the nature of the thing to be done. Marbury v. Madison, 1 Cranch, [5 U. S.] 171; Little v. Barreme, 2 Cranch, [6 U. S.] 170. It is also contended that Edwards is not a public officer quoad hoc. Whether money due from the United States to an individual may be attached in the hands of an officer, or agent of the United States holding it in that capacity, is a question of considerable importance. In the case of Hodgson v. Dexter, 1 Cranch, [5 U. S.] 345, it was decided that a public agent, contracting for the United States, is not personally liable upon the contract; and surely the law will not raise an implied contract against a public agent who would not be bound by an express agreement. Mr. Cutting could not have maintained an action against the treasurer of the United States for his salary.

The liability of Mr. Edwards may be different. Can the money, while in his hands, be considered as in the custody of the United States? or as the money of the United States? It has gone out of the treasury with all the usual forms. Is it charged to him on the books of the treasury? or is it charged to the respective officers whose salary he receives? Is he accountable to them, or to the United States? His official character, whatever it may be, does not appear in the record. That of Mr. Tucker appears by the return of the attachment. We think that Mr. Edwards must appear to the attachment and defend himself. The official character of Mr. Cutting does not appear in the record, and therefore we cannot come at the question, whether the salary of a public officer of the United States can be attached so as to starve him out of office. At present we have nothing before us but the writ of attachment and return; so that we cannot decide the points intended to be submitted to the court. Mr. Edwards afterwards appeared as garnishee and pleaded, that when the attachment was served on him, and for a long time before, he was and had been a clerk in the war department. That according to the usage of the department of war, a general warrant for the payment of the salaries of the officers in the war department was usually drawn from time to time as the salaries became due in favor of him the said Lewis Edwards, and that according to the said usage a general warrant for the payment of sundry salaries, becoming due on the 1st of April, 1823, was drawn by the secretary of the treasury in favor of him the said Lewis Edwards, agent for paying the said salaries, which warrant was carried through the necessary forms of the government, and the money placed by him in the office of discount and deposit at Washington to the credit of the said Lewis, agent for paying salaries as aforesaid; and that among the officers to whom the said money was to be distributed was the said Nathaniel Cutting, who became entitled, on the said 1st day of April, 1823, to $400 for one quarter's salary as clerk in the said war department, which said quarter's salary was payable to him, the said Nathaniel, when he should obtain from the treasurer of the United States his check for the payment of the same; which he never did obtain, and the said sum never was, in fact, in his hands as the money of the said N. Cutting, and therefore he saith that at the time the attachment was levied in his hands as aforesaid he had not in his hands any of the moneys or credits of the said N. Cutting, subject and liable to the attachment aforesaid.

And the said Lewis Edwards for further plea saith, that before the said quarter's salary became payable to the said N. Cutting as aforesaid, that is to say, between the 25th of November, 1822, and the 5th of March, 1823, he, the said N. Cutting, drew divers orders in favor of divers persons for different sums of money amounting altogether to $400, upon the said Lewis Edwards, agent as aforesaid, which said orders were drawn upon the

credit of his said quarter's salary becoming due as aforesaid on the said 1st day of April, 1823, as aforesaid, which said orders were accepted by him the said Lewis before the attachment aforesaid was levied in his hands, and so the said Lewis saith that at the time of the service of the attachment aforesaid there was no money, and could not have been any money of him the said N. Cutting in his hands which could be subject or liable to attachment as aforesaid, and this he the said Lewis is ready to verify, &c.

To the first of these pleas the plaintiff by his counsel, Mr. Morfit, demurred, and to the other joined issue upon the fact. Upon this demurrer, the court, at May term, 1826, was of opinion that Mr. Edwards was to be considered as an agent of the government, and that neither he nor the treasurer of the United States could be sued for the salary by Mr. Cutting, and therefore not liable as garnishees; and that if they could be sued as garnishees, it did not appear by the case agreed, (which was the same matter stated in the pleas,) that there were any effects, moneys, or credits, of Mr. Cutting in their hands at the time of the service of the writ of attachment. The plaintiff thereupon discontinued his suit.

Case No. 671.

The AVERY.

[2 Gall. 308.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1814.

OFFICE AND OFFICER—MARSHAL'S COMMISSIONS—CLERK'S FEES—INTERLOCUTORY SALES.

1. The marshal is entitled to his full commissions, according to the act of 1799, c. 125, [1 Stat. 624,] upon all interlocutory sales of prize property. The act of 27th Jan., 1813, c. 155, [2 Stat. 792,] applies only to sales after final condemnation.

2. The clerk is entitled to commissions upon proceeds of prize property sold by interlocutory order, and paid into court by the marshal.

[Cited in Leech v. Kay, 4 Fed. 73.]

3. It is the duty of the marshal, upon all interlocutory sales to bring the proceeds into court, with a regular account of the sales.

G. Blake, for the captors.

Dexter, for the marshal. Shaw, clerk, in pro. per.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice. The brig Avery and cargo were captured on the 28th of April, 1813; and prize proceedings having been instituted, part of the cargo was condemned, and the residue finally ordered to be restored by the district court; and, on appeal to this court, the decree of restoration was, at this term, reversed, and the whole property condemned to the captors. Pending the proceedings in the court below, the goods, whereof restoration was afterwards decreed, were, in pursuance of an interlocutory order of the 28th of August, 1813, sold on the 7th of the ensuing September, and the proceeds paid over to the clerk of the district court on the 27th of the ensuing October. An application has now been made, in behalf of the captors, to have the net proceeds paid over to them, after allowing to the marshal his commissions according to the act of 27th Jan., 1813, c. 155, [2 Stat. 792,] and without any allowance whatever to the clerk for commissions. Notice having been given to the marshal and clerk to show cause why this application should not be granted, they have appeared and claimed the commissions allowed to them respectively by the act of 28th of Feb., 1799, c. 125, §§ 1, 2.

The questions have been argued, and are now to be decided. It is contended, on behalf of the captors, that the act of 28th Feb., 1799, c. 125, [1 Stat. 624,] which allows to the marshal as fees "for sales of vessels or other property, and for receiving and paying the money, for any sum under five hundred dollars, two and one half per cent. for any larger sum one and a quarter per cent. upon the excess," is repealed, so far as respects prize causes, by the act of 27th of Jan., 1813, c. 155. This act, after providing that all vessels and property captured by private armed ships, and condemned as prize, shall, after condemnation, be sold by the marshal, in such lots, and on such credit, as the owners of the ship shall direct; and after further providing, that the marshal shall pay over and distribute the proceeds among the parties entitled, after deducting duties, costs and charges, declares, that for selling prize property, and receiving and paying over the proceeds as aforesaid, the marshal shall be entitled to a commission of one per cent. and no more, first deducting all duties, costs and charges; with a proviso, that in no case of condemnation and sale of any one prize vessel and cargo shall his commission exceed two hundred and fifty dollars.

It is very clear, that the terms of this act apply only to sales after a final condemnation, and not to sales made pendente lite under interlocutory decrees of court. Nor can it be admitted, that the intention of the legislature requires a more enlarged construction. Interlocutory sales are often ordered under a perishable monition and survey, or for other good cause, in the discretion of the court; and such sales are invariably made for cash only. This becomes indispensable, because the rights of the parties litigating before the court are not ascertained, and the net proceeds are to be brought into the registry, to await the final decision. Suppose a final decree of restoration should pass after such an interlocutory sale, are the commissions of the marshal restricted to the provisions of the act of the 27th of Jan., 1813, c. 155? It cannot be doubted, and indeed was conceded at the argument, that such a case was without the statute. And if it be so, I

[1] [Reported by John Gallison, Esq.]

should be glad to know, how a subsequent decree of condemnation would vary his right. His title to the commissions accrues at the time of the sale, and not upon the final result of the cause. It attaches, if at all, at the moment when he has executed his duty, and paid over the proceeds of the sale to the court. He is then entitled to deduct his fees; and I know of no subsequent fact, that can have a retroactive effect to defeat his rights. On the whole, I am of opinion, that the act of 27th of Jan., 1813, c. 155, applies only to sales of prize property after a final condemnation, and is so far and no farther a repeal of the act of 28th of Feb., 1799, c. 125. The marshal is therefore entitled to his full commissions.

As to the claim of the clerk to one and a quarter per cent. commission, allowed him by the act of 28th of Feb., 1799, c. 125, reviving the act of 1st of March, 1793, c. 20, [1 Stat. 622,] "on all money deposited in court," there is not, in my judgment, the slightest reason to contest it. The only argument urged against it is, that the money under the interlocutory sale ought not to have been paid into court by the marshal; and that the clerk cannot gain a title by an irregular act of the marshal. The whole foundation of this argument fails. It was not only not an irregularity for the marshal to pay the money into court, but it would have been a gross misconduct on his part to have done otherwise. It is his duty, on all interlocutory sales, to bring the proceeds immediately into court with a regular account of such sales. This is the known and uniform practice of the court, and I will add, it is a practice not only founded in the settled doctrines of the admiralty, but also of great importance for the security of suitors. Let the clerk, therefore, be allowed his usual commissions out of the prize property in the registry.

Case No. 672.

The AVERY.

[2 Gall. 386.][1]

Circuit Court, D. Massachusetts. May Term, 1815.

PRIZE — DOUBTFUL CHARACTER OF VESSEL — CONDEMNATION AFTER A YEAR AND A DAY — REHEARING AT SUBSEQUENT TERM.

1. If, upon the ship's papers, it be doubtful, whether the property captured as prize belong to an enemy, it is not usual to proceed immediately to condemnation, although no claim be interposed. But if, in such case, no claim be interposed within a year and a day, condemnation is of course to the captors.

[See note at end of case.]

2. The circuit court cannot rehear a cause, or admit a claim, at a term subsequent to that, in which the cause was finally decided (a).

[Cited in Doggett v. Emerson, Case No. 3,961; Bank of United States v. Moss, 6 How. (47 U. S.) 38; The Illinois, Case No. 7,003.]

[See The New England, Case No. 10,151.]

In admiralty. W. Sullivan prayed the court to admit proof of the neutral ownership of a part of the cargo of this vessel, which had been some time since condemned for want of a claim, suggesting that this proof had been obtained from such a distance, as made it impossible to have received it before. The admiralty rule of a year and day, however suited to the courts of Europe, where communication may be had with all parts in sixty days, was not, he contended, applicable to a country so remote from many parts of the commercial world, as the United States.

W. Sullivan, for the promovants.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice. The British brig Avery was captured on the 28th of April, 1813, libelled in the district court on the 28th of July of the same year, and afterwards, upon the hearing in the district court, the vessel and part of the cargo were condemned as enemies' property. As to the residue, a decree of dismissal was, by consent of the captors, made against them, from which they appealed to this court, and at October term, 1814, no claim ever having been, in either court, interposed to any part of the property, the same was finally condemned to the captors, and distribution ordered of the prize proceeds, which have accordingly been withdrawn from the registry of the court. A motion is now made by counsel, in behalf of certain merchants of Morocco, to interpose a claim to said property, and to have the same regularly tried, on an appeal to the supreme court. And the question to be decided, is, whether the court can now entertain this motion.

It is an ancient and indisputable rule of the law of nations, "Res in hostium navibus praesumuntur esse hostium, donec contrarium probetur." Locc. lib. 2, c. 4, note 11; Grot. lib. 3, c. 6, § 6; Bynk. c. 13. And it is the duty of neutral shippers to put on board the most plenary proofs, to repel this presumption. If they omit it, and a condemnation ensues, it is justly imputable to their own laches. It is not now usual, in the prize courts, to condemn goods for want of a claim upon the hearing at the return of the monition, except in cases where there is a strong presumption from the evidence, that the property actually belongs to an enemy. If there be probable evidence of a neutral interest, sentence is suspended for a reasonable time, to enable the party to make a claim. That reasonable time has been fixed, by the immemorial usage of the admiralty, to a year and a day. And if no claim is interposed within that time, condemnation follows of course in paenam contumaciae. 2 Rob. Coll. Mar. p. 89, note. Nor is this a mere arbitrary regulation. It

[1] [Reported by John Gallison, Esq.]

is to be found in analogous cases in the common law, as a limitation to the rights of property, in cases of wrecks, (2 Inst. 168,) and estrays, (Bl. Comm. 298; 5 Rep. [Coke,] 108;) in the conclusive efficacy of a judgment in a writ of right, even against strangers, unless they sue within that term, (Plow. 357a; Co. Litt. 254b, 262;) in the limitation of the effect of a continual claim; in the prescription as to suing appeals of death; and in confining prosecutions for murder to cases, where the stroke and death happen within the same period. It is likewise found applied to similar purposes in the ancient Gothic constitutions. 1 Bl. Comm. 298; 4 Bl. Comm. 315. Above all, it is adopted in the civil law, in the early admiralty ordinances of France, in the laws of Oleron, and in the Consolato del Mare, as a limitation of right in cases of shipwreck, because, as the custom of Normandy expresses it, "eo tempore elapso, videtur Dominus habuisse pro derelicto." Cod. Naufragiis, lib. 11, tit. 5, l. 2; Peck. Adm. Rem. Naut. 889; Consol. del Mare, c. 252; Les Us et Coutumes de la Mer, 53, 54; Laws of Oleron, 30. It is highly probable, from this summary history of the rule, that it has been generally received among all maritime nations.[2] At all events, it is a part of the admiralty law, which this court is bound to respect; and we are not at liberty, upon any notions of supposed inconvenience, to create a novel regulation. If the present be found unsuitable to our circumstances, as a maritime power, it will be for the legislature to devise a more just and equitable rule. Stare decisis is a great maxim in the administration of the law of nations.

In the case at bar, although no claim was interposed, condemnation was not finally pronounced, until about sixteen months after the prize proceedings were first instituted—and it was upon the footing of the general rule, that the sentence was then passed. That sentence has been completely executed, and a distribution made; and this court can have no more jurisdiction to revive or review the cause, or to sustain the present application, than it can have to adjudicate upon any other cause, which has been determined within twenty years. The supreme court have refused to re-hear a cause at a term subsequent to that, in which it was determined, being of opinion, as I well recollect, that the cause was no longer coram judice. Hudson v. Guestier, 7 Cranch, [11 U. S.] 1. It has also affirmed the doctrine, that where no claim is interposed for prize property, condemnation must go to the captors. If, therefore, the present motion could be granted, it would be of little avail to the parties. But it is utterly incompetent for this court, sitting as such, to grant an appeal in a cause, which is no longer within their cognizance. The motion must be overruled. In The Harrison, 1 Wheat. [14 U. S.] 298, the doctrine of this case as to the year and a day was directly affirmed by the supreme court.

NOTE, [from original report.] The origin and various modifications of this prescription of a year and day are explained with great copiousness and learning by Heineccius in his essay "De praescriptione annali juris Lubecensis a jure communi diversa." Opera Minora, Syll. I. Exerc. 26. After remarking, that in the codes of all the principal German nations, the day is found superadded, tamquam auctarium quoddam, to the year; he proceeds to say (section 8) that the Germans of the middle age gave the name of "day" to that legitimate delay, which was indulged to every one before making his appearance in court; and as it was the custom for citations to command an appearance on the fourteenth day, and the party was to be thrice cited before he incurred the sentence of contumacy, this, including the three days assigned for appearance, gave six weeks and three days, which period was denoted by one word "day." Thus, if we may believe Heineccius, the "year and day" (annus et dies) originally signified a much longer period, than it is now thought to comprehend. He adds, however, that in the laws of Lubec, which he was examining, the word "day" means not six weeks and three days, but twenty-four hours only, and accordingly the prescription, which in Saxony extended to four hundred and ten days, was in Lubec confined to three hundred and sixty-six. From the same writer (section 17) it appears, that by this law the property both of real and personal things was lost, if not asserted within a year and a day. In this respect, it differs from the civil law, which allows a much longer time for immovable, than movable property. By the law of Lubec the prescription did not begin to run against absent persons, until they had knowledge of the event. But the civil law, in respect to movable things, granted no indulgence to the absent. (Section 18.) According to the French Encyclopedia (Jurisprudence —An et Jour) the day was added to the year, to avoid the difficulty of deciding whether the last day should or should not be included in the term. Much learning upon this subject, and an enumeration of several examples from the common law, will be found in Spelman's Glossary, 32.

Case No. 673.

AVERY v. DOANE.

[1 Biss. 64;[1] 3 Amer. Law Reg. 229.]

District Court, D. Wisconsin. Nov. Term, 1854.

HUSBAND AND WIFE — WIFE'S SEPARATE ESTATE —DEBTOR AND CREDITOR—GARNISHMENT.

1. A married woman living with her husband and carrying on trade in her own name, cannot, in Wisconsin, become his debtor nor be garnisheed in proceedings against him.

2. It seems that she cannot hold, to the exclusion of her husband or his creditors, a stock of goods purchased upon credit, nor the proceeds or profits.

At law. This proceeding was commenced by writ of attachment which was served on Sarah A. Doane, as garnishee. Her answer was taken before a commissioner of this court, wherein she states she is the wife of the defendant, Edgar P. Doane, and has

[2] [See note at end of case.]

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

been for eighteen years, and that she resides with her husband at Green Bay, where she is and has been engaged in the dry goods, millinery and fancy goods business for four years; that she carries on the business and buys goods in New York and Chicago in her own name, principally on credit. She also bought goods on credit out of her husband's store before he sold out and stopped business. She had a running account with her husband. When she commenced business at Green Bay her father purchased part of the goods amounting to four or five hundred dollars, and gave her some money as a present. Her business has always been in her own hands, and she now gives her husband his board for his assistance and services. The plaintiff's counsel [2] [not being satisfied with the answer of Sarah A. Doane, of which the foregoing is in substance a part,] moved the court to order an issue, to try her liability as garnishee under the statute, which motion was opposed by her counsel, upon the ground that being the wife of the defendant in the attachment suit, she is not answerable in this proceeding, under the circumstances disclosed in her answer.

Stevost & Bloodgood, for plaintiff.
H. L. Palmer, for defendant.

MILLER, District Judge. There is no law in this state recognizing the custom of London, whereby married women may carry on the business of trade and merchandise as femes sole, while cohabiting with their husbands. In some states femes covert may carry on business as femes sole in pursuance of statutes, while their husbands are engaged as mariners and absent from the country. This is the extent of legislation upon this subject in any of the states within my knowledge. It is unnecessary to refer to authorities to prove, that at common law the husband is entitled to the goods and chattels of the wife, and also to all sums of money which she earns by her own skill and labor, and that these he has absolutely in his own right and not in hers. And if she purchases goods or property, during coverture, with his assent, and with the proceeds of her skill and saving, they become his at the moment of the purchase, and he becomes responsible for such as may be purchased upon credit.

It is contended that the act to provide for the protection of women in the enjoyment of their own property,—approved February 1st, 1850, (chapter 44,) changes the common law upon this subject. The third section of the act is as follows: "Any married female may receive by inheritance or by gift, grant, bequest or devise from any person other than her husband and hold to her own and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits, in the same manner and with like effect, as if she were unmarried, and the same shall not be subject to the disposal of her husband nor be liable for his debts." The act provides more effectually for the protection of the wife's property by dispensing with the necessary intervention of trustees, than courts of equity had done, but it does not authorize the wife to hold to her own use, to the exclusion of her husband or his creditors, a stock of goods purchased by her on credit nor the profits or proceeds of trade. By the act she might have held to their exclusion the money given her by her father, but nothing more. That was property given her by a person other than her husband, which she by the act could receive and not be subject to the disposal of her husband, nor liable for his debts. The goods now in the store and the notes, accounts, and cash in hand she did not receive by inheritance, gift, grant, devise, or bequest from any person other than her husband or in any way known to this act. The act changes materially the legal incidents of the marriage relation, but it has not extinguished quite all the marital rights of the husband. He is still entitled to the person and labor of his wife, and to the benefits of her industry and economy. The wife by the act is not degraded to the position of a hireling, which she would be if it authorized her to withhold from her husband the proceeds of her own labor, nor is she vested with authority over him, nor independence of him in her business transactions of trade, even if he, as in this instance, after disposing of his goods without paying his debts, should consent to become her servant for his board.

The defendant by voluntarily surrendering to his wife his marital authority in the control and business of his family can not compromise the legal rights of his creditors. He may consent to serve his wife in the store for his board, but the law entitles him and his creditors to the goods and proceeds of sales. The persons from whom she purchased goods upon credit with her husband's consent, cannot bring suit against her, but must resort to him for the recovery of their demands, although the charges in their books may be to her, or the notes signed by her alone. As she cannot contract in business or trade in her own name while living with her husband, she can not sue or be sued in her own name upon transactions connected with the trade, nor be summoned as his garnishee. She can no more be his debtor in this particular than she can hold the goods in store or the avails of sales to the exclusion of him or his creditors.

The common law has wisely ordered that property acquired by the wife by purchase, with the consent of her husband, is in his possession and under his control, and the act under consideration does not disturb this

[2] [From 3 Amer. Law Reg. 229.]

provision, so essential to the peace and happiness of families. The act of this state is copied from that of the state of New York, where a similar decision was made in Lovett v. Robinson, 7 How. Pr. 105. And a similar decision of the supreme court of Pennsylvania, upon a similar law, is reported in Raybold v. Raybold, 8 Harris, [20 Pa. St.] 308. In that case it is decided that the fact that real estate was paid for with the wife's earnings and savings, does not give her a trust estate in the property; but that money thus acquired is not the property of the wife within the meaning of the act relating to the estate of married women, but is the property of her husband. For these reasons, the proceedings against Sarah A. Doane are dismissed, and the application for an issue is overruled.

NOTE, [from original report.] The following are the decisions of the supreme court of Wisconsin on the questions involved. Conway v. Smith, 13 Wis. 125, where it is held that the statute gives married women as necessarily incident to the power of holding property, the power of making all contracts necessary and convenient for its enjoyment, and that such contracts can be enforced at law. Approved in Todd v. Lee, 15 Wis. 365, where it is further held that she may become a sole trader and hold the profits of the business. Also approved in Leonard v. Rogan, 20 Wis. 540. The earnings of a married woman, however, during coverture, are the property of her husband, and he can make no contract with her in relation to them; and where a woman had loaned her earnings to her husband, who to repay her had transferred to a trustee notes of third parties, the receiver of the husband's estate was held entitled to reduce the notes to possession and apply them in payment of his debts. Elliott v. Bentley, 17 Wis. 591. A married woman owning land in her own name may cultivate it by the labor of her husband and their minor children, and the products and proceeds are not liable to be taken in execution against him. Feller v. Alden, 23 Wis. 301. Money placed by her in his hands to be invested for her, does not thereby become his property. Id. Under a verbal agreement that the wife was to conduct the husband's business during his absence and have the avails as her separate property, her earnings still remain his property, and she cannot maintain an action on a note purchased by her with such earnings. Stimson v. White, 20 Wis. 562.

The following are the decisions in New York upon the questions involved under a similar statute, the Wisconsin statute being in most respects copied verbatim from it: Sleight v. Read, 18 Barb. 159; Freeman v. Orser, 5 Duer, 476; Smart v. Comstock, 24 Barb. 411; Coon v. Brook, 21 Barb. 546; Cropsey v. McKinney, 30 Barb. 47; Yale v. Dederer, 17 How. Pr. 165, 21 Barb. 286, and 18 N. Y. 265; Commissioners of Excise v. Keller, 20 How. Pr. 280; Berwick v. Dusenberry, 32 How. Pr. 348; Cramer v. Comstock, 11 How. Pr. 486; Klen v. Gibney, 24 How. Pr. 31; Sammis v. McLaughlin, 35 N. Y. 647; Owen v. Cawley, 36 N. Y. 600; Bass v. Bean, 16 How. Pr. 93; Vrooman v. Griffiths, 1 Keyes, [*40 N. Y.] 53; Gage v. Dauchy, 32 N. Y. 293; Abbey v. Deyo, 44 Barb. 374; Knapp v. Smith, 27 N. Y. 277; Sherman v. Elder, 24 N. Y. 381; Marsh v. Hoppock, 3 Bosw. 478; Manchester v. Sahler, 47 Barb. 155; Van Sickle v. Van Sickle, 8 How. Pr. 265; Dillaye v. Parks, 31 Barb. 132; Buckley v. Wells, 33 N. Y. 518; Lockwood v. Cullin, 4 Rob. [N. Y.] 129; Longendyke v. Longendyke, 44 Barb. 366; Whitney v. Whitney, 49 Barb. 319; Savage v. O'Neil, 44 N. Y. 298; Merchant v. Bunnell, 2 Keyes, [3 Keyes, (42 N. Y.)] 539; Kluender v. Lynch, 3 Keyes, [4 Keyes, (*43 N. Y.)] 361.

The following are the decisions of the supreme court of Illinois on a somewhat different statute: Emerson v. Clayton, 32 Ill. 493; Bear v. Hays, 36 Ill. 280; Brownell v. Dixon, 37 Ill. 197; Elijah v. Taylor, Id. 247; Farrell v. Patterson, 43 Ill. 52; Streeter v. Streeter, Id. 155; Cole v. Van Riper, 44 Ill. 58; Manny v. Rixford, Id. 129; Schwartz v. Saunders, 46 Ill. 18; Wortman v. Price, 47 Ill. 22; Sweeney v. Damron, Id. 450; Pierce v. Hasbrouck, 49 Ill. 23; Snider v. Ridgway, Id. 522; Carpenter v. Mitchell, 50 Ill. 470; Dean v. Bailey, Id. 481; Dyer v. Keefer, 51 Ill. 525; Chicago, B. & Q. R. Co. v. Dunn, 52 Ill. 260; Pike v. Baker, 53 Ill. 163; McLaurie v. Partlow, Id. 340; Haines v. Haines, 54 Ill. 74; Wilson v. Loomis, 55 Ill. 352; Thomas v. City of Chicago, Id. 403. Also the following cases, recently decided: Cookson v. Toole, (Jan. term, 1871,) 5 Chi. Leg. News, 184; Hoker v. Boggs, Id. 195; Parent v. Callerand, (June term, 1872,) Id. 159; Schmidt v. Post, Id. 196. These will probably appear in 56 and 57 Ill.[1] See, also, In re Kinkhead, [Case No. 7,824.] The United States supreme court has also passed on the New York statute. Voorhees v. Bonesteel, 16 Wall. [83 U. S.] 16.

Case No. 674.

AVERY v. FOX.

[1 Abb. U. S. 246.][2]

Circuit Court, Sixth Circuit. W. D. Michigan. Jan. Term, 1868.

NAVIGABLE STREAMS—INJUNCTION.

1. The owner of land bordering upon a stream, although navigable, in which the tide does not ebb and flow, is presumed to be the owner of the land beneath the water to the center line of the stream.

2. Such riparian proprietor has also a right to use the water of the stream, in its flow, in any manner not inconsistent with the rights of others in it.

[Cited in Rutz v. City of St. Louis, 10 Fed. 341.]

3. But the public have the right to use all navigable streams as highways; and the owner of the bed of such a stream has no right, as such, in the waters thereof, which can authorize him to impede or obstruct navigation upon it. The right of the public, for purposes of navigation, is paramount to that of the riparian proprietor.

[Cited in Rutz v. City of St. Louis, 10 Fed. 341.]

4. The government of a state may authorize alterations to be made in the course, width, etc., of navigable streams, with a view to afford greater facilities for navigation; and for this purpose may take the property of a riparian owner, upon complying with the constitutional requirement to make compensation therefor.

5. The government of the United States may authorize similar alterations in navigable streams, for the purpose of affording increased facilities for navigation between the states; and for this purpose may take the property of a riparian owner. But they can only take such property upon making or providing for just compensation.

6. If an alteration in the course of a stream, by diverting it from its natural channel to an

[1] [The cases referred to are officially reported as follows: Cookson v. Toole, 59 Ill. 515; Hoker v. Boggs, 63 Ill. 161; Parent v. Callerand, 64 Ill. 97; Schmidt v. Postel, 63 Ill. 58.]

[2] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

artificial one, for the purpose of improving navigation, results in depriving the riparian owner of the use of the stream which he is employing advantageously as an incident to his land, this is taking the private property of such owner, in the use of the water, for a public use; and he is entitled to compensation.

[Cited in Rutz v. City of St. Louis, 10 Fed. 341.]

7. Although the courts cannot directly restrain the government of the United States, nor the action of the president as the executive power, nor that of congress as the legislative department; yet when congress makes an appropriation for a public improvement, and commits the execution of the work and the expenditure of the money to one of the departments, which in turn employs agents to carry forward the work, neither such department nor its agents will be exempt from the restraining power of the courts, if either seek to execute the law in an unconstitutional manner;—as, by taking private property against the consent of the owner and without compensation.

[See note at end of case.]

8. Private property cannot be taken for public use until compensation is actually made. It is not enough that a provision is made by law for ascertaining and making compensation afterwards.

In equity. Motion for a preliminary injunction. Denied.

C. A. Kent and C. I. Walker, for the motion.

E. S. Eggleston and L. Patterson, opposed.

WITHEY, District Judge. The bill in this case is for an injunction against defendants, contractors and employes in constructing a new channel from White lake into Lake Michigan. Based on bill and affidavit, a motion is made for a temporary injunction to restrain defendants from proceeding with the work. It appears from the bill that White lake is four miles long and one mile wide; that with a commodious channel for entrance, this lake would afford one of the best harbors on Lake Michigan. White lake is separated from Lake Michigan by a strip of land about 50 rods in width. White river empties into White lake, is for a distance of about 5 miles, immediately above the lake, a stream from 100 to 200 feet wide, from 3 to 8 feet deep, and running from 2 to 3 miles per hour. The outlet of White lake is also called White river, is from 75 to 200 feet in width, and in the channel, generally, from 4 to 10 feet deep, and runs from the western part of the lake northwesterly, parallel with the strip of land between the two lakes, about three quarters of a mile. It then turns west and runs 40 to 50 rods to Lake Michigan. Westerly winds blow sand from said strip of land into the outlet, so that the channel is kept in a navigable condition only by the action of the current, and by large expenditure annually of money in removing such deposited sand.

Complainants own 70 acres of land lying on the outlet, on which is a steam sawmill and other buildings and improvements, the value of which is not less than $50,000. They also own lumber lands up the White river, and are accustomed to supply their mill with logs through White river, White lake, and the outlet. There is a bayou near their mill, wherein logs are stored—logs are taken from the bayou through an opening into the outlet to the sawmill as wanted. Complainants have a steam tug which runs between said lakes, aiding in the transportation of logs and lumber. All vessels passing from one lake into the other must go by complainants' property through the outlet. They also have a pier extending from the mouth of the outlet into Lake Michigan. Their lumber, when sawed, is received by vessels coming from Lake Michigan, at a dock near the mouth of the outlet.

The congress of the United States has appropriated $57,000 for the improvement of the harbor at White River, to be expended under the directions of the war department. The war department, through its agents, has caused examinations and surveys to be made with reference to the work of improvement, and regards the improvement of the present outlet as impracticable, and has commenced the work of cutting a new channel through the sand bank or strip of land lying between the two lakes, making a straight cut of 200 feet in width and 12 feet deep, from deep water in Lake Michigan to deep water in White lake.

Complainants claim that the opening of this new channel must result in the rapid closing of the old outlet, because the new channel will be very much wider, deeper, and shorter than the old. As a natural and necessary consequence, they say, the water of the inner lake must seek the level of Lake Michigan through the new channel; the descent must be more rapid, as the distance is less; its greater depth and width will contribute materially to make the water prefer it to the old channel.

Several legal questions have been presented, involving the rights of riparian proprietors upon the navigable waters of the state; the rights of the public in, and particularly as to the power of the general government to divert or obstruct such streams in making harbors for the convenience and protection of commerce and navigation, and other questions which I shall have occasion hereafter to refer to. Without reference to the other facts of the case as presented by complainants and defendants, as to whether complainants will, by the opening of the proposed new channel, be deprived of enjoyed vested rights to such an extent as to justify the exercise of the restraining power of the court for their protection—I will first pass upon the legal questions that have been urged upon my consideration.

1. The outlet of White lake is a navigable stream, and the law is too firmly settled to allow of discussion at this day, that the owner of land bordering on a navigable stream, in which the tide does not ebb and flow, owns the land beneath the water to the center thereof. Neither the nation nor state owns

the beds of navigable streams within the state, but the riparian proprietor is owner thereof. It is equally well settled as law, that a riparian proprietor has a property in the use of water flowing by his premises; that is, a right to use it in its flow, in any manner not inconsistent with the rights of others to its use. If, then, the law recognizes such individual property, or, which is the same thing, individual right, in the use of water flowing past or through the land of a person, can such stream be so far obstructed or diverted as to deprive such owner of the use of the water? Clearly not. If the owner of land adjoining such stream has a mill which obtains its motive power therefrom, the water of such stream cannot be so far obstructed or diverted as to deprive his mill of its motive power, nor so as seriously to diminish the needed power. If the stream be navigable for crafts of any sort, for logs and lumber, and be used for any or all these purposes, any diversion or obstruction of the water accustomed to flow there, which should render navigation either impossible or difficult and more expensive, would be unlawful, and in either case, on a proper showing, should be prevented by injunction.

This right of private persons to the use of water as it flows by or through their lands, in any manner not inconsistent with the public easement, is as sacred as is the right of a person to his land, his house, or his personal property. The public, however, have the right to use such streams as are navigable as highways, and the owner of a bed of a stream has no rights in the water thereof which will permit him to use it to the injury of the public. He cannot so far divert the water to his private use as to render navigation impossible or difficult, nor can he place obstructions in the stream in a manner to produce such results. His right and the right of the public to the use of the water of such streams are to remain unimpaired as far as possible, but the right of the public for purposes of navigation is paramount, and there can be no use of the water by a riparian proprietor inconsistent with the public easement. The law, as thus understood, does not deprive a state of the right to improve its navigable rivers, nor indeed to permit the damming or bridging of such streams, providing navigation is not thereby obstructed, as when suitable locks or draws are provided through which navigation is secured to the public. And so, too, a state, which by its constitution is not prohibited from entering upon works of internal improvement, may cut channels around rapids or carrying places to afford greater facilities for navigation, so as to enable crafts to pass such carrying places which could not be done without, or only in times of high water. In doing so, the state as well as individuals must respect the right of riparian proprietors, and not deprive them of such enjoyed use as they are entitled to have continued in the water, to an extent to produce irreparable injury. Mere inconvenience to the private citizen resulting from any such public improvement may well be ignored for the greater benefit to the public, and be made to give way from principles of public policy.

2. But upon principles of public law, which are recognized in most of the state constitutions, and in the constitution of the United States, private property cannot be taken for public use without making just compensation. The right of eminent domain, which is the right that the people or government retain over the estates of individuals to resume the same for public use, is a right that carries with it the duty to make just compensation to the individual whose property is taken.

3. I now come to the question whether the United States, either from motives of public policy or the power given to congress by the constitution, to regulate commerce among the states, can lawfully, in the improvement of harbors of national importance and concernment, such as the one at White lake is conceded to be, change the outlet of the small lakes or mouths of rivers, so as to deprive persons owning lands bordering the same entirely of the use of the water as it naturally flows by or through their lands. The United States have a right to make the cut between White lake and Lake Michigan—the land, where the proposed cut is to be, having first been secured—provided thereby private interests are not seriously impaired or private rights destroyed. It is an incident to the sovereignty of the United States, and a right recognized in the constitution, in that clause which prohibits the taking of private property without just compensation, that it may take private property for public use—of the necessity or expediency of which congress must judge, but the obligation to make compensation is concomitant with the right. Bonaparte v. Camden & A. R. Co., [Case No. 1,617;] Dickey v. Maysville & L. Turnpike Co., 7 Dana, 119. In the last case the court say, "The national power to use the land of a citizen or state for an armory or fortification is undoubted and irresistible; the constitutional obligation to pay the owner a just equivalent, if it be demanded, is equally undoubted and irresistible." The case involved the right to carry the United States mail over the road of a turnpike company without payment of toll, and at page 115 the court say, "The right to use private property for a mail route—as for any other national purpose, being qualified by the constitutional condition that a just compensation be made for the use, unless the owner voluntarily waive it—does not imply an authority to take, or to use for post office or post road purposes, the land or the house of a citizen, or the railroad or macadamized road of associated citizens, without paying to the owner or owners a just compensation." The principle of that case is directly in point. The legislature of the state, or the congress of the United States, possesses whatever power exists in

either government to take private property for public use, and to provide compensation. If now the power to take may be exercised alone,—when we find that the lawmaking power is alone judge of the necessity or expediency of taking,—there will be found no check to its most arbitrary exercise. And as was said by Chief Justice Marshall, in Fletcher v. Peck, 6 Cranch, [10 U. S.] 135, if any limits to legislative power be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To divert a stream from its natural channel into an artificial one, for the purpose of affording improved navigation and benefiting commerce, may be a work of great public concernment and advantage, but if thereby a riparian owner is wholly or injuriously deprived of the use of its waters, which he is employing advantageously as an incident to his land, it is taking the private property of such owner in and to the use of that water for public use, and unless just compensation is made, is against both the principles of the common law and the provisions of the constitution of the United States, and courts have no alternative but to so administer the law as to secure and protect such rights in a proper case.

4. It was urged upon the argument that the United States is prosecuting the White River harbor improvement, and as a sovereign power, cannot be restrained. The United States cannot be brought before the court as a party defendant in the record; the courts cannot restrain the president of the United States as the executive power of the government, nor congress, the lawmaking power; but when congress makes an appropriation to improve a harbor, and commits the direction of the work and expenditure of the money appropriated to the war department, which employs its agents to carry forward the work, neither the war department nor its agents will be exempt from the restraining power of the court, if either seek to execute the law in an unconstitutional manner, by taking private property against the consent of the owner, without compensation. The war department is not acting as the executive, nor as the agent of the executive power, but ministerially. If the court has jurisdiction of the subject-matter and person of the defendants, I know of no rule which would exclude from the process of injunction any person on account of the character or capacity in which he acts, although such character or duty be conferred or imposed upon him by the law of a state or of congress. 1 Baldw. 206, [Bonaparte v. Camden & A. R. Co., Case No. 1,617.]

5. One further question is suggested by the argument and from the considerations which I have given, viz.: When is compensation to be made? Or may private property be taken or private rights be impaired before compensation made, if by some law provision is made for ascertaining and making compensation? I regard the just rule to be, that the taking of private property should not be allowed until compensation is actually made, thus imposing on the owner no burthen of seeking or pursuing expensive remedies, and leaving him exposed to no risk or expense in obtaining compensation. 1 Baldw. 227, [supra.]

6. If, then, the facts of this case bring the complainants within the rules of law as indicated in my views already expressed, the work which is being prosecuted by defendants should be prevented by injunction. I have already stated most of the allegations of the bill in substance. Complainants therein state that the strip of land between the outlet of White lake and Lake Michigan, is in part a mere sand bank, and westerly winds blow this sand into the river in great quantities, so that the channel is kept navigable only by the action of the current and by artificial means. Great expense is necessary every year, on the part of parties interested, to keep the channel clear of the sand which drifts in. They also say that, in their judgment, the opening of the new channel must result in the rapid closing of the old outlet. The wider, straighter, shorter and deeper channel proposed will naturally and necessarily result in causing the waters of White lake to seek the level of Lake Michigan through the new channel. And they say that any diminution of the accustomed supply of water in the present outlet would tend to injure their property, since there is now hardly enough; and that if the current should cease to flow, even though the water should remain as deep as at present, the expense of getting logs from White lake to the bayou would be seriously increased and the value of their property diminished.

The evidence in support of the bill is the affidavit of Col. J. D. Webster, who from 1838 to 1854 was an officer of the topographical engineers of the United States army, and for several years had charge of government harbor improvements on Lake Michigan, is familiar with the shores of the lake, has given great attention and reflection to the action of the winds and currents thereof. He states that the effect of the new channel will be that almost the entire water passing from White lake to Lake Michigan will flow through the new channel, and that there will remain but little or no current in the old channel. That in consequence it will be gradually but surely filled with sand, and within a few years closed for all practical and useful purposes. But this opinion is based upon causes operating in the absence of the use of artificial means to aid this channel by dredging out the sand, as now employed. He thinks no considerable effect, in keeping the present channel open after the completion of the new, would result from the running back into Lake Michigan of the waters which are by strong westerly winds blown into White lake.

The defendants, in opposition to the motion for injunction, present three affidavits, no an-

swer having been filed. Col. J. B. Wheeler, of the United States army, who, under instructions from the secretary of war, has charge of the work of constructing the proposed new channel, gives full information as to the surveys for the work, the report to the war department, and among other items, the report says: "It is hardly possible that any reasonable expenditure of money upon this (the present) entrance and portion of the river or outlet would give us a harbor suitable to the wants and necessities of the general commerce on Lake Michigan." And further, in reference to the locality of the proposed new channel, it is said: "By examining this locality we see that there is deep water in both lakes near the shore, and that there, the distance between the twelve feet waters in each, is only twelve hundred and fifty feet. This, then, is the place where the channel should be made."

The secretary of war transmitted this information to congress, and the appropriation was thereupon made, and Col. Wheeler was directed to proceed with the work accordingly. Col. Wheeler says: "Whether the opening of the new channel will necessarily close the old one, is a subject of speculation."

John D. Sturtevant states his residence at White lake since 1861, and from his observations as to the action of the waters on the east shore of Lake Michigan, it is his opinion that the effect of opening the new channel, as proposed, will not be as stated in the bill and by Col. Webster in his affidavit, but that the present outlet will not be filled or closed. The affidavit of Charles Mears, a resident on the east coast of Lake Michigan since 1838, states that in that year he built a sawmill on White lake, and manufactured lumber there for 20 years; that he has had experience in improving harbors on this shore at six different points; has been a careful observer of the action and effects of the winds and currents at White lake and other points. He gives it as his judgment that the effect of opening the new channel will not be as stated in the bill of complainants and in Col. Webster's affidavit. On the contrary, that if the improvement is made, it is his opinion the present outlet will not be filled by drifting sands or by the action of the water. He further states that strong westerly winds raise the water in White lake 12 inches or more, and the result will be, if the new channel is made, that as the wind subsides and the water of Lake Michigan recedes, the pent-up waters of White lake will seek both outlets into the outer lake, not through the new channel alone, and will keep the present channel from filling with drifting sand. Such are the facts, and such the conflicting opinions presented upon this motion, from which to determine whether the complainants will be irreparably injured by the new channel when constructed.

It is clear that it will not be the new channel which will cause the old outlet to fill with sand, but the wind blowing the sand into this channel that will close it if it should be closed. The current in this outlet cannot be greater than that of the river above, which is two or three miles per hour—it is probably less, but if as great, a current running but two or three miles an hour would produce little or no effect in removing sand precipitated into the bed of the outlet; hence it is that great expense is necessary annually to remove the deposited sand. The only current that removes sand from the outlet is that which flows at irregular intervals, caused by water from Lake Michigan, blown into White lake on account of strong westerly winds, running out when the wind subsides; but this current is not adequate to remove the sand from the channel, and must be aided by the artificial means which are employed.

It appears, then, that this outlet would cease to be navigable to its present extent were it not for the use of such artificial means. And, as I view the facts, it does not appear but that, after the new channel is made, the same application of artificial means will keep this outlet open for all practical uses which complainants now enjoy therein. That use is principally in running logs, as vessels now receive complainants' lumber near the mouth of the outlet, and not at their mil, the lumber being conveyed by land carriage to a dock near Lake Michigan.

Complainants have a tug which they employ in this outlet, but it does not appear, from the facts of the case, but that the employment of artificial means in keeping the channel clear, to the extent now employed, would continue the present facilities for tug navigation, as well as other purposes, for which complainants now use the channel; unless the effect of the new channel will be, not only to take a portion of the water accustomed to flow through the old, but lower the level of White lake to such an extent as to materially reduce the depth of water in the present outlet. It is said by the bill that White lake will, in consequence of the new channel being very much wider, deeper, and shorter than the old one, naturally and necessarily seek the level of Lake Michigan. This conclusion may be conceded; but what effect will thereby be produced in the present channel? The bill gives no information from which to answer satisfactorily the question. How much above the level of Lake Michigan is White lake? Is there any considerable difference, or such difference in the level of the two lakes as that the new channel will so far lower White lake as to prevent its water flowing into the old outlet, or materially reduce the depth of water therein? These questions I am unable to answer from the facts of the case, and do not feel disposed to interfere with the public work at White lake, designed, as it is, greatly to benefit commerce and navigation by affording what does not now exist, a safe and commodious entrance to one of the best harbors on the lake, except

the showing is such as decisively to require it. It will be conceded that the present channel, in its natural condition, is not so far navigable as that vessels of ordinary draught of water navigating Lake Michigan can enter through it into White lake, and that it is only kept or made navigable for crafts of light draught when artificial means are employed at great cost annually in dredging out the sand which is therein deposited by the frequently recurring strong westerly winds; and that the new channel will afford ample facilities for all classes of vessels to enter the harbor of White lake. It is, therefore, of great public importance that the cut be made.

If complainants can reach vessels in White lake, which enter through the new channel, to transport their lumber to market, without much greater inconvenience than they now do vessels at the mouth of the outlet, they would not seem, in this particular, to be materially injured by the new cut. Their mill cannot be materially different from midway between White lake and the mouth of the outlet. If sufficient water is left in the outlet, with or without the employment of the artificial means, for floating their logs to their mill, I cannot see wherein they are to be irreparably damaged. The result of the new channel may be to give complainants some inconvenience; more time may be consumed in running their logs if the current of the present outlet is diminished, as it probably would be; but mere inconvenience, or delay in navigating a stream, must be submitted to from motives of public policy where the public good demands it.

The right to interfere by injunction rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which, on just and equitable grounds, ought to be prevented. A court should be extremely cautious in the exercise of this power, and before enjoining an important public work, require a clear case on the facts as well as on the law. The injury should be apparent, and in a case like the present, of apprehended injury, resting largely in opinions on one side, and denials of injury on the other, the question of damage should be put beyond mere probabilities, and reach something like demonstration. My investigations have led me to the conclusion that complainants' right to the enjoyment of the water of White river outlet, as riparian owners, and as well in right of the public easement, to the extent which they now enjoy its use, is at law clear; but that the facts do not make a clear showing of necessity for the exercise of the restraining power of the court by injunction to protect them in the enjoyment of their rights. The motion for a temporary injunction is denied.

[NOTE. Concerning the right to an injunction against the government of the United States, an interesting case occurred in the circuit court for the district of middle Tennessee. The United States had obtained a judgment against an individual, and by various executions more was recovered than was due on the judgment, whereupon the court decreed a perpetual injunction against the United States, and that it should pay the costs. The supreme court, however, reversed this decree, holding, per Mr. Justice McLean, that "there was no jurisdiction of this case in the circuit court, as the government is not liable to be sued, except with its own consent, given by law. Nor can a decree or judgment be entered against the government for costs. The circuit court, as a court of law, may direct credits to be given on the judgment, consequently may examine the grounds on which such an entry is claimed, and may direct the execution to be stayed until such an investigation shall be made." U. S. v. McLemore, 4 How. (45 U. S.) 286. A bill in equity will not lie to enjoin the United States, —Hill v. U. S., 9 How. (50 U. S.) 386; nor can the president be restrained from carrying into effect an act which is alleged to be unconstitutional. A bill having that for its purpose cannot be filed. Mississippi v. Johnson, 4 Wall. (71 U. S.) 475. In a later case the following from Mr. Justice Gray, of the supreme court of Massachusetts, was quoted: "The broader reason is that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits, as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury." Briggs v. The Light Boats, 11 Allen, 162. Continuing, Mr. Justice Miller, speaking for the supreme court of the United States, said: "As we have no person in this government who exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption of liability from suit rests. It seems most probable that it has been adopted in our courts, as a part of the general doctrine of publicists, that the supreme power in every state, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts." In summarizing the law of the case Mr. Justice Miller also said: "This exemption is limited to suits against the United States directly and by name, and cannot be successfully pleaded in favor of officers and agents of the United States, when sued by private persons for property in their possession as such officers and agents. In such cases a court of competent jurisdiction over the parties before it may inquire into the lawfulness of the possession of the United States as held by such officers or agents, and give judgment according to the result of that inquiry. The difference in the essential features of a monarchical and republican form of government renders the decisions of the English courts on this subject of but little value as precedents, while an examination of numerous decisions of this court, from its organization under the constitution to the present day, establishes the foregoing proposition." U. S. v. Lee, 106 U. S. 196, 1 Sup. Ct. 240.]

Case No. 675.

AVERY v. JOHANN.

[3 N. B. R. 144. (Quarto, 36); 4 N. B. R. 434, (Quarto, 143;) 2 Amer. Law T. Rep. Bankr. 92; 1 Chi. Leg. News, 261; 2 Biss. 139.]

District Court, D. Wisconsin. April Term, 1869.

BANKRUPTCY—WHAT CONSTITUTES — FRAUDULENT CONVEYANCES.

[The fact that a debtor, after judgment against him in a state court, fraudulently con-

veyed all his real property, of a value greater than the debt, to his sons, is not a sufficient cause of bankruptcy as to the judgment creditor, whose remedy is to have the conveyance set aside in a court of equity.]

[Distinguished in Re Stansell, Case No. 13,293. Disapproved in Re Sheehan, Id. 12,737. Cited in Re Wells, Id. 17,388.]

[In bankruptcy. Petition by Avery against Nicholas Johann, based on a judgment in a state court and a fraudulent conveyance to avoid its execution. Dismissed without prejudice to proceedings on the judgment.]

MILLER, District Judge. On the 15th day of September, 1856, Nicholas Johann made his note to the Milwaukee and Lake Superior Railroad Company, payable on the 1st day of July, 1866, with his mortgage on a tract of land as security. The petitioner having become the assignee of the note and mortgage, on the 26th day of September, 1866, instituted proceedings in a court of this state to foreclose the mortgage. In the month of December following, a judgment for the sale of the mortgaged premises was rendered, with an order for execution for the residue of the debt against other property of the debtor. The mortgaged premises being encumbered with taxes and tax titles, the proceeds of sale were inconsiderable, when the amount of the residue of the debt was certified and transferred to the judgment record, pursuant to a law of the state. The petition in bankruptcy is founded on this judgment. It represents as the cause of bankruptcy, that on the 15th day of October, 1868, Nicholas Johann, the debtor, fraudulently conveyed to his two sons all his estate, lands, and tenements, describing them, with intent to hinder and delay this petitioner in the collection of his said debt. The conveyances were exhibited at the hearing. The debtor claims no property except such as is embraced within the exemption laws of the state. No other debt was alleged or proven. The real estate conveyed to his two sons is of greater value than the amount of his debt. Johann is a farmer, and not engaged in trade.

There is no doubt but a conveyance by a father to his sons, in consideration of his support, is fraudulent as to his creditors, and would be a cause of bankruptcy at the instance of creditors other than this petitioner. The objects of the bankruptcy act are discharge of a debtor from his debts, and an equal distribution of his estate amongst his creditors, in proportion to the amount of their respective debts. This case is not within the scope or intent of the act. There are no creditors to claim distribution of assets. Nor does any creditor allege as cause of bankruptcy those conveyances, but the petitioner, who can enforce the collection of his debt by proceedings in equity in the court where his judgment remains of record. A single creditor, whose debt is secured by a lien on lands of greater value than the amount of his debt, cannot be permitted to abandon all remedies open to him for the collection of his debt, and claim the jurisdiction of this court in bankruptcy for the purpose.

A judgment creditor cannot claim the jurisdiction of the court in bankruptcy for the collection of his debt, fully secured by the only lien on real estate.

It cannot be adjudged that Johann made the conveyance to his sons in contemplation of bankruptcy or insolvency. Nor can I find him to be in a state of insolvency, while it appears there is property sufficient for the full payment of his only debt, upon the removal of a cloud on the title.

The deeds having been given by the debtor during the pendency of the suit of this petitioner against him should be declared fraudulent, if no legal or equitable consideration therefor be shown in the proper tribunal. Such a decree cannot be claimed upon this petition in bankruptcy. If a question of this character should arise at the instance of an assignee in bankruptcy, I would require him to bring his bill in equity. Shawhan v. Wherritt, 7 How. [48 U. S.] 629. For these reasons, I order the petition dismissed, but without prejudice to proceedings on the judgment.

Case No. 676.

AVERY v. SPRINGPORT.

[14 Blatchf. 272.][1]

Circuit Court, N. D. New York. June, 1877.

RAILROAD COMPANIES — MUNICIPAL AID BONDS — EXECUTION — SEAL — COMPLIANCE WITH STATUTE.

A statute authorizing a town to issue bonds in aid of the construction of a railroad, provided that the bonds should be under the hands and seals of commissioners. They issued coupon bonds which were not sealed, although their wording showed that sealing was intended, and the coupons were not sealed: *Held*, in a suit on the coupons, that the bonds and coupons were void.

[Cited in Phelps v. Yates, Case No. 11,082.]

[At law. Action by Noyes L. Avery against the town of Springport on coupons for the payment of interest on municipal bonds. Heard on defendant's motion for a new trial. New trial ordered.]

James R. Cox, for plaintiff.

George F. Danforth, for defendant.

JOHNSON, Circuit Judge. The material question in this case is, whether the execution of the instruments called bonds was sufficient in form to bind the defendant. The statute under which they purport to have been issued was a law of New York, entitled, "An act to facilitate the construction of the Cayuga Lake Railroad, and to authorize the town of Springport, Cayuga county, to subscribe to the capital stock thereof," passed April 24, 1869, (Laws 1869, p. 677.) The 2d

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

section of the act is the only one which authorizes any one to bind the town for the payment of money in aid of the railroad to be constructed. It enacts, that "it shall be lawful for the said commissioner or commissioners" (for whose appointment provision was made by the 1st section) "to borrow on the faith and credit of the said town" a certain sum of money, at a rate of interest not exceeding seven per cent., for a term not exceeding thirty years, and to execute bonds therefor under their hands and seals. The instruments sought to be treated as bonds under the statute are not under seal, although their wording shows that sealing was contemplated, as a necessary part of their execution. This action is brought upon a certain number of coupons detached from bonds so executed without seals. The coupons are not themselves sealed, nor are any of them executed by the signature of more than one commissioner. They are, therefore, subject to all the difficulties which the bonds are liable to. The defect, if it be one, being in the execution, which does not pursue the direction of the statute, neither the plaintiff nor any one else can have become possessed of the bonds without knowledge of the absence of seals and of the requirements of the statute in that regard. This action is on the instruments, and the recovery can be only had on them. The law which authorizes bonds to be issued prescribes the form and mode in which they are to be executed. They are to be under the hands and seals of the commissioners. Instruments under their seals and not under their hands, or under their hands and not under their seals, are alike not executed in conformity with the statute, and are alike inoperative to create an obligation against the town. The principle is involved in People v. Mead, 24 N. Y. 114, where instruments called in the statute bonds were held properly executed without being sealed, the act directing their execution to be under the official signatures of certain designated officers, and that mode of execution having been employed. Various cases have been cited showing that a party required to give an instrument under seal, cannot, in an action against him, insist on his own omission to seal the instrument, as a defence. Such was the case of an unsealed bond on attachment, (Kelly v. McCormick, 28 N. Y. 318,) and in the case of U. S. v. Linn, 15 Pet. [40 U. S.] 290, where the bond of a surety for a receiver of taxes was unsealed. The court held, in that case, that the instrument was a good obligation at common law, unsealed. Other cases resting on the same grounds are cited, but none of them give any countenance to the idea that a mere statutory power can be so executed as to impose an obligation, unless the statutory authority is pursued. In Town of Coloma v. Eaves, 92 U. S. 484, 489, 490, stress is laid upon the fact that the execution of the instruments was in exact conformity with the provisions of the statute; and it is held, that, by such an execution, the statutory prerequisites to the issuing of the bonds are established in favor of a bona fide holder for value. In the same case, the doctrine of the courts of the United States is stated, perhaps, in its broadest form, in support of the rights of bona fide holders of municipal bonds, so far as compliance with precedent conditions prescribed by statute is concerned, where the requisite legislative authority has been given to a municipal corporation, or its officers, to issue municipal bonds. But, in none of the cases have I found even an intimation that anything will serve to supply the want of an execution such as the statute calls for. Indeed, it seems plainly to result from the fact that the power originates only from the statutory grant, that the statute must be followed in order to make out an execution of the statutory power.

The verdict must be set aside for the erroneous ruling at the circuit in respect to the want of the seal, and a new trial must be ordered, with costs to abide the event.

AVERY, (UNITED STATES v.) See Case No. 14,481.

Case No. 677.

AVERY v. The WANATA.

[44 Fed. 361, note.]

Circuit Court, S. D. New York.

ADMIRALTY — DECREE FOR DAMAGES TO SEVERAL LIBELANTS—APPEAL.

[A decree for damages for collision in favor of several libelants should be for a gross sum, to be distributed by the clerk, and not for the several amounts of the loss or damage of each, if any one of such amounts will be for a sum less than $2,000, so that an appeal therefrom may therefore be denied.]

[See note at end of case.]

[In admiralty. Libel by John W. Avery and W. Hall Johnson, executors of Josiah Johnson, deceased, John Carrol, and others, against the schooner Wanata, George Sparrow and others, claimants, for damages growing out of a collision. Decree for libelants. Heard on application of claimants to have the decree award a gross sum, so as to permit an appeal to be taken to the supreme court, it appearing that each of the awards to the several libelants was below the jurisdictional amount of $2,000. Claimants' application granted. Decree afterwards affirmed. The Wanata v. Avery, 95 U. S. 600.]

WOODRUFF, Circuit Judge. The claimants ask that the decree herein may award a gross sum to the libelants, and execution therefor; the same to be distributed by the clerk to the several libelants, according to the amounts of their several loss or damage caused by the collision, for which the schooner is condemned. The libelants, on the other

hand, ask that the decree be in substance several decrees; that is to say, that it condemn the schooner for each several amount of loss, and award execution to each libelant to collect the amount of his separate loss. The materiality of these conflicting claims is supposed to arise from the apprehension of an appeal by the libelants to the supreme court, and a suggestion that, if the decree were in the form last mentioned, no appeal would lie from those parts of the decree which awarded to either or any of the libelants a sum less than $2,000; and that the supreme court would not have jurisdiction to reverse any part except that which awards more than $2,000 to one of the libelants. Whether the form proposed by the claimants of decreeing the payment of a gross sum, to be distributed among the libelants, will affect the question of the jurisdiction of the supreme court to reverse the whole decree if found erroneous, is not for this court to decide. If the apparent injustice of compelling the claimants to pay a part of the loss when the decision of the supreme court, as the case may be, declares that the claimants or their schooner have been wrongfully condemned, and ought not to be required to pay anything, can be avoided without violating any important rule of practice or form, then surely such avoidance would be matter for satisfaction rather than regret. Such apparent injustice was strongly illustrated in the case of Rich v. Lambert, 12 How. [53 U. S.] 347, and perhaps still more strikingly in the cases of The Mary Eveline, [Case No. 9,211;] and Merrill v. Petty, 16 Wall. [83 U. S.] 338, 348. I therefore settle the decree in the form which the claimants have requested.

[NOTE. In affirming the decree of the circuit court, Mr. Justice Clifford, speaking for the supreme court, said: Everywhere it is admitted that an appeal in admiralty carries up the whole fund, and that it is the duty of the circuit court to execute its own decree; and it is equally clear that the fund in this case consists of the stipulation given in the district court for costs, the stipulation given there for value, and the bond or stipulation in the sum of $2,000, to prosecute the appeal with effect, and pay all damages and costs awarded against them, if the appellants shall fail to make their appeal good. Montgomery v. Anderson, 21 How. (62 U. S.) 386. Two points were ruled in that case applicable to this: (1) That the appeal in admiralty carries up the res; (2) that the circuit court must carry into execution its own decree. The Collector, 6 Wheat. (19 U. S.) 194; 2 Pars. Shipp. 493. Sureties in such an appeal bond or stipulation may become liable for the whole amount specified, as the condition of the instrument is that the principal shall prosecute his appeal with effect, and pay all damages awarded against the appellant, if he fail to make good his appeal. Hence it was decided by this court that the surety in such a bond is liable for the entire amount of damages and costs, to the extent of the penalty, and interest thereon from the date of the institution of the suit, when the property attached produces less than the judgment or decree. Ives v. Merchants' Bank, 12 How. (53 U. S.) 159. Examined in the light of these suggestions, as the decree should be, it is mainfest that it contains no error, as the amount of the stipulation for value is decreed to be paid to the libelants in part discharge of the taxed costs, leaving the balance of the taxed costs and the accrued interest from the date of the decree in the district court to the date of the decree in the circuit court to be paid by the sureties in the appeal bond, which may, by the rules and usages which belong to courts of admiralty, be treated as an admiralty stipulation. 1 Stat. 276; Adm. Rules, 5, 21.]

Case No. 678.

The AVID.

[3 Ben. 434.][1]

District Court, E. D. New York. Oct., 1869.

COLLISION AT PIER—ICE—MOORING—COSTS.

1. A bark and a barge were both moored alongside a pier. The bark's long-boat was hanging under her counter, close down to the water, from lines run from the stern, there being no davits. A floe of ice came into the slip, and parted the barge's lines, and drove her against the long-boat, and crushed it: *Held*, That the barge was in fault, in not being properly moored;

2. That the bark was in fault, in reference to the position of the boat;

3. That the damages must be divided;

4. That costs would not be allowed for depositions which were illegible.

[Cited in The Mary Patten, Case No. 9,223.]

In admiralty.

BENEDICT, District Judge. This action is brought to recover for the destruction of the long-boat of the bark Algiers, by being crushed by the barge Avid, during the night of the 14th of February, 1869. The bark and the barge were both moored alongside pier 28, in the East river. The long-boat was hanging under the bark's counter, close down by the water, the ropes running from the stern, there being no davits. While in this position, the ice came into the slip, during the night, with sufficient force to part the barge's fastenings, and drive her ahead upon the long-boat, thus doing the injury complained of.

It is manifest that the long-boat was swung in an improper and dangerous place, where it was greatly exposed to injury from neighboring vessels. For this reason, the bark must be held in fault. The Phoenix, [Case No. 11,111.]

The remaining question is, whether there was fault on the part of the barge, in regard to her fastenings, which should render her also responsible for the accident.

On the part of the bark, it is proved by the mate, that he went on board the barge, on hearing the crash; that he then examined the barge; that he found the stern line had parted; and that he, at the time, complained to the master of the barge, that his line was not sufficient to hold his vessel. The master of the bark, also, is called, who does not appear, however, to have examined the lines of the

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

barge until morning, when he saw the stern line that had parted.

On the part of the barge, no witness is called but the claimant himself, who swears that the barge was made securely fast to the pier, by stem and stern lines, and a seven-inch breast line; that a floe of ice came in the slip, which parted the stern line and the bow line, and pulled off the cavil, to which the breast line was fastened, and thus his barge was driven into the long-boat. He further says, that he hove his boat back by the windlass. But in the answer, which is sworn to by this same claimant, it is expressly stated, that but one line parted, "leaving two lines still secured to the pier; that in a few moments the barge sprung back to her lines, and it was then discovered that the long-boat had been smashed." The account given in the answer thus differing from the account given upon the stand, a doubt is raised as to the sufficiency of the barge's fasts, which is further strengthened by the fact that no vessel broke adrift, except this barge, and that the barge herself received no injury from the pressure of the ice. In this posture of the evidence, it must be held that the claimant has failed to show that the drifting of the barge was caused by the overwhelming power of the ice, and not from any carelessness or neglect in her fastenings, and that the barge is also chargeable with fault.

There being, then, fault found on both sides, the damages will be apportioned.

In taxing the costs, the clerk will strike from the libellant's bill of costs the fees for the depositions, because of their extreme illegibility, as presented to the court. A reference may be had, to prove the amount of the damage, unless the parties can agree on the sum.

Case No. 679.

AVIL v. ALEXANDRIA WATER CO.

[1 Hughes, 408.][1]

Circuit Court, E. D. Virginia. April, 1877.

CONFISCATION AND SALE OF CORPORATE STOCK—FRAUD—BONA FIDE PURCHASER.

Where shares in a corporation were sold by the United States marshal, under a decree of confiscation rendered under like circumstances to those condemned by the United States supreme court in Windsor v. McVeigh and Gregory v. McVeigh, 93 U. S. 274, 284, and the corporation had denied the purchaser's title, and that purchaser had sold the stock to the plaintiff, *Held*, in an action of trespass on the case for value, that the corporation was not liable to the plaintiff for the stock or unpaid dividends, if his vendor's title was under a confiscation sale, and the corporation had denied its validity, and the plaintiff had had such notice of these facts before his purchase as should have put him upon inquiry.

[1] [Reported by Hon. Robert W. Hughes, District Judge.]

[At law. Trespass on the case by John Avil against the Alexandria Water Company. Verdict and judgment for defendant.]

On the 14th day of May, 1864, ten shares of stock in the Alexandria Water Company, standing in the name of W. N. & J. H. McVeigh, citizens of Alexandria, but then within the lines of the confederate army, were sold under a decree of the United States district court in a libel for confiscation which had been rendered under the same circumstances as those described in the cases of Windsor v. McVeigh and Gregory v. McVeigh, decided by the United States supreme court, and reported in 93 U. S. 274 and 284. That is to say, the appearance and the answer of the claimant of the property libelled for confiscation, had been stricken out at the trial of the libel, and a decree of condemnation entered without opportunity being given to the claimant to make defence. The purchaser of the stock at the United States marshal's sale of it was Wm. A. Duncan, of Alexandria county, Virginia, and a certificate of stock was issued to him by the water company as of the day of the marshal's sale. Dividends on the stock were paid to this purchaser, as they were declared, up to 1866; and dividends had accrued since to the amount of $347.50. Since 1866 the company had denied the title of this purchaser to the stock.

On the 6th March, 1874, Wm. A. Duncan, by indorsement on the certificate of stock, had assigned these ten shares to John Avil, a citizen of Pennsylvania, his brother-in-law, and coupled with the assignment a power of attorney in blank to make the proper transfer on the books of the water company. Demand had been made upon the company for transfer by Avil, on the 23d April, 1874, and had been refused. Evidence going to show that Avil, at the time of and before he received the assignment of the stock from Duncan, knew the character of his title, was given to the jury; and it was proved that the consideration of the purchase was a note of hand, not yet paid, given by Avil to Duncan in a considerably less amount than the face or market value of the stock.

At the trial, the court instructed the jury that if they believed that W. A. Duncan's title was obtained through a confiscation sale that was not legal, in May, 1864, and that there had been a continual denial of the validity of Duncan's title by the defendant company since June, 1867, and that the plaintiff had such notice of this fact as should have put him upon inquiry as to the character of that title before purchasing the shares of stock in question, they should find for the defendant. The jury returned a verdict for the defendant; and judgment was rendered accordingly.

W. Willoughby, for plaintiff.

S. F. Beade, for defendant.

Case No. 680.

The AVON.

[Brown, Adm. 170;[1] 18 Int. Rev. Rec. 165; 6 Chi. Leg. News, 41.]

Circuit Court, N. D. Ohio. Feb., 1873.

COLLISION IN THE WELLAND CANAL — JURISDICTION OF TORTS IN FOREIGN WATERS WHERE LOCAL LAW GIVES NO LIEN—ADMIRALTY LIEN NOT DIVESTED BY SALE TO BONA FIDE PURCHASER, UNLESS BY A PROCEEDING IN REM—LIBELLANT'S DAMAGES NOT TO BE DECREASED BY AMOUNT PAID HIM BY UNDERWRITERS.

1. The general maritime law universally recognized by civilized nations gives a lien for a maritime tort upon the offending vessel, and this lien travels with the ship into whosesoever hands she may go. The proceeding in rem, to enforce such a lien, is not process. In no sense is it remedy only, or a part of the lex fori, but is the enforcement of a proprietary interest.

[Cited in The Champion, Case No. 2,583; The Champion, Id. 2,584; The S. S. Oregon, 42 Fed. 79.]

2. This lien or proprietary interest is not divested by a sale to a bona fide purchaser without notice, unless had by virtue of a judicial proceeding in rem.

3. A transfer within a jurisdiction where the offending ship is not subject to seizure does not constitute an exception to this rule.

[Cited in The Champion, Case No. 2,583; The Arcturus, 18 Fed. 748.]

4. The waters of the Welland canal, as now used for international commerce, are within American admiralty jurisdiction. The Suez and other canals, and all the improved navigation of the world, have been, and from the nature of their use should be, as much subject to admiralty jurisdiction as waters in natural channels.

[Cited in The Champion, Case No. 2,584; Hatch v. The Boston, 3 Fed. 810.]

[See The Oler, Case No. 10,485.]

5. While a natural thoroughfare, although wholly within the dominion of a government, may be passed by commercial ships of right, yet the nation which constructs an artificial channel may annex such conditions to its use as it pleases.

6. When it may be inferred that the maritime law sought to be applied is excluded by the lex loci, the remedy in rem should be denied. If from the circumstances a contrary presumption arises, the principle of the maritime law involved should be enforced.

7. It is not enough per se to deprive a court of admiralty jurisdiction, that collision happens where there is municipal power to exclude the maritime rule. It must further appear that it has actually been done, and this the record in this case fails to show. The mere absence of a tribunal to enforce the maritime law has never been admitted as sufficient evidence of intention to exclude it.

8. No argument can be drawn from the fact that the Welland canal is a tideless water, and that therefore the authorities which sustain admiralty jurisdiction over torts and contracts, in foreign waters, do not extend the maritime law over it. Admiralty courts have taken jurisdiction wholly irrespective of the fact of a tide.

[Cited in The E. M. McChesney, Case No. 4,463; Malony v. City of Milwaukee, 1 Fed. 612; The B. & C., 18 Fed. 544.]

9. Inapplicability of the lex loci contractus, the lex rei citae, and the lex loci delicti, where obligations growing out of international commerce are to be adjudicated with reference to the maritime law, considered.

10. The libellant in a collision case, when successful, is entitled to recover the full amount of his damages, notwithstanding he may have received partial indemnity from the underwriters.

In admiralty. Collision in the Welland canal between the schooner Medbury and the propeller Avon. The claimant interposed two special pleas to the libel. (1) That the Avon was a British vessel, owned and registered in Ontario, and at the time of the collision bound from one British port to another—that the Welland canal is an artificial navigable water connecting Lakes Erie and Ontario, exclusively British property, and within British territory. (2) That after the collision and before libel filed, claimant purchased the propeller for a valuable consideration, without notice of this claim. That there are no admiralty courts in Ontario, and no admiralty jurisdiction in force there, and that by the laws of said province the propeller is not liable to seizure for injuries done by her while owned by another person.

B. R. Beavis and Willey, Cary & Terrell, for libellants.

The only reported case upon the question whether courts of admiralty have jurisdiction of a tort committed upon the Welland canal is that of Scott v. The Young America, [Case No. 12,549,] where the jurisdiction was sustained. This has ever since been accepted as law. This decision was not based upon the obsolete act of 1845, [5 Stat. 726,] for it declared the act of 1789, [1 Stat. 76, § 9,] furnished a broader jurisdiction. The case of The Genesee Chief, [12 How. (53 U. S.) 443,] was rested "upon the ground that the lakes and navigable waters connecting them are within the scope of admiralty jurisdiction." Same language is employed in case of The Eagle, 8 Wall. [75 U. S.] 20, which is decisive of the present case. The objection that the Avon was owned in Canada is met by the uniform practice of the American courts for sixty years to enforce remedies in admiralty without reference to ownership, whether domestic or foreign. The Commerce, 1 Black, [66 U. S.] 580; The Maggie Hammond, 9 Wall. [76 U. S.] 435. No case can be found holding that jurisdiction between our own citizens and foreigners is a matter of comity—it is everywhere treated as a matter of right. The fact that by the local law there is no lien for a tort is disposed of by the case of The Eagle, [supra.] It is not a question of local law, but of the general maritime law, though in cases of contract, the court may decline jurisdiction if it sees fit. 1 Pars. Shipp. 531. The district court erred in deducting from the damages the amount received from the insurance companies. It is something with which a trespasser has nothing to do. If the insurance is paid before suit brought, and the company subrogated, the company is the proper party to sue, but if paid after suit

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

brought, as in this case, the proceeding is not affected by it. The company may become a party as co-libellant if it chooses, or the suit may go on as commenced, the libellant accounting to the company for its proportion.

Estep & Burk, for claimant.

(1) The jurisdiction in cases of tort depends exclusively on locality—it must happen upon waters over which the jurisdiction extends. The Commerce, 1 Black, [66 U. S.] 584. The "navigable waters" spoken of in the Acts of 1789, are known by different names, and it is, perhaps, not necessary they should be connected directly with the sea. The words "navigable streams" are sometimes used, but no correct definition could make this canal a stream of water, as it is without head or flow, and vessels pass through it with the aid of a dozen locks. No case can be found of a court of admiralty assuming jurisdiction of a collision in a canal except in the great Holland canal, which was treated as a confining of the waters of the sea to a particular locality. In the cases of The Genesee Chief, [12 How. (53 U. S.) 443,] and The Eagle, [8 Wall. (75 U. S.) 15,] the distinction is taken between public navigable streams, which are the common property of both nations, and private ways constructed by corporate enterprise, into which vessels can only enter by leave, upon payment of tolls, and subject to regulations prescribed by the owner or the Canadian government. The canal in question was dry land more than fifty feet above the level of Lake Ontario when congress passed the act of 1789, and so continued for more than fifty years. Congress could not therefore have intended to include it. The Ohio and Pennsylvania canal connects the navigable waters of two states, and is navigable by vessels of 100 tons, but it has never been claimed to be within the jurisdiction of admiralty. They are navigable, but not public navigable streams. These canals may be, and frequently are, leased to private corporations or individuals, who may close them against everybody but themselves. In the case of The Young America, [Case No. 12,549,] no plea or answer was interposed, and the case was heard on motion to set aside the decree. The decision was based wholly upon the act of 1845, now obsolete, the canal being in full operation when congress passed the act, and they must have intended to include it.

(2) The seizure of the vessel is a proceeding in rem, based upon a maritime lien for the injury complained of, which is enforced by subjecting the property to the satisfaction of the claim. If such lien exists it must be by virtue of some law. Evidence shows it is not by the law of Canada—it cannot be by virtue of a law of the United States, as they have no extraterritorial jurisdiction. This court can only enforce liens given by some law—it cannot create them. There was no lien while the propeller remained in Canada; yet if it did not then exist it did not attach when she came into American waters. It is not claimed the lien was created by the seizure, for the seizure was made to enforce a lien already existing. The property could not be seized upon execution or attachment, as it had passed out of the hands of the person doing the injury. By the law under which the present owners acquired title, she was free and unincumbered, and ought to remain so wherever she goes. The contract under which they bought the property is governed by the lex loci contractus, and if valid there, it should be held by the comity of nations valid everywhere.

EMMONS, Circuit Judge. The Avon is a Canadian vessel. On her way from a Canadian port on Lake Ontario, to another like port on Lake Erie, she collided in the Welland canal with the libellant's vessel, an American ship, on its way from one American port to another. The canal connects the two lakes, and is wholly artificial, but by treaty between England and the United States, and local Canadian laws, is open alike to the ships of both countries. It is a thoroughfare for international commerce, and is navigated by ships as well from the ocean as the lakes. Subsequent to the collision, and before the filing of the libel, the Avon was sold in Canada to a Canadian purchaser. This suit was commenced the first time she visited an American port, and no laches are imputed to the libellant. We have given the case far more than its share of attention, and are at last compelled to make a decree condemning the Avon, in much doubt, however apparently logical the steps may seem by which it has been reached. It is argued by the claimant that there is no jurisdiction for wrongs occurring in this artificial passage, created by and wholly within the government of Canada. That as the local law of that province gives no lien, none can be enforced here, and that, at all events, the subsequent sale from one subject to another of a Canadian ship within that province, as it there gave an unincumbered title, all other courts will respect and protect it. These propositions are deemed too well settled to require citations in their support.

We have an argumentative purpose in noticing a few familiar maxims, which respondent's counsel deem conclusive objections to the relief asked. Numerous judgments and authors too, when attention is not challenged to the distinction, dispose of cases like that before this court, as if the rules we shall fully concede were applicable to their determination. This libel sets up a wrong, where consequences are not to be measured by the local law, and that it may be clearly perceived that this case constitutes an exception to the principles which gen-

erally apply to such local code, we desire to state and concede them, with their proper qualifications, in some fullness and detail. The utmost extension of the rules in reference to the lex loci contractus, as sustained in the following treatises and judgments, and the numerous other similar ones, both federal and state, are not intended to be in any degree disregarded or even qualified. Story, Confl. Law, §§ 242, 243, 327; Wheat. Int. Law, tit. "Lex Rei Citae and Lex Loci Contractus;" Bell v. Bruen, 1 How. [42 U. S.] 169; Duncan v. U. S., 7 Pet. [32 U. S.] 435; Caldwell v. Carrington, 9 Pet. [34 U. S.] 86; Pope v. Nickerson, [Case No. 11,274;] Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 520; Allen v. Schuchardt, [Case No. 236;] Mutual Ins. Co. v. Wright, 23 How. [64 U. S.] 412; Bulkley v. Honold, 19 How. [60 U. S.] 390; Wheat. Int. Law, pt. 11, c. 2, § 7.

The ship being Canadian, and at the time of the sale in Canadian waters, and the parties Canadians, bring the case so clearly within the principles which apply the lex rei citae, that any analysis of judgments is unnecessary to show that the local law will regulate rights unless the maritime is made to apply. Whart. Priv. Int. Law, tit. "Lex Rei Citae," discusses with special fulness this subject, and so far as the facts of this case are concerned, his criticism is approved. It is familiar law in the federal courts. The municipal lex loci delicti will equally control, if the conditions of this navigation are not such as to make applicable the principles governing collisions upon the sea. See Story, Confl. Law, §§ 423b, 423g; Whart. Priv. Int. Law, §§ 477, 480, and notes Id. § 707; Whitford v. Panama R. Co., 23 N. Y. 467, 475, 482; Rafael v. Verelst, 2 W. Bl. 1055; Mostyn v. Fabrigas, Cowp. 161, and notes in Smith, Lead. Cas.; The Halley, L. R. 2 Adm. & Ecc. 17, 18, 19, 22. This well understood rule is of course not intentionally interfered with. That an act lawful by the law of the place where it takes place is so everywhere, is but a truism. That no court can create a lien by its judgment upon property without its territorial jurisdiction, or assume to administer its own municipal law to create one, over things not subject to its provisions, when and where the transactions occurred, out of which it is asserted the right in rem springs, is also in its broadest sense admitted. Whart. Priv. Int. Law, § 828; Story, Confl. Law, §§ 322b, 401, 402a. Not only do we decide as we do in the light of such rule, but say with confidence, we should dissent from the qualifications asserted by courts of great respectability. We should have decided differently The Milford, Swab. 362; The Jonathan Goodhue, Id. 526, in which, by virtue of an English statute, Dr. Lushington gave an American master a lien not authorized by the law of his own country, and in reference to which his contract was made. They are justly criticised in The Halley, L. R. 2 Adm. & Ecc. 12. This proceeding in rem is not process. In no sense is it remedy only, or a part of the lex fori. It is the enforcement of a proprietary interest, and can no more be resorted to when that by the law of the place of the contract or of the act does not exist, than a suit for possession can be maintained without a title to support it. Although there are some judgments in the supreme court which seem so to treat it, and the history of the 12th admiralty rule would authorize a different doctrine, the late tendencies there, and its numerous other decisions, ably drawing the line between the laws of contracts and of property, and mere remedies, show clearly there is no authority in that high tribunal for sustaining this libel upon the notion that the proceeding is but a remedial form. In Vandewater v. Mills, 19 How. [60 U. S.] 82, the court, by Grier, J., comments upon the looseness of likening it to attachments in personam. The late case of Harmer v. Bell, 22 Eng. Law & Eq. 62, 7 Moore P. C. 267, which is often approved in the supreme court, in discussing the nature of this proceeding, points out clearly the broad difference between process and remedies, on the one hand, and the enforcement specifically of an interest in the thing on the other. Unless therefore a lien, by virtue of some law applicable to the act, was created by this collision, when and where it occurred, there is no standing here by the libellant. We sustain the libel only because it is believed the maritime law affords the measure of right.

That the general maritime law yields, in all instances, when it is the will of the local sovereignty that its own code shall apply in waters subject to its control, is but another undisputed maxim; and although no question has been made that this artificial passage, wholly within the dominion, may be fully governed by its laws, and all conditions annexed to its navigation which the political power deems expedient, we suggest, for the purpose of construing some judgments hereafter cited, that it is no more absolute and plenary than that of all governments in the natural bays, ports, and partially inclosed waters of the sea. Wheat. Int. Law, pt. 2, c. 2, § 9; Ben. Adm. §§ 39, 256, 240; Whart. Priv. Int. Law, §§ 356, 358, 440, 443, 859; Halleck, Int. Law, p. 130, § 13, citing Wheat. pt. 2, c. 4, § 6, and other authors. After saying that the local jurisdiction extends to all bays and ports within headlands, and to a marine league from shore, he adds: "Within this territory its rights of property and territorial jurisdiction are absolute, and exclude that of every other nation." See [Halleck, Int. Law,] p. 132, § 16. More than this certainly cannot be said of the Welland canal. Judgments in reference to acts in such waters are precedents for like proceedings here. We have a motive, too, in calling attention to the rule that, when waters are boundaries, like the St. Clair and Detroit rivers, where the collision in the case of The Eagle, 8 Wall. [75 U. S.] 15, occurred, the

right, the absolute right, of navigation is common to the ships of both countries, and also that, when rivers or narrow straits of the sea lead through one country into another, there also the right of passage exists, and the municipal jurisdiction is modified accordingly. Halleck, 137, § 22; Wheat. pt. 2, c. 4, § 11; 1 Phillim. Int. Law, § 155; Halleck, pp. 138, 140, 141, 142, 146; Wheat. §§ 12, 14.

It is no longer questioned here or in England, that for a marine tort a lien exists upon the offending ship. In the Rock Island Bridge, 6 Wall. [73 U. S.] 213, it is said: "For torts committed upon the sea, a lien is given which travels with the ship into whosesoever hands she may go." The Bold Buccleugh, 7 Moore, P. C. 284, is approved. That it is universally recognized as a part of the general maritime law, and dependent upon no local rule of the English or American admiralty, see The America, [Case No. 288,] where, in a careful opinion, Judge Hall, of the northern district of New York, cites and reviews Edwards v. The Stockton, [Id. 4,297;] The Hornet, [Id. 1,640;] [Article on the tribunals and the administration of justice, etc.,] 16 Law Reg. 1; The Nestor, [Case No. 10,126.] They fully sustain his conclusions. And see The R. B. Forbes, [Id. 11,598, Id. 11,275;] Vandewater v. Mills, 19 How. [60 U. S.] 82; The Young Mechanic, [Case No. 18,180;] The Phoebe, [Id. 11,064;] The Rebecca, [Id. 11,619;] The Feronia, L. R. 2 Adm. & Ecc. 65; The Commerce, 1 Black, [66 U. S.] 580. This feature of universality of recognition, it will be seen, is an important element in the other question, whether it shall be applied within local jurisdiction by the presumed consent of the sovereign. That the lien is not divested by sale to a bona fide purchaser, unless it is by virtue of a proceeding in rem, is also said in Vandewater v. Mills, 19 How. [60 U. S.] 82, and The Rock Island Bridge, 6 Wall. [73 U. S.] 213. The case cited and approved there is a strong instance of the application of the rule; cases, therefore, will be referred to, not in support of the general doctrine, but to show only that the circumstances of the present transfer, within a jurisdiction where the ship was not subject to seizure, do not constitute an exception. The Rebecca, [Case No. 11,619;] The Stockton, [Id. 4,297;] The Mary, [Id. 9,186,] as well as several of the judgments before referred to as sustaining the general doctrine that the lien exists, presented circumstances of strong equities in favor of innocent purchasers who urged them against the enforcement of the lien. But it was held to constitute a proprietary interest which no transfer, save by a judicial proceeding in rem, could divest. The Charles Amelia, L. R. 2 Adm. & Ecc. 330, was a collision in British waters between a French and English vessel. The former was subsequently sold under bankruptcy proceedings in France. It was said, as this was not a proceeding in rem, but one which sold the owner's interest only, the lien was not affected. The Bengal, Swab. 468; The John and Mary, Id. 471. The one was a suit for seamen's wages, and the other for damages by collision. Judgments at law had been in both obtained, but this election was held not to preclude a subsequent resort to the offending ships. They, it was said, were primarily liable irrespective of ownership. In The Batavia, 2 Dod. 500, it was held that a sale in Batavia did not divest the lien for seamen's wages due in England. Nor is this rule, in its most extended application, deemed an impolitic or hard one, the modification or restriction of which is demanded by the exigencies of modern commerce. It is favored, not because it is an ancient theory and old writers so say, but because the necessities of international intercourse and the safety of navigation have been found to require it. The China, 7 Wall. [74 U. S.] 53; The Halley, L. R. 2 Adm. & Ecc. 13, 15; The Prins Frederik, 2 Dod. 467; The Rebecca, [Case No. 11,619.] Where there had been a sale without notice, it is said: "What can be more equitable, when the ship has been the cause of the damage, than to look to it for reparation? It is often the sole source of security." The Gazelle, 2 W. Rob. Adm. 280; The Amalia, Brown. & L. 152, and nearly all the decisions hereafter cited, are equally commendatory of the rule which holds the ship liable as the offending thing, irrespective of transfers, with notice or without it. Conditions will be demanded more clearly indicative of an intent on the part of the local government to exclude such a rule, than would be required to displace one deemed hard and unconscionable, and at war with public policy. That the waters of the Welland canal, as now used for international commerce, are within the American admiralty jurisdiction, we had, as remarked on the argument, no doubt, and had this collision occurred between two American ships, and no transfer had been made within the dominion of Canada, we should have followed for other reasons than those there stated. The Young America, [Case No. 12,549;] The Genesee Chief, 12 How. [53 U. S.] 443; The Magnolia, 20 How. [61 U. S.] 296; The Commerce, 1 Black, [66 U. S.] 580; The Hine v. Trevor, 4 Wall. [71 U. S.] 558; The Belfast, 7 Wall. [74 U. S.] 624; The Eagle, 8 Wall. [75 U. S.] 15; The Daniel Ball, 10 Wall. [77 U. S.] 557; and kindred cases, include these waters. The recent English decisions, either drawing upon the late statutes, or treating their old phrase "Within the ebb and flow of the tide," as in reason only it should be treated, as a mode of describing navigability, have taken jurisdiction of cases in artificial and tideless waters. See The Eagle, [supra,] and the cases there and hereafter cited.

There are few harbors in the Northwest which are not entered through wholly artificial passages. It would be most impolitic to say that a ship, in passing through our

St. Mary's canal, between Lakes Huron and Superior, is beyond the process of the admiralty. A large portion of the commerce of the latter lake will soon pass through the Portage Lake canal. The St. Clair Flats are now so crossed by a similar channel, through which passes as much international commerce as through any waters on the continent. The Suez canal, those of Venice, Amsterdam, Rotterdam, and the Great Northern canal and basins of Holland, and all the improved navigations of the world have been, and from the nature of their use should be, as much subject to the admiralty jurisdiction as waters in natural channels. It would be a most mischievous and gratuitous distinction which would exclude them. There is but one difference which would work a material consequence in a case like that before us. A natural thoroughfare from sea to sea, although wholly within the domain of a government, may be passed by commercial ships of right, while the nation which constructs an artificial one may annex such conditions to its use as it pleases. Such a thoroughfare is subject to the same control as are the natural bays, whose waters are within natural headlands, and lead only to the country of the government controlling them. We cannot say, therefore, in this case, as we do of the collision in that of The Eagle, [8 Wall. (75 U. S.) 15,] or as we would of a ship passing through the Bosphorus to a Russian port on the Black sea, that Canada or Turkey could not impose their laws. We must treat it as we would a passage up the Golden Horn at Constantinople, or down the lagoon and up the Grand canal at Venice, where every condition the local authority saw fit to impose would be obligatory. We must apply here the same implications which admiralty courts have established as general principles of law where the local authority is absolute and unqualified. If the result is an inference that the principle of the maritime law, now sought to be enforced, is excluded by that of Canada, the remedy in rem should be denied. If, on the contrary, precedent, and more especially wholesome protective principles, authorize a different presumption, the Avon should be held liable in rem for her offenses. The claimant relies upon Smith v. Condry, 1 How. [42 U. S.] 28, and the principles before recognized, that the obligation imposed upon an act in the state where it occurs should constitute the measure of liability in all other jurisdictions. That case exempted a ship from liability where an English statute compelled the employment of a pilot in the port of Liverpool, and expressly provided that the vessel should not be liable for damages resulting from the wrongs of such public officers. This judgment has been followed in The Halley, L. R. 2 Adm. & Ecc. 3. This latter case, by the general course of its learned and greatly extended argument, more than by any direct assertion of such a doctrine, shows that when the local law is applied, it is because the peculiar circumstances of the transaction and the nature of the law create the presumption that such is the intention of the sovereignty within whose waters the transaction occurred. It is not enough per se that a collision happens where there is municipal power to exclude the maritime rule. It must further appear that it has actually done so. When ships are seeking a port for protection or trade, or leaving it having engaged in it, and more especially where they are in the custody of its local political officers by compulsion, they are subject to such portions of the municipal law as are intended for their governance. The port police regulations, the local customs in reference to navigation, and all rules which, from their nature and office, are presumed to apply to domestic and stranger ships alike, regulate the conduct of both classes. If the power which prescribes them has declared the obligations which arise from their observance or violation, all other nations will adopt the same measure of duty. This is the limit of the rule. Smith v. Condry, [supra,] and similar judgments, may mislead, unless read in the light of general principles, which they do not intend to deny, and which some of them directly affirm. Literally and formally they assert the application of the lex loci delicti, as if it were a case upon land, and as if the general municipal law would, of its own force, and by its general promulgation in the state, apply to a marine tort as it would to a trespass within its real territory. This is by no means true. The inquiry is but half answered when we learn what is the local code regulating wrongs generally in the nation. The other, and equally important portion here is, has the government, in unmistakable terms, declared that it shall be enforced upon foreign ships to the exclusion of the maritime rule? This is what we think is meant in The Eagle, [8 Wall. (75 U. S.) 15,] where Justice Nelson says, that Smith v. Condry was an exceptional case. In The Halley, [L. R. 2 Adm. & Ecc. 3,] in all respects like Smith v. Condry, [1 How. (42 U. S.) 28,] Sir R. Phillimore, page 6, cites The Girolamo, 3 Hagg. Adm. 177; The Zollverein, Swab. 99; The Golubchick, 1 W. Rob. Adm. 147; to which others might have been added, that the English courts in cases of collisions administer the maritime law, and he follows them by cases showing the right in rem is a favorite in the admiralty. It is especially shown that it is quite consistent with the general rule for the court of admiralty to enforce all such modifications as the local government clearly creates.

The libellant's counsel considered the judgment in The Eagle, [supra,] as covering all the questions involved. Did it stand alone, we should not so hold. It did undoubtedly

decide that the obligations created by a collision in Canadian waters were not measured by her laws in the circumstances of that case. Although it occurred where the municipal jurisdiction, for all the purposes of local government and of her own ships, was absolute, the court said: "The cause would be governed by the practice and principles of the courts of admiralty of this country, wholly irrespective of any local law." They add that Smith v. Condry, [supra,] was an exceptional case, leaving the inference strong, as the libellants urge, that the generality asserted is universally applicable, save where ships have compulsorily submitted themselves to local governmental official control. But the facts in The Eagle, [supra,] required no such extended doctrine as is now imputed to it. The case leaves the law applicable to this record where it found it, imposing upon the courts the duty of deciding whether, in the instance before it, the circumstances of the ship and the navigation subjected the transactions to the municipal or the maritime law. It was a very common case, so far as this point is concerned, and did not call for, as in the superior court it did not elicit, any judicial discussion. It occurred in boundary waters, the vessels were all Americans, exercising an international right in circumstances where, without exception, it has ever been held the local laws were inapplicable. It might as well be said that the English statutes limiting liability would control the obligation of an American owner for wrongs committed against a home vessel within a marine league of the island of Saint Helena. We do not therefore misunderstand the doctrine of The Eagle, [8 Wall. (75 U. S.) 15,] and make it the foundation of our judgment, only so far as it reiterates the familiar doctrine we suppose it to announce. We do not think the record shows, that Canada has excluded this favorite, universally recognized, and necessary principle of maritime law from the waters of this canal. She has opened this thoroughfare from sea to sea, as our government has that over the St. Clair flats, and the hundreds of artificial entrances it has constructed to the harbors of the nation; as Holland has the Great Northern canal and her other numerous artificial and improved navigations, and as the expensively constructed entrances to ports everywhere are opened. All alike are free to the commerce of the world. In all, the more general and universally acquiesced-in doctrines of the maritime law have been unreservedly applied, save where statutory limitations or local usages have modified it. The mere absence of a tribunal to enforce it has never been admitted as sufficient evidence of such an intention. We know of nothing in the conditions of this navigation which exempts it from the rules applied to all other waters where the municipal authority is equally supreme.

The following cases are those which, in the brief time we could command, have been selected from the long list in reference to the general subject most pertinent to the precise facts before us. We think they not only authorize, but compel, a subordinate court to enforce the right asserted in the libel: The Maggie Hammond, 9 Wall. [76 U. S.] 435. The bill of lading was made in Scotland, by the master of a Canadian ship, to transport goods of a Canadian to Canada. Parties, contracts, goods, ship, and voyage, were all foreign. The vessel put into Wales, and there wrongfully refused to carry forward the cargo. The libel, in the opinion of the court, set out two causes of action: the breach of the contract to deliver, and the wrongful act in Wales. In reference to the contract to deliver, and irrespective of the local wrong in Wales, jurisdiction in rem was sustained upon two grounds: First, that a lien existed by the general maritime law; and, second, that, although doubtful, the better opinion was that it did so by that of Scotland, where the contract was made. We are concerned with the first reason only. As to this, it is said, where a lien is given by the maritime law, it is no objection to proceeding in our courts in rem, that the local courts were not clothed with similar authority. Though as a general rule, where both litigants are subjects of the country where the transaction occurs, and where no such remedy exists, our courts will refuse it as between them; still, if no objection by the consul is made, even in such case, they may in their discretion entertain jurisdiction. The decision seems full, that where the maritime law is clear, the mere absence of a local court to enforce its liens will not prevent an American court of admiralty from doing so. The case before us is far clearer than the extreme one in 9 Wall. [76 U. S.] Here the injured party is a citizen, and the offending ship the only source of satisfaction within our jurisdiction. This case applies the rule to a leading maritime state, and shows the practice is not by the superior court considered to depend upon the barbarous or semi-barbarous character of the countries in which actions have accrued. It treats the waters of England, Scotland and Wales, as it would those of Turkey, China, or Egypt. The absence of a court in the one, no more than in the other, prevents the administration of maritime rights attendant upon contracts or wrongs within their waters. If such a distinction is not made, the precedents and conclusive doctrines of all authors, the assumption of the law for all time, precludes discussion here. Suppose the collision happened in China, Africa, or in the harbors of semi-barbarous or wholly non-commercial people, with no court of admiralty, the objection that its absence would prevent a remedy would not seriously be heard.

The following decision affords a striking illustration of how wholly independent is the administration of maritime liens of the other

and different question whether, at the place and at the time they vest, there is a remedy for their enforcement: The Siren, 7 Wall. [74 U. S.] 152, a prize vessel in the custody of the captors, collided with the intervenor's ship. She was condemned and the proceeds paid into the registry. Although no suit in rem or otherwise could have been sustained, because the ship was the property of the government, still it was said the lien existed and would be enforced whenever exigencies occurred which vested the jurisdiction of the court. The practice in the English admiralty against government ships is referred to; instances where seamen's wages have been enforced in cases of forfeiture to government, and various other cases where liens and rights have been sustained after the subject has come into the possession of the court, although they could not have been originally enforced, are discussed and likened to that in judgment. Page 158 it is said: "The existence of a lien is not dependent upon the ability of the claimant to enforce it." This in various forms of expression is repeated and illustrated. The Davis, 10 Wall. [77 U. S.] 15, is another instance of the enforcement of a maritime lien where the right to proceed in rem was dependent upon the future accidents of the res. The libellants proceeded as salvors of cotton owned by the United States, and although it was conceded no such remedy could be maintained if the property had reached the hands of government officers, that the lien nevertheless attached, and it would be enforced if the process did not involve an invasion of their actual possession. The Siren, [supra,] upon the point for which we cite it, is approved. The claimant's counsel then is hardly justified in saying that the existence of a lien without the ability to enforce it at the time it originally vests, and at the place and against the thing in its then condition, is an absurdity. We perceive neither absurdity, injustice or impolicy in saying that a right in rem exists, the enforcement of which may depend upon the accident of whether the res enters a jurisdiction where courts are clothed with the necessary power, or passes from the hands of those in whose actual possession for political reasons it cannot be impleaded. And see The Bird of Paradise, 5 Wall. [72 U. S.] 545. The Ticonderoga, Swab. 215, an American ship, was in the employ of the French government, and by orders of an official, was taken in tow of a steamer, also in same employment, and through the sole fault of the latter was brought into collision with the Melampus in the Golden Horn at Constantinople; no question of jurisdiction was made or the peculiar character of the waters mentioned in the report of the case. This narrow bayou, but two or three miles in length, is in some places less than 700 feet wide, and is crossed by a bridge of boats connecting the city of Constantinople with its northern suburbs, Pera and Galata. It is not a thoroughfare from sea to sea, and the local municipal jurisdiction is as absolute as that of England in the Welland canal. In the subsequent case of The Griefswald, Swab. 430, in which the collision happened in the roadstead off the town of Dardanelles, a question of jurisdiction was made; but Dr. Lushington said he had no doubt of it, and it was said that in The Ticonderoga, [supra,] the court took "jurisdiction in these very waters." The case, however, proves far more than that admiralty jurisdiction will be assumed over these foreign waters bordered by cities and suburban towns, and inclosed from the sea by drawbridges and land thoroughfares. It holds that for a wrong there committed the general maritime law applies and will be enforced by a proceeding in rem. It being urged that the owners, and therefore the ship, were not liable, on account of the control of the French government, Dr. Lushington replied: "We must recollect that this is a proceeding in rem. I am not aware where there has been a proceeding in rem, and the vessel has been guilty of damage, that any attempt has been made in this court to deprive the party complaining of the right he has by the maritime law of the world of proceeding against the property itself." This is said in reference to a collision happening in private waters within the municipal jurisdiction of a country whose courts at that time would not enforce the lien. The anomalous mixed foreign tribunals which by treaties and usage administer justice between citizens of different nationalities enforce only that law of the world to which Dr. Lushington refers. They administer the maritime law, because by the law of nations, where it is not by positive local law superseded, it applies within the municipal jurisdiction of Turkey. And this is just the proposition before us, and upon which this case depends. See Wheat. Int. Law, pt. 1, c. 1, § 10, and note by Lawrence; and Id. pt. 2, c. 2, § 12, and notes, for the character of these tribunals; and The Griefswald, Swab. 430. If the above case rightly applied the law, by giving an English owner a remedy in rem against an American citizen for a collision happening within a municipality where the local law gave none, it will require some nice distinctions which it is not the modern policy of admiralty tribunals, and certainly not of those of England or America to make, in order to distinguish the case at bar from it. The Griefswald, Swab. 430. The collision was in the roadstead off the town of Dardanelles, and within the municipal jurisdiction of Turkey. The Griefswald was Prussian, and the Constellation English. Two questions were decided: 1st. That the admiralty had jurisdiction of matters happening in waters within the municipal government of Turkey; and 2d. That the particular proceedings in the local Prussian consular court at Constantinople were not res

adjudicata. In deciding the last and principal matter considered, Dr. Lushington says: "The municipal laws of Prussia could have nothing to do with the question in issue, which must be governed by maritime law as it prevails in the maritime states of Europe." "In cases of collision, it has been the practice of this country, and so far as I know, of the European states, and of the United States of America, to allow a party alleging grievance by collision, to proceed in rem against the ship, wherever found, and this practice, it is manifest, is most conducive to justice, because in very many cases a remedy in personam would be impracticable." This reason for the rule would be readily defeated if a transfer terminated the liability of the offending res. The Mali Ivo, L. R. 2 Adm. & Ecc. 356, collision, in the Bosphorus, within the municipal jurisdiction of Turkey, between Norwegian and Austrian ships, Dr. Lushington said, he doubted whether there was, in such case, where both were foreigners, a discretion which would authorize him to decline the jurisdiction similar to that which existed in the case of seaman's wages. At all events there was no doubt as to the jurisdiction wherever the tide ebbed. The lien was enforced and the merits decided.

It is a singular use of this phrase, ebb and flow of the tide, in view of the well-known fact that there is no tide in the Black sea, the sea of Marmora, or the passage between them. (See Lippincott's Gazetteer, Black sea; McCulloch's, same title; both assert there are no tides. Ben. Adm. § 226, and the learned authors he refers to say the same thing.) This is noticed only to suggest that no argument can be drawn from the fact that the Welland canal is a tideless water, and that therefore these English judgments do not extend the maritime law over it. They have paid no attention to this fact of a tide in foreign waters, but have taken jurisdiction wholly irrespective of it. Why they still cling to the meaningless form of words must depend upon reasons we do not appreciate.

In the Bold Buccleugh, 3 W. Rob. Adm. 220, 2 Eng. Law & Eq. 536, the collision occurred in British waters, and the lien there attached, but she went to Scotland, was there seized, and discharged on bail, and by her law was not subject to second seizure. While in this condition she was sold to a bona fide purchaser in Scotland. The claim was as here, that as by the law of the place of sale, the ship was exempt from seizure, so she should be in England. Dr. Lushington thought the interests of commerce demanded a different rule, and saying that the vendee would have a remedy over against the vendor, notwithstanding the local law, he condemned the Buccleugh. This case is a leading one, and has several times been approved in the supreme court. It was affirmed 22 Eng. Law & Eq. and 7 Moore P. C. 267, upon the ground that the proceedings in Scotland were in personam only. But the principle for which it is quoted from 3 W. Rob. Adm. is in no way impaired.

It may well be that we, in this instance, may make a mistake in the opposite direction, but nothing is more common, even by courts of high character, where attention is not challenged to the subject, than to overlook the inapplicability of the familiar rules in reference to the lex loci contractus, the lex rei sitae, and the lex loci delicti, where obligations growing out of international commerce are to be adjudicated in reference to the maritime law. A bill of lading made in England, by the master of an American ship, will be governed by the American law, though the voyage be to France or to China. The lex loci contractus does not apply, although the contract is made in England. See Pope v. Nickerson, [Case No. 11,274;] Lloyd v. Guibert, L. R. 1 Q. B. 115, the facts of which are too extended for statement, but in which is a most instructive opinion, discussing the application of the Danish law as that of the place of the principle contract; that of Portugal, where a bottomry bond in question was executed; that of England, being the place of delivery of the goods, the general maritime law, and lastly the French law, being that which was actually applied, to limit the liability of the owner, because it was that of the ship. It interestingly illustrates the impossibility and impolicy of applying, in these instances, the lex loci. The difficulty arising in semi-barbarous countries, and other places having little or no home commerce, and consequently little well-settled commercial law, while numerous foreign vessels of all other countries throng their ports, is forcibly stated. The most influential portion of this elaborate judgment here, is that which concedes that if there had been any generally acknowledged maritime law, as universal and well-settled as that which we are asked to apply, and which prohibited the release of the owner upon resigning the ship and freight, so as to make the French law marked and exceptional, it would have been applied, and that of France rejected. The presumption was that the maritime law did apply where that was clear and undisputed.

In Cammell v. Sewell, 5 Hurl. & N. 728, goods shipped in Russia by a Prussian ship, belonging to an English owner, were sold in Norway by the master, where the ship was wrecked. The sale was upheld, because the law of Norway authorized it. But each [strict] justice concedes that if there had been a well-settled maritime rule the other way, the local law should not have been applied. Crompton, J., says: "If it could be made out that there was a general maritime law on this subject, it would be a question how far we could suffer the law of a particular country to prevail against it." Cock-

burn, J., replying to this argument at the bar, said: "But the maritime law is not uniform," and repeats this as a reason in rendering judgment. Byles, J., believing such was the maritime law, was for holding the sale void. The goods here, it will be noticed, were not carried into Norway for the purpose of trade. It was one of the exigencies of international commerce, and it was for this reason that her laws should not govern, if they contravened the general maxims of commercial justice and policy. In Donald v. Hewitt, 33 Ala. 534, the court, in deciding that liens given by local statutes, to be enforced by judicial proceedings, would yield to a local home attachment in personam against the owner of the res, take pains to say such rules will not apply to maritime liens, which override the local law; and so are many other cases both here and in England. It is said in Bags of Linseed, 1 Black, [66 U. S.] 108, courts of admiralty, in carrying into effect maritime contracts, are not governed by the rules of the common law, but deal with them upon equitable principles, and the usages and necessities of commerce. In many other departments of international law, analogies may be found showing that the decree we make is more in accordance with its general spirit and policy than to hold that every ship, as it enters foreign waters, passed beyond its protection. At sea, the ship is part of the national territory to which it belongs. In ports, also, most nations still suffer the same theory to apply to all which is done within the ship, even though moored in their harbors. Although criminal jurisdiction is never extended beyond the national limits in other cases, the criminal statutes of our own and other governments include offences committed on shipboard without foreign municipal jurisdictions. See Halleck, Int. Law, and the numerous authoritites he cites, page 170, § 24, p. 171, § 26 et seq.

The general rule in reference to ships, as we understand it, is not to yield the maritime law to any doubtful suggestions of the local power, and in no case to do so where its invasions are unjust and injurious to the general interests of commerce. Liverpool Marine Credit Co. v. Hunter, L. R. 3 Ch. App. 479, L. R. 4 Eq. 62, commenting upon and distinguishing Simpson v. Fogo, 1 Hem. & M. 195, 1 Johns. & H. 18; and see Cammell v. Sewell, 5 Hurl. & N. 728, and other cases.

The decree below is affirmed, except as to the damages. They must be increased by the amount which was deducted on account of the amount paid by the insurance company. See 1 Pars. Mar. Ins. 442; Protection Ins. Co. v. Wilson, 6 Ohio St. 553; Yates v. Whyte, 4 Bing. N. C. 272; Hart v. Western R. Co., 13 Metc. [Mass.] 99. This rule seems to be conceded by the appellant, and no present examination has been given it for distinctions which might take this case out of the common rule. Decree affirmed.

Case No. 681.

AYER v. ADAMS.

[Nowhere reported; opinion not now accessible.]

Case No. 682.

AYER v. BRASTOW.

[5 Law Rep. 498.]

District Court, D. Maine. Dec. 30, 1842.

BANKRUPTCY—INSOLVENCY OF PARTNER AND PARTNERSHIP.

1. In a separate bankruptcy of one member of a partnership, if the firm or the other partners are solvent, the court will ordinarily order an account to be taken, and will leave the joint property in the possession of the solvent partners.

[Cited in Amsinck v. Bean, 22 Wall. (89 U. S.) 403.]

2. But where the partnership is insolvent and also all the partners, although some may not be in bankruptcy, the rule is reversed and the court will ordinarily order the joint property to be placed in the hands of the assignee of the bankrupt partner to be administered in bankruptcy.

[Cited in Forsaith v. Merritt, Case No. 4,946; Re Leland, Id. 8,228; Amsinck v. Bean, 22 Wall. (89 U. S.) 403; Wilkins v. Davis, Case No. 17,664.]

In bankruptcy. This was a petition by the assignee of the estate of Samuel Thurston, a voluntary petitioner in bankruptcy, who was declared a bankrupt in his private capacity and also as partner in the late firm of Thurston & Brastow, April 19, 1842. The petition alleges that the firm is insolvent and also that Brastow, the other partner, is insolvent; that the books and papers of the firm are in the hands of Brastow, and that he refuses to surrender them to the assignee, and concludes with a prayer that the court will thereupon pass such order as it may deem proper in the case. Brastow on notice appeared and put in an answer to the petition. The answer admits that in April, 1834, he entered into copartnership with Thurston, and that the copartnership then formed has not been dissolved but by the proceedings in bankruptcy; that in the summer of 1837, the firm suspended payment and has since remained insolvent. That at the time of the suspension of payment, the firm owed more than $50,000, and that he then undertook the settlement of the demands and has continued his efforts to the present time, but has never had the assistance of his partner, but that Thurston has, in all cases, assented to what he has done; that he has settled by payment or compromise, debts to the amount of twenty-five or thirty thousand dollars, and that he still is engaged in the business of settling the affairs of the firm, and that for this purpose it is necessary that the books and papers of the firm should be retained by him; that he is ready to co-operate and advise with the assignee of said Thurston in all his negotiations for this purpose, and concludes with a prayer that he may be per-

mitted to retain the books of account and the papers of the firm for the purpose of closing the concern.

WARE, District Judge. This case has been submitted to the decision of the court, on the facts stated in the petition of the assignee and the answer of the partner without argument. As the matter submitted involves questions of some difficulty and delicacy, and of no inconsiderable importance, it would have been more satisfactory to me to have had the benefit of an argument before deciding them. But as the parties have chosen to submit them without, I will proceed now to state some of the conclusions to which I have arrived, on such an examination of the question, and as I have been able to give them. In the first place, when all the partners are jointly in bankruptcy, either on their own voluntary petition or on adverse proceedings by their creditors, all the joint property of the firm, and all the separate property of each of the partners passes to the assignee. This is expressly provided for by the 14th section of the act, and necessarily results from the general principle that a person cannot go into bankruptcy by halves. He cannot be a bankrupt as partner, and not a bankrupt as an individual, and being so in both capacities, his creditors have no mode of reaching his joint and separate property but by proceedings in bankruptcy. In the separate bankruptcy of one of the partners, all his separate property passes to his assignee with the same power over it that he had, that is, the exclusive right to the possession, and the exclusive right of disposing of it. But of the joint property, all that passes to the assignee is the interest, which the bankrupt had in it, subject to the rights of the other partners. The solvent partners have a lien on the partnership assets for the payment of the partnership debts, and also, for their share of the surplus. What passes to the assignee, then, is the interest which the bankrupt may appear to have on taking an account. But the interest of the bankrupt does not pass to his assignee with precisely the same powers over the property which the bankrupt himself had. Before the bankruptcy, his power over it was that of a partner; it was a joint tenancy. A joint tenant of a chattel has, it is said, the power of disposing of the whole, (3 Kent, Comm. 350,) though it is otherwise of real estate. But, however it may be as a general rule, it is certain that in the particular modification of joint tenancy existing in partnership, a joint tenant has this power, whether it be considered as legally incident to the quality of his title, or to his being the authorized agent or praepositus of the partnership for their purpose. But by the bankruptcy, the partnership is dissolved, and the joint tenancy severed. The assignee succeeds to the right of the bankrupt, not as a partner, but as a tenant in common. Though he succeeds to all the beneficial interest of the bankrupt, it will not necessarily follow that he succeeds to all his rights of disposing of the property.

Between tenants in common of chattels each has an equal right to the possession, and therefore one tenant in common cannot maintain trespass or trover against his co-tenant for dispossessing him. If one tenant in common takes all the chattels personal, the other has no remedy by action, but he must wait and may take them when he can see his time. Litt. Ten. § 323; 2 Co. Litt. 200. The tenant in possession may therefore legally retain the possession, for he has an equal right with the other, though if he loses or destroys the thing, an action will lie for the co-tenant; and so also if he sells it; but this must be on the assumption that his co-tenant affirms the sale, for as a general rule, a tenant in common can sell only his own share. 3 Kent, Comm. 350, note. But in the case of a tenancy in common, supervening on a joint tenancy in partnership on its dissolution, by the bankruptcy of one of the partners, the principles of the law seem to be somewhat modified. The moral person constituted by the articles of partnership is extinct for general purposes, but it seems has a modified existence for certain objects, and with limited faculties. The partnership is said to be continued for the purpose of winding up the concern, but not for engaging in any new enterprise. The solvent partner, remaining in possession of the partnership effects, has the power of disposing of them and applying the proceeds to the discharge of the partnership obligations. When he sells he conveys a good title to the whole thing sold, and not merely his own interest. Coll. Partn. 497. For this purpose he is the representative and administrator of the moral or civil person which was the creature of the partnership articles. But it seems that he is not the agent or representative of the partnership for all purposes even of winding up and closing the business. He cannot negotiate a bill of exchange or promissory note so as to bind the firm. Coll. Partn. 497. And in suits for the recovery of debts due to the firm, he cannot maintain an action in his own name or that of the partnership alone but must unite the assignee of the bankrupt partner. Story, Partn. § 362. But he remains the representative or administrator of the firm for the purpose of disposing of the partnership effects. And it seems that he has generally a right to retain the control and possession of them, until an account is taken, for the purpose of applying them in good faith to the discharge of the joint debts, and for his share of the surplus. Story, Partn. §§ 339, 407; 3 Kent, Comm. 59. Such being the right of the solvent partner, what are those of the assignee of the bankrupt, and to what extent may he deal with the partnership effects? It is stated generally that he succeeds to 1 the interest and

rights of the bankrupt. These, after the dissolution of the partnership, are the rights of a tenant in common, and of that particular species of tenancy, which results from the dissolution of a partnership. In the absence of any particular agreement, each partner has an equal right to the possession of the effects, to dispose of and apply them to the discharge of the partnership liabilities. The assignee succeeding to all the rights of the partner, must have the same right of possession and of administering the effects as the solvent partner. This seems to be the necessary result of acknowledged principles, and so the doctrine is clearly stated by Chancellor Kent, in Murray v. Murray, 5 Johns. Ch. 60. In that case, it was contended by counsel that there are only two cases in which the assignee, under a separate commission, has a right to deal with the joint property; one, where the solvent partner is abroad. Barker v. Goodair, 11 Ves. 86, and the other where the property left at the time of the bankruptcy is in the possession of the bankrupt partner. Smith v. Stokes, 1 East, 367. But the court ruled that the assignee, as tenant in common, had an equal right to the possession and control of the assets with the solvent partner; that neither party had any absolute and exclusive right to the possession and distribution, and that the assignee, having obtained possession, had a right to retain the assets for the purpose of converting them into money and distributing it among those who are entitled to the proceeds. The legal rights of the solvent partner against the assignee in possession, would appear to be the same as that of the assignee against the solvent partner in possession; that is, to an account and to his share of the surplus after the payment of the joint debts. Such appear to be the rights of the parties in the case of a separate bankruptcy of one partner, when the other is solvent. The assignee of the bankrupt has an equal title to the control and administration of the joint effects with the solvent partner. If the effects are in the hands of the partner, the court will ordinarily direct an account to be taken, to ascertain the interest which the bankrupt has in the joint estate, and will not take the effects out of the solvent partner's possession, unless some equitable ground is shown, which requires such a proceeding to protect the rights of those who have an interest in the estate.

The question in this case is, what course should be adopted where the non-bankrupt partner is insolvent. The proceedings in bankruptcy are according to the course of equity, and to enable the court to do full justice to all partners in interest, the district court, sitting as a court of bankruptcy, is clothed with all the powers of a court of general equity jurisdiction. When the partnership and all the partners are insolvent, though not all in bankruptcy, the natural and obvious view, which a court of equity takes of the matter, is that the effects of the firm belong not to any of the partners but to the creditors. They have a right to look to all the partners for the payment of their debts, and they have the same right to seek their remedies through the assignee as the administrator of a bankrupt partner, as they have against any of the other partners. By the common law, the assignee has no better title to the possession and administration of the effects than the other partners. But in equity he would seem to have a superior claim. For he has an equal legal title as succeeding to the rights of the bankrupt, and he has a superior equity as being the proper representative of all the creditors, who in justice have the sole right to the property. It may be further observed, that the assignee administers and distributes the estate under the law, giving to each creditor his equal share. And this equality, which is the dictate of natural equity, when the estate is brought into bankruptcy, is expressly provided for by law. But if the effects are left in the hands of the insolvent partner, as his administration is not under the immediate control of the court, he has it in his power to defeat the policy of the bankrupt law by giving preferences. In this case, the respondent states in his answer, that he has settled, by payment or compromise, one half or more of the whole debts of the firm; that is, the effects of the firm thus far have been appropriated to the payment of one half of the creditors, while the other half have received nothing. Now one great object of the bankrupt law, is to prevent this preference of favored creditors, and to give to all an equal share of the estate in proportion to the amount of their demands. Another very obvious reason for preferring the administration of the assignee is found in the fact itself that the partner is insolvent. The creditors, among whom the property is to be distributed, have a just claim to have the effects placed in security for the purpose of being converted into money for their benefit. As a general rule, it cannot be doubted that the administration will be more safe in the hands of an assignee than in those of an insolvent partner. Has then the court the power of taking the effects out of the possession of the insolvent partner and placing them in the hands of the assignee. As a general question, this I suppose does not admit of doubt. The partnership is dissolved by the bankruptcy; and on a dissolution by bankruptcy or otherwise, any of the partners or the representatives of a partner may insist on having the whole concern wound up by a sale. Story, Partn. §§ 350, 351; 3 Kent, Comm. 64; Coll. Partn. bk. 1, c. 3, § 3; Crawshay v. Collins, 15 Ves. 227; Featherstonhaugh v. Fenwick, 17 Ves. 298. This when done on application to a court of equity, can be done only by the court's taking the control of the property into its own hands. This is

the general rule, although the court will not perhaps always order a sale when it will be injurious to the estate. Crawshay v. Collins, 2 Russ. 325; 3 Cond. Eng. Ch. 136. Even while the partnership is existing, if one of the partners has involved the firm in debt or has become insolvent, the court will restrain him by injunction from negotiating the partnership paper and from contracting or receiving partnership debts; and where a dissolution is intended or has taken place, will, on application of a partner in a proper case, appoint a receiver. Story, Partn. §§ 227, 228; Coll. Partn. bk. 1, c. 3, §§ 5, 6, pp. 189, 197, 198. There can then be no doubt of the power of the court to take the control and administration of the effects into its own hands. On the separate bankruptcy of one partner, if the firm, or if the other partners are solvent, the general rule in equity, as I understand it, is that the court will not take the joint effects out of the hands of the solvent partners, but leave the possession and distribution with them, subject of course to be controlled by the court when equity requires it, unless when a sale is demanded, or when some special ground is shown requiring the interposition of the court. But where the firm itself and all the partners are insolvent, the interest of the creditors and the policy of the law require that the rule should be reversed, and that the administration of the assets should be by the assignee or a receiver under the direction of the court, and the distribution be made by the law. The court may indeed, in special cases, employ the insolvent partner to aid in the settlement of the estate, but he then will act under the authority and direction of the court. And this I understand to be the practice in equity.

Case No. 683.

AYER et al. v. The GLAUCUS.

[4 Cliff. 166.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1870.

APPEAL IN ADMIRALTY — TRIAL DE NOVO — COLLISION — BETWEEN STEAM AND SAIL — CREDIBILITY OF WITNESSES — LIGHTS.

1. There are cases in which it is suggested, if not decided, that an appellate court will not in general examine the decree of the subordinate court upon the merits, where the matter in issue depends upon the credibility of witnesses.

2. Since the passage of the act of March 3, 1803, [2 Stat. 244,] appeals are allowed to the circuit court from any decree rendered in the district court in any cause of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of fifty dollars.

3. The rules of the supreme court provide that the testimony given in the district court may be taken down by the clerk and transmitted to the circuit court, or, it may be retaken by deposition; and the fiftieth rule provides that further proof may be taken in the circuit court. This shows that the facts, as well as the law, are open to revision in the circuit court.

4. Where the appeal is on a question of fact, the burden is on the appellant to show that the decision of the inferior court was erroneous; but the court of paramount jurisdiction will examine the whole testimony in the case.

5. Both vessels in this case were bound to observe and follow the rules and regulations established by congress to prevent collisions, and if they had, the collision would not have occurred.

6. This was not a case of inevitable accident, because one or the other, or both, were in fault.

7. Steamships are required to keep out of the way of sailing vessels when the two are proceeding in such directions as to involve risk of collision, and the sailing vessel is required to keep her course subject to the qualification applicable to both, which is, that due regard must be had to all dangers of navigation, and also to any special circumstances, which may exist at the time, rendering departure from the requirement necessary in order to avoid immediate danger.

8. When witnesses on the different sides make irreconcilable statements, the question as to which shall be believed is to be determined by ascertaining who had the best means of knowledge and observation, as to the facts upon which the conflicting evidence is given.

9. The master, mate, wheelsman, and two seamen, were on the deck of a schooner at the time of her collision with a steamer. Three persons, the pilot, second mate, and wheelsman, were in the pilot-house of the steamer, and one seaman on her deck. These observed the schooner when a mile distant, and testified that she subsequently changed her course before the collision. The witnesses on the schooner testified that she did not. *Held*, in this case, the witnesses on board the schooner had the best means of knowledge as to what her management was.

10. Circumstantial evidence may be sufficient to control direct testimony, but in such case, the circumstantial facts from which the inference is to be drawn, should be fully proved.

11. An inference from an inference does not have much probative force.

12. A schooner in a clear night, with proper lights set, was heading north-west by west. A steamer was heading east by north. Witnesses in the pilot-house of the steamer said they saw both the red and green light of the schooner, and as the two vessels approached each other, the green light disappeared, from which it was argued that she must have ported her helm, and fallen off to the leeward. A seaman on the deck of the steamer, and standing on her starboard bow, saw only the red light of the schooner, and reported the same to the pilot. *Held*, it was a case where it was the duty of the steamer to keep out of the way of the schooner.

[On appeal from the district court of the United States for the district of Massachusetts.]

In admiralty. Libel [by James S. Ayer against the steamer Glaucus, the Metropolitan Steamship Company, claimants] in a cause of collision. Damages were claimed in this case by the libellants, as the owners of the schooner Electric Flash, on account of a collision which occurred between the schooner and the steam-propeller Glaucus, at ten

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

o'clock in the evening of Feb. 1, 1868, in Long Island sound, nearly opposite to New Haven, by which the schooner, with a full cargo on board, was run down and sunk, and became a total loss. Just before the collision took place, the schooner was close hauled on the port tack, beating up the sound, on a voyage from Newfoundland to the port of New York, and when she descried the steamer she was heading north-west by west, and, having a whole sail breeze from the west-south-west, she was making five and a half knots an hour. Her cargo consisted of frozen herring. The owners claimed damages for the loss of the cargo as well as for the loss of the schooner, and also for the loss of her provisions, nautical instruments, and charts. Bound down the sound, the Glaucus, a steam-propeller of eighteen hundred and forty-eight tons, new measurement, was on a voyage from New York to Boston, and she was heading east by north, and was making eleven knots. These facts were undisputed. It also appeared that the night was clear, and that the moon was shining and unobscured by clouds. [Decree for libellants. Claimants appeal. Affirmed.]

John C. Dodge, proctor for libellants.

F. C. Loring and M. F. Dickinson, Jr., proctors for claimants.

CLIFFORD, Circuit Justice. Causes of collision, civil and maritime, since the passage of the act establishing certain rules and regulations for preventing such disasters, depend, in most cases, upon controverted matters of fact, to be determined by the testimony of witnesses rather than upon questions of law. Decided cases may be referred to in which it is suggested, if not positively stated, that an appellate court will not, in general, re-examine the decree of the subordinate court upon the merits in such a case, where it appears that the matter in issue depends upon the credibility of the witnesses; but those remarks were not necessary to the decision of the appeal in any one of those cases, nor do they express the correct rule upon the subject as understood at the present time in the supreme court. Newell v. Norton, 3 Wall. [70 U. S.] 267; The Potomac, 2 Black, [67 U. S.] 584; The Marcellus, 1 Black, [66 U. S.] 417; The Water Witch, Id. 500. Since the passage of the act of March 3, 1803, appeals are allowed to the circuit court from any decree rendered in the district court, in any cause of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of fifty dollars, and the provision is, that the circuit court is authorized and required to "receive, hear, and determine such appeal." 2 Stat. 244. Provision is also made, by the rules prescribed by the supreme court, that the testimony given in the district court may be taken down by the clerk and be transmitted to the circuit court, to be there used on the appeal, or it may be retaken by deposition at the election of the parties, and the fiftieth rule provides that further proof may be taken in the circuit court, which shows to a demonstration that the facts as well as the law of the case are open to revision on appeal in the circuit court. The Baltimore, 8 Wall. [75 U. S.] 382. Where the appeal involves a question of fact, the burden is on the appellant to show that the decree rendered in the subordinate court is erroneous; but it is a mistake to suppose that the court of paramount jurisdiction will not re-examine the whole testimony in the case. 2 Stat. 244; [The Baltimore, supra;] 8 Wall. [75 U. S.] 382.

Both vessels, under the circumstances of this case, were bound to observe and follow the rules and regulations established by congress to prevent collisions on the water, and it is clear, if they had done so, the collision would not have occurred. 13 Stat. 60. Inevitable accident is not even suggested, nor could it be with any hope that any such view would be adopted by the court, as it was clear that one or the other, or both, were in fault. Union S. S. Co. v. New York & V. S. S. Co., 24 How. [65 U. S.] 313; The Morning Light, 2 Wall. [69 U. S.] 556. Proper regulation lights were shown by the schooner, as required by law, and the proofs also show to the entire satisfaction of the court that she had a competent lookout properly stationed on the vessel. Proper sidelights, as required by the regulations established by the act of April 29, 1864, were also shown by the steamer; but she had "a central range of two white lights," as required by section 11 of the act of July 25, 1866, for "all coasting steamers" and other steamers, navigating bays, lakes, rivers, &c., as therein specifically provided. 13 Stat. 59; 14 Stat. 228. Extended remarks upon the circumstance that the steamer had two white lights, instead of one only, as prescribed by the first-named provision, are unnecessary, as it is clear, even if the steamer was not one falling within the regulation established by the subsequent act, that the circumstance that she had two white lights did not contribute, in any respect whatever, to the disaster.

The respondents admit that the two vessels came in collision on the day, and substantially at the place, as assumed by the libellants, and that the schooner suffered damage; but they do not admit that she was totally lost, nor do they admit the extent of the injury to the cargo, as alleged in the libel. They admit the collision, without qualification, and the proofs show that the steamer struck the schooner on the port bow, near the stem, carrying away the bowsprit, stem, and port knight-head, and that the effect of the blow extended across the vessel, crushing out the starboard bow, which caused the vessel immediately to capsize and sink. Steamships are required to keep out of the way of a sailing ship, when the two are pro-

ceeding in such directions as to involve risk of collision, and the correlative duty required of the sailing ship is that where one of two ships is required to keep out of the way, the other shall keep her course, subject to the qualification applicable to both, that due regard must be had to all dangers of navigation, and also to any special circumstances which may exist at the time, rendering a departure from the requirement necessary, in order to avoid immediate danger. 13 Stat. 61; Mail Steamship Co. v. Rumball, 21 How. [62 U. S.] 384.

Argument to show that those rules are applicable to the case before the court is unnecessary, as that point is conceded by both parties, and is too plain for controversy. Prior to the collision, and at the time the two vessels came together, five persons, to wit, the master, mate, wheelsman, and two seamen, were on the deck of the schooner, three having been there for some time, and the other two came up from the lower watch just before the collision took place, and they all testify, in the most positive manner, that the schooner did not change her course. Support to their statements is also derived from the testimony of the master of the schooner "Nightingale," which was to the leeward, and sailing in the same direction as the schooner of the libellants. He was on deck at the time of the collision; saw both vessels at the time; and he states that he did not see any change in the course of the injured schooner before she was struck by the steamer. Testimony was introduced by the respondents, tending to show that the witness had made contradictory statements upon the subject out of court, but the testimony introduced for that purpose is not of a character to impair, essentially, the credit of the witness. Attempt is made by the respondents to controvert those statements, and to show by the statements of witnesses on board the steamer, and by evidence in its nature circumstantial, that the schooner did change her course, and that the collision was occasioned by that departure from the rules of navigation as established by the act of congress. Three persons were in the pilot-house of the steamer when the schooner was descried, and they remained there as the two vessels advanced to the place of collision; and there was also one seaman on the deck, called, in the testimony, the bow watch. Those in the pilot-house, to wit, the pilot, second mate, and wheelsman, testify that they descried the schooner when she was a mile distant, and they state that the schooner did subsequently change her course before the collision occurred. Repugnant statements cannot both be true, and when they cannot be reconciled, the one or the other must be rejected; and in the performance of that duty it usually becomes important to ascertain which witness had the best means of knowledge, as it is more reasonable to conclude that the error is the result of mistake than of deliberate intention. Evidently the libellants' witnesses speak from actual knowledge, and unless they have willfully stated what they know to be false, their statements, it would seem, must be correct. They were on the deck of the schooner, and they cannot well be mistaken in respect to the matter in controversy. Distant nearly a mile,—as the respondents' witnesses were,—and situated in the pilot-house of the steamer, they could only infer what they have affirmed, or to say the least, inference must have entered very largely into their statements as to what transpired on the deck of the schooner, as it is hardly to be credited that they could see either the helmsman, or the wheel. Mail Steamship Co. v. Rumball, 21 How. [62 U. S.] 382.

Certain circumstances, stated by the witnesses situated in the pilot-house of the steamer, are invoked by the respondents as confirmatory of their theory, and it is insisted, in argument, that one of those circumstances is of itself sufficient to overcome the statement of the libellants' witnesses, that the schooner did not change her course; and to prove the affirmative of that issue, circumstantial evidence may undoubtedly be sufficient to control direct testimony of a repugnant tendency, and to establish a theory of an opposite character; but it is indispensably necessary, in order that it may have any such effect, that the circumstantial facts, from which the inference is to be drawn, should be fully proved. An inference from an inference, if it be allowable at all, cannot be regarded, even in a civil case, as having much probative force, because the chances that it may be erroneous render it unsafe as the basis of judicial action. This is especially so when it is opposed to the direct statements of credible witnesses, who are otherwise entirely unimpeached. Presumptive proof is admissible in every case; but the collateral facts, from which the presumption is drawn, must be fully proved. Certainly no safe inference or presumption can be drawn from such facts until they are satisfactorily established. 1 Stark. Ev. 13, 57. The express testimony of the witnesses in the pilot-house of the steamer is, that when they first descried the schooner, they saw both her green and red lights, and that, as she advanced, her green light disappeared, and the inference from that circumstance is that she ported her helm, and fell off to the leeward. Sailing ships under way shall carry the same lights as steamships under way, "with the exception of the white mast-head light, which they shall never carry," that is, they shall carry a green light on the starboard side, and a red light on the port side, constructed as required in the regulations enacted by congress; and the further provision is, that they shall born be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent those lights from being seen across the bow. Lights constructed and fitted in that way

may both be seen at the same time at that distance in a clear night, when the two vessels are approaching head on, or nearly head on; but the steamer was heading east by north, and the schooner was heading northwest by west; and the statements of those witnesses are, that they saw the green light of the schooner, as well as her red light, four points over the starboard bow of the steamer. Undoubtedly they might have seen the red light under those circumstances; but it was conceded in argument that they could hardly have seen the green light at the same time, unless there is some error in the basis of facts as assumed by both sides. Confirmation of the view that those witnesses are in error is found in the testimony of the seaman, called the bow watch, who was stationed as a lookout on the starboard bow of the steamer. Standing there, his position and opportunity for seeing both lights, if they could be seen at all on that angle, were much better than the other witnesses, as he was farther forward, and was standing nearer the water-line of the vessel. He saw the red light only, and he testifies that he reported the light as soon as he saw it, which shows that the attention of the pilot was called to the red light as soon as it was seen by the lookout. Several other circumstances are referred to by the respondents in supporting their theory that the schooner changed her course; but they are of such slight probative force that it does not appear to be necessary to give them a separate examination. Viewed in any proper light, the case is one where it was the duty of the steamer to keep out of the way of the schooner, and the proofs show to a demonstration that she did not perform that duty; and as there were no obstacles to prevent her from avoiding the schooner, she must answer for the consequences. When she starboarded her helm "a little," if she had put it hard a-starboard, she would have gone clear, or if she had ported her helm, she would have gone under the stern of the schooner. Both parties excepted to the commissioner's report; but the court is of the opinion that none of the exceptions ought to be sustained. Decree affirmed, with costs.

Case No. 684.

AYER v. THACHER.

[3 Mason, 153.][1]

Circuit Court, D. Maine. May Term, 1823.

OFFICE AND OFFICER — RECOVERY OF FEES FROM ONE UNLAWFULLY IN POSSESSION OF THE OFFICE.

The surveyor appointed for the port of Eastport under the act of the 7th of May, 1822, c. 107, [3 Stat. 693,] is surveyor of the district of Passamaquoddy, and entitled to act for the whole district, and receive fees accordingly.

[1] [Reported by William P. Mason, Esq.]

At law. This was an action brought by [Samuel Ayer] the surveyor of Eastport, appointed under the act of the 7th of May, 1822, c. 107, [3 Stat. 693,] against [Stephen Thacher] the collector of the district of Passamaquoddy, for fees accruing by virtue of his office, and received by the collector. The sole point was, whether the surveyor appointed under the act of 1822, was by that act constituted surveyor of the port of Eastport only, or was surveyor of the district of Passamaquoddy, and not limited in his duties to the port of Eastport. [Judgment for plaintiff.]

Mr. Davies, for plaintiff.

Orr & Longfellow, for defendant.

Before STORY, Circuit Justice, and WARE, District Judge.

STORY, Circuit Justice. The parties concede, that the court have jurisdiction of this case under the act of 3d March, 1815, [3 Stat. 245,] c. 101, § 4. I meddle not, therefore, with that question; but shall content myself with the only point now in controversy.

The fifth section of the act of 1822, c. 107. [3 Stat. 694,] authorizes the president, among other things, to appoint "a surveyor for the port of Eastport, in the district of Passamaquoddy." The plaintiff was duly commissioned for that office, and claims in virtue thereof to be surveyor for the district of Passamaquoddy; and he supports his claim by reference to the eighth section, which grants "to the surveyor at Eastport for the district of Passamaquoddy five hundred dollars," as his salary. There is no other surveyor authorized by law to be appointed in the district; and under this description the plaintiff is certainly entitled to receive this salary. But the defendant nevertheless asserts, that the surveyor appointed by this act, is merely surveyor of the port of Eastport; is entitled to perform duties only at that port; and can receive no fees accruing from services done out of that port. It appears to me, that this construction of the act is incorrect. It is true, that the first clause provides for the appointment of a surveyor "for the port of Eastport in the district of Passamaquoddy;" and if there had been several surveyors authorized by law to be appointed in several other ports in that district, there might have been grounds to confine him to the duties connected with the port of Eastport. But no other surveyors are so authorized; and the clause, granting the salary, explains the ambiguity in the first clause, and shows that the surveyor so appointed is "the surveyor at Eastport" (that is, to reside at Eastport) "for the district of Passamaquoddy." Indeed, it does not appear, that by law any such port as the "port of Eastport" is, in terms, recognized as a port of entry or delivery. The act of 1799, c. 128, § 2, [Bio. & D. Laws, —1 Stat. 627, c. 22,] provides that in Massachusetts "there shall be twenty-two dis-

tricts and ports of entry," and enumerates among them "Machias and Passamaquoddy;" and afterwards adds, "and for each of the districts of Machias and Passamaquoddy shall be appointed a collector to reside at the said ports of Machias and Passamaquoddy respectively." The act of 3d of March, 1803, c. 79, a part of whose title is "An act to make Beaufort and Passamaquoddy ports of entry and delivery," [2 Stat. 229,] in the fourth section provides, that "such place within the district of Passamaquoddy in the state of Massachusetts, as the secretary of the treasury may direct, shall be a port of entry and delivery, at which the collector shall reside, as well for foreign vessels as for vessels of the United States." Under this act the secretary of the treasury is understood by an order of the 3d of June, 1803, to have designated the present port of Eastport. The port thus designated, seems as well from the title of this act, as from the language of the act of 1799, c. 128, [1 Stat. 627,] to be in a revenue sense the port of Passamaquoddy, or of Passamaquoddy district; and as no other port of delivery or entry is provided for, the port of Eastport is now, to all intents and purposes, the sole port of entry and delivery of and for the whole district, and the surveyor of that port is the surveyor of the district. Indeed, in our revenue laws "port" and "district" are often used, as of the same import, in cases where the limits of the port and district are the same. The act of 1799, c. 128, seems to have used the words "port" and "district" of Passamaquoddy in this sense. I am not aware, that there is any town or place known and incorporated by the name of Passamaquoddy. Machias was incorporated as a town on the 23d of June, 1784; and Eastport on the 24th of February, 1798. The latter, at the time of its incorporation, was known by the name of Plantation, No. 8; and whether it had also acquired in common parlance the name of Passamaquoddy, is a point on which I have no means of forming an opinion. My opinion is, that the plaintiff is surveyor of the district of Passamaquoddy, and as such entitled to recover. Judgment accordingly.

Case No. 685.

In re AYERS.

[6 Biss. 48.] [1]

District Court, W. D. Wisconsin. April, 1874.

GUARANTOR—WHEN CANNOT PROVE DEBT — PARTICEPS CRIMINIS — PREFERENCE — RELEASING GUARANTOR—REVIVING LIABILITY.

1. The guarantors of a note, the holder of which had forfeited his claim against a bankrupt estate, have no right to prove against the estate, their liability having already been discharged by the act of the principal.

2. If the guarantors participated in the act by which their principal forfeited his claim, they occupy no better position, and cannot prove.

3. Where the holder has taken a preference, in fraud of the bankrupt act, and a recovery has been had against him by the assignee, payment of the judgment does not revive his right to prove against the estate; and by such preference he has released the guarantors, and they have no claim against the estate.

4. It seems, that a guarantor, not legally liable to the holder, cannot, by any subsequent promise, revive the liability of the estate.

In bankruptcy. Motion by the assignee to expunge the proof of debt filed by A. Prutsman and Charles H. Stowers as guarantors upon two notes of the bankrupt payable to one G. H. Gile, amounting to $2,049. The bankrupt and one Fallis being indebted to Prutsman & Stowers, and they owing Gile, the bankrupt, with Fallis, made notes payable to Gile for the amount of the debt due to Prutsman & Stowers, who then guaranteed them and delivered them to Gile.

Mariner, Smith & Ordway, for the motion.

These creditors had a security and they should release it before they can legally prove for the whole. In re Jaycox, [Case No. 7,242.] Their not holding the legal title to the security makes no difference. [Id. 7,242.] A surety or guarantor cannot prove a debt when the principal creditor cannot. Sigsby v. Willis, [Id. 12,849;] In re Ellerhorst, [Id. 4,381.] Gile could not prove without a surrender, and payment of the judgment was not a surrender. In re Tonkin, [Id. 14,094;] In re Richter, [Id. 11,803;] In re Stephens, [Id. 13,365.] Judgment against Gile for fraud is res adjudicata as against these creditors, they being in privity with him. In re Richter, [supra.]

George W. Burnell, contra.

By rule 34 (1871) of the U. S. supreme court contingent liabilities must be proved in the name of the creditors if known. Creditors ignorant of a fraudulent conveyance to another party, but who afterwards express themselves as satisfied with it, may prove their claims. In re Chamberlain. [Case No. 2,574.] The case of Sigsby & Willis, [supra,] cited by the opposite counsel, was between partners, and is not in point.

HOPKINS, District Judge. From the evidence read on the hearing of the motion, it appears that within four months before the filing of the petition in bankruptcy, the bankrupt made a bill of sale of his lumber to Mr. Gile, to pay or secure the payment of these notes, and that the assignee brought suit in the United States circuit court for this district, against said Gile, for the recovery of the value of such property, on the ground that the sale was illegal and void as constituting a preference contrary to the provisions of the bankrupt act, and that he recovered a judgment therefor, which Gile afterwards paid. This motion is made on the ground

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

that, as Gile, the holder of the notes, could not prove the claim on account of his fraud in attempting to obtain a preference, the guarantors of the notes cannot do so. I think it is clear that Mr. Gile, by his effort to obtain and hold a fraudulent preference, forfeited his right to prove the debt or to participate in the bankrupt's estate. Section 39 of bankrupt act; In re Stephens, [Case No. 13,365;] Cookinham v. Morgan, [Id. 3,183.] The subsequent payment of the judgment was not a surrender within the meaning of section 23, so as to remove the disability and revive the right to prove his debt. Hood v. Karper, [Id. 6,664.]

If guarantors and indorsers may prove the debt or claim in such cases, notwithstanding the fraud of the holder, this provision of the law may be wholly avoided and rendered nugatory. But the supreme court of the United States, in the case of Bartholow v. Bean, 18 Wall. [85 U. S.] 635, recently decided, have laid down a proposition which I think must control this case. Justice Miller, who delivered the opinion, says: "It is very obvious that the statute intended, in pursuit of its policy of equal distribution to exclude both the holder of the note and the surety or indorser from the right to receive payment from the insolvent bankrupt. It is forbidden. It is called a fraud upon the statute in one place and an evasion in another." After stating that a holder of indorsed paper might refuse a tender of payment, and that such refusal would not exonerate the surety or indorser, because in refusing he would be but obeying the plain mandate of the bankrupt act, he says, "by receiving the money, the holder of the note makes himself liable to a judgment for the amount in favor of the bankrupt's assignee, *and loses his right to recover either of the indorser or of the bankrupts's estate.*" The italics are mine, made because of the great importance of the principle included and enunciated in that clause. That case, as I have before said, would seem to dispose of the question involved in this motion; for, if the holder of a note forfeits his claim as against the sureties by his fraud upon the bankrupt act, then these guarantors are not or would not be legally liable to Mr. Gile, and do not occupy the position of parties who are authorized, under section 19, [14 Stat. 525,] to prove their debts, as they are not "liable as bail, surety, guarantors or otherwise for the bankrupt;" so that, giving to the language of the opinion above italicized its natural and obvious meaning, this motion must be granted, for the facts of this case clearly bring it within the doctrine there announced.

In this case Mr. Stowers, who makes the affidavit or proof, says they are liable. Whether that statement was made under a misapprehension of the law, or they have voluntarily promised to pay the notes since, does not appear, and it is probably immaterial, for if they were not legally liable to the holder, after his fraudulent act, they cannot by any subsequent promise revive the liability of the estate to them. But it will be seen that section 19 authorizes parties liable for the debts of a bankrupt, who have not paid the same or any part thereof, to prove such debts only when the "creditor shall fail or omit to prove them." It would be an unwarrantable construction to give to those words, it seems to me, to hold that they covered the case of a creditor who had forfeited his right to prove his debt by his own fraudulent acts.

The doctrine enunciated in the opinion of the supreme court is not by any means new. It is only a new application of the old rule that every act of a creditor which extinguishes his remedy as against the principal absolves the surety, guarantor or indorser. But even if there is any question upon this view of the case, I think, upon another ground, this motion must be granted. The testimony taken and read on this motion shows that the guarantors themselves participated and assisted in obtaining the illegal preference of this claim, were participes criminis, and therefore occupy no better or different position than the holder, and cannot be permitted to prove the claim any more than he could. They were the parties "to be benefited," within the meaning of §§ 35 and 39 of the bankrupt act, and being actors in the illegal transaction, they must be excluded from all participation in the bankrupt's estate. The proof of the claim is therefore stricken out and expunged, and the register will strike these claimants from the list of creditors of the estate.

Case No. 686.

AYLING v. HULL.

[2 Cliff. 494;[1] Merw. Pat. Inv. 91.]

Circuit Court, D. Massachusetts. Oct. Term, 1865.

PATENTS FOR INVENTIONS — PATENTABILITY—NOVELTY—INTERFERENCES—INJUNCTION —ABANDONMENT.

1. The presumption arising from the introduction in evidence of his patents, that the complainant is the original and first inventor of the invention therein described, may be regarded as strengthened by the fact that the complainant's application and respondent's patent were declared in interference at the patent office, that the cases were appealed to the superior court of the District of Columbia, being at every step decided in the complainant's favor, the respondent, during the entire pendency of the interferences, asserting himself to be the original and first inventor.

2. It was held that the subjects-matter of the complainant's patents were not the same as that of the English patent of Alexander Parker.

3. It is competent for the circuit court to entertain a bill of complaint, founded on letters-patent of the United States, for an injunction,

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission. Merw. Pat. Inv. 91, contains a partial report only.]

for an account, or for the repeal of an interfering patent for the same invention.

4. The motion for injunction is addressed to the discretion, and the court may or may not, according to the circumstances, order issues for a jury.

5. An inventor, at the time of making his discovery, intended to apply for letters-patent thereon; but having been incorrectly advised that his invention was anticipated by a patent of prior date, he kept his improvement a secret, practising it for his own benefit; and when aware that he had been misinformed, he filed his application without unnecessary delay. *Held*, that he had not so postponed his application for a patent, and concealed his invention, as to forfeit his right to the grant of a patent.

In equity. This was a bill in equity in which the complainant alleged that he was the first and original inventor of an improved process for changing, curing, or treating caoutchouc, and also of an improved product from caoutchouc, which product was the result of the said process. The two inventions were embraced in separate patents, each bearing the same date, to wit, May 10, 1864. The prayer of the bill of complaint was, that two certain letters-patent granted to the respondent might be adjudged and decreed to be void throughout the United States, and for an injunction and for an account. The invention described in the first patent of the complainant was a new process by which caoutchouc and its compounds were changed or cured, so that they were unaffected by changes of temperature, by contact with fatty and acid substances, and by exposure to the atmosphere, and so that their strength and elasticity were increased. The change produced on caoutchouc was similar to that effected by heat in the presence of sulphur, known as vulcanization, except that there was no sulphur left in the rubber, nor were there any other agents left therein tending to its injury or destruction; and except also, that the change was more permanent and uniform in its character. The patentee stated that the process was essentially "a cold one," which could be successfully practiced in any degree of natural temperature, and might be described as consisting in bringing the caoutchouc into contact for a suitable time, with a recently discovered fluid solvent thereof, known in commerce as "carbon spirits," when the fluid was combined with chloride of sulphur in the proportion of about one measure of the chloride of sulphur to fifty of the carbon spirits. In the other patent, the specification described the product or article of manufacture as chiefly composed of caoutchouc, and combined with carbon spirits and chloride of sulphur. It was charged upon the respondent that he obtained and held two certain patents, which covered the same inventions as those secured to the complainant in the patents, upon which the suit was founded. Of the patents of the respondent, one was dated December 26, 1864, and entitled "an improvement in treating caoutchouc," the other, March 10, 1863, and was upon an improved caoutchouc or india-rubber. It was alleged in the bill of complaint that the patents of the respondent were an interference with the patents of the complainant, and that the respondent refused to acknowledge the rights of complainant, and was using and practicing the inventions in violation of complainant's rights. It was admitted that the patents of the two parties were upon the same inventions. Several defences were set up in the answer, of which the following are all that require recapitulation:—

First, that neither party was the original and first inventor of the improvements, but that both were old and belonged to the public. To prove this, an English patent granted to one Alexander Parker was introduced in evidence.

Second, inasmuch as the complainant's patents were issued only a short time before the filing of the bill of complaint, the court ought not to order an injunction, or enter any decree affirming the validity of the patents, until the same had been judicially established; and to that end the respondent asked that proper issues might be framed, and the cause sent to a jury.

Third, that the defendant not only did not use reasonable diligence in completing the alleged discovery, but that he secreted and concealed whatever he had accomplished, for his own benefit, and for such length of time that he had no superior equity over the respondent, and therefore that the court should leave the parties to their legal rights.

The more important portions of the evidence applicable to the first defence may be gathered from the opinion of the court, when considering the question of originality, and the facts upon which the third defence was based appear in the discussion, by the court, of that point.

B. R. Curtis and Chauncey Smith, for complainant.

F. A. Brooks, for respondent.

CLIFFORD, Circuit Justice. The patents of the complainant being introduced in evidence, the prima facie presumption is, that he is the original and first inventor of what is therein described as his invention, and the conduct of the respondent may be regarded as strengthening that presumption rather than as weakening it. The record shows that he applied for patents for the same improvements, and that an interference was declared by the patent office in each case, between his applications and those made by the complainant. The first hearing was before the examiner, and he decided against the respondent. Appeals were taken in due course of business, to the board of appeal and to the commissioner, both being decided in the same way, and he thereupon appealed to the ultimate tribunal, but met with no

better success. Throughout these controversies, he steadily and constantly maintained the validity of his applications, and still continued to press his claims for patents until the same were granted. The record also shows that having succeeded in obtaining his patents, he brought a suit against the complainant, charging him with infringement of his patents, and claimed that he, the respondent, was the original and first inventor of the improvements therein described and secured. Being unable to show any right to enjoy the property of the invention himself, he now denies the originality of invention either in himself, or the complainant, and seeks to destroy it as a right of property in the complainant. Ungracious, however, as the defence is, still, it is a sufficient one if it be proved. But it is not proved, and the pretence has no foundation whatever. On the contrary, the testimony introduced by the complainant shows, to the entire satisfaction of the court, that the complainant is, as he alleges himself to be, the original and first inventor of the improvement. The patentee of the English patent took, as he states in his specification, forty parts of bisulphuret of carbon and added to it one part of chloride of sulphur prepared as neutral as possible, mixed well the ingredients in a suitable vessel, and immersed caoutchouc in sheets or other forms in the mixture, allowing them to remain therein a longer or shorter time, according to the thickness or substance of the article. The fluid used by the complainant, is the product of the distillation of the natural petroleum or rock oil, and is combined with chloride of sulphur in the proportions before mentioned.

The expert testimony offered by the complainant, shows that coal-tar naphtha has been long known as the light oil produced in the decomposition of coal, when sudden and high heat is applied to it. The statement is that it consists, when highly rectified, in a large part, of a substance called by chemists benzole or benzine, and that it has specific characters, although it is a mixture. The principal expert witness called for complainant states that it has a low boiling point, but congeals wholly or in part at about the temperature of freezing water. It forms compounds of decomposition with nitric-acid, one of which crystallizes and has the composition of compounds in the benzole series, derived from benzoic acid. One of its peculiar physical characters is, that although very volatile, it does not diffuse in air at forty degrees, and cannot, therefore, be used in the manufacture of air-gas. The witness states that he has been acquainted with the article, under different names, such as coal-tar naphtha, light-spirits naphtha, crude benzole, and rectified naphtha, for more than twenty years. Chemists, he says, have known it more than forty years, under these and other names, and that he has experimented with it at different times within the period since it came to his knowledge. On the other hand, he states that petroleum naphtha or carbon spirits is a fluid distinct from the other hydro-carbons, both in physical and chemical characters, and that it constitutes a new product, which cannot be included in any other known series. He describes it as a light mobile fluid, obtained in the purification of crude petroleum oil, and by the slow distillation of bituminous coal at the lowest possible heat. His representations are, that it has peculiar physical and chemical characters, as, for example, it has a high boiling point much above that of water, and yet it diffuses in air at a temperature of forty degrees rapidly, and, consequently, becomes an efficient agent in the production of what is termed air-gas. Another characteristic is, that it exhales rapidly and completely at a temperature of sixty degrees without a particle of residuum or without becoming colored, and it may be mixed with other bodies without producing change of color. When exposed to cold, it bears the reduction of fifty degrees below zero without becoming solid, and still remains a mobile fluid, and when mixed with nitric-acid, its chemical property is such that it does not form nitrobenzole by decomposition, nor can the products of the benzoic series be then obtained from it. The conclusion of the witness is, that its elements are differently united from those of coal naphtha, or any of those resulting from the application of a high temperature to coal; and there can be no doubt, in the judgment of the court, that his conclusion is correct. The evidence also shows, that the product obtained by the complainant is new, and that the respondent is plainly in error in the view he puts forth upon that subject. Jurisdiction in suits of this nature is conferred upon the circuit courts by an act of congress, and it is competent for the court to entertain a bill of complaint for an injunction and an account, or for the repeal of an interfering patent for the same invention, at any time after the letters-patent are granted. Undoubtedly the application for injunction is in all cases addressed to the discretion of the court, and it may be that the court, under some circumstances, might order issues to a jury in a suit like the present, for the repeal of an interfering patent. Suffice it to say, however, there are no circumstances in this case which afford any proper ground for the last-named application, and the respondent has no claims for any delay, if the complainant is entitled to a decree.

The theory of fact on which the third defence is founded is not correct. The complainant did exercise reasonable diligence in adapting and perfecting his invention, as appears from all the evidence, when properly understood. When he made his invention he intended to apply for a patent, and doubtless would have been so, had he not been misled and been induced to believe that his in-

vention had been anticipated. While laboring under that impression, he decided to keep it a secret and practise it for his own benefit; but the evidence clearly shows that as soon as he was undeceived, and it came to his knowledge that he had not been anticipated, he began his preparations for application for a patent, and obtained it without unnecessary delay. None of the defences set up by the respondent can be sustained, and they are accordingly overruled. The complainant is entitled to a decree as prayed in the bill of complaint, and for his costs.

AYLING, (TOWN OF WEYANWEGAN v.) See Case No. 17,473.

Case No. 687.

AYLWARD v. SMITH.

Circuit Court, D. Massachusetts. Oct. Term, 1873.

[Affirming Aylward v. Smith, Case No. 688. Cited in Choate v. Meredith. Id. 2,692. Nowhere reported; opinion not now accessible.]

Case No. 688.

AYLWARD v. SMITH.

[2 Low. 192.][1]

District Court, D. Massachusetts. Dec., 1872.[2]

DEMURRAGE—LAY DAYS—ARRIVAL OF VESSEL.

Under the usual bill of lading, the lay days do not begin to run until the vessel has arrived at her place of discharge, and is ready to be unloaded.

[Cited in Gronstadt v. Witthoff, 15 Fed. 268; Fish v. One Hundred and Fifty Tons Brown Stone, 20 Fed. 202; The Henry Sutton, 26 Fed. 926; Manson v. New York, N. H. & H. R. Co., 31 Fed. 299.]

In admiralty. Demurrage.—Libel, by [James E. Aylward] the master of schooner Sandalphon, [against Martin L. Smith,] alleging that, on the seventh day of December, 1872, the Hoboken Coal Company shipped on board his vessel, then lying at Hoboken, in New Jersey, a cargo of coal, to be delivered to the respondent at Cambridgeport, Mass., for a certain freight, and the libellant signed a bill of lading therefor; that he proceeded on his voyage, and arrived at the wharf of the respondent on the 20th of December, and was detained there, by the respondent's neglect and fault, for twenty-seven days beyond the time allowed for discharging cargo by the contract between the parties. It appeared that the schooner was towed to the respondent's wharf in the afternoon of the 20th December, at about high tide; and was made fast outside of another vessel which was in the berth. This other vessel was hauled out on the next day; but the libellant's schooner was then hard aground, and so remained for some days, the tides being lower than usual. Afterwards, the ice made round her, and she could not be hauled in until the 18th of January, when the cargo was discharged in less than two days. The libel stated the distance of the schooner from the wharf to be thirty-five feet; and the evidence was somewhat conflicting as to the exact distance, the respondent maintaining that it was considerably greater. Both parties did what they could to break the ice and to haul in the vessel. On the 28th of December, the deck load of twenty tons was delivered by means of a staging or bridge; and it was alleged that more might have been landed in this way; but the respondents testified that the bridge was so slippery and dangerous that it was impracticable to use it further. The bill of lading contained these words: "Usual dem. after three days, Sundays exc." It was agreed that this meant that the usual demurrage of eight cents per ton for each ton of the cargo was to be paid for every day the vessel should be detained beyond three days, exclusive of Sundays. The libellant demanded demurrage at this rate for twenty-seven days. [Libel dismissed. Decree affirmed in Aylward v. Smith, Case No. 687.]

C. F. Walcott, for the libellant, cited Abb. Shipp. (11th Ed.) 271; Brown v. Johnson, 10 Mees. & W. 331.

T. H. Russell, for respondent.

LOWELL, District Judge. It does not appear to me that the unfortunate delay in discharging this schooner arose from any fault on either side. I cannot agree that the defendant is responsible for the position which the master took up for his vessel while waiting his turn to unload. There was no hidden danger at that place of which warning should be given to strangers; and no notice was given by the master of his purpose to put the vessel there; no questions were asked or answered about depth of water, draft, or any thing else. The schooner lay in a place to which a tug master, well acquainted with the navigation, had taken her, and where she might well enough have awaited her turn at the dock if the accidental change of tides, caused by a change of wind, had not come on the next day, and if extreme cold weather had not set in at the same time.

It seems to be thought that a person who has a wharf with only enough water at ordinary times, and liable to be deficient on extraordinary occasions, or a wharf to which navigation is somewhat difficult or intricate, ought to be held to warrant the safe approach of all vessels that are navigated with ordinary care and skill; but I know of no such law. There was, as I have already ob-

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

[2] [Affirmed by circuit court in Aylward v. Smith, Case No. 687.]

served, nothing said about the draft of the schooner, no deception, nothing to raise an inference that either party had any thought on this subject. The contract was to carry the cargo to Cambridgeport; and both parties treated this as meaning the defendant's wharf in that port, as no doubt it did; but there was no absolute engagement on either part that the schooner should be able to reach the wharf in any particular time. The defendant did not engage, either expressly or by implication, that a berth should be always open for the libellant, whenever he should arrive. Any such implication would be most unreasonable, considering the uncertainties and delays that attend the navigation of sailing-vessels. And the bill of lading, in giving three days to clear the vessel, when the actual delivery of the cargo would take about half that time, appears intended to make allowance for some possible detention of this kind. Nor is there any ground for saying that the defendant could have taken out any more coal than the deck load in the mode in which that was taken, or that the master asked him to do so.

Neither party being in fault, the loss must fall on the plaintiff if his voyage was not ended and the lay days begun; otherwise, on the defendant. A voyage of this kind is usually considered to be ended, as between the ship-owner and the freighter, when the ship has arrived at the place of discharge, such as the public dock, although not able to get a berth immediately: Brown v. Johnson, 10 Mees. & W. 331. It is upon this rule that the plaintiff relies. He says that he arrived at the wharf on the 20th of December, reported to the defendant, and ended his voyage. This argument is specious; but it assumes that the vessel had arrived at the dock or wharf, when, in truth, she had only very nearly arrived. It has been held in two English cases, concerning cargoes of coals shipped under contracts almost identical with this, that delays within the port for a considerable time, owing to a want of sufficient water at the place of delivery would not require the freighter to receive the coals at another place, or cause the lay days to begin, though the contract had the clause that the ship was to go only so near to the place as she could safely get. It was held that, although she could not safely go up while the tides were neap, yet that was one of the accidents of navigation which a vessel contracting to go to a tidal harbor ran the risk of: Parker v. Winlow, 7 El. & Bl. 942; Bastifell v. Lloyd, 1 Hurl. & C. 388. The distance at which the ship is kept from her berth by the low water is immaterial, if it be so far that the delivery of the cargo is prevented. Upon this point, which is chiefly one of fact, I hold that the vessel had not arrived.

Then, if the vessel is to earn demurrage, she must not only arrive, but be ready to deliver her cargo; and that readiness must continue at least during the three days which the contract gives to the consignee. If the acts of the master on the first day are looked upon as a sort of tender of his cargo, it is one of the essential qualities of a tender that it should be continuing. Thus, where freight was to be paid in three days after arrival, "and before delivering of any part of the cargo," and the vessel arrived, and on the next day the cargo was destroyed by fire and water, it was held that the freight was not earned, because it was implied in the contract that the vessel should be able to deliver the cargo at any time during the three days: Duthie v. Hilton, 38 Law J. C. P. 93, L. R. 4 C. P. 138. I have seen no American case so nearly analogous to this as those which I have cited from the English reports, though I have no doubt the law is the same in both countries. Upon the whole, I find that the libellant has not made out that his lay days had begun when this delay occurred, nor that it was caused by any default of the respondent. The result is, that the libel must be dismissed, with costs. Libel dismissed.

AYLWARD, (UNITED STATES v.) See Case No. 14,482.

AYMAR, (UNITED STATES v.) See Case No. 14,483.

Case No. 689.

AYRES v. WESTERN R. CORP.

[14 Blatchf. 9.][1]

Circuit Court, S. D. New York. Oct. 19, 1876.

CARRIERS—LIABILITY AS WAREHOUSEMEN—NOTICE TO CONSIGNEE OF ARRIVAL OF GOODS.

Goods, in the course of transportation from West Springfield, Massachusetts, to Cleveland, Ohio, were destroyed by fire in the depot of the Western Railroad Corporation, at East Albany, New York. That corporation, when it received the goods at West Springfield, gave a receipt, setting forth that it had received 4 cases, marked J. B. C., Cleveland, Ohio. The receipt, on its face, said: "This contract, and the responsibility of the parties hereto, being limited and controlled by the rules and regulations printed upon the back of this receipt;" "it being also understood, that this corporation assumes no liability beyond the end of its own line, and that, so far as it acts as agent for other parties participating in the joint transit aforesaid, said parties are separately liable." The back of the receipt said: "The following rules and regulations have been adopted by the several railroad corporations in regard to freight." "The company will not hold itself liable as common carriers, for articles of freight, after their arrival at their place of destination and unloading at the company's warehouse or depots." "All articles of freight must be taken away within 24 hours after being unladen from the cars." The cases were marked as described in the receipt, and also marked, "care of Western Transportation Co.," a corporation engaged in carrying freight on the Erie canal. The terminus of the road of the Western Railroad Corporation was at East Albany. The goods arrived there and

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

were unladen at its warehouse. Three days afterwards the warehouse took fire, and the goods were consumed, without fault on the part of the corporation. It did not appear that notice of the arrival of the goods was given by the corporation to the Western Transportation Company: *Held*, that the Western Railroad Corporation was liable for the value of the goods.

[Cited in Wertheimer v. Pennsylvania R. Co., 1 Fed. 233; Rackett v. Stickney, 27 Fed. 879; The Brantford City, 29 Fed. 394.]

[At law. Action by John B. Ayres against the Western Railroad Corporation for the value of goods destroyed by fire while stored in defendant's warehouse. Judgment for plaintiff.]

George Bliss, for plaintiff.

George W. Miller, for defendant.

WALLACE, District Judge. The plaintiff seeks to recover the value of certain paper destroyed by fire in the freight depot of the defendant, while in course of transportation from West Springfield, Massachusetts, to Cleveland, Ohio, and other points beyond the terminus of the defendant's road. Upon the shipment of the goods, the defendant gave the shipper a receipt in the following terms: "Western Railroad Corporation, West Springfield, June 26th, 1861. Received of Southworth Mf'g Co., 10 cases paper, marked and numbered—4, J. B. Cobb & Co., Cleveland, Ohio—5, J. R. Dayton, Quincy, Ill.—1, Ogden, Brownell & Co., Keokuk, Iowa; contents and value unknown; to be transported to ....., and delivered at the ..... depot there, to ....., on the payment of freight therefor, together with such expenses as shall be shown by vouchers to have been advanced on the same; this contract and the responsibility of the parties hereto being limited and controlled by the rules and regulations printed upon the back of this receipt, as also by the terms of their printed tariffs of freight; and it being, also, understood, that this corporation assumes no liability beyond the end of its own line, and that, so far as it acts as agent for other parties, participating in the joint transit aforesaid, said parties are separately liable." Upon the back of the receipt there was an endorsement: "The following rules and regulations have been adopted by the several railroad corporations in regard to freight." Then follow a number of rules, among which are these: "The company will not hold itself liable, as common carriers, for articles of freight, after their arrival at their place of destination and unloading at the company's warehouse or depots." "All articles of freight must be taken away within twenty-four hours after being unladen from the cars, the company reserving the right of charging storage on the same, or placing the same in store at the risk and expense of the owner, if they see fit, after a lapse of time." The several parcels of goods were marked as described in the receipt, and also marked "care of Western Transportation Co.," a corporation engaged in carrying freight upon the Erie canal. The terminus of the defendant's road was at East Albany, where the goods arrived and were unladen at the defendant's warehouse on the 2d of July; and, on the 5th of July, the warehouse took fire and the goods were consumed, without fault on the part of the defendant. It is not shown that notice of the arrival of the goods was given by the defendant to the Western Transportation Company, but it does appear, that, according to the usual course of business, an agent of the latter visited the warehouse of the defendant, to look for goods, prior to the 5th of July.

Giving effect to the receipt delivered by the defendant to the shipper, as a special contract, which restricts the common-law liability of the defendant as a carrier, and renders it liable only according to the conditions mentioned upon the face and back of the receipt, the defendant was liable as a carrier for the goods destroyed in its warehouse, while in course of transportation. The goods were to be transported by the defendant to its depot, for the purpose of delivery there to a second carrier, in the course of transportation to the ultimate destination of the goods; and, in such case, the carrier is liable as a carrier while the goods are in its warehouse awaiting delivery to the second carrier, unless it is absolved by notice of their arrival to the second carrier, or by the terms of a special contract with the shipper. Condit v. Grand Trunk Ry. Co., 54 N. Y. 500; Railroad Co. v. Manufacturing Co., 16 Wall. [83 U. S.] 318; Mills v. Michigan Cent. R. Co., 45 N. Y. 622; McDonald v. Western R. Co., 34 N. Y. 497; Rawson v. Holland, 59 N. Y. 611. It is not claimed that the defendant had become exonerated from liability by giving notice of the arrival of the goods to the second carrier, but it is insisted that it is exempted because of the condition on the back of the receipt, which reads, that it will not hold itself liable as a common carrier, for such articles, "after their arrival at their place of destination and unloading at the company's warehouse or depots." The argument for the defendant is, that the place of destination, within the language of the condition, is that point on the defendant's road where it is to deliver the goods to some other carrier or to the consignee. If this position is sound, doubtless, the defendant was liable only as a warehouseman, and, as the goods were destroyed without fault on its part, is not liable for them. To sustain this position it is necessary to maintain, that, when goods are addressed to a point beyond the line of the first carrier, consigned to the care of a connecting carrier, their place of destination is that place where the first carrier is to deliver them to the second carrier. Such a conclusion is opposed to

the plain and ordinary meaning of language. The goods were shipped to Cleveland and other points further west, and the packages were marked, "care of Western Transportation Company." So far as the defendant was concerned, its duty would have been discharged by delivering the goods to the Western Transportation Company, but it does not follow from this that the Western Transportation Company was the place of destination. So to hold would require the rest of the address to be disregarded. The place of destination is the place designated for the ultimate unlading of the goods, and is that point on the defendant's road, or on that of any connecting carrier, at which the consignee is to receive the goods according to the usual course of business of the carrier. Looking at the various terms of the receipt, it is apparent, that the receipt is designed to modify the liability not only of the defendant, but of the various connecting carriers who participate with it in the transportation; and, while some of the conditions are adapted to protect the defendant, many of them are inserted for the protection of the connecting carriers. It is framed to cover shipments for places on the defendant's line, and also for shipments to distant places upon or beyond the lines of connecting carriers who are to participate with the defendant in the transportation of the goods, and for whom the defendant is to act as agent in the transaction. Upon its face, the receipt provides that the defendant shall assume no liability beyond the end of its own line, and that "the parties participating in the joint transit" are to be separately liable, while the conditions upon the back of the receipt consist of "rules adopted by the several railroad corporations in regard to freight." It is framed to stand for a contract between the shipper and the defendant, and also for one between the shipper and the connecting roads who participate in the joint transit, so that both the defendant and the connecting carriers may find protection in the several conditions. This being the object in view, the meaning of the term in question seems obvious. It is used in two of the conditions only, one of which provides against liability for articles of freight "after their arrival at their place of destination and unloading at the company's warehouse," and the other that such articles "arriving at their place of destination must be taken away within twenty-four hours after being unladen." The place of destination is the ultimate destination of the goods. When this is on the defendant's road, unless the goods are taken away within twenty-four hours after their arrival and unloading, the defendant is liable only as warehouseman; when the place is upon the road of a connecting carrier, such carrier, after the twenty-four hours, ceases to be liable as carrier, and assumes only the liability of a warehouseman. This construction is consistent with the instrument as a whole, with the relations of the various parties to it, and with the nature of the transaction the receipt is intended to provide for. If the meaning of the conditions were doubtful, the construction to be given them should be one most strongly against the carrier. The conditions are designed to relax the common-law liability of the carrier—a liability which the shipper has a right to insist upon, and of which he is not to be deprived without clear evidence of his assent. If the meaning of such conditions is involved in any doubt, the doubt is to be resolved in his favor. The conditions in question are satisfied by the construction which has thus been placed upon them. These conclusions lead to a decision against the defendant.

But, if it should be conceded that the conditions upon the back of the receipt are so expressed as to refer to the warehouse of the defendant, and relieve the defendant from the obligations of a carrier after the arrival of the goods there, the same result must follow, because of the controlling authority here of the case of Railroad Co. v. Manufacturing Co., 16 Wall. [83 U. S.] 318. It is there held, that the delivery by the carrier to the shipper, of a shipping receipt, which, upon its face, refers to conditions on the back, defining the terms of the carrier's responsibility, and its acceptance by the shipper, does not constitute a special contract between the shipper and the carrier, by which the liability of the latter is limited by the conditions on the back of the receipt. It is unnecessary to refer to or discuss the principles or the authorities which bear upon the doctrine thus held. The case, in effect, decides, that no act on the part of the shipper, short of an explicit agreement, will imply an assent on his part to a contract proposed by a carrier, modifying the liability of the latter. That this conclusion conflicts with many decisions of high authority in this country and England, must be conceded; but the case furnishes a rule of plain and certain application, and sweeps away many fine and artificial distinctions which have involved in confusion the whole doctrine of notices and special contracts, as affecting the rights and liabilities of common carriers. Some of these cases have turned upon the point, whether the conditions in a printed receipt were in small type or in large, and whether the receipt was taken deliberately or hurriedly, while one case in the court of last resort in this state places controlling emphasis upon the fact that the receipt was taken by the shipper in a dimly-lighted car, and holds that it was, therefore, not a contract. Blossom v. Dodd, 43 N. Y. 264. Another case of the supreme court of the same state holds the receipt a contract, although taken by a foreigner ignorant of the language in which it was printed, and to whom no explanation of its terms

was vouchsafed. Fibel v. Livingston, 64 Barb. 179. See, also, Warhus v. Bowery Sav. Bank, 21 N. Y. 543. Thus, while one man is absolved from obligation because it may be inconvenient for him to inform himself of the terms of the proposed contract, another is held. The theory, of course, is, that assent to the proposed contract is or is not implied from the circumstances of the transaction, but the cases illustrate the utter uncertainty of the test of assent, when one man who is ignorant of the language of the proposed contract is presumed to assent, while another is absolved because, from the type in which it is printed, or the light by which he is to read it, he cannot acquaint himself with its terms without more or less inconvenience. The rule held by the supreme court of the United States is capable of certain and easy application, and, if adhered to, will go far to abrogate a class of contracts to which practically the carrier is the only party.

Judgment is ordered for the plaintiff.

Case No. 690.

AZCARATI v. FITZSIMMONS.

[3 Wash. C. C. 134.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1811.

COURTS — CONFLICTING STATE AND FEDERAL JURISDICTION — TAKING MONEY OUT OF COURT — EXECUTION AFTER A YEAR AND A DAY.

1. Motion to take out of court money levied by the marshal, to satisfy a judgment obtained by the plaintiff against the defendant, on the ground of priority, under a judgment obtained in the court of the state of Pennsylvania, in favour of William Lewis Esqr. who made the motion.

2. Although the remedy by motion, to take money out of court, in a case of this kind, is not the only one the party has, yet, as it decides the rights of the parties in a summary way, it is convenient to all; but the court will take care, that the party who shall be authorized to take the money, is entitled to it, under a regular execution, and under which the proceedings have been regular. If irregularities appear, sufficient to set aside the execution, the party must resort to his suit at law against the officer.

[Cited in Rockhill v. Hanna, Case No. 11,980; The Sabine, 50 Fed. 219.]

3. It is a fatal objection to an execution, that it issued more than a year and a day after the judgment, without a scire facias having been issued to revive the judgment.

[Cited in Rockhill v. Hanna, Case No. 11,980.]

[As to the origin of the prescription of a year and a day, see The Avery, Id. 672.]

4. It seems, that the court would not be disposed to aid the plaintiff, in an execution which had been dormant for a considerable time, to the disadvantage of a party having equal equity, although he had been equally negligent.

[1] [Published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

William Lewis, executor of Fuller, on the 20th of March 1800, revived a judgment by scire facias, which had been obtained by Fuller. A fieri facias issued, returnable to December 1800; an alias fieri facias, returnable to December 1801, on which proceedings were stayed by order of Lewis. A plur. fieri facias returnable to March 1802, on which proceedings were likewise stayed. A second plur. fieri facias was then issued to December 1804, on which a return of nulla bona was made, and on the 9th of September 1811, a third plur. fieri facias was issued, to December, which was levied on the 12th of September 1811, on property in the hands of the marshal of this court, which he had seized prior to the date of this execution, under an execution from this court, obtained by Azcarati. The entry made in respect to the fieri facias, returnable to December 1801, is vice comes, non misit breve. The marshal having sold the property seized, in order to satisfy the plaintiff's execution, and brought the money into court; this motion was made on the part of Mr. Lewis, to take it out to satisfy his execution from the state court, on the ground of preference. As to the plaintiff's right, it appeared shortly as follows:— Under the fieri facias issued on his judgment in 1803, the marshal returned it, levied on real property, and an inquisition. A venditioni exponas issued in 1804. By the marshal's docket, it appears, that he levied this writ on the household furniture of the defendant, as per inventory taken, and that proceedings were stayed by order of plaintiff's attorney. The marshal was examined, and he stated, that having seized the furniture and made an inventory of it, on a former execution of one Verdere, which was partly settled, he levied the plaintiff's fieri facias on the same furniture, and an additional quantity; that he left the property with the defendant, taking an indemnity against subsequent executions; but that soon after the death of Fitzsimmons, in August last, he seized the property again, and retained possession till the sale, which seizure or repossession was gained, prior to the 9th of September, when Lewis's execution issued.

It was contended, by Tilghman and Rawle, for Lewis, that the furniture under Azcarati's fieri facias, was not seized, as appears by the only legal evidence, the return of the writ, and the marshal's docket, and that it could not be seized under the venditioni exponas. But at all events, the leaving the property with the defendant, did away the force of the seizure, as decided often in this court. That the proceedings of Lewis are regular, as an execution was taken out within a year after the judgment; and that the continuances, though not actually entered on the roll, may be considered as if done. Strange, 100; 2 Burns, 172.

Levy, for the plaintiff, contended, that Lewis's execution was irregular, as the con-

tinuances of his first execution cannot be entered, unless the first execution was returned and filed. 2 Wils. 82; 2 Tidd, Pr. 1004; 2 Saund. 72f, 68e.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

WASHINGTON, Circuit Justice, delivered the opinion of the court. The first question is, whether Mr. Lewis, in whose behalf this motion is made, is entitled to the money returned by the marshal, as levied, in satisfaction of the plaintiff's execution? If he would have been entitled, in case his right had accrued upon a judgment of this court, his case will not be different because his judgment was obtained in a state court. This is not the only remedy which a party has, to redress himself against an officer who applies to the satisfaction of some other judgment, the proceeds of property which is bound by the execution of such party. But the practice of deciding upon motion, the priorities and rights of contending parties, for money raised by the officer upon execution, and brought into court, contributes to the convenience of those parties, and to the safety of the officer. It saves expense, and prevents multiplicity of suits. Nevertheless, the court will take care, that the person who is authorized to take out the money, is entitled to the same, under a regular execution, and that the proceedings under it have been regular. If such irregularity appears, as in the opinion of the court is sufficient to set aside the execution; the court will not interfere in a summary way, in favour of the party, but will leave him to his other remedies, and will leave the officer to act in such manner as he may think most safe. For, it would be not less absurd than mischievous, to permit a person to take money out of court, under the authority of an execution, which, the court from which it issued may, and ought, to set aside for irregularity.

The question then is, whether the execution, under which Mr. Lewis claims, has been regularly issued? The objection that it issued more than a year and a day after the judgment, without a scire facias to warrant it, seems to the court fatal. It is true, that if the first execution, which was taken out within the year and day, returnable to December 1800, had been regularly continued down to the period when this execution issued; or if that execution had been returned and filed, so that the continuances could be considered as entered; this objection might be removed. And yet, even in that case, there might be considerations sufficiently weighty with the court, to forbid them from supplying the want of regular continuances in favour of an ancient, dormant, execution, to the disadvantage of other creditors having equal equity, although they may have been equally faulty. But it is unnecessary, in this case, to consider the comparative merits of the contending parties for this money, since the court is of opinion, that the irregularity of the proceedings of the present applicant, is fatal to his pretensions.

Case No. 691.

AZURIA v. INSURANCE CO. OF PENNSYLVANIA.

[3 Wash. C. C. 177.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1812.

ADMIRALTY PRACTICE — EVIDENCE FROM RECORD OF FOREIGN COURT TO CONTRADICT WITNESS.

The invoice, stated, in the record of the condemnation of the vessel insured, to have been found on board, at the time of capture, and the answers of the mate, to the standing interrogatories, were admitted in evidence, on the part of the defendants.

Action on a policy on goods on board the Mercer, at and from Philadelphia to Teneriffe. The vessel and cargo were captured, carried into Halifax, and condemned as enemies' property. The record of the sentence of condemnation, was read by the plaintiffs' counsel. The defendants' counsel moved to read—1. The order of the court directing further proof. 2. The invoice stated in the record, as one of the papers found on board at the time of the capture, and particularly referred to by the captain and part owner, in his answers to the standing interrogatories; a copy of which interrogatories, with the answers, was proved by the depositions of witnesses taken in this cause, and by the answers of the mate to the standing interrogatories, in order to contradict his deposition referred to. This was objected to by the plaintiffs' counsel; but the court thought the evidence offered came within the rule laid down in the case of Marshal v. Union Ins. Co., [Case No. 9,135,] and admitted it to be read. The invoice, offered to be read, being the one referred to in the depositions of two of the witnesses, taken in this cause, is made part of them; and there can be no doubt of the propriety of reading the answers of the mate, to the standing interrogatories, for the purpose of discrediting him.

*NOTE. [from original report.] It was stated by Mr. Dallas, on the part of the plaintiffs, that no objection was made to the reading of the interlocutory order, directing further proof.

[1] [Published from the MSS. of the Hon. Bushrod Washington, Associate Justice of the United States, under the supervision of Richard Peters, Jr., Esq.]

B.

BAACK, (MANUFACTURERS' NAT. BANK v.) See Case No. 9,052.

BABBAGE, (STRATTON v.) See Case No. 13,527.

Case No. 692.

BABBELL et al. v. GARDNER.

The CATHARINE.

[Bee, 87.][1]

District Court, D. South Carolina, 1796.

SEAMEN—WAGES—FORFEITURE—GOING ON SHORE—DISCHARGE.

1. A British seaman does not forfeit his wages, under Act 2 Geo. II., merely by coming on shore to demand legally payment of his wages; but this must be done within forty eight hours after he leaves his ship.

2. Words which might imply a discharge of the chief mate do not amount to a discharge when spoken by the captain in anger and when the captain on the following day orders the mate to go on board to his duty.

[In admiralty. Libel by George Babbell against Job Gardner and the brig Catharine for wages. Dismissed.]

BEE, District Judge. This is a suit for wages as chief mate of the brig Catharine. The vessel is British property, the articles were signed in London, and, therefore, the contract must be considered altogether according to the lex loci of the country where it was made. The argument has been full, and the evidence long, and, in some points, contradictory; but upon mature consideration, the two following points seem alone to call for my decision.

1st. Whether there has been such a breach of his contract on the part of the actor as amounts to a forfeiture of his wages.

2d. Whether he is entitled at this time to demand them.

It appears that the actor did his duty on board this vessel for upwards of eleven months; and no complaint is produced, prior to the dispute which occasioned this suit. The words made use of by the captain, in the heat of passion, might, if there had been no subsequent explanation, have implied a discharge; but the conduct of the captain next morning was fully sufficient to do away with that impression: for he desired the mate, coolly, to go on board and do his duty; and upon hearing something about being discharged, asked who had discharged him. But was this retraction on the captain's part so far binding on the mate as to make the latter guilty of desertion? That he considered himself as discharged is certain. That upon his own statement of the circumstances, counsel concurred with him, is also clear.

Let us then look into the act of 2 Geo. II., to which the articles expressly refer. The 3d clause says that desertion, or obstinate refusal to proceed on the voyage shall incur the forfeiture of wages. No such obstinacy has been pretended here. The act further declares that entering on board a ship of war shall not amount to desertion; and that no mariner shall, by signing articles, be deprived of the means of recovering wages due before that act passed.

In their construction of this clause, the courts of admiralty in this country, prior to the revolution, considered no seaman as a deserter because he entered on board of a ship of war, or because he applied to a court of justice for his wages, within forty eight hours after leaving his ship. Numberless instances of this sort may be found among the records of this court; and I remember the remarkable Case of Pitkin and Cardon, [unreported,] where this point was fully discussed. Indeed, if the letter of the articles be alone referred to, "that no man, under any pretence whatever should go ashore without leave of his captain," redress must, in most cases, be withheld from the injured seaman; for, having once had recourse to the law, he would hardly venture back to his ship, till his suit should be determined.

I am of opinion that the actor having applied for legal satisfaction within forty-eight hours after he left the vessel, cannot be considered a deserter, nor chargeable with a breach of articles. But I am also satisfied that the hasty language of the captain does not amount to a discharge, if coupled with subsequent circumstances. The articles must be complied with, and the voyage therein described must be performed. Till then the mate cannot demand his wages. Let the summons be dismissed.

[1][Reported by Hon. Thomas Bee, District Judge.]

BABBETT, (D'WOLF v.) See Case No. 4,220.

Case No. 693.

BABBITT v. BURGESS.

[2 Dill. 169;[1] 7 N. B. R. 561; 5 Chi. Leg. News, 326.]

Circuit Court, E. D. Missouri. March, 1873.

BANKRUPT ACT — RIGHT OF ASSIGNEE TO SUE — PAYMENT TO DEBTOR AFTER BANKRUPTCY — TECHNICAL OBJECTIONS UNAVAILING IN APPELLATE COURT — PROCEDURE WHERE SEVERAL DEFENDANTS RESIDE IN DIFFERENT DISTRICTS OF THE SAME STATE.

1. An assignee in bankruptcy may sue on a written contract entered into between the bankrupt and the defendant, to recover a debt alleged to be due the bankrupt thereunder.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

2. Such a cause of action is not local.

3. Payments made mala fide to a debtor after a petition in bankruptcy is filed against him, are void.

4. Whether payments under all circumstances made to such a debtor are void, quaere?

[See Howard v. Crompton, Case No. 6,758.]

5. Mere technical objections taken for the first time in the appellate court are unavailing. Judiciary Act, § 32. [1 Stat. 91,] applied.

6. The act of May 4, 1858, (11 Stat. 272,) prescribing the mode of procedure where there are several defendants residing in different districts of the same state, construed and applied.

At law. This is a writ of error to United States district court for the western district of Missouri.

It appears from the record in this case that the plaintiff is assignee of Bowman, also of Miller, and of Miller & Co.; the copartnership being composed of Bowman and Miller. On the 9th of March, 1868, Bowman was adjudged bankrupt, and thereafter Vose was duly appointed assignee of said Bowman. In June following, said Vose, as said assignee, filed a bill in equity praying for an injunction to restrain this defendant and the Atlantic & Pacific Railroad Company from paying to Miller any money due to said Miller on account of work done for said railroad, and to restrain said Miller from receiving the same. An injunction was granted and served June 17, 1868, on the defendant and the company. In July following, proceedings in bankruptcy were commenced against Miller, and Miller & Co., and on the 31st of August, 1868, said Burgess, the defendant, paid to Miller a certain sum of money due to said Miller from the defendant—the amount paid being seventy-five per cent. of the amount due. In December, 1868, Miller, and Miller & Co., were adjudged bankrupts in the course of the proceedings commenced against them in July preceding.

Subsequently, Vose resigned his assigneeship; Babbitt was duly appointed his successor, and Vose executed in due form the assignment to Babbitt. The latter, on motion to the court, was substituted for Vose, assignee of Miller, as plaintiff in this cause—this cause having been originally commenced by Vose, when he was assignee, to recover of defendant what was alleged to be due from him to Miller, the bankrupt. After that substitution was made, Babbitt, by leave, filed an amended declaration.

The subsequent proceedings appear in the opinion of the court. [Judgment for plaintiff.] The defendant sued out the writ of error that brings the cause to this court. [Affirmed.]

A. H. Bereman, for plaintiff in error.

N. Meyers, for defendant in error.

Before DILLON, Circuit Judge, and TREAT, District Judge.

TREAT, District Judge. After the amended declaration was filed, the defendant moved to dismiss the suit on the ground that "the assignee of Miller & Co. cannot maintain a suit as assignee of Miller," which motion was overruled and an exception thereto saved.

That motion was properly overruled, as is manifest, not only from the record, but from the course of proceedings in those bankrupt cases which involve both private and copartnership estates. In these proceedings, then, Bowman was adjudged a bankrupt on his own petition in March, and therefore his interest in the copartnership assets passed to Vose, his assignee. In July a petition was filed against Miller, and also against the copartnership of Miller & Co., and both Miller, and the copartnership of Miller & Co. were adjudged bankrupt, and Vose became the assignee of Miller, and also of Miller & Co. Thus, Vose was originally, and the present plaintiff, as his successor, is now assignee, not of Bowman alone, but also of Miller & Co. and of Miller. As assignee of Miller, therefore, he could maintain the suit against defendant on the written contract between Miller and defendant. The motion to dismiss was founded on an error of fact as well as a misapprehension of the relative position of the parties.

The next step by defendant was the filing of a plea to the jurisdiction, which plea was heard and overruled. No exception to the action of the court in that matter was taken; and the plea was evidently bad on its face. It set out that the cause of action occurred out of the district, and that the defendant resided out of the district; but the cause of the action was not local, nor was it averred that the defendant was not found and served within the district.

Thereupon defendant filed his plea to the merits, setting up payment to Miller of all that was due him, on the 12th of May, 1868, and prior to any proceedings in bankruptcy against either Miller or Miller & Co., or rather the delivery of the following order to Miller and the receipt of the same by Miller in satisfaction of all due the latter:—

"Contractor's Office, S. W. P. R. R., Rolla, Mo., May 12, 1868. To the commissioners appointed under the law passed by the general assembly, March, 1868, for settlement of claims for work done and materials furnished: Please pay E. Miller $3,607 7-100, being the amount due him on a full and final settlement of his accounts as sub-contractor on sections 7 and 8 west of the Gasconade river, on the line of the Southwest Pacific Railroad. [Signed] E. Burgess & Co., Contractors.

"I acknowledge the above to be a just and final settlement of my account with E. Burgess & Co., contractors. [Signed] E. Miller."

To the pleas of the defendant, plaintiff filed a replication, to which there was a rejoinder.

When Vose was assignee, he and defend-

ant's counsel entered into a written agreement of the facts, in order to avoid taking unnecessary depositions. That agreement was an express admission that on the 17th of June, 1868, Burgess owed to Miller, for work under his sub-contract, the sum of $3,607 7-100, that sum being the true balance due at that time. During the trial, a copy of a notice addressed to plaintiff's attorneys and signed by the attorneys for the defendant, was offered, it being to the effect that the defendant withdrew said written admission, and would object to the reading of the same in evidence at the trial. The transcript does not show that the notice was previously served on plaintiff's attorneys, nor what action, if any, was taken by the court with reference to it. So far as can be inferred, the court did not hold the defendant to his written admission, for the order on the commissioners and the receipt of defendant therefor, above recited, were received in evidence: and also the oral testimony of the defendant and of his bookkeeper, the latter of whom says he personally made the settlement of May 12, 1868, with Miller. It is thus evident that the defendant had the full benefit of all he claimed. His own testimony is, that he delivered the order of May 12 to Miller in payment of the demand due, and then on August 31, 1868, bought it of Miller at seventy-five cents on the dollar. As to the weight of testimony, and the general finding for plaintiff (this case having been tried without a jury, and no question of law having been saved with respect thereto), the case of Norris v. Jackson, 9 Wall. [76 U. S.] 125, is decisive. This court cannot on a writ of error go behind that general finding to inquire into the weight or sufficiency of the evidence. It is apparent, however, from the transcript, that the order and receipt (so called) of May 12th, 1868, did not amount to an accord and satisfaction. It was an accord, but not satisfaction. It is also evident that neither party regarded it as full satisfaction or payment, for the order remained dishonored as late as August 31, 1868, when defendant says he bought it at seventy-five cents on the dollar. It is probable, therefore, that the district court rightly concluded that the defendant, after he had full knowledge of the pending proceedings in bankruptcy against Miller, and while the injunction was in full force, did make payment to the latter, in fraud of the bankrupt act; and consequently the payment was void. It is not necessary for this court to take the extreme position held by the supreme court of Pennsylvania, [Mays v. Manufacturers' Nat. Bank, 64 Pa. St. (14 P. F. Smith,) 74,] [2] and rule that all payments made to a debtor, after a petition filed against him in bankruptcy, are to be adjudged void, if the debtor is subsequently declared bankrupt. This court, however, holds that payments thus made mala fide, or with a view of defeating the bankrupt act in any of its essential requirements, are void, and the person by whom such payment was made can be held to answer for the original demand to the assignee, whose title relates to the day of commencing proceedings in bankruptcy. It may have been, therefore, that the district court reached the conclusion, from the evidence, that the payment by the defendant in August was mala fide and in fraud of the law. And it may be that it was with reference to the mala fides that it permitted the injunction record to be received in evidence, which fact forms the principal ground insisted upon for a reversal. The injunction order, and its service on defendant, tended to show that he had notice, not only of the demand of Bowman's assignee, but of the nature of that demand upon the money due, and also of the then contemplated proceedings in bankruptcy against Miller. If that was the view of the court, the admission of that record was competent, and this court has no means, from the transcript here, to discover anything to the contrary.

As to the objections taken here for the first time, on mere technical grounds, to the pleadings, it must suffice, even if they constituted good causes for a special demurrer (which this court does not admit), that inasmuch as no special demurrer was filed in the district court, the thirty-second section of the judiciary act [1 Stat. 91] forbids us to notice them. That section is very broad and very liberal, and has been held to authorize such amendments to be made, even in the appellate court. Its design is to promote the early, just, and legal determination of matters in controversy. Parties litigant should, if they so desire, interpose their technical objections in the court below, and if they do not, they ought not to be heard for the first time in the appellate court upon such points, especially where it is obvious that the judgment was such as the law and facts demanded. It subserves no good or lawful end to have a right judgment reversed and litigation prolonged, when the appellant has no substantial or meritorious objection to urge—when the technical points presented, it is clearly evident, could not, however decided in the court below, have prejudiced his rights in any way. Loose pleading and practice are to be discouraged; but where the right to amend is liberal, technical and formal defects should be urged, in order that they may be corrected in the court of original jurisdiction. Such defects are no ground for reversal of a judgment here.

The objections interposed to the admission of the injunction record, and the argument of appellant's counsel, overlooked entirely the enactment of congress, of May 4, 1858, (11 Stat. 272.) This act prescribes, inter alia, the mode of procedure where several defendants reside in different districts in the same state.

The service of the injunction order on defendant in the eastern district was correct.

[2] [See note at end of case.]

and in strict conformity with this act of congress. All, therefore, which is in the transcript by way of objection to jurisdiction in the injunction suit, on account of the residence of the defendant and of the place of service, were not well taken. There were three defendants to the injunction suit, and it was stated in the bill that Miller resided in the western district and defendant in the eastern district, and the return to the order shows that they were served in their respective districts, as the act of congress required.

When this case was here before, the record did not disclose the condition of the injunction suit, and we held the proceedings in that suit to be inter alios acta. The present transcript shows that suit to have been substantially between the same parties, and to have been conducted as the act of congress required; therefore there was no error in admitting that record in evidence.

Affirmed.

[NOTE. The ground of the ruling in Mays v. Manufacturers' Nat. Bank, 64 Pa. St. (14 P. F. Smith,) 74, was that the bankrupt act of March 2, 1867, (14 Stat. 517,) contained no express provision that payments made in good faith to a bankrupt after his assignment should be valid, and therefore all such payments must be invalid, for the assignment is constructive notice to all the world. But the act provides that the assignment shall relate back to the beginning of the proceedings, and consequently payments made after that time are void. This question was not involved in the decision, which was as follows: Property acquired by a bankrupt after his assignment is not subject to the proceedings in bankruptcy, and when it is deposited by the bankrupt in a bank, and paid out again on the bankrupt's checks before a discharge is granted him, the bank is not liable to the assignee for the amount so paid.]

BABBITT, (HARRIS v.) See Case No. 6,114.

Case No. 694.

BABBITT v. WALBRUN et al.

[1 Dill. 19;[1] 4 N. B. R. 121, (Quarto, 30;) 2 Chi. Leg. News, 285.]

Circuit Court, W. D. Missouri. 1870.

BANKRUPTCY—SALES OUT OF ORDINARY COURSE—PROOF OF FRAUD, &C.

1. Under the 35th section of the bankrupt act [of March 2, 1867; 14 Stat. 517] it was held erroneous to instruct the jury "that if a sale of property by the bankrupt was not in the ordinary and usual course of business, it was fraudulent." The instruction should have been, not that such a sale was absolutely fraudulent, but that the fact referred to was prima facie evidence that it was fraudulent.

[See Rison v. Knapp, Case No. 11,861; Ashby v. Steere, Id. 576; Martin v. Toof, Id. 9,167; Toof v. Martin, 13 Wall. (80 U. S.) 40.]

2. A sale of property by the bankrupt out of the usual and ordinary course of business is presumptively fraudulent, but this presumption may be rebutted by evidence aliunde, to be produced by the vendee.

[See Collins v. Bell, Case No. 3,010; Ashby v. Steere, Id. 576; Main v. Glen, Id. 8,973; Norton v. Billings, 4 Fed. 623.]

3. When it is sought to affect a second vendee with fraud, such fraud must be shown, and the mere fact, without more, that he knew that the sale by the bankrupt to the first vendee embraced all of the stock of the seller, will not make the purchase of the second vendee fraudulent in law.

4. Certain sections of the bankrupt act, relating to fraud, commented on by the circuit judge.

[See Babbitt v. Walbrun, Case No. 695, and note.]

[5. Cited in Andrews v. Graves, Case No. 376, to the point that, to annul a sale, the vendee must be shown to have had good reason to believe that the insolvent was to evade the bankruptcy act.]

[6. Cited in Re Bousfield & Poole Manuf'g Co., Case No. 1,704, to the point that the six-months provision does not apply to cases arising between the bankrupt and a bona fide creditor, but between the bankrupt and others; and in Hall v. Hayner, Case No. 5,933, to the point that bankruptcy proceedings must be begun within four months after the giving of a preference to avoid such preference as contrary to the bankruptcy act.]

[In error to the district court of the United States for the western district of Missouri.]

[At law. Action in trover by Babbitt, assignee in bankruptcy of Mendelson, against Walbrun & Co., to recover the value of property alleged to have been fraudulently sold by the bankrupt. The district court gave judgment for plaintiff. (Opinion nowhere reported, and not now accessible.) Defendant brings error. Reversed. A new trial was subsequently had, and judgment again given for plaintiff. (Opinion nowhere reported, and not accessible.) On writ of error, this was affirmed by the circuit court in Case No. 695, and by the supreme court in Walbrun v. Babbitt, 16 Wall. (83 U. S.) 577.]

This case is brought here by writ of error from the district court of the western district of Missouri. The plaintiff is the assignee in bankruptcy of one Mendelson, and brought this action in trover against the defendants, Walbrun & Co., to recover the value of a stock of goods which the bankrupt sold to one Summerfield, and the latter to the defendants.

Mendelson is shown by uncontradicted evidence to have been insolvent, and he sold the whole stock of goods to Summerfield (his brother-in-law) at one time, he having written to the latter to come to the place where the former was living, with a view to disposing of his goods to him. Mendelson had but little if any other property. Summerfield remained there a few days, and leaving the goods in possession of Mendelson, went to the defendants, living in another place, and with whom he was acquainted, informed them of his purchase of Mendelson, the price he gave, and offered to sell the goods to the defendants at five per cent. profit. One of

[1] [Reported by Hon John F. Dillon, Circuit Judge, and here reprinted by permission.]

the defendants went with Summerfield to the place where the goods were, stopped at Mendelson's house, examined the goods, accepted Summerfield's offer, and paid him in cash (as defendants and Summerfield both testify), the purchase money for the goods, and removed them to the defendants' place of business.

There was evidence tending to show that the defendants, or one of the firm, knew that Summerfield had purchased the entire stock of Mendelson; but there was no direct evidence that the defendants or either of them, knew that Mendelson was in debt, or that he had any fraudulent purpose in disposing of the goods to Summerfield.

There was no evidence that either of the defendants made any inquiry on these subjects.

Both Mendelson and Summerfield testify that the latter paid the former in cash for the goods, but Mendelson never paid any of the money to his creditors, giving, as a reason, that he had lost it.

This is a mere outline of the case, but sufficient to enable the instructions, which were given to the jury, and which are assigned as error, to be understood.

Among other instructions to the jury, the court gave the following:

1. "If, upon considering the facts and circumstances of the case, you come to the conclusion that the sale was not in Mendelson's ordinary and usual course of business, then the sale was fraudulent. If the sale is found by you to have been fraudulent, the next inquiry will be, were the defendants, Walbrun & Co., so connected with the sale throughout, as to make them parties in it, or affect them with notice; that is, such knowledge or relation to it as to make them liable.

"The firm of Walbrun & Co. consists of three partners; what any one or more of the partners did, or knew, is the knowledge of the whole of the partners, and they are, so far as this case is concerned, alike responsible.

2. "Returning to the first view presented in regard to Mendelson's insolvency, and the reasonable cause to believe it which Summerfield must have had, in order to make the sale void, you are instructed that if either of the partners of Walbrun & Co. had reasonable cause to believe that, at the time of the sale to Summerfield, Mendelson was insolvent, or acting in contemplation of insolvency, and the sale therefore void, and they or either of them afterwards, with that knowledge, purchased or obtained possession of the stock of goods in controversy, and converted them to their own use, they are responsible for the value of the goods.

3. "Upon the second branch of your inquiry as to the prima facie fraudulent sale, because not made in the usual course of business, you are instructed that if Walbrun & Co., or either of the partners, knew that the sale was not made in the ordinary and usual course of business, by Mendelson to Summerfield, they are all affected with knowledge of the legal fraud, and if they afterwards, in any manner obtained possession of the goods, and converted them to their own use, they are responsible for their value. The fact that the goods passed through the hands of Summerfield makes no difference in the liability of Walbrun & Co., provided they were affected with knowledge or notice of the fraud, under the instructions given."

The plaintiff recovered, and the defendants prosecute a writ of error.

Allen and Broadhead, for plaintiffs in error.
N. Meyers, for defendant in error.

Before DILLON, Circuit Judge, and TREAT, District Judge.

DILLON, Circuit Judge. The question is whether the instructions to the jury, referred to in the statement of the case, are correct; and this involves a construction of the 35th section of the bankrupt act [of March 2, 1867; 14 Stat. 517, c. 176.]

The second branch of this section is in these words: "And if any person being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay, the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud."

It is to be read, however, in connection with the first subdivision of the same section, and with section 23 and section 39 (latter part) of the same act, these being in pari materia.

The court instructed that "if the sale was not in Mendelson's ordinary and usual course of business, then it was fraudulent." The court should have said, not that it was fraudulent, but that such a fact was prima facie evidence that it was fraudulent.

The sale by Mendelson to Summerfield would be fraudulent if the following facts concurred:

1st. If Mendelson was insolvent, or contemplated insolvency or bankruptcy.

2d. If Summerfield, when he bought the goods, had reasonable cause to believe him to be insolvent, and to be acting in contemplation of insolvency, and that the sale was made by Mendelson with a view to prevent, etc., or to defeat, etc., or to evade, etc., the provisions of the bankrupt act.

Sales so made are void and in fraud of creditors and their rights under the bankrupt law.

And as against the immediate vendee and all actual participators, such a sale, if made out of the usual and ordinary course of business (as where an insolvent merchant, as in the case at bar, sells out all his stock and property), is prima facie evidence of fraud; that is, of the foregoing elements constituting a fraudulent sale. But it is only prima facie, and the presumption may be rebutted by evidence aliunde to be produced by the vendee.

Now the second instruction, viewed in the light of the above exposition of the meaning of the statute, is erroneous, in that it omits, in speaking of the facts which make Walbrun & Co.'s purchase fraudulent, some of the essential elements of fraud.

This court cannot agree with the learned judge of the district court in the views of the law expressed in the third instruction.

It directs the jury that if the defendants knew that the sale by Mendelson to Summerfield was not made in the ordinary and usual course of business, they (the defendants) are affected with the legal fraud, and that if they afterwards obtained the goods in any way, and converted them, they are responsible. The error is in holding that such a sale is necessarily fraudulent, instead of presumptively fraudulent.

Besides, when it is proposed to affect a second vendee, such vendee must be shown to have participated in the original fraudulent sale, or it must be shown that he knew, or at least had reasonable cause to know, the facts which made the first sale fraudulent. The mere fact, without more, that the second vendee knew that the first sale embraced all the stock of the seller, is not enough to make his purchase fraudulent in law.

The title of the second vendee can only be impeached when it is shown that he participated in the fraudulent sale, or if this is not shown, then by showing that his purchase was actually mala fide; that is, made with knowledge that the sale to the first vendee was fraudulent; and the mere fact that the second vendee knew that the sale to the first vendee was made out of the ordinary course of business, will not alone defeat the title of the second vendee. It is only a circumstance proper as evidence to go to the jury on the question of the bona fides of the purchase by the second vendee. The distinction is to be observed between fraud and the evidence which goes to establish fraud. It is proper to observe that the term "fraud," as used in the sentence of the 35th section under consideration, relates to both classes of cases mentioned therein. The first class is confined to preferences, and the second to sales, etc., other than by way of preference. See Bean v. Brookmire, [Case No. 1,168.]

[2] [Sections 23 and 29 are reconcilable, by confining the latter to actual frauds as contradistinguished from constructive frauds.]

Since the views of his honor below are not fully coincident with those above, the judgment of the district court is reversed, and the case remanded for a new trial.

Judge TREAT concurs.

Reversed.

NOTE, [from original report.] At the April term, 1871, this cause came once more before the court, the plaintiff having again recovered: and the rulings in the court below being in accordance with the foregoing opinion, the judgment was affirmed, [Case 695, and the judgment of the circuit court thereafter affirmed by the supreme court in 16 Wall, (83 U. S.) 577.]

Case No. 695.

BABBITT v. WALBRUN et al.

[6 N. B. R. 359.]

Circuit Court, W. D. Missouri. April Term, 1871.[1]

INSOLVENCY—FRAUDULENT AND SHAM SALE—EVIDENCE—ADMISSIBILITY.

[1. Under the bankrupt act of March 2, 1867, (14 Stat. 517, c. 176,) a sale out of the usual course of business of all one's stock in trade, to a person who knows the seller's insolvency, is prima facie void and fraudulent as to the purchaser, and a sale by such purchaser to persons knowing the first to have been fraudulent or a sham is void.]

[See Babbitt v. Waldron, Case No. 694.]

[See note at end of case.]

[2. A charge that the jury, to give a verdict for the assignee in bankruptcy, must be satisfied that a certain sale by the bankrupts was void or fraudulent, and that the second buyers participated in, or had reasonable cause to know of, the fraud, is sufficient, without a separate charge that participation in the fraud was essential to recover.]

[See note at end of case.]

[3. The admission of an insolvent merchant's statement, whether true or not, that he lost the money received from the sale of his stock, the reality of the sale being doubtful, taken in connection with testimony that the purchaser had no means of paying, is not ground for error, since it was not made the basis of any suggestion or instruction to the jury, and was at most irrelevant matter, which could injure neither party.]

[4. In a suit by an assignee in bankruptcy, the proceedings in bankruptcy are admissible to show the appointment of the assignee; and the introduction of the record of such proceedings up to and including the appointment, no use being made of them, because the insolvency was admitted, is not a ground for error.]

[Cited in Re Crane, Case No. 3,352.]

[In error to the district court of the United States for the western district of Missouri.

[2] [From 4 N. B. R. 121.]

[1] [Affirmed by supreme court in Walbrun v. Babbitt, 16 Wall. (83 U. S.) 577.]

[At law. Action of trover under the bankrupt act of March 2, 1867, (14 Stat. 517, c. 176,) by Babbitt, assignee in bankruptcy of Mendelson, against Walbrun & Co., to recover property alleged to have been fraudulently sold. Judgment was given for plaintiff, (opinion of district court nowhere reported, and not now accessible,) but on writ of error this was reversed by the circuit court, (Case No. 694.) Upon a new trial, plaintiff again had judgment, (opinion of district court nowhere reported, and not now accessible.) Defendant brings error. Affirmed. This judgment of the circuit court was affirmed by the supreme court in Walbrun v. Babbitt, 16 Wall. (83 U. S.) 577. See note at end of case.]

TREAT, District Judge. In order that the views of the court upon the errors assigned, may be stated briefly, and that they may be understood, a succinct statement of the case is necessary. Mendelson, doing business in Kingsville as a merchant, wrote to his brother-in-law in St. Louis to come and buy him out. Mendelson was insolvent at the time. The brother-in-law, Summerfield, went to Kingsville, and learning that Mendelson wished to sell out because the competition was so sharp that he could not make a living, bought out Mendelson at twenty-five per cent. off the cost of the stock. Immediately, Summerfield, leaving the stock in possession of M. during his (Summerfield's) absence, went to Chillicothe, Missouri, and offered to sell the whole stock to defendants at twenty per cent. off, whereby Summerfield would apparently make five per cent. on the trade. Defendants, by one of their partners, went to Kingsville with S., stopped over night at Mendelson's house, in the morning went to the store where the stock of goods was, commenced an examination of them, and upon learning that S. must leave in consequence of the alleged sickness of his wife, and upon the assurance of S. that he would make all right if the inventory was found defective, defendants paid the full inventory price at the rate agreed, and immediately shipped the goods away.

In connection with the alleged sale from Mendelson to Summerfield, and the subsequent sale by Summerfield to defendants, there were many facts and circumstances provoking inquiry, inducing suspicion, and represented differently in the sworn testimony of the respective parties thereto. The case is one where, in an effort to unravel a supposed web of fraud, the parties implicated have to be successively examined under oath; thus seeking to ascertain from unwilling witnesses what they designed to conceal, and what their interest is to keep unrevealed. In this case, as in most others of a supposed scheme of fraud cunningly devised, it was necessary to pursue the inquiry searchingly into all the facts and circumstances surrounding the two-fold transaction, and, consequently, to permit the testimony to take a wider range than in ordinary suits at law. In doing so, many statements, voluntarily or otherwise made by the adverse witnesses who are the alleged parties to the fraud, should be carefully scrutinized, and admitted or rejected in the light of the developments made in the progress of the trial and the attitude of the witnesses. It does not follow that the plaintiff is concluded by every statement made by such a witness when called by him, nor is he precluded from proving directly the reverse to be the truth. Hence it was proper to admit the testimony objected to under this head, and to charge the jury as to the credibility of witnesses in the manner the court did, instead of doing so in the language of the instruction asked, the latter being inapplicable to the course pursued.

Applying the rules of evidence correctly, the only doubtful point is as to the admission of Mendelson's statements concerning his loss of the money alleged to have been paid to him by Summerfield. But that statement by Mendelson had to be taken in connection with the various aspects the case might assume during the trial, and especially with the testimony that Summerfield did not have the means to pay what he and Mendelson say he did pay for the stock of goods; and the fact thus stated by him, whether true or not, was not made the basis of any suggestion or instruction, and at most was treated as an irrelevant and immaterial matter from which none of the parties could be prejudiced, and least of all the defendants. Without analyzing in detail the various facts concerning which evidence was given, and the instructions asked and refused, and the different portions of the charge, the main propositions of law controlling the controversy will give all needed light as to the views entertained by this court.

It is apparent that the case throughout had two aspects, viz.: First. Whether there had been an actual or mere sham sale to Summerfield. Second. Whether the sale to defendants was actually by Summerfield, or through a mere sham contrivance ostensibly by him, but really by Mendelson. Hence each aspect of the case had to be borne in mind, and what would not have been strictly admissible in evidence in one aspect, would be in the other.

It was not for the court arbitrarily to determine which aspect the jury might under the evidence find to be the true one. It appeared that Mendelson, because he could not make a living at the business, (as he and Summerfield both swear,) sends for his married brother-in-law to buy out, for cash, a losing business; and that immediately his brother-in-law, destitute of means, perhaps, appears on the scene, pretends to buy out the concern, leaves it in charge of Mendelson, immediately proceeds to a distant town,

negotiates with defendants to sell to them, and one of the defendants accompanies Summerfield, without delay, to Kingsville, closes the bargain and ships the goods away at once. Now the inquiry was a natural one, whether the part Summerfield played was not merely a contrivance between Mendelson and himself to sell the goods to defendants nominally through Summerfield as Mendelson's vendee, but actually from Mendelson direct to defendants. That branch of the subject matter had to be thoroughly investigated. The plaintiff was not bound to accept the pretenses set up as true, but had a right to go behind them in pursuit of the facts. The instructions asked and the charge by the court relate largely to the hypothesis of an actual sale by Mendelson to Summerfield, as the consequent relation of defendants to the case as second vendees; yet the charge looked to each of the two aspects, and did not, as did the instructions which were refused, wholly ignore the other view of the case.

Treating the case in the light of the law governing a second vendee, the main proposition would be: Were defendants innocent and bona fide purchasers for value? To ascertain their status it was necessary to learn whether they paid anything on the purchase, and how much, and whether they had notice of Summerfield's title as it stood affected by his dealings with Mendelson. Necessarily, if the title was good in Summerfield, the controversy was at an end; and hence the first step was as to that title; therefore the inquiry under the bankrupt act into the alleged sale to Summerfield. As it was out of the usual course of business, it was presumptively fraudulent and void as to him, if he knew Mendelson to be insolvent, (and the insolvency was admitted,) because, as held by this court during this term, in the case of Lawrence v. Graves, [Case No. 8,138,] it is impossible to conceive how a person buying from a known insolvent all of his stock of goods (which the law presumes prima facie evidence of fraud) could be in a position other than to be put upon inquiry where reasonable cause existed to believe that the transaction was a meditated fraud. In that view the court gave the instruction most complained of. Now if Summerfield bought the goods under such circumstances the sale to him was fraudulent, unless shown by rebutting evidence to have been bona fide and honest.

If no such rebutting evidence was offered, the next step was to ascertain whether defendants had notice of the previous fraudulent transaction, or participated in it in such a way as was designed to aid the fraudulent purpose intended by Mendelson. In Clements v. Moore, 6 Wall. [73 U. S.] 312, the legal principles governing such cases are succinctly stated: "A sale may be void for bad faith, though the buyer pays the full value of the property bought. This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer loses the property, without reference to the amount or application of what he has paid, and he can have no relief, either at law or in equity. * * * The cardinal principle in all such cases is that the property of the debtor shall not be diverted from the payment of his debts, to the injury of his creditors, by means of the fraud." Applying the doctrine thus laid down to the case at bar, the sale to defendants would be void if defendants had notice that the sale to Summerfield was fraudulent, or, there being no actual sale to Summerfield, if they really took title directly from Mendelson, knowing all the facts charged and the relation of Summerfield to the transaction. It was proper therefore, to admit or exclude testimony, and to instruct the jury with reference to both hypotheses. True, the whole law applicable might have been more distinctly and formally unfolded, if each hypothesis had been separately stated, and the legal rules pertaining thereto arranged under each specific head; yet it often happens that such an elaborate exposition of legal rules serves to confuse rather than aid juries.

The charge put to the jury, the essential inquiries upon which the case was to turn, was first, as to the transactions between Mendelson and Summerfield, and next as to the bona fides of defendants. As to the second inquiry, the language was: "It is not, however, sufficient in this case to find the sale from Mendelson to Summerfield to have been either void or fraudulent. In order to find the issues against the defendants you must be satisfied that they participated in the fraudulent sale, or at least had reasonable cause to know the sale to have been fraudulent." Thus both hypotheses were included, so that notice of the fraud or participation in it was declared essential to a recovery. It was not, therefore, necessary to repeat that proposition, it having been once distinctly announced.

The views expressed by the plaintiff's counsel are not broad enough to cover the case of a second vendee. The first sale being void as between the parties thereto in consequence of fraud, a second vendee being a bona fide purchaser for valuable consideration is not affected by the technical rules which obtain as to the original parties alone. Thus a purchaser from Mendelson who knew Mendelson to be insolvent, if the sale was out of the usual course of business, might have reasonable cause to believe the fraud to exist; but a purchaser from the first vendee who knew merely that it included the whole stock of Mendelson was not thereby charged with notice that the first sale was fraudulent, for other elements are essential to make the sale fraudulent and void. A

sale by an insolvent person, though known to be insolvent, is not therefore necessarily void, otherwise an insolvent person could not lawfully dispose of any of his property. But it is not necessary to go again over the ground already under this head fully stated during this term in the opinion delivered in the case of Darby v. Boatmen's Sav. Inst., [Case No. 3,571.] As previously decided in the case at bar, the purchasers from a first vendee must, in order to invalidate their title, be affected by notice of or participation in the original fraud. That is, must have been purchasers without valuable consideration or mala fide. An examination of the record shows that the proceedings in bankruptcy were offered in evidence, including the bankrupt's schedules, and certainly that record was admissible to show the fact of adjudication and appointment of the plaintiff as assignee. It appears that so much of the bankruptcy record was introduced as included all proceedings of record up to and including the appointment of assignee; and though the schedules were thus introduced as a part of that record, no use was made of them, inasmuch as the fact of Mendelson's insolvency at the time of the sale was admitted. Thus the question presented by the counsel in that respect does not arise. Juries have twice passed on this case upon the merits; and, therefore, more technical points are to be received with less favor, when the whole testimony is in the record and an examination thereof shows that the verdict was obviously for the right party. Affirmed.

[NOTE. On writ of error this judgment was affirmed by the supreme court. Walbrun v. Babbitt, 16 Wall. (83 U. S.) 577. Mr. Justice Davis, in delivering the opinion, said that section 35 of the bankrupt act of 1867 prohibited fraudulent sales, as well as fraudulent preferences, and declared that such sales out of the usual course of business should be prima facie evidence of fraud. The usual course of business in this case was to sell at retail. "But it is wholly a different thing when he sells his entire stock to one or more persons. This is an unusual occurrence, out of the ordinary mode of transacting such a business, is prima facie evidence of fraud, and throws the burden of proof on the purchaser to sustain the validity of his purchase. Scammon v. Cole, Case No. 12,432; Graham v. Stark, Id. 5,676; In re Kingsbury, Id. 7,816; Driggs v. Moore, Id. 4,083; Tuttle v. Truax, Id. 14,277. Summerfield seeks to overthrow the legal presumption that Mendelson intended to commit a fraud on his creditors, by showing that he paid full value for the goods, in ignorance of the condition of Mendelson's affairs. But the law will not let him escape in this way. The question raised by the statute is not his actual belief, but what he had reasonable cause to believe. In purchasing in the way and under the circumstances he did, the law told him that a fraud of some kind was intended on the part of the seller, and he was put on inquiry to ascertain the true condition of Mendelson's business. This he did not do, nor did he make any attempt in that direction. Indeed, he contented himself with limiting his inquiries to the object Mendelson had in selling out, and to his future purposes. Something more was required than this information to repel the presumption of fraud which the law raised in the mere fact of a retail merchant selling out his entire stock of goods. If this sort of information could sustain the sale, the provision of the bankrupt law we are considering would be no protection to creditors, for any one in Mendelson's situation, and with the purpose he had in view, would be likely to give the party with whom he was dealing a plausible reason for his conduct. The presumption of fraud arising from the unusual nature of the sale in this case can only be overcome by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller. All reasonable means, pursued in good faith, must be used for this purpose. If Summerfield had employed any means at all directed to this end, he would have discovered the actual insolvency of Mendelson. In choosing to remain ignorant of what the necessities of his case required him to know, he took the risk of the impeachment of the transaction by the assignee in bankruptcy in case Mendelson should, within the time limited in the statute, be declared a bankrupt. The defendants are in no better condition than Summerfield would be if he had not transferred the stock to them, because they took his title with full knowledge of its infirmity, and must blame their own folly for the result. Ritter, the active agent of the firm in the transaction, was fully informed by Summerfield of the circumstances attending his purchase, and this information was confirmed on his arrival at Kingsville. He there found Mendelson in charge of the store, with some of the goods boxed up and some on the shelves, sure indications that the sale was recent, and that there had been no actual change of possession. These things, in connection with the residence of Summerfield in St. Louis, and his occupation there, ought to have excited the fears of a reasonable man that the sale by Mendelson was not for an honest purpose, and prompted him to make inquiry upon the subject. Ritter, instead of doing this, treated the transaction as one of ordinary occurrence, and as not imposing on him the duty of ascertaining the pecuniary status of either the vendor or the vendee. Without learning anything, or seeking to learn anything, beyond the facts that the goods suited him, and Mendelson wanted to change his business, he completed the purchase, and immediately transferred the stock to the store of the defendants in Chillicothe. If this sale can be upheld, the law which declared the title of Summerfield prima facie fraudulent could be easily rendered of no benefit, for all that would be necessary for a person buying property out of the ordinary course of business of the seller, to place it out of the reach of creditors, would be, as soon as he had consummated his purchase, to sell to another, who would acquire a good title, no matter how presumptively invalid the title of his vendor might be. It needs no argument to prove that, if the law against fraudulent sales could be evaded in this way, it would furnish no sort of protection to creditors. Ritter, when he purchased, knew the nature of Summerfield's title, because he knew, or ought to have known, that a retail dealer like Mendelson, in selling out his entire stock, was presumptively intending to defraud his creditors, if it should turn out that he had any. Of this the bankrupt law gave him distinct notice, and as he chose, like Summerfield, to remain ignorant of Mendelson's affairs, he took the hazard of Summerfield's inability to prove the fairness of his title. It follows that, if the sale to Summerfield cannot be supported, neither can the sale by him to the defendants. It is unnecessary to notice the exceptions taken to the admission or rejection of testimony, because our decision is based on the evidence which was received without objection, and about which there is no controversy."]

BABBITT, (WILKINSON v.) See Case No. 17,668.

Case No. 696.

In re BABCOCK.

[3 Story, 393.][1]

Circuit Court, D. Massachusetts. May Term, 1844.

PRINCIPAL AND SURETY — PAYMENT BY SURETY—SUBROGATION—PRINCIPAL FIRST LIABLE—BANKRUPTCY.

1. A surety can require the creditor to proceed first against the principal only when his suretyship appears on the face of the instrument, or when he offers to indemnify the creditor in his proceedings against the principal, and to pay whatever the principal fails to pay.

2. Where the principal is bankrupt, a court of equity will, on application by the surety, compel the creditor to prove his debt against the principal, provided the surety bring the amount due into court. And if the surety pay the debt, he will be entitled to be substituted for the creditor, and to assume his rights.

3. An accommodation acceptor of a bill of exchange is a surety, as to the drawer, but a principal as to the holder, although the holder knew him to be an accommodation acceptor.

[Cited in Mead v. National Bank, Case No. 9,366.]

[See Perry v. Crammond, Case No. 11,005.]

4. The holder of a bill of exchange is entitled to prove his debt in bankruptcy against the drawer, the acceptor, and the payee, and to receive a dividend from all their estates until his full debt is paid; and if one only be bankrupt, he may prove his debt against such bankrupt, and also proceed against the others at law.

5. Sureties are generally entitled. upon payment of the debt of the principal, to the securities held by the creditor; but in bankruptcy, if the bankrupt give the creditor a security from his own property, the creditor cannot prove his debt without surrendering the security; but if a security from a third person be transferred to the creditor, he may prove his debt without surrendering the security, and may enforce such security against such third person, provided he do not thereby receive more than his claim.

[Cited in Re Cram, Case No. 3,343; Re Ellerhorst, Id. 4,381; Re Dunkerson, Id. 4,157; Re Anderson, Id. 350; Re Kinne, 5 Fed. 60.]

6. Where a creditor proved his debt in bankruptcy against the acceptor, and, also, brought a suit at law against the drawers and attached their property,—it was *held* that he was not bound to pursue the law-suit at his own expense, but if he did not, the assignee of the bankrupt could carry it on for the benefit of the bankrupt's estate, and at the expense thereof.

[7. Cited in Re Wallace, Case No. 17,094, as an instance of proceedings or petition for the exercise of the equity power under the act of 1841.]

[In bankruptcy. In the matter of Samuel H. Babcock, a bankrupt. Petition by Henry Winsor, assignee, that Hugh R. Kendall, a creditor, for whom the bankrupt was surety on a bill of exchange, be ordered to proceed in a suit against the debtor under said bill, and apply the proceeds to the satisfaction thereof. Ordered that the creditor proceed with the suit, or authorize the same to be carried on by the assignee.]

This was a case in bankruptcy adjourned into the circuit court from the district court, the judge of the district court being interested in the case. The petition on which the case came before the court was as follows: —"Henry Winsor of Boston, in said district, assignee of said Babcock, respectfully represents, that Hugh R. Kendall of said Boston has filed a proof of debt against the estate of said Babcock, in and by which the said Kendall states, that the said Babcock, at and before the date of the proceedings in bankruptcy in his case, was, and still is justly and truly indebted unto said Kendall in the sum of five thousand five hundred seventy-four dollars and fourteen cents, with interest thereon. First upon a certain bill of exchange, dated at Dudley on the thirteenth day of October, 1841, drawn by one Theodore Leonard, agent, upon the said Samuel H. Babcock, and by him accepted, for the sum of five thousand four hundred ninety-nine dollars and seventy-seven cents, payable in eight months from date, to the order of the said Theodore Leonard, agent, and endorsed and delivered to said Kendall for lawful value, which said bill the said Kendall avers, on due presentment thereof at maturity, was dishonored by the said Babcock, whereof the said drawer had due notice. Second, in the sum of seventy-four dollars thirty-seven cents, costs of suit, accrued in an action, brought upon said bill of exchange by said Kendall in the court of common pleas, for the county of Suffolk, in which action property of the said bankrupt was attached. And the said Kendall claims said costs in full. And your petitioner further shows that the said Theodore Leonard was agent of the Dudley Manufacturing Company, a corporation established by law in the commonwealth of Massachusetts, and that, as such agent, and for and in behalf of said corporation, drew said draft: that said corporation was, at the time of the drawing of said draft, and still is, indebted unto the said Samuel H. Babcock: that said Babcock accepted said draft for the accommodation and benefit of said corporation, and that, as between said Babcock and said corporation, the said corporation were bound to take up and pay said draft and save the said Babcock harmless therefrom, and that said Babcock was merely surety for said corporation for the payment thereof; and your petitioner further shows, that said Kendall commenced a suit against the said Dudley Manufacturing Company on said bill of exchange, and caused the property of said corporation to be attached therein, in which the writ was made returnable to the court of common pleas, at the July Term, A. D. 1842, holden at Boston within and for the county of Suffolk. That the said suit is still pending, and the said Kendall prays that he may have judgment in said suit, and take out execution on such judgment, and cause the property of said corporation to be levied upon or sold in satisfaction of said judgment; that your petitioner, on

[1] [Reported by William W. Story, Esq.]

the twenty-fifth day of August last, sent a written notice to the said Kendall, that he would be required to obtain all that can be realized from the said Dudley Manufacturing Company or from said security. And your petitioner further avers, that said Kendall well knew at the time he received the said bill of exchange, that the same was accepted by said Babcock for the accommodation of the said Dudley Manufacturing Company. And your petitioner further represents, that he is advised that by the rules and course of proceedings in a court of equity, or court sitting in bankruptcy, a party claiming to be a creditor of a surety, who holds security from the principal debtor, is bound to apply such security as far as the same will go to the satisfaction of said debt, and that if the creditor relinquishes such security he releases the surety to the extent of the security so relinquished. Wherefore your petitioner prays that the said Kendall be ordered by this honorable court to proceed in said suit and to levy upon said property of said corporation so attached, or to otherwise dispose of the same according to law, and apply the same or the proceeds thereof in satisfaction of said bill of exchange and costs, and that he be not allowed any dividend on the estate of said Babcock until he has first applied said security as aforesaid in extinguishment and satisfaction of said claims."

The answer was as follows:—"The respondent in answer to the said petition says, that he admits that he has filed a proof of debt against the estate of said Babcock as alleged in the said complainant's bill of complaint. The respondent admits said draft was drawn as set forth in the petition, but doth not admit that the same was accepted by said Babcock for the accommodation of the said company, and requires the complainant to prove that fact if material, and avers, that he the said respondent had no knowledge of said fact, if it existed. And this respondent admits, that he did commence a suit against said company upon said draft, as set forth in the said petition, and avers that on the same day he also commenced another suit against the said Babcock, as acceptor of said bill. And the said respondent admits, that on said writ against the said company, he attached all the said company's interest in certain property real and personal, which was subject to other prior attachments, and that all the personal property so attached has been absorbed by the prior attachments thereon; and that a great part of the real estate attached has also been taken on other attachments, and what is now holden by the said Kendall upon the said attachment is the remnant, which has been left of the said estate, after satisfying the said prior attachments, and of the value of said remnant, and also of the title of said company thereto this respondent is ignorant. And this respondent prays this honorable court that the said petition may be dismissed, and that he may be allowed his costs and counsel fees in this behalf sustained." It was further agreed that Babcock was an accommodation acceptor of the bill stated in the petition; and that that fact was unknown to Kendall, the creditor, when he took the bill.

The case was argued by William Gray, for the petitioner, Winsor, and by C. A. Welch, for Kendall, the creditor.

Before STORY, Circuit Justice, and SPRAGUE, District Judge.

STORY, Circuit Justice. The circumstances of the case, shortly stated, are these: Kendall (the creditor), is the holder of a bill of exchange, drawn by one Leonard, agent of the Dudley Manufacturing Company, payable to his own order, upon Babcock, the bankrupt, and accepted by him, and endorsed by Leonard to Kendall. It is admitted that Babcock is a mere accommodation acceptor, but that fact was not known to Kendall at the time of his taking the bill. The bill at its maturity was dishonored, and Kendall has proved his debt in bankruptcy against the estate of Babcock; and has also brought a suit against the Dudley Manufacturing Company as drawers, and attached property of the company in that suit. The assignee of Babcock by his petition now asks the court to order Kendall to proceed in said suit, and to levy his execution upon the property so attached, and to apply the proceeds in satisfaction of the bill of exchange, and that he may not be allowed any dividend on the estate of Babcock until he has first applied the property attached in extinguishment and satisfaction of his claim. The argument in support of the prayer of the petition turns upon this, that Babcock is but a surety for the debt, that the attachment is a security held by the creditor for the debt, and that, in equity, the surety has a right to require, that the security shall be first applied in discharge of his liability pro tanto, before he is called upon to discharge his secondary obligation.

There is no doubt, that a surety for a debt may in many cases be entitled to relief by requiring the creditor to proceed against the principal. But this is ordinarily limited to cases where his character as surety stands confessed upon the face of the instrument itself; and also where he offers to indemnify the creditor in his proceedings against the principal, and also offers to pay whatever the principal may fail to pay under those very proceedings. This is the common course, where the surety seeks, by a bill against the creditor and the principal, to compel the latter to exonerate the surety from losses which may otherwise be sustained by him by the delays and forbearance of the creditor in enforcing his debt. See 1 Story, Eq. Jur. § 327, and cases there cited; 2 Story, Eq. Jur. §§ 730, 849. Upon a similar ground, if the creditor in the case of the bankruptcy of the principal has not proved

his debt against him, but declines to do so, a court of equity will, upon a bill filed by the surety, compel the creditor to prove his debt in bankruptcy, and give the surety the benefit thereof; but then, in such a case, the relief is granted upon the terms, that the surety brings the amount due into court. Beardmore v. Cruttenden, 1 Cooke, Bankr. Law, 211; 1 Deac. Bankr. Laws, (Ed. 1827,) p. 291; Ex parte Rushforth, 10 Ves. 409, 414; Wright v. Simpson, 6 Ves. 734. And if the creditor has himself already proved his debt in bankruptcy, the surety will have a right upon payment of the debt to stand in equity as substituted to the rights of the creditor, and will be entitled to the dividends. But a person may be a surety so far as regards the principal, and yet not be entitled to hold that character in respect to the creditor. Thus, for example, in the case of a bill of exchange, an accommodation acceptor for the drawer is to be deemed the principal and primary debtor, as to the holder of the bill, and it will make no difference generally in cases of this sort, whether he is known to be an accommodation acceptor or not; and yet in respect to the drawer he is to be treated to all intents and purposes as a mere surety. Ex parte Ryswicke, 2 P. Wms. 89; Ex parte Marshal, 1 Atk. 129; Ex parte Matthews, 6 Ves. 283; Ex parte Atkinson, 1 Cooke, Bankr. Law, p. 210; Deac. Bankr. Law, pp. 253, 254; Id. (Ed. 1827,) p. 291; Ex parte Rushforth, 10 Ves. 409, 414. So that it is not safe in all cases to reason, that a person, who is in fact a surety, quoad the principal, is to be treated as a surety throughout in regard to the creditor. That may and usually does turn upon very different considerations. See U. S. v. Cushman, [Case No. 14,908;] Berg v. Radcliffe, 6 Johns. Ch. 302; Hollier v. Eyre, 9 Clark & F. 1, 4, 5. Now, upon the known principles of courts of equity, acting in bankruptcy, the holder of a bill of exchange is entitled to prove his debt in bankruptcy against the drawer, the payee, and the acceptor respectively, if they have all become bankrupts, and to take a dividend against the estates of each until he has been paid his full debt. If one of the parties only is bankrupt, the creditor is still entitled to proceed against the other at law, until he has obtained satisfaction. It makes no difference in the case, whether the bill is an accommodation bill or not. This is sufficiently apparent from the cases of English v. Darley, 2 Bos. & P. 62; Ex parte Bank of Scotland, 19 Ves. 310; Ex parte Rushforth, 10 Ves. 410; Ex parte Reed, 3 Deac. & C. 481; and others cited in 1 Deac. Bankr. Laws, (Ed. 1827,) 239, 255.

In relation to the point of the creditor's having collected securities in his hands for the payment of the debt, it is doubtless true, that sureties are entitled upon the discharge or payment of the debt by themselves to have the benefit of those securities. But in bankruptcy a distinction is taken between the case of a security given to the creditor by the bankrupt himself of his own property, and the case of a security of a third person transferred to the creditor by the bankrupt, or otherwise in his hands. In the former case the creditor is not allowed to prove his debt against the bankrupt, unless he surrenders up the security, or it is sold with his consent, and then he may prove for the residue of his debt, which the security when sold does not discharge. In the latter case he may prove his debt in bankruptcy without surrendering the security of the third person which he holds, and may, notwithstanding such proof, proceed to enforce his security against such third person, provided, however, he does not take, under the bankruptcy and the security, more than the full amount of his debt. This distinction was maintained in Ex parte Bloxham, 6 Ves. 449; Ex parte Crossley, 3 Brown, Ch. 237; and Ex parte Parr, 18 Ves. 65.

From the principles, which have been stated, admitting the attachment to be a security, and the bankrupt to be a mere accommodation acceptor, it is clear, that the creditor has a right to proceed against the bankrupt for his debt in bankruptcy, and also against the other parties to the bill, under his attachment, until he has recovered the full amount of his debt; for it is not a security given by the bankrupt of his own property, but is a security attained by the creditor against other parties to the bill by a proceeding in invitum. I give no opinion, what is the light in which this attachment is to be viewed in respect to the present parties—whether as a security, or as a mere remedial process to enforce payment of the debt against the drawers. In either view, so far as the present petition is concerned, the result must be the same. The most, that the assignee is entitled to, is to have the aid of the court in having the attachment suit carried on to its proper conclusion, for the benefit of the bankrupt's estate as far as regards any surplus, which shall remain after the creditor has received from the dividends in bankruptcy and under the attachment the full amount of his debt. The creditor is not bound to pursue the attachment suit at his own expense, unless he choose so to do; but he is bound, if he does not choose to carry it on upon his own account, to allow the assignee to carry it on for the benefit of the bankrupt's estate at the expense thereof. If the attachment suit is proceeded in, and any money is received under it, the creditor will be entitled to receive so much thereof as, with the dividends received, will cover the full amount of his debt and costs; the surplus will belong to the estate of the bankrupt. If the creditor declines to proceed farther, all the future costs must be borne by the assignee. If the creditor chooses to proceed in the suit, the future costs in the suit must be borne by the creditor and the

assignee, according to their respective interests in, or benefits derived from the suit.

What I shall order, therefore, upon the present petition, is, that the creditor shall forthwith make his election whether he will proceed in the attachment suit upon his own account or not;—That if he elects to proceed therein, then he shall be required to proceed therein under the order and discretion of the court, as it shall award from time to time; and that, if he shall obtain payment therein, and levy upon any property, he shall be entitled to receive from the proceeds, if sufficient, the full amount of his debt and costs —deducting therefrom the dividends received from the bankrupt's estate, and the surplus to be paid over to the assignee. If the creditor shall decline to proceed in said suit, then he shall authorize and allow the same to be carried on by the assignee at the expense and for the benefit of the bankrupt's estate; and that out of the property or money which shall be obtained under and in virtue of the suit, he shall, after the expenses thereof are deducted, be entitled to receive the full amount of his debt, beyond the dividends received by him, out of the proceeds, if sufficient, and the surplus, if any, shall belong to the assignee for the benefit of the bankrupt's estate. And either party shall be at liberty to apply to the court from time to time for further directions in the premises.

[NOTE. For other cases involving the estate of this bankrupt, see In re Babcock, Case No. 697; Ex parte Winsor, Id. 17,884; and Winsor v. Kendall, Id. 17,886.]

Case No. 697.

In re BABCOCK.

[1 Woodb. & M. 26.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1845.

BANKRUPTCY — ASSIGNEE MAY CONTINUE LITIGATION—EXPENSES.

1. If a person become a bankrupt, who was interested in land in dispute one tenth. and helped to defend in the suit, the assignee may continue to defend, if the creditors, knowing the fact, do not object, [but] it may be otherwise in commencing disputed suits, unless the creditors assent.

2. The amount of the expense in the defence would be in proportion to his interest, where no contract to pay more had been made by the bankrupt; but if he had agreed to pay more, e. g. one half, and the defence would not be continued without his paying the half, the effects of the bankrupt are liable for that half till an assignee is appointed; and after that, the assignee, as assignee, is liable for the half, if the creditors did not object to a continuance of the defence, and respectable counsel advised it, and the assignee directed it.

[In bankruptcy. In the matter of Samuel H. Babcock, a bankrupt. The assignee excepts to the commissioner's report as to counsel fees and costs.]

In this case, the assignee paid in part, and proposes to pay in full to Charles G. Loring and William Gray, Esq., $396.09 for professional services, which sum, being charged in his account, was objected to by the creditors when the account was presented for settlement. The court therefore referred the matter to George S. Hillard, as commissioner, to examine and report thereon. His report, made at this term, constitutes a part of the case. It recommends, as reasonable and just. the allowance of only one tenth the whole bill of costs against the effects of Babcock. This is placed on the ground, that no express agreement is satisfactorily proved to have been made by the assignee to pay more, and that the interest of the bankrupt in the matter in controversy where the costs arose, was only one tenth. The assignee not acquiescing in this report, and the district judge being interested as a creditor in Babcock's estate, the case came before the circuit judge for hearing and decision at this term. [The claim as made by the assignee was allowed.]

William Gray, for assignee.

Before WOODBURY, Circuit Justice, and SPRAGUE, District Judge.

WOODBURY, Circuit Justice. On the examination of the report of the commissioner, the conclusions formed by him from the facts proved, do not strike me as entirely just. It is conceded that Babcock was interested to the extent of one tenth with others in certain lands, about which a legal controversy arose with third persons. After it had continued some time in charge of Mr. Loring and Mr. Gray, as counsel for all the owners, some of whom had become insolvent, the counsel declined to proceed further, unless the solvent proprietors would become responsible for their services. I infer from the report that this was a responsibility for their future services; and hence if any account arose for services performed prior to that agreement, the estate of Babcock has, I presume, been charged with only one tenth of the amount. The spirit of that agreement should govern, after it was made, till Babcock became a bankrupt. As I understand the report and the acts of the parties subsequent to it, the agreement was, that thenceforward Babcock should pay one half of the fees afterwards becoming due, and his estate probably has been charged with that half till his bankruptcy, deducting any sums paid by him on that account.

The only question here is as to the services performed by counsel after he became a bankrupt. As to those, it is found by the commissioner, that the assignee was advised to enter his appearance and acquiesce in the suit going on, and did right in continuing to make further defence. It is also found, that he was informed of the agreement in rela-

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

tion to the payment of costs. It does not, to be sure, appear by the commissioner's report, that the assignee expressly stipulated to continue to pay the same proportion as Babcock had; and the claim for it is therefore disallowed by him. But it appears that he did not object to or dissent from that arrangement; and it is clear, that he assented to the further defence of the action for the benefit of the estate, with full knowledge of the agreement. It strikes me that, under such circumstances, it is just and reasonable to infer his acquiescence in the continuance of the payment of one half of the future expenses by Babcock's estate. It seems equitable, also, to charge that estate with one half, as the estate was reaping any advantage likely to arise from a continuance of the defence on the former agreed terms, and without which terms the defence would not be continued. The opportunity thus enjoyed for an expected gain or benefit should not be taken without incurring the charge attached to it. He took it, then, cum onere; nor do I see any thing in the case to show the further defence by the assignee to have been improper, or likely to prove prejudicial to the estate. Nothing of that kind has been pointed out, and it is not to be presumed where the defense, as in this case, was advised by respectable counsel, and is justified by the commissioner.

In England, an assignee cannot commence and prosecute suits in equity so as to charge the estate with costs, unless he previously consults the creditors, and obtains the support of a majority of them. 1 Cooke, Bankr. Law, 292; 1 Atk. 91, 106. But here it was the defence of an old suit in equity, rather than the institution of a new one; and as the commissioner reports in favor of the propriety of the defence, I am not disposed to inquire further into that branch of the question. No objection being taken to the amount of any of the items in the account, the claim as made by the assignee is allowed.

[NOTE. For other cases involving the estate of this bankrupt, see In re Babcock, Case No. 696; Ex parte Winsor, Id. 17,884; and Winsor v. Kendall, Id. 17,886.]

BABCOCK, (CITY BANK OF RACINE v.) See Case No. 2,741.

Case No. 698.

BABCOCK v. DEGENER.

[1 MacA. Pat. Cas. 607.]

Circuit Court, District of Columbia. Jan., 1859.

PATENTS FOR INVENTIONS — RIGHT TO APPEAL — PRIORITY OF INVENTION—ABANDONMENT.

[1. Under the provision of Act July 4, 1836, § 8, (5 Stat. 119,) that whenever application is made for a patent which interferes with a prior patent, or one for which an application may be pending, the commissioner of patents shall give notice thereof to the applicants or patentees, "and, if either shall be dissatisfied with the decision of the commissioner on the question of priority of right or invention, * * * he may appeal from such decision," the right of appeal is not confined to unsuccessful applicants, and the patentee under a prior patent may appeal from a decision that a patent shall issue to the applicant. Pomeroy v. Connison, Case No. 11,259. disapproved.]

[2. An applicant for a patent for an improvement in printing presses had made a complete model of his invention in 1853, as shown by the uncontradicted testimony of two witnesses. The earliest evidence of a similar invention by a prior patentee was a drawing exhibited in October, 1855. *Held*, that the applicant had established priority of invention.]

[3. On behalf of the patentee under the earlier patent, it was claimed that the applicant's invention was not a practically operative machine; that the amount of force required to operate the cog-wheels, which conveyed motion to the several parts of the press, and the weakness of the frame, (it being open-armed, and not braced across the top as was the patentee's,) were defects that made it practically useless; and that it was an immature experiment. The testimony, as well as the official decision, of the examiners of patents, was that the applicant's model represented a complete operative machine. *Held*, that the model must be deemed a practicable machine, and that the claim of abandonment, founded on the impracticability of the model, had not been established.]

[4. Abandonment of an invention involves a public knowledge and use of the invention, and is to be proved by evidence of acts inconsistent with the retention of exclusive property in the invention. Merely withholding the invention from the public does not amount to an abandonment, though it may, as against a junior inventor, require the fullest measure of proof on the part of the first inventor.]

[See Kelleher v. Darling, Case No. 7,653; Sprague v. Adriance, Id. 13,248; and, for cases holding that application for a patent should be made in a reasonable time, see Ellithorpe v. Robertson, Case No. 4,409; Stephens v. Salisbury, Id. 13,369.]

[5. The use of an invention by the public for the period of 11 months before the date of a patent to a junior inventor *held* to be too short a period to debar the applicant from taking advantage of the saving terms of Act March 3, 1839, § 7, (5 Stat. 354.)]

[Appeal from the commissioner of patents awarding a patent to Frederick O. Degener. Affirmed.]

Statement of the Case.

The patent issued to Frederick O. Degener January 11th, 1859, No. 22,611. The part of the commissioner's report relating to the question of jurisdiction is given in full:

Commissioner's Report.

In the interference case recently decided by this office between Frederick O. Degener and George K. Babcock, and from which decision an appeal has been taken to your honor, it is probable that it will be insisted by the appellee (Degener) that the appeal does not lie, because the judgment rendered was against a patentee. In Pomeroy v. Connison, [Case No. 11,259,] Judge Cranch gave this interpretation to the eighth section of the act of [July 4,] 1836, [5 Stat. 117, c. 357;] but as the grounds of his opinion have not been regarded as satisfactory, a general desire has

been felt that the question should be re-examined. To accomplish this result, the appeal in the present case was granted. The clause of the act referred to, after directing that the commissioner shall give notice alike to patentees and applicants whose claims in his judgment interfere with each other, declares that "if either shall be dissatisfied with the decision on the question of priority of right or invention, on a hearing thereof he may appeal from such decision," &c. Language could not be more emphatic or distinct; and if the applicant can claim that it gives him a right of appeal, it is difficult to perceive on what ground the patentee could be excluded. It would be an unsound rule of construction which would permit a right so broadly conferred to be frittered away by the concluding language of the sentence, when that language may well receive an exposition entirely consistent with the preservation of such right. When both parties are applicants, then the question to be decided by the appellate judge is certainly 'which, or whether either, of them is entitled to receive a patent as prayed for,' and it is to such a case that this language is to be confined. But this does not conflict with the previous declaration that when a patentee and applicant are parties to the issue either of them may appeal. The appeal being thus allowed, the nature and effect of the judge's action upon it follow as a well-understood legal consequence. The declaration of the learned judge that the decision of the commissioner, so far as the patentee is concerned, is a brutum fulmen, and that an appeal is not given in such case to the patentee because such decision does not in any manner affect his legal or equitable rights, seems to find no countenance in the terms or spirit of the act of 1836. If the rights and interests of the patentee cannot be affected by the decision of the commissioner, why is he summoned to the issue and subjected to the duty and burden of the investigation? It is a maxim that the law will force no man to do a vain thing; yet worse than vain would be the action of the patentee as a party to an interference if, terminate the question as it might, his rights and interests were to remain unaffected thereby. It is true that the commissioner cannot cancel a patent, but he can impair its value by asserting his conviction of its illegality and by giving the invention which it protects to another. If his judgment is erroneous, it inflicts a deep injury upon the patentee, by inviting infringements upon his patent, and legalizing them as far as possible, and thus involving him in harassing and impoverishing litigation. For such injury he should have the summary redress by appeal which it was doubtless the intention of the act of 1836 to give him. As in practice in such cases, the patent, although ordered, is not issued pending the appeal. There is no obstacle to the complete execution of the judgment of the appellate judge should he determine in favor of the patentee and against the claim of the applicant. It is obvious that every reason urged against the authority of your honor to entertain an appeal in behalf of a patentee would equally apply against the authority of the commissioner to decide an issue to which such patentee was a party; and yet the commissioner is not only authorized, but expressly required by the statute under consideration to form and to determine such issue. (Signed, J. Holt, Commissioner.)

A. Pollok and T. D. Stetson, for appellants.
J. L. Kingsley, for appellee.

MERRICK, Circuit Judge. In this case, upon an interference declared, the commissioner of patents has awarded a patent to the applicant for an improvement in printing-presses, and an appeal has been prayed and allowed by the commissioner from that decision. It is insisted that no appeal will lie in such case, and that consequently the commissioner erred in its allowance, and that the appeal should be dismissed. The case of Pomeroy v. Connison, [Case No. 11,259,] decided by Judge Cranch in 1842, is relied on for this proposition. The decision is directly in point, but its correctness is assailed by the commissioner in his argument, and also by the appellant, and I therefore cannot escape its consideration. Were it the decision of a superior tribunal, it would be incumbent upon me to yield to its authority, whatever might be my individual opinion upon the true interpretation of the law; but not being of that dignity, I must look to the reasoning only on which it rests, giving, of course, all due weight to it as the opinion of a learned and enlightened judge, whose judgments at all times challenge respectful consideration.

Although the power and jurisdiction given by the patent laws are special and limited, I do not think that the policy of the law ever contemplated that they should be construed strictly, in the sense in which strict construction is held to be the rule of interpretation of those statutes which confer powers in derogation of common rights, or clothe with authority special tribunals, to the curtailment of the jurisdiction of superior courts administering justice upon the principles and after the modes known to the common law. On the contrary, all the rights and powers affecting the subject of patents arise out of positive law, and have been so benignly regarded by the framers of our institutions that they have been specially secured and confided to the care of the federal government by the provisions of the constitution itself. One portion of the law is not to be construed more rigidly than another, but all the parts, having their common source in the statutes, are to be interpreted with a wise liberality of construction, in furtherance of justice, and to give equal aid and facility of vindication to

every right which grows out of patentable discoveries. Taking this principle of construction for our guide, if we find the language of the statute broad enough to embrace an appeal by a patentee from a decision in favor of an applicant, as well as an appeal by an applicant where the decision has been against him and in favor of the patentee, and if we can also discover any advantage which might accrue to the patentee from allowing him the appeal, then the statute should be so interpreted, notwithstanding the law be susceptible of another stricter construction which would exclude him from that privilege.

Now, by the act of [August 30,] 1852, [10 Stat. 75,] c. 107, all the powers, responsibilities, and duties imposed by the eleventh section of the act of [March 3,] 1839, [5 Stat. 354,] upon the chief judge were conferred upon each of the assistant judges of the circuit court of the District of Columbia, and appeals may be taken to either of the three judges; and by the eleventh section of the act of 1839 the right of appeal to the chief judge has been extended to all cases where an appeal to a board of examiners, provided for in the act of [July 4,] 1836, § 7, [5 Stat. 119,] might have been taken. The whole question comes, then, to what appeals might have been taken to a board of examiners under the act of 1836. The eighth section of that act contains the following clause: "That whenever an application shall be made for a patent, which in the opinion of the commissioner would interfere with any other patent for which an application may be pending, or with any unexpired patent which shall have been granted, it shall be the duty of the commissioner to give notice thereof to such applicants or patentees, as the case may be; and if either shall be dissatisfied with the decision of the commissioner on the question of priority of right or invention, on a hearing thereof he may appeal from such decision, on the like terms and conditions as are provided in the preceding section of the act; and the like proceedings shall be had to determine which, or whether either, of the applicants is entitled to receive a patent as prayed for." The words "if either shall be dissatisfied with the decision of the commissioner on the question of priority of right or invention, on a hearing thereof, he may appeal from such decision," are used in reference to the persons named in the portion of the sentence immediately preceding who are entitled to notice from the commissioner, to wit, "applicants or patentees, as the case may be." Then, not only is the language of the statute broad enough to embrace, but in point of fact does embrace, in explicit terms, a "patentee" who is dissatisfied with the decision of the commissioner on the question of priority of right or invention. But it is said that no valuable right of the patentee is at all prejudiced by the decision of the commissioner, inasmuch as the commissioner has no power under the statute to vacate his patent; and notwithstanding the issue of a patent in favor of his rival applicant, he may, under the sixteenth section of the act of 1836, go into a court of equity to avoid the junior patent. Is it true, however, that the patentee is on that account not injured by the emanation of the junior patent? Certainly if the framers of the patent law had thought so, and that the act of the commissioner in granting the junior patent was vain and futile as to his, they would not have so carefully imposed upon the commissioner the duty of giving the patentee notice of the interfering claim, and an opportunity to contest the right of the applicant before the commissioner. If he has an interest in contesting the emanation of another patent before the commissioner, is that interest divested by an adverse decision? The same interest which authorizes him to call for a decision would operate with unabated force until a correct decision were obtained, and he would be as much protected by a decision of the judge, on appeal, directing the commissioner not to issue a patent as by the commissioner's own resolution to the same effect. As the law has recognized this interest beyond dispute in the one case, it seems to follow by irresistible conclusion that it recognizes it in the other, the language of the act being comprehensive enough to include the means of its continued vindication.

Besides, it will readily be perceived that the emanation of a second patent must throw a cloud upon the title of the prior patentee and seriously impair the market value of his patent, not only in the continuous production and sale of the articles covered by it, but still more effectually deprive him of the means of selling, in solido, the property in his discovery by an assignment in whole or in part of the patent; for who would purchase from him with a junior patent staring him in the face, sanctioned by a solemn adjudication of the commissioner in favor of its priority? And although the sixteenth section of the law of 1836 [5 Stat. 123] gives the patentee the further remedy of a bill in equity, the remedy thereby is slow and vexatious, requiring months, perhaps years, of watchfulness, anxiety, and expense before he can reap its fruits, and in part, at least, but compensatory, and not wholly and ab initio preventive. It cannot be said that this power to defeat a prima facie right, which has already sprung into existence, is the legal equivalent for a total prevention of the origination of such adverse claim. Moreover, the party holding the junior patent has the means in his hands of enabling other persons to injure the senior patentee; for notwithstanding he may file his bill in equity against the junior patentee, and have his patent declared void, yet, by the proviso of said sixteenth section, such decree "shall not affect the rights of any person except

the parties to the action or those deriving title from them subsequent to the rendition of such judgment." It will therefore be seen that from the date of the emanation of the patent up to the time of final adjudication the junior patentee has it in his power by licenses, assignments, and in various ways, to raise up other competitors to the senior patentee, as to each one of whom the judgment will be inoperative, and against each one of whom he must run the hazard and expense of a new suit. But if on appeal to a circuit judge from the decision of the commissioner the judgment of the commissioner is reversed and a patent withheld. none of these evil consequences to the senior patentee can follow. It then appears that substantial benefit may accrue to the patentee from having his appeal to the circuit judge, and the allowance of such appeal by the commissioner operating a supersedeas or suspension of his judgment until final hearing, the relations of the two parties to each other remaining in the interval unchanged. The summary nature of the remedy, too, and its speedy hearing which the statute requires, commend a resort to such appeal in regard to a right the duration of which is limited to fourteen years.

But it is said that in the clause "if either be dissatisfied with the decision of the commissioner, * * * he may appeal," the word "either" may be satisfied by applying it to the words "such applicants," i. e., either of such applicants; and that this construction is "probable, from the fact that they [the legislature] have only authorized the judge to determine between contending applicants, and not between an applicant and a patentee; for, when they come to say what the judge is to do upon the appeal, we find it is to determine which, or whether either, of the applicants is entitled to receive a patent as prayed for. The word 'either' in the former part of the claim is here explained to mean either of the applicants. It cannot be contended that the judge is to decide whether a patentee is entitled to receive a patent which he has already received and which is still in his possession."

But unquestionably the language quoted cannot be limited to the case of contending applicants, since an appeal has never been denied to the unsuccessful applicant as against the patentee; and upon such appeal the patentee has always had a standing before the judge upon appeal to contest the application, which standing he could only have by force of the provisions of the eighth section and of the words thereof above quoted. But the phrase "to determine which, or whether either, of the applicants is entitled to receive a patent as prayed for" appears to me to have been introduced into the section for a totally different object from the one imputed. The preceding part of the sentence had pointed to the question which the judge was to review on appeal—"the question of priority of right or invention"—which would of necessity be the only question open in a contest between an applicant and a patentee, the government upon that issue being estopped, as against the patentee, from denying the patentability of that to which it had already given its sanction by the issue of the existing patent. And besides, according to the ordinary rules regulating appeals from one tribunal to another, the appellate is confined in its revision to those precise questions which were agitated before the inferior tribunal. In regard to patent appeals, this general policy is enforced by the eleventh section of the act of 1839, [5 Stat. 354,] which expressly confines the judge to the questions presented by the reasons of appeal and the decision of the commissioner. But in the case of contending applicants there is not only the question of priority in agitation between them to be passed upon by the appellate judge, but there is a further question, which perhaps it may be the interest of both to keep out of the view of the judge, but one in which the government, as the guardian of the rights of the people, has the deepest interest, to wit, the question whether either of the applicants has brought forward a patentable claim; and to insure the examination of this question at every stage of the controversy, congress has industriously embodied in the statute the injunction upon the judge to inquire whether either of the applicants be entitled to a patent as prayed for. If neither has produced a patentable claim, then neither is entitled to receive a patent, however the question of priority between them may be decided. This interpretation of the words of the statute appears to give vital energy to every word of a section which otherwise would be awkward and contradictory in its parts, and seems to be furthering the great object of the patent laws as well as administering equal justice to all parties, and to be in harmony with every other provision of the statute; and when we come to the sixteenth section, we find the same equality of remedy. When there are two interfering patents, (and it matters not whether either of them has been granted on an appeal to the judge from the commissioner or originally by the commissioner,) or when an application for a patent has been refused, the right of second appeal is given in both cases in the form of an original bill in equity before the proper circuit court, with an ultimate resort to the supreme court of the United States. In view, therefore, of the reasons I have assigned, and of the studious amplitude of remedies the law has provided for meritorious inventors, I have reached the conclusion that under the eighth section of the act of 1836 [5 Stat. 120,] a patentee has equal right of appeal from a decision of the commissioner in favor of an applicant to one of the judges of the circuit court of the District of Columbia as an applicant for a patent has under the same sec-

tion from an adverse decision in favor of a prior patentee.

Having, then, jurisdiction, I proceed to inquire into the merits of the case. Both parties claim a certain improvement in printing-presses, which need not be minutely described, as they admit the principles involved to be identical; and only two questions have been presented for my consideration, to wit, priority of invention and abandonment on the part of Degener, the applicant. On account of the great looseness in practice of solicitors in assigning reasons of appeal, I take occasion to remark that it is perhaps very questionable whether these points have been presented for my consideration with sufficient distinctness. The law of 1839, c. 87. [5 S.] § 11, [5 Stat. 354,] requires the commissioner to lay before the judge the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal, to which the revision shall be confined. Now, the nature of an assignment of reasons to which the revision of the judge is to be confined is entirely nullified by an assignment, in the sweeping terms of a single sentence, asserting that the decision of the commissioner is erroneous, because against the weight of legal evidence and contrary to the principles of law. It is manifest that such an assignment does not assist the judge in ascertaining the precise issues of law and fact made before the commissioner; and while I am far from intimating a desire for technical accuracy in an assignment, yet reasonable definiteness and precision in view of the words of the law, may hereafter be more strictly insisted upon. The response of the commissioner in the present case, however, shows with great distinctness the points made before him, and they are priority of invention and abandonment by Degener, the applicant. From an inspection of the testimony, it is apparent that Degener had made a complete model of his invention in the fall of 1853. The evidence of two witnesses—Kneeland and Kuck—stands uncontradicted on this point, while the earliest trace of Babcock's invention was in a drawing shown to one Morrison Davis in October, 1855. This point, then, is with the applicant.

On the second point I am equally well satisfied with the correctness of the commissioner's decision. The counsel for Babcock have argued this question very elaborately in two aspects. They have endeavored to show that in point of fact the invention of Degener was not a practically operative machine, but rested only in immature experiment, furnishing no obstacle to Babcock's patent and no right to a patent in Degener; that the amount of force necessary to operate the several cog-wheels which convey the desired motion to the several parts of the press, and the weakness of the frame, (it being open-armed, and not braced across the top, as Babcock's,) were defects which made it practically useless and a mere vain experiment. Besides the official judgment of the examiners in the case—that the model represented a complete operative machine—at the request of the appellant's counsel I examined under oath, Examiners Baldwin and King, both of whom testified before me that in their opinions the model of Degener represented a practically operative machine; Examiner King concluding that the frame-work of Babcock's machine was stronger than Degener's, and to that extent perhaps better. Both being shown to be models of operative machines, this branch of the objection fails—an inquiry into the comparative merits of the two, beyond the naked question of capacity to operate, not being open for investigation. The remaining branch of the argument upon abandonment, in the proper sense of the term, remains to be considered. The true meaning of the word in the acts of congress is an abandonment of the invention to the public—a dedication of his discovery to the free use of his fellow beings. It is, as said by Judge Story, "like the dedication of a public way or other easement," and is to be proved in the same manner by evidence of some acts inconsistent with the retention of exclusive property himself; and in this regard his acts are to be construed liberally. Merely withholding his invention from the public, as justly argued by the commissioner, can never amount to an abandonment; however it may, in connection with the circumstances, pile up difficulties, if too long continued, in the way of asserting and proving priority over another inventor who applies for a patent. It may raise up an equity in favor of the junior discoverer which will call for the fullest measure of proof on the part of the first inventor to disperse the cloud of distrust with which he has thereby enveloped his own case, but of itself cannot defeat his claim.

It has been supposed that the case of Gayler v. Wilder, 10 How. [51 U. S.] 477, has introduced a new rule on this subject into the patent law; but not so. The court there expressly affirms, on page 498, that the omission of a prior discoverer to try the value of his invention by proper tests, or his omission to bring it into public use, would not deprive it of its priority. "He might have omitted both, and also abandoned its use, and been ignorant of the extent of its value;" yet if it was the same with the junior patentee, "the latter would not, upon such grounds, be entitled to a patent," provided the former, "and its mode of construction, were still in the memory" of the first inventor "before they were recalled" by the junior patent. What the court, then, does decide is a very important, but a different question, to wit: If the discovery of the first inventor had been so far laid aside that it was in point of fact absolutely and irrevocably forgotten by him and by the whole world but for its recall to his memory by the

second invention, then the said inventor must be held equally meritorious as one who discovers a lost art or an unpatented and unpublished foreign invention, and like him entitled to a patent. Indeed, the circumstances in Gayler v. Wilder, [supra,] were much stronger than the present case; and while the court affirmed the legal proposition, they intimated the strongest doubt whether in that case the evidence was sufficient to warrant the inference which the jury then drew. There is no testimony in the present controversy from which one would be warranted in drawing a like conclusion; nor is there any testimony that the invention was even used by the public before Degener's application, except for about the period of eleven months before the date of Babcock's patent and his application—a period too short to debar him from the saving terms of the seventh section of the act of 1839. [5 Stat. 354.]

Upon the whole case, I am of opinion, and accordingly certify to the Hon. Joseph Holt, commissioner of patents, that there is no error in his decision in the premises; that his judgment is affirmed, and that a patent must be issued to Frederick O. Degener as prayed.

BABCOCK, (GALE v.) See Case No. 5,188.

Case No. 699.

BABCOCK et al. v. MILLARD et al.

[4 West. Law Month. 314.]

Circuit Court, N. D. Ohio. 1862.

EQUITY—CREDITOR'S BILL—PARTIES—CITIZENSHIP—NEGOTIABLE INSTRUMENTS.

1. A creditor's bill filed in a court having both legal and equitable jurisdiction, to obtain satisfaction of a judgment at law, rendered in the same court, is not [according to the uniform rule of the seventh circuit] an original action, though it may embrace defendants who were not parties to the judgment.

2. Whatever may be the true rule limiting the jurisdiction of the circuit courts of the United States, in original actions, in respect to the residence and citizenship of parties, it does not apply to a creditor's bill in chancery in the circuit court, filed to obtain satisfaction of a judgment of that court.

3. Thus: When B. & Co., citizens and residents of New-York, had obtained a judgment in the circuit court of the United States, for the northern district of Ohio, against C. V. M. and I. N. H.. and afterwards filed a creditor's bill in chancery in the same court against C. V. M. and I. N. H., the judgment debtors, and J. W. M., and A. H. H., all of whom were citizens and residents of Ohio, and S. R. H., who though duly served with process, was a citizen and resident of Michigan, and who pleaded such citizenship and residence, to the jurisdiction of the court.—It was *held*, that the plea could not be sustained, however it might be in the case of an original suit, where thus united with other defendants, citizens of Ohio.

4. That the notes assigned are negotiable, is no ground of demurrer to a creditor's bill, which seeks to subject to the payment of a judgment, the judgment debtor's interest in certain promissory notes not due at the filing of the bill, which the judgment debtor had assigned as security to another party who is made a defendant. The court may so control the custody of the notes and provide for demand and notice when due, as shall prevent their being negotiated, and protect the rights of all parties thereto.

[In equity. Creditor's bill by Babcock & Co. against Charles V. Millard, Isaac N. Hathaway, John W. May, Alonzo Hathaway, and Sylvester R. Hathaway, based upon a judgment in this court, against said Millard and Isaac Hathaway. Heard on plea to the jurisdiction and demurrers. Overruled.]

M. R. Waite, for complainants.

Kent & Newton, for defendants.

WILLSON, District Judge. This is the case of a creditor's bill, filed by complainants, who are citizens of the state of New-York, against the defendants, four of whom are citizens of the state of Ohio, and the other a citizen and resident of the state of Michigan. The judgment at law, on which the suit is predicated, was obtained in this court, against Charles V. Millard and Isaac N. Hathaway, at the July term, 1861, for $1,121.83 damages and costs of suit. Execution was issued, and returned by the marshal wholly unsatisfied, the said Millard & Hathaway having no property subject to levy. It appears that in June, 1861, the mercantile firm of Millard & Hathaway was dissolved, Millard retiring from the concern, and Hathaway purchasing his interest in, and assuming the debts of the firm. Isaac N. Hathaway, on the 20th day of July, 1861, sold and delivered the stock of goods (which had belonged to the late firm) to the defendants, John W. May and Alonzo Hathaway, for the sum of $7,511.21 for which they gave four promissory notes of $1,877.80 each, payable to the order of Isaac N. Hathaway, at six, twelve, eighteen and twenty-four months. Isaac N. Hathaway transferred these notes to Sylvester R. Hathaway, as security and indemnity against his liability as indorser of certain bills of exchange. At the time of the commencement of this suit, it is conceded, that the liability of Sylvester R. Hathaway, as indorser of those bills, amounted to about $2,000. The complainants, by their proceeding in chancery, seek to subject to the payment of their judgments, the proceeds of the four notes, after Sylvester H. Hathaway is paid or otherwise indemnified against his liability as indorser of said bills of exchange.

The defendant, Sylvester R. Hathaway, (who was duly served with process in this district) has interposed a plea to the jurisdiction of the court, on the ground that he is a citizen of Michigan.

John W. May and Alonzo Hathaway have answered the interrogatories propounded to them in the bill, and have also filed a

demurrer, on the ground that the four notes in question, given by them, are negotiable.

Isaac N. Hathaway has filed a general demurrer to the bill.

The first question in the case, is, should the plea of Sylvester R. Hathaway, to the jurisdiction of the court, be sustained? In the argument, great ability and research were displayed by the learned counsel on both sides, as to the extent of jurisdiction of the federal courts over citizens of different states, in original suits. The eleventh section of the judiciary act of [September 24,] 1789, [1 Stat. 78, c. 20,] provides that, "the circuit courts shall have original cognizance, concurrent with the courts of several states, * * * when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, * * * and the suit is between a citizen of the state where the suit is brought and a citizen of another state; and no civil suit shall be brought * * * against an inhabitant of the United States, * * * in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." By the act of congress of the 28th of February, 1839, (5 Stat. 321, [c. 36,]) it is provided that, "where in any suit * * * commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought, or shall not voluntarily appear therein, it shall be lawful for the court to entertain jurisdiction * * * between the parties before it, but the judgment or decree * * * shall not conclude or prejudice those not regularly served with process or not voluntarily appearing." On the authority of Strawbridge v. Curtiss, 3 Cranch, [7 U. S.] 267, and Corporation of New Orleans v. Winter, 1 Wheat. [14 U. S.] 91, it is contended, that the words in the act of 1789, to wit, "between a citizen of a state where a suit is brought and a citizen of another state", mean that each distinct interest should be represented by persons, all of whom are entitled to sue or may be sued in the federal courts; or in other words, that the law requires each plaintiff to be competent to sue each defendant over whom the court is asked to entertain jurisdiction. And further, that the act of 1839 relates solely to the nonjoinder of persons out of the reach of process, and does not extend the jurisdiction of the court over parties not previously within its cognizance.

On the other hand, it is contended, that the provision of the 2d section of the 3d article of the constitution, which declares that the judicial power of the United States shall extend to all cases arising between citizens of different states, authorises the exercise of jurisdiction in all cases where any of the parties defendant are citizens of one or more states, different from that of the plaintiff; and that the act of 1839 [supra] was passed exclusively with the intent to rid the courts of the decision in the case of Strawbridge v. Curtiss, [3 Cranch, (7 U. S.) 267,] and others resting upon that authority.

Whatever should be the ultimate and settled doctrine of the supreme court, as to the extent of the jurisdiction of the circuit courts over parties defendant, in original suits it is not now necessary to determine; nor is the case before us one, which requires the declaration of any rule of law on the subject of proper parties defendant in original suits. This is not an original suit. It is simply a proceeding in aid of execution upon a judgment at law. It has been uniformly held in the 7th federal judicial circuit, that a creditor's bill is a continuation of the suit at law, as it merely seeks to obtain the fruits of a judgment, or to remove obstacles to a purely legal remedy. In Hatch v. Dorr, [Case No. 6,206,] this doctrine is expressly declared. There it was held by Mr. Justice McLean, that even an injunction bill is not an original bill, as it sets up matter in equity against the plaintiff's of which he could not avail himself at law. In that case, as in the proceeding by creditor's bill, equitable considerations are to be inquired into; in the latter case to carry the judgment into effect, and in the other to prevent the plaintiff, in the suit at law, from availing himself unjustly of a legal advantage. In the case of Freeman v. Howe, 24 How. [65 U. S.] 460, it is said "the principle is, that a bill filed on the equity side of the court, to restrain or regulate judgments at law in the same court, is not an original suit, but ancillary and dependent; supplemental merely to the original suit out of which it has arisen, and is maintained without reference to the citizenship or residence of the parties." So in Dunlap v. Stetson, [Case No. 4,164,] the court say, "considerations of this sort have satisfied the minds of some of the most enlightened judges, that the act of congress (of 1789) was never intended to apply to bills for relief upon judgments rendered in the circuit court. They are deemed to be, not original suits, but branches growing out of the original suits, and dependent upon them." The proceeding in chancery, by creditor's bill, in this court, is analogous to the practice prescribed by the Ohio Code of Civil Procedure, par. 458 et seq., which makes the creditor's bill an action in aid of execution. It cannot be properly said, therefore, that the process which has been issued in this case and served upon Sylvester R. Hathaway, is an original process, or that he is exempt on account of his residence in, or citizenship of, the state of Michigan, from the jurisdiction of this court, and the consequent liability to answer and obey its orders and decrees.

It remains to determine, whether, the demurrer to the bill, filed by the other defendants, is well taken, on the ground that the

notes in question are negotiable, and were not due when this suit was commenced. We are not disposed to question the soundness of the doctrine maintained by the supreme court of Ohio, in Stone v. Elliott, 11 Ohio St. 252, where it is declared that, "it would be almost destructive to one of the essential characteristics of negotiable paper to hold, that an attachment (or other judicial proceeding) prevents a subsequent bona fide indorsee, for value, from acquiring a good title." Nor can we deny the force of the argument, in support of the doctrine used by the supreme court of Pennsylvania, in Kieffer v. Ehler, 6 Harris, [18 Pa. St.] 388. Furthermore, we fully agree with both the supreme courts of Ohio and Pennsylvania, as declared in those cases, that the negotiation of such paper by a defendant after he has had notice of the attachment, or other judicial proceeding, is a fraud upon the law: and we think the court from which the attachment (or chancery process) issues, has power to prevent this by requiring the negotiable paper to be placed in such custody as will prevent it from being misapplied, taking care that it shall be demanded at maturity, and notice be given to indorsers, if necessary; and that the money, if paid, shall stand in place of the note or bill to abide the event. The very purpose of the writ of injunction which issued in this case to Sylvester R. Hathaway, was to prevent him from negotiating or otherwise disposing of the notes held by him in trust. He being a party to the suit and properly in court, is subject to any order the court may make in the premises; nor can he violate or disregard the injunction without incurring the penalties of the law. In all this, the court has the power, and it is certainly its duty, to protect the rights of the makers of the notes, and provide for their discharge from liability, when the notes are paid.

The plea of Sylvester R. Hathaway to the jurisdiction of the court, and the demurrers interposed by the other defendants are overruled.

BABCOCK, (STATE OF NEW JERSEY v.) See Case No. 10,163.

Case No. 700.

BABCOCK v. PETTIBONE.

[12 Blatchf. 354.] [1]

Circuit Court, N. D. New York. Oct. 13, 1874.

PAROL EVIDENCE—EQUITY — RESCISSION OF LAND PATENT—LACHES.

1. In 1845, O. P., of Steuben county, New York, put money into the hands of his son, O. P., of Dodge county, Wisconsin, to locate for him a tract of government land. The son applied the money to the purpose, and a patent for the land was issued in 1848 to "O. P., of Dodge county, Wisconsin," and delivered to him. He entered into possession of the land, and, in 1853, executed a mortgage on it. In 1866, O. P., the father, gave a warranty deed of the land to B., who, by direction of the father, paid the purchase money to the son. The son gave possession of the land to B. Afterwards, a foreclosure suit was brought on the mortgage, to which suit B. was made a party. He defended it on the ground that the father, and not the son, owned the land when the mortgage was given, but was defeated in the suit and evicted. He then brought this suit against the father, to recover for a breach of the covenant of warranty: *Held*, that parol evidence was inadmissible to show that the father was intended as the patentee in the patent, and not the son, for the reason that there was no ambiguity in the patent, in the description of the person named in it as the patentee.

[See U. S. v. Thompson, Case No. 16,486.]

[See note at end of case.]

2. The patent, having been delivered to the son, who was the grantee named in it, was valid, until vacated for mistake.

3. On the facts, the father, as against a bona fide holder of the mortgage, was guilty of laches, in taking no steps to have the mistake corrected.

[At law. Action by Norman E. Babcock against Oliver Pettibone for damages for breach of covenant of warranty in a deed. Judgment for plaintiff.]

Laning & Willett, for plaintiff.

Harlow L. Comstock and Irvin W. Near, for defendant.

WALLACE, District Judge. This action is brought to recover damages for breach of covenant of warranty in a deed executed by the defendant to the plaintiff, April 9th, 1866, conveying eighty acres of land in the county of Dodge, state of Wisconsin. Upon receiving the deed, the plaintiff entered into possession, and was thereafter evicted under a writ of assistance issued upon a judgment of foreclosure. The foreclosure was by action, and was upon a mortgage executed by Oliver Pettibone, of Dodge county, Wisconsin, to the La Crosse & Milwaukee Railroad Company, on the 26th of September, 1853. The plaintiff was made a party to this action, and defended upon the ground that the real estate was, in fact, owned by Oliver Pettibone, of the county of Steuben, in the state of New York, instead of Oliver Pettibone, of Dodge county, Wisconsin, at the time the latter executed the mortgage.

It appears, by the evidence, that, in 1845, the defendant, who then resided in Steuben county, N. Y., and has continued to reside there, attempted to locate a lot of eighty acres of land in Dodge county, Wisconsin, and placed funds in the hands of an agent there, to pay the purchase price, but, failing to obtain the particular lot he desired, returned home, and directed his son Oliver, who then resided in Dodge county, to select another lot for him, and apply the money left in the hands of the agent to the payment of the price. The son located the land described in the deed to the plaintiff, applied the

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

money in the hands of the agent as directed, and thereupon the receiver of the land office issued a certificate acknowledging the receipt of the purchase money from Oliver Pettibone, of Dodge county, Wisconsin territory. This certificate was forwarded to the general land office, and thereupon, on the 10th of May, 1848, a patent was issued by the United States to "Oliver Pettibone, of Dodge county, Wisconsin territory," and delivered to the son. The son entered into possession of, and improved, the land, and, on the 26th of September, 1853, executed the mortgage to the railroad company, under which the plaintiff was evicted. The father learned of the execution of this mortgage about a year after it was executed, reproved the son for having given it, but allowed him to remain in possession until the conveyance to the plaintiff, when the father directed the entire purchase money to be paid by the plaintiff to the son. When the action to foreclose the mortgage was commenced, the present plaintiff, by his attorney, wrote to the defendant, notifying him of the pendency of the action, and requesting information for its defence, and thereupon the defendant informed the plaintiff substantially of the facts as they have been stated. The foreclosure action was litigated, and judgment against the defendant therein rendered in the circuit court for Dodge county, which, on appeal, was affirmed by the supreme court of the state, it being held by the supreme court [Barton v. Babcock, 28 Wis. 192][1] that extrinsic evidence was not admissible to show that Oliver Pettibone, of Steuben county, N. Y., was the real grantee, it having been proved in that case, as in this, that the son was the only person of his name in Dodge county, Wisconsin.

It is doubtful if the notice given by the plaintiff to the defendant, of the pendency of the action in Wisconsin for the foreclosure of the mortgage, was of such a character as to estop the defendant from contesting the validity of the incumbrance which the judgment in that action established. The notice did not require the defendant to appear and defend the suit, nor was the defence in any manner tendered to him. Strong analogies favor the position, that, when the covenantor is notified of the pendency of the suit, and, instead of requiring to be allowed to defend, furnishes information for its defence to the covenantee, he waives a formal tender of the defense, but the authorities do not fully sustain it. I shall consider the judgment, therefore, as but presumptive evidence of the facts which it adjudicated, and the whole question determined by it open here.

The high authority of the court which decided one of the controlling questions here, entitles that decision to great consideration, but, disregarding it as authority in this case, I am satisfied that it was a correct exposition of the law, and that parol evidence is inadmissible to show that Oliver Pettibone, of Steuben county, N. Y., was the person intended as the patentee, instead of Oliver Pettibone, of Dodge county, Wisconsin, who was named as such in the instrument.

It is not to be doubted that the identity of a grantee in a deed is a question of fact, to be established, ordinarily, by evidence dehors the instrument, precisely as the identity of the land conveyed is to be ascertained by such evidence. Neither is it doubtful, that, if the description of the grantee is equally applicable to two or more persons, a question of latent ambiguity arises, which may be determined by parol, precisely as would be the case if the description of the land conveyed was equally applicable to two or more parcels. It does not follow, however, that, if part of the description is unequivocally applicable to one grantee or to one parcel of land, and not to the other, extrinsic evidence will be permitted, to establish the intent of the grantor, and to control, in disregard of the description. On the contrary, the general doctrine is clear, that evidence which, passing by and disregarding the description in the written instrument, seeks to import into it, and engraft upon it, an intention independent of its terms, is not admissible, because it contradicts rather than explains the instrument.

In my view, this case does not present a question of latent ambiguity, in the ordinary acceptation of the term, because a latent ambiguity exists, as tersely stated by Alderson, B., in Smith v. Jeffryes, 15 Mees. & W. 562, "where you show that words apply equally to two different things or subject-matters," and its solution rests, as stated by Abbott, C. J., in Beaumont v. Field, 2 Chit. 275, not on "what was the meaning of the grantor," but on "what was his meaning by the words used." In this case, the words could only apply to Oliver Pettibone, of Dodge county, Wisconsin; and the question is not what was the intention of the grantor when that description was used, but what was meant by the words used. If the words used are clear, unambiguous and determinate, to describe one person or one subject-matter, there can be no latent ambiguity, unless they describe another equally well, and, therefore, there is no room for construction to be sought for in the light of surrounding circumstances.

It is true, that, on the maxim, falsa demonstratio non nocet, an incorrect portion of a description is frequently rejected when sufficient remains in the instrument to indicate with legal certainty the person or subject-matter intended; but this rule is to be followed with caution. It would hardly be contended, that if, by will, a testator devised his farm in the county of Dodge, with no other description, his intention to devise his farm in the county of Steuben could be established by extrinsic evidence, if it appeared that, at the time of making his will,

[1] [See note at end of case.]

he had a farm in each county. The test, that there must exist sufficient indication of intention, on the face of the instrument, after the false description is rejected, to justify the application of the evidence, would not exist in such case, because, when the location of the farm is stricken from the description, there remains nothing in the instrument to indicate which farm was intended to be devised. And, in this case, when the description of the patentee's residence is rejected, nothing remains to indicate which Oliver Pettibone was the person intended. To sustain the theory of the defendant, it would result, that a latent ambiguity must first be created by rejecting a portion of the description, so as to make it applicable to two persons, and then be explained by extrinsic evidence, to show which of the two persons was intended, and this when the instrument itself would be destitute of any indication of intent upon its face, to justify the application of the evidence. The description here was not applicable to the defendant, and the case is not within the principle which permits extraneous evidence to be given. Grant v. Grant, 39 Law J. C. P. 140.

If the conclusion thus expressed is erroneous there are other difficulties in the way of the defence. The evidence shows that the patent was delivered to the son, and proof that, as between him and the defendant, the son was not entitled to it, or that, as between them, the son was the agent of the defendant to receive delivery, does not establish the fact that the United States was aware of these facts, or recognized the relation of the parties, or intended the grant to the defendant. The patent was issued and delivered to the son, as the real person entitled to it, under circumstances which justified the United States in treating him as such; and although he was not, in fact, the person entitled to it, as between him and the defendant, the grant to him was not a nullity, but was valid until vacated for mistake, by scire facias, or by proceedings in equity.

With full knowledge of the facts, or of sufficient to put him on inquiry, the defendant lies by from 1854, when he learned that his son had executed a mortgage on the property, without taking proceedings to have the mistake corrected, until the mortgage passed into the hands of a bona fide purchaser. If the defendant, instead of the plaintiff, had defended the foreclosure action, and alleged mistake, and asked to have the patent corrected on that ground, he would have been defeated by his laches and the superior equities of the holder of the mortgage, and the mortgage would have been declared a valid lien. Judgement is, therefore, ordered for the plaintiff.

[NOTE. In the case of Barton v. Babcock, before the supreme court of Wisconsin, referred to in the foregoing opinion. Mr. Justice Cole, speaking for that court, said: "At the time of the entry, Oliver Pettibone, the son, resided in Dodge county, Wisconsin territory, and Oliver Pettibone, the father, resided at Hornellsville, Steuben county, New York. Considerable testimony was introduced on the trial, against the objection of the plaintiffs, tending to show that Oliver Pettibone, the father, entered the land, and owned it when the mortgage was executed. According to our view, this evidence was clearly inadmissible between these parties The record itself showed that the title to this property was in Oliver Pettibone, of Dodge county. Wisconsin. There was but one person of that name living in Dodge county, and so there was no ambiguity in the patent. There was only one person to whom the entire description in the patent applied. There is therefore nothing to be explained, and there is really no room for construction. * * * The court is not at liberty to reject so much of the description in the patent as relates to residence to substitute a person to whom it does not apply. * * * The patent shows that the title to the land in controversy was in the mortgagor when he executed the mortgage, and that is conclusive in this action." Barton v. Babcock, 28 Wis. 192.]

BABCOCK, (SMITH v.) See Cases Nos. 13,008 and 13,009.

Case No. 701.

BABCOCK v. STONE et al.

[3 McLean, 172.] [1]

Circuit Court, D. Illinois. June Term, 1843.

PARTNERSHIP — AUTHORITY OF PARTNER TO BIND FIRM— COMMERCIAL PAPER — PURCHASER WITHOUT NOTICE.

1. Where A, being a partner in two firms, draws a bill by one firm on the other, payable to himself, for his individual debt, and accepted by such firm, [such bill] cannot be recovered [on] by the payee against the drawers or acceptors.

[See note at end of case.]

2. But where in the ordinary course of business, and before the maturity of the bill, it is assigned by the payee, without notice. the payment of the bill, by the indorsee can be enforced.

[See note at end of case.]

3. Where men associate in partnership, they give a credit to the individuals composing the firm, and where a loss must be sustained, it should fall upon those who placed the higher confidence in the fraudulent person.

4. On this ground, where there is no notice of fraud, a partner may often bind his partners, though his act be a fraud on the firm.

[At law. Action by Samuel Babcock against Stone, John B. Glover, and Manning on a bill of exchange. Heard on demurrer to replication. Demurrer overruled, and judgment for plaintiff.]

Thomas & Keating, for defendants.

OPINION OF THE COURT. This action is brought by the plaintiff as the indorsee and holder of the following bill: "Alton, June 9th, 1836. Twelve months after date, pay to the order of John B. Glover, twenty-

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

seven hundred forty-one dollars ninety-two cents, value received, and charge the same to the account of Stone, Manning & Co." To James Debow & Co., St. Louis, Missouri. Accepted by James Debow & Co., and also indorsed, "Pay to Samuel Babcock, John B. Glover."

The defendants pleaded that the bill of exchange was made by the said John B. Glover, for the purpose of securing an individual debt, and not an account of the firm and partnership of James Debow & Co., or for any indebtment of theirs. That Glover accepted the same in the name of defendants, without the knowledge or consent of his partners, but for the individual benefit of the said Glover. That the plaintiff took the bill, well knowing that it was made and accepted as aforesaid. That the bill was for the individual debt of the said John B. Glover, &c. To this the plaintiff replied, that when the bill was so as aforesaid transferred to him, he did not know that said bill of exchange was drawn by said Glover, in the name of Stone, Manning & Co., and accepted by said Glover, in the name of James Debow & Co., to secure his individual debt, &c. To this replication the defendants demurred.

It is clear that Glover could not have recovered as payee against the drawers or acceptors of this bill. It was created by him, he being a partner of the drawers and acceptors, not to pay a partnership debt, but for his individual benefit. This was a fraud upon his partners. But he negotiated it to Babcock, the plaintiff, who is averred to be an innocent holder, having had, at the time of the indorsement, no notice of the fraud. Being an indorsee without notice, it becomes a question whether he or the partners of Glover shall lose the amount of the bill. The bill was indorsed by Glover to the plaintiff, before its maturity. In Story on Partnership, 161, it is said, "that by forming a partnership, the partners declare themselves to the world satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible for what they will respectively do within the scope of the partnership concerns." On this ground the firm is bound for the frauds committed by one of its partners. Where one of two innocent persons must suffer by the act of a third person, the rule is just, that he shall suffer, who reposed the higher confidence and credit in such person. If the bill had been indorsed to the plaintiff after it was due, or out of the ordinary course of business, or under circumstances calculated to excite suspicion, he could have no right to recover. But none of these facts exist, and he must be considered as an innocent holder, before the bill was due, and without notice of any fact which could render the bill suspicious. The above doctrine is substantially laid down in Jones v. Yates, 9 Barn. & C. 532; Bosanquet v. Wray, 6 Taunt. 597; Aubert v. Maze, 2 Bos. & P. 371; and Smith v. Lusher, 5 Cow. 688. The demurrer to the replication is overruled. Judgment.

[NOTE. In a recent case before the supreme court, it appeared that one Ferry was a copartner in two firms, both engaged in manufacturing lumber, but at different points in Michigan. He executed notes amounting to over $15,000, in the name of one firm, payable to the order of the other, for his own benefit, and sold them to a bank in another state. The articles of copartnership of the firm appearing as maker provided that no capital was to be diverted to the use of any of the partners. but the copartners had no knowledge of the notes in suit until they matured. In an action by the bank, a bona fide holder, against the maker, a judgment was rendered for plaintiff by the trial court, (see National Exch. Bank v. White, 30 Fed. 412,) but on appeal this judgment was reversed, on the ground that a partnership organized "for the purpose of carrying on the business of sawing lumber, pickets, and lath" is "non-trading" in character, and an individual partner of such a firm has no right, as a matter of law, to execute a note in the name of the firm, without the knowledge of his copartners, in the absence of express authority, or a course of dealing from which such authority can be presumed. Dowling v. Exchange Bank of Boston, 145 U. S. 512, 12 Sup. Ct. 928. Where there are facts tending to establish a course of business implying such authority, the question is one for the jury. Id.]

Case No. 702.

BABCOCK v. TERRY.

[1 Lowell, 66.][1]

District Court, D. Massachusetts. April, 1866.

SEAMEN — WAGES — CONTRACT BETWEEN MASTER AND OWNER—PASSAGE MONEY — MASTER'S COMMISSIONS.

1. Where the contract between the master and owners of a whaleship was, that if the former should procure four thousand barrels of oil, or a full ship, he should have a lay of one-sixteenth, otherwise a lay of one-seventeenth, and the evidence showed that he brought home a full cargo, and that the ship was well stowed, but that the number of barrels was much less than four thousand, *held*, the master was entitled to the larger lay.

2. Where the master after filling his ship with sea-elephant oil, left behind him at the island where the oil had been obtained some of his ship's company to pursue the business, and the owners afterwards sent out another vessel under another master and brought home the oil made by those men after the former master had left them, *held*, that the former master could not claim a lay in that oil.

3. When the ship has not the means to cure a seaman who is taken ill on a whaling voyage, and he is cared for on shore, the reasonable expenses of his care and cure are chargeable to the ship.

[See The Monongahela, Case No. 9,712.]

4. The case of Hazard v. Howland [Case No. 6,280] followed in the matter of penalty on a master for bringing spirits on board the ship, and permitting them to be used there contrary to the articles.

5. The master of a whaleship has no right to charge a commission on the money paid out to the crew in the course of the voyage.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

6. Where the master of a ship gave to another shipmaster, whom he brought home as a passenger, a receipt for $150 passage-money, *held*, that he was justly chargeable with the full amount, notwithstanding his testimony that he received only $75, and gave the receipt for the larger sum "for the benefit" of the passenger, which the court understood to mean that the latter might be able to charge that sum to his owners.

[In admiralty. Libel by Daniel S. Babcock, master of the ship Samuel Robertson, against Isaiah F. Terry, the owner, for wages and advances. Decree for libellant.]

The libellant was the master of the ship Samuel Robertson, of Fairhaven, on a voyage made several years since for whale and sea-elephant oil. The cause now came up on exceptions to the report of an assessor, and to settle certain points which had not been submitted to him. The chief object of the voyage was to procure the oil of the sea-elephant or walrus, which was a new branch of industry when this voyage began, and had only been carried on from New London, out of which port the libellant had sailed as mate on a similar voyage. The sea-elephant is taken on shore at Hurd's island, an uninhabited place which lies very low in the southern latitudes, and has a boisterous and uncertain climate. The animals are killed and stripped on shore, and the blubber is dragged and rafted to the beach and put on board a tender, to be carried to the ship and tried into oil, there being no anchorage fit for large vessels within about three hundred miles. Captain Babcock lost his tender on the day of her arrival at the island, and sent home for another, and in the mean time left his second mate and some of the men to catch sea-elephants, and himself cruised for whales, but without much success. When the new tender came out, the chase of sea-elephants was pursued with diligence, and the ship received a cargo and returned with it to New Bedford. The libellant left the new tender with a sufficient crew at Hurd's island, making a new contract with them conditioned to be void if the owners sent out the same or any other ship. They did send out the Arab, under another master, and she made a voyage and brought home, among other things, fifteen hundred barrels of oil which had been made by the crew of the tender after the Samuel Robertson had sailed for home. The libellant demanded a lay of one-sixteenth in all the oil brought home by him, and in the fifteen hundred barrels made by the men whom he left on the island; five per cent on sales of slops; five per cent on moneys advanced to the crew, and his whole disbursement account. The respondent disputed several items of the account; admitted a lay of one-seventeenth only in the oil brought home; and claimed a deduction from his lay for breach of the shipping articles by the libellant in bringing distilled spirits on board the ship at sundry times, and for negligence and want of skill. The facts on which the decision of these points depended are stated in the opinion of the court.

A. S. Cushman, for libellant.
J. C. Stone, for respondent.

LOWELL, District Judge. To begin with the master's general conduct. The evidence does not show that he was either careless or unskilful. He was certainly unfortunate in the loss of his tender, and in the small amount of whales taken in his off-shore cruise; but the preponderance of the evidence is, that these results were not owing to his fault. It was said that I must give greater weight to the evidence against him than to that in his favor, because the witnesses taken from the ship were reluctant to say any thing to his discredit. But after making whatever allowance I can discover to be due to apparent or probable bias, I must decide the case, after all, upon what the witnesses say, and not upon what they might have said had they testified differently. And the whole evidence convinces me that, excepting in the matter of distilled spirits, to which I shall recur presently, the master exerted himself with reasonable care and skill, and with rather uncommon diligence for the promotion of the best interests of the voyage. Upon the special matter of the slops, the assessor is satisfied that the master has duly accounted for them; and I see no reason to vary his award in that respect, nor to charge him with the value of certain articles stolen from the wreck of the Alfred.

On the other hand, I cannot allow the master a commission on moneys advanced to the crew. His contract expressly provides for the commission on sale of slops, but mentions no other; the usage of the trade is against it, and so is the reason of the thing. The commission on the sales is intended to compensate him for his trouble in making them, and to ensure his selling to the best advantage. The necessary advances to the crew are made as a part of a master's ordinary duty, and from the owner's money; the trouble is slight, and the responsibility nothing. I affirm the assessor's disallowance of the charge.

Nor can I allow the libellant a lay in the oil taken at Hurd's island after he sailed for home. The contract made with the men whom he left behind, appears to have been carefully drawn, with the intention of giving the owners full control over this matter. They have seen fit to allow a lay in this oil to the master and crew of the Arab, who took it on board, and brought it home; and I cannot say they have acted unjustly. These men did a certain amount of work upon this oil, and are better entitled than those who came home in the Samuel Robertson to some share in its value. The libellant took the responsibility of the enterprise, and this may entitle him to some considera-

tion from the owners; but he has no legal claim which a court can ascertain and enforce.

The amount of the master's lay depends upon the construction of the special contract as applied to the facts of the case. It was agreed, that if the master procured on board the ship four thousand barrels of oil, or a full ship, his lay was to be one-sixteenth, otherwise one-seventeenth. The ship brought home somewhat over three thousand four hundred barrels, and the evidence is clear that she was full, and there is no proof that she was badly stowed. The respondent says that the ship did, on one occasion, bring a good deal more. He gives the number of gallons, by which it appears she had a little more than thirty-five hundred barrels, besides a considerable quantity of bone, said, in the argument, to be equivalent to some two hundred barrels of oil. It does not appear that she ever did or could bring four thousand barrels, or very near that amount.

Under these circumstances, it is fair to assume the libellant's construction of the agreement, and hold that he was to procure a full cargo estimated at four thousand barrels, more or less, rather than to say with the respondent, that the specification was intended as a minimum, and that the larger share was dependent on his getting at least four thousand barrels. The former construction, it is true, rejects the demonstration as false; but then it appears to be false. Such a contract should be construed against the owners in a doubtful case, because they are supposed to know the capacity of the vessel, which the master certainly did not; and it is not to be presumed that they would establish as a minimum an amount of cargo larger than the vessel was ever known to carry. Upon the facts in evidence, the respondent's interpretation gives scarcely greater weight to the words, "or a full ship," than the other does to the "four thousand barrels," because it is not credible that they could in any event expect the vessel to bring more than the specified amount. This point then, not submitted to the assessor, I must decide for the libellant.

The assessor has rejected the whole of the very large bill charged by the libellant for the expenses connected with the illness, death, and burial of Mr. Briggs at Mauritius. As it appears, however, that the ship was unable to furnish the proper medicines and medical attendance, which the unfortunate situation of the chief officer demanded, the master was right in boarding him on shore. And after examination of the account, I have thought it right to allow one hundred and twenty-five dollars as a fair charge against the owners on this account. The George, [Case No. 5,329;] The Atlantic, [Id. 620.]

The next inquiry is, what penalty, if any, should be awarded for the breach of the article concerning spirituous liquors. And upon this, the case of Hazard v. Howland, [Case No. 6,280,] decided by Judge Sprague in 1863, is a direct authority. It was there adjudged that the owners have a right to say whether or not these liquors shall be used on their vessel for other than medicinal purposes; and further, that the penalty affixed by the articles, of a total forfeiture of wages, is one to be chancered by the court. In the present case the evidence is clear that the master wilfully violated this stipulation, and permitted his officers to have nearly as much whiskey as they liked. I must suppose that the discipline of the ship was injuriously affected by this laxity. What the actual pecuniary damage to the voyage was, it is impossible to say; and I shall deduct from the libellant's lay the sum of three hundred and seventy-five dollars, which is the penalty imposed by Judge Sprague, in the case cited, and in which the master's lay was very nearly what it is here.

There is but one item of account remaining to be considered. The respondent produced before the assessor, a paper signed by the libellant, acknowledging to have received one hundred and fifty dollars as the passage-money of one Captain Proctor, from Mauritius to New Bedford. The libellant testified that he received in fact but seventy-five dollars for this service; that the price receipted for was the fair price of a first-class passage, to which Captain Proctor was entitled, but that the accommodations actually furnished him did not come up to that description, and the receipt was given "for the benefit of Captain Proctor." This means, I suppose, that Proctor's owners were to pay for the accommodation he ought to have had, and Captain Proctor himself only for what he had. No doubt a receipt is open to explanation; but I am not satisfied with this explanation, which appears to involve a fraud on the persons who were ultimately to pay the passage-money. The owners of the Samuel Robertson were entitled to receive all that Captain Proctor's owners were bound to pay; it is not fit that one-half the money should be kept in the hands of the agents; and I am unwilling to believe that this was done. If the master has undertaken to release Captain Proctor from any part of the amount due for his passage, he must settle that account with him.

The account then stands thus: (The judge here stated the account in conformity with the above opinion.)

Decree for the libellant.

BABCOCK, (TUTHILL v.) See Case No. 14,275.

BABCOCK, (UNITED STATES v.) See Cases Nos. 14,484, 14,485, 14,486, 14,487, and 14,488.

Case No. 703.

BABCOCK v. WESTON.

[1 Gall. 168.][1]

Circuit Court, D. Rhode Island. June Term, 1812.

CONFLICT OF LAWS—DISCHARGE UNDER LEX LOCI — CONSTITUTIONAL LAW — POWER OF STATE TO SUSPEND PROCESS OF FEDERAL COURTS.

1. Independent of the constitution of the United States, a discharge of a debt, under the laws of the state where the debt is contracted, is good every where.

[Cited in Woodhull v. Wagner, Case No. 17,975.]

[See Penniman v. Meigs, 9 Johns. 325; Murray v. De Rottenham, 6 Johns. Ch. 52; Holmes v. Remsen, 4 Johns. Ch. 471; Story, Confl. Laws, §§ 272, 278, 278a; Van Reimsdyk v. Kane, Case No. 16,871, and authorities cited therein.]

2. A state legislature cannot suspend process in the courts of the United States as to its citizens.

[See Duncan v. Darst, 1 How. (42 U. S.) 301; McNutt v. Bland, 2 How. (43 U. S.) 9; Beers v. Houghton, 9 Pet. (34 U. S.) 329; Keary v. Farmers' & Merchants' Bank, 16 Pet. (41 U. S.) 89; Catherwood v. Gapete, Case No. 2,513.]

At law. Assumpsit [by Samuel H. Babcock against Human Weston] upon a contract executed in Boston. The defendant pleaded the pendency of a petition before the legislature of Rhode Island, by the defendant, to obtain the benefit of the insolvent act of that state, and an order of the legislature thereon, continuing the petition to their next session, and directing in the mean time a suspension of all process against the defendant. Demurrer and joinder. The action was commenced after the passing of the order.

Mr. Whipple, for the defendant, in support of the plea, contended, that the order of the legislature of a stay of process was peremptory upon the circuit court, as well as the state court, and therefore, that the action ought to abate.

Searle and Crapo, e contra.

STORY, Circuit Justice. I am of opinion, that the plea is bad. It is not competent for the legislature of Rhode Island to suspend process in the courts of the United States, or to bind citizens of other states by their orders. As this is a suit between a citizen of Massachusetts and a citizen of Rhode Island, on a contract made in Massachusetts, it is exceedingly doubtful, whether an act of insolvency, completely executed under the authority of Rhode Island, would in this court be held a good bar. Putting out of view any consideration of the constitution of the United States, a discharge under the laws of a state may perhaps be held a good bar even as to foreign contracts, of an action brought in the courts of that state; because the courts are bound by such laws; and the party seeking remedy in such courts must pursue it according to the laws of such state. So also in case of a contract made in a state between citizens of that state, a discharge good by its laws, may be good everywhere. But such a discharge of a contract made between a citizen of another state and a citizen of Rhode Island, without the jurisdiction of Rhode Island, may well, in point of legal effect, be doubted. The general rule is, that a contract is governed, as to its construction and efficacy, by the law of the place, where it is made; and a discharge good there, would be sufficient in every other jurisdiction. See Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 122; Ogden v. Saunders, 12 Wheat. [25 U. S.] 213; Clay v. Smith, 3 Pet. [28 U. S.] 411; Woodhull v. Wagner, [supra;] Le Loy v. Crowninshield, [Case No. 8,269;] Phillips v. Allan, 8 Barn. & C. 477; Lewis v. Owen, 4 Barn. & Ald. 654; 2 Bell, Comm. pp. 689–691. But this rule does not extend to support a bar to the contract, where such bar happens to be good merely by the law of the place, where the action is brought, and the party is found; unless the courts within that state, where the remedy is sought, are exclusively bound by its regulations. However, on all these points I give no opinion.

The allegations contained in the plea might possibly afford a ground for a continuance of the cause, if it were certain, that the act of insolvency would ever be granted. But it rests in contingency, and even if granted, may never be a sound bar to the action. It would be too much to hold a mere application to the legislature a ground for the postponement of the rights of parties, who have regular claims before the court. I make this suggestion, because it has been intimated, that the bar, if bad, may in the discretion of the court be allowed to operate a continuance until the next term, in order then to ascertain the ultimate decision of the legislature. Plea adjudged bad, and judgment for the plaintiff.

[1] [Reported by John Gallison, Esq.]

BABCOCK, (WYMAN v.) See Case No. 18,113.

Case No. 704.

BABSON v. THOMASTON MUT. FIRE INS. CO.

[4 Ins. Law J. 50.]

Circuit Court, D. Maine. 1874.

INSURANCE—INSURABLE INTEREST—TRUSTEE.

[A trustee duly appointed by a court in place of the one named in a will, who has declined to serve, has an insurable interest in the property charged with the trust, and may take out a fire insurance policy thereon in his own name, provided he communicates the facts as to title to the insurer.]

At law. Action by John Babson against the Thomaston Mutual Fire Insurance Company, on a policy of insurance upon a dwell-

ing house, the defense to which was that, at the time of effecting the insurance, plaintiff had no title or insurable interest in the property. [Judgment for plaintiff.] The case was tried before the judge without the intervention of a jury. The facts of the case are as follows: The property formerly belonged to Sarah McCrate. She died leaving a will, in which Richard H. Tucker was named executor, and who also was constituted trustee, to whom this property was devised in trust. The will likewise contained the following clause: "And I hereby authorize and empower the said Richard H. Tucker, the trustee before named, to appoint a trustee to be substituted for him in case he, the said Tucker, should from any cause be unable to act as such, and also to name a suitable person to succeed him as trustee after his decease; which appointment of a substitute or successor is to be made by the said Tucker in writing, and such substitute or successor shall have the same powers and authority as the present trustee; or if said appointment of a new trustee shall not, from accident or otherwise, be made by the present trustee, or his successor, then the then judge of probate for the county of Lincoln shall appoint one in case of a vacancy as provided by law." Tucker, the trustee, declined both trusts, in a writing addressed to the judge of probate, in the following words, viz.: "I decline both trusts, and recommend the Hon. John Babson as the most proper and suitable person for the acceptance of the above trust, in my place and stead." Thereupon the judge of probate passed a decree in substance as follows: "And the said Richard H. Tucker having in writing declined the trust reposed in him by virtue of said instrument, (the will,) ordered, that John Babson be administrator with the will annexed, first giving bond, with sureties," etc. A bond was furnished, in addition to one as administrator, approved and ordered to be recorded, containing the recital "that whereas the said John Babson has been appointed by the judge of probate trustee of the estate of Sarah McCrate, late of Wiscasset, deceased, agreeably to the provisions of the last will and testament of said Sarah McCrate, and certain property having come into his hands in trust for purposes in said will set forth: now, therefore, if the said John Babson shall faithfully execute such trust according to the will of the testatrix, so far as is consistent with law, and shall make a true and perfect inventory," etc. Plaintiff thereupon proceeded to execute the trust, and under this state of the title took out a policy in the name of "John Babson," describing the property as "his dwelling house," although it appeared in evidence that the facts as to title were communicated to the company when the insurance was effected.

Held that the facts disclosed an insurable interest in plaintiff, and judgment was entered for plaintiff.

Before SHEPLEY, Circuit Judge.

BABSON, (UNITED STATES v.) See Case No. 14,489.

Case No. 705.

In re BACH.

District Court. Dec., 1872.

[Cited in Re Duncan, Case No. 4,132. Nowhere reported; opinion not now accessible.]

BACHE, (FREVALL v.) See Case No. 5,113.

BACHE, (JONES v.) See Case No. 7,454.

Case No. 706.

BACHELDER v. MOULTON et al.

[11 Blatchf. 304;[1] 6 Fish. Pat. Cas. 488; 4 O. G. 501.]

Circuit Court, S. D. New York. Sept. 25, 1873.

PATENTS FOR INVENTIONS — SEWING MACHINES — ANTICIPATION.

1. The reissued letters patent granted to John Bachelder, December 12th, 1865, for an "improvement in sewing machines," and extended [by act] for seven years from the 8th of May, 1870, are infringed by the Whitney sewing machine, which uses, as a perpetual feed, the feed of Allen B. Wilson, covered by reissued patent No. 346, granted to him January 22d, 1856, and reissued patent No. 414, granted to him December 9th, 1856.

[Cited in Potter v. Stewart, 7 Fed. 215.]

2. A decision, in a suit brought for an infringement of the Wilson patents, that the prior existence of the Bachelder patent did not destroy the novelty of the Wilson patents, is not a decision that the use of the feeding arrangement of the Wilson patents does not infringe the Bachelder patent.

3. The Wilson patents cover inventions not found in the Bachelder patent, but a machine constructed according to the Wilson patents embraces inventions claimed in the Bachelder patent.

[In equity. Suit by John Bachelder against William J. Moulton and others on reissued letters patent for an "improvement in sewing machines," granted to complainant December 12, 1865. Complainant moves for provisional injunction. Granted.

[The original patent was granted to same May 8, 1849. There were two intermediate reissues, and an extension. The claims of the reissue sued upon are as follows: "First. I claim, in combination, the supporting bed, which supports the material horizontally in the machine, and is provided with a throat for the passage of the needle and the constant yielding pressure-holder, each having the functions and mode of operation hereinbefore specified. Second. I claim, in combination, the supporting bed, the constant yielding pressure holder, and the reciprocating eye-pointed needle, each having the func-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. Syllabus taken from Blatchford's Reports, and statement from Fisher's Patent Cases.]

tions and mode of operation hereinbefore specified. Third. I claim, in combination, the supporting bed, the constant yielding pressure-holder, and the reciprocating needle-carrier, each having the functions and mode of operation hereinbefore specified. Fourth. I claim, in combination, the supporting bed, the yielding pressure-holder, the reciprocating eye-pointed needle, and the perpetual feed which moves the material horizontally under and past the needle while it is supported by the supporting bed, each having the functions and mode of operation hereinbefore specified. Fifth. I claim, in combination, the supporting bed, the yielding pressure-holder, the reciprocating needle-carrier, and the perpetual feed which moves the material horizontally upon and over the supporting bed, each having the functions and mode of operation hereinbefore specified. Sixth. I claim, in combination, the holding surface which supports the material, immediately about the needle, horizontally under the thrust of the needle, and the perpetual feed which moves the material horizontally under and past the needle, upon and over such holding surface, each having the functions and mode of operation hereinbefore specified. Seventh. I claim, in combination, the holding surface, which supports the material immediately about the needle, horizontally under the thrust of the needle, the perpetual feed which moves the material horizontally under and past the needle, upon and over such holding surface, and the receiving-plate, which receives the material from the feed during the operation of the machine in sewing a seam, each having the functions and mode of operation, hereinbefore specified. * * * Ninth. I claim, in combination, the horizontally holding surface immediately about the needle, the perpetual feed, and the yielding pressure-holder, each having the functions and mode of operation hereinbefore specified. Tenth. I claim, in combination, the horizontally holding surface immediately about the needle, the perpetual feed, the yielding pressure-holder, and a reciprocating eye-pointed needle, each having the functions and mode of operation hereinbefore specified. Eleventh. I claim, in combination, the horizontally holding surface immediately about the needle, the perpetual feed, the yielding pressure-holder, and the reciprocating needle-carrier, each having the functions and mode of operation hereinbefore specified. Twelfth. I claim, in combination, the receiving plate and the perpetual feed, each having the functions and mode of operation hereinbefore specified. Thirteenth. I claim, in combination, the horizontally holding surface immediately about the needle, the perpetual feed, and reciprocating needle-carrier, each having the functions and mode of operation hereinbefore specified. Fourteenth. I claim, in combination, the perpetual feed, the receiving plate, and the yielding pressure-holder, each having the functions and mode of operation hereinbefore specified." The further facts necessary to an understanding of the case are sufficiently set forth in the opinion of the court.] [2]

George Gifford and Solomon J. Gordon, for plaintiff.

Theodore Cuyler and Andrew Boardman, for defendants.

BLATCHFORD, District Judge. The reissued letters patent granted to the plaintiff, December 12th, 1865, for an "improvement in sewing machines," and on which the motion for a provisional injunction in this case is made, were the foundation of the suit of Potter v. Braunsdorf, [Case No. 11,321,] decided by this court, on final hearing. Every question necessary or pertinent to the decision of the present motion was considered in that case, and disposed of adversely to the defence. Since that time such reissued patent has been, by an act of congress approved July 14, 1870, (16 Stat. 656,) extended for seven years from the 8th of May, 1870.

The sewing machine of the defendants in the former case was called the Aetna machine, and employed, as a perpetual feeding device, a cylinder moving intermittently, by revolving on a horizontal axis, and so arranged that the cloth laid horizontally upon it, and was partially supported by it. Such cylinder was situated immediately in front of the needle, and was provided with a roughened surface, which acted from below, through an aperture in a horizontal table, upon the under surface of the cloth to be fed, and operated, in feeding, in combination with a yielding, curved pressure foot, which was pressed from above, by a spring, upon the upper surface of the cloth, such foot also acting as a needle stripper. The Aetna machine was provided, also, with the other devices necessary to make up the combinations covered by the first, second, third, fourth, fifth, sixth and eleventh claims of the Bachelder patent, namely, a reciprocating eye-pointed needle and a reciprocating needle-carrier, moving substantially in vertical planes, a horizontal holding surface provided with a throat for the passage of the needle, (such holding surface forming part of the supporting bed,) and a table, a part of which was so arranged with reference to the feed as to receive and aid in supporting the material, in its passage from the feed. In the Aetna machine the material could be fed perpetually while it was supported horizontally, and a seam of any length could be sewn, without requiring the sewing to be stopped at any time to attach a fresh portion of the material to the feeding instrument. This is a material feature distinguishing the Bachelder machine from those which preceded it. The Aetna machine had, it is true, a capacity beyond that of the Bachelder machine, namely, that of sewing a seam of any desired cur-

[2] [From 6 Fish. Pat. Cas. 488.]

vature, arising from the fact that, in the Bachelder machine, the material is impaled on pins, while, in the Aetna machine, the roughened surface of the feeding cylinder engaged with the material only to such extent as was necessary to move the material forward, but not to such extent as to prevent the free lateral turning of the material by the operator, during the process of feeding, so as to produce a curved or angular seam. But this, though an improvement on Bachelder's invention, embodied that invention.

The machine of the defendants in the present case is known as the Whitney sewing machine, and uses, as a perpetual feed, what is known as the feed of Allen B. Wilson. That feeding arrangement was covered by two patents issued to Wilson, which have now expired. One of them, reissue No. 346, issued January 22d, 1856, was extended, and expired November 12th, 1871. It covered, in its claims, four features of invention: (1) The described method of causing the material to be sewed to progress regularly, by the joint action of the surfaces between which it is clamped, and which act in conjunction; (2) holding the material at rest by the needle, or its equivalent, in combination with the method of causing it to progress regularly; (3) arranging the described feeding surfaces in such relation to the needle, that they or one of them shall perform the office of stripping the material from the needle; (4) so mounting and attaching one of the feeding surfaces to some other part of the machine, that it may be removed or drawn away from the other surface at pleasure. The other patent, reissue No. 414, issued December 9th, 1856, was extended, and expired November 12th, 1871. It covered, by one of its claims, a combination of three elements, namely, a table or platform to support the material to be sewed, holding it for the action of the needle, and presenting it properly to the grasp of the feeding apparatus; a sewing mechanism proper, consisting of a needle and shuttle, or their equivalents; and a mechanical feed, automatic and causing the cloth to progress regularly, to which the cloth is not attached, and so grasping the cloth that it may be turned and twisted by the hand of an operator, such twisting not interfering with the regular progression of the cloth. The feed of Wilson consists of two surfaces or bars, which clamp the material. The material is advanced and moved forward under the needle, to receive the stitches, by the joint operation of such two surfaces or bars. One of such bars has a rough surface and a lateral motion. The other has a smooth surface and no lateral motion.

The machine of the defendants has Bachelder's horizontal holding surface, in having a small horizontal round plate, through slots in which teeth on the reciprocating feed-bar project upward, on which plate the material immediately about the needle rests, so as to be borne up horizontally under the thrust of the needle, such plate being perforated with an opening or throat for the passage of the needle.

The machine of the defendants has Bachelder's receiving plate, in that portion of the said round plate which receives and supports the material as it passes from the feed.

The machine of the defendants has Bachelder's yielding pressure-holder, in having a spring pressure-foot near the needle, which rests on the upper surface of the material, and holds the material to the bed on which it is supported, the pressure foot adapting itself to variations in the thickness of the material.

The machine of the defendants has a reciprocating eye-pointed needle and a reciprocating needle carrier, substantially like those of Bachelder.

In all these particulars in which the Aetna machine was like the Bachelder machine, the defendants' machine does not differ from the Aetna machine. This embraces all particulars except the feed. In the defendants' machine, the cloth is advanced regularly and horizontally, by an intermittent motion, through the joint action of the rough surface of the moving bar beneath and the surface of the pressure foot above. It is apparent that, in the arrangement and operation of the defendants' feed, and its relations to other co-operating parts of the machine, there are the following material features in common with Bachelder's machine: The cloth lies horizontally on the feeding device, and a portion of the surface of the cloth which lies immediately in front of the needle, and of the horizontal holding surface, is supported by the feeding device during the act of feeding. The material is fed perpetually, so that a seam of any length can be sewn without removal or replacement of the parts of the machine. The material is delivered, with a seam sewn in it, upon the receiving plate.

In the Bachelder machine different portions of the belt are feeding at different times, as, in the Aetna machine, different portions of the cylinder were feeding at different times, while, in the defendants' machine, the same part of the feeding bar always acts in feeding. But this difference is immaterial. The action of the parts employed at any one time, in feeding, is the same, in the two machines, so far as the essence of Bachelder's invention of a perpetual feed is concerned. So, too, it is an immaterial difference, that, in the Bachelder machine, the feeding device is always in contact with the material, and always aids in supporting it, while, in the defendants' machine, the feeding device is not always in contact with the material, and, therefore, only aids at intervals in supporting it. Equally immaterial is it, that, the defendants' feeding bar being provided with a roughened surface, instead of with impaling pins, seams of any

desired angularity or curvature can be sewn in the defendants' machine, while such seams cannot be sewn in the Bachelder machine. This is the same difference which existed between the Aetna machine and the Bachelder machine. The increased capacity given to the machine by the facility of turning and twisting the material, due to the absence of impaling pins, is an improvement, but the vital features of Bachelder's arrangement are retained. The feeding device of the defendants has a horizontal surface which, at the time of feeding, aids in supporting the material, and thus makes the feeding possible, and is a perpetual feed, and delivers the material to and upon the receiving plate.

The point most strenuously urged on behalf of the defendants is, that heretofore suits have been brought in many of the courts for infringement of the reissued patents of Wilson, before mentioned, Nos. 346 and 414; that the defendants in those suits have set up the prior existence of the Bachelder machine, and the prior granting of the Bachelder patent, as destroying the novelty of the above-recited claims of the Wilson patents; and that it has been uniformly held that there was nothing in the Bachelder machine or the Bachelder patent to invalidate those claims. These decisions of the courts are urged as decisions that the feeding arrangement of Wilson and the feeding arrangement of Bachelder do not interfere with each other, and, consequently, that the use of the feeding arrangement of Wilson cannot infringe the Bachelder patent. But this is not a logical conclusion from what was decided in the cases referred to. All that was decided in those cases was, that the claims of the Wilson patents covered inventions which were not to be found in the Bachelder patent—inventions beyond anything found in the Bachelder patent, being the inventions claimed in the Wilson patents; but there was no decision that a machine constructed according to the descriptions contained in the specifications of the Wilson patents did not embrace inventions claimed in the Bachelder patent. No such decision could have been made, because no such question was involved. The principle properly applicable to the decision of the question involved in the present motion is a familiar one in the patent law. Bachelder had no right to use Wilson's improvements, without Wilson's consent. Wilson, on the other hand, had no right, in constructing a machine containing his own improvements, to embody therein the improvements patented by Bachelder, without Bachelder's consent.

Nothing is shown which anticipates Bachelder's inventions on the point of novelty. The plaintiff's title and the validity of his claims are free from doubt, and have been established, and the infringement by the defendants' machine is clear. An injunction must issue on all the claims.

BACHELDER, (UNITED STATES v.) See Case No. 14,490.

Case No. 707.

In re BACHMAN.

[12 N. B. R. 223; 2 Cent. Law J. 119; 22 Int. Rev. Rec. 19.]

District Court, W. D. Missouri. 1876.

CORPORATIONS—STOCK—TRANSFER—INDEBTEDNESS ON SUBSCRIPTION.

[1. A by-law of a corporation, that no transfer of stock shall be made or allowed by any stockholder who at the time is indebted to the corporation, merely attaches a condition to the right of property in the stock for the better security of corporate creditors, and does not conflict with the Missouri law which declares personal estate to be transferable in the manner prescribed by law, even if it be construed to prohibit the assignment of stock while part of the subscription remains unpaid.]

[See Brent v. Bank of Washington, Case No. 1,834; In re Dunkerson, Id. 4,156; Mechanics' Bank v. Seton, 1 Pet. (26 U. S.) 299.]

[2. An unpaid subscription to stock, for which the subscriber has executed notes to the corporation, is a debt, within the meaning of a by-law which prohibits the transfer of stock by a stockholder who is indebted to the corporation.]

[3. When such a by-law is in force, the officers or directors of the corporation cannot, as against creditors of the corporation, relieve a stockholder from liability on his unpaid subscription by registering a transfer of the stock, and delivering up the notes of the stockholder for the subscription.]

[See National Bank v. Watsontown Bank, 105 U. S. 217.]

[4. A statutory provision that "no shares shall be transferred until all previous calls shall have been fully paid in" does not prevent the corporation from further limiting the right of transfer by a by-law that no transfer shall be made while the stockholder is indebted to the corporation.]

[5. Under an assignment of stock which authorizes an officer of the corporation to make the necessary transfer on the books of the corporation, the officer is the agent of the assignor, in making the transfer, and not of the corporation; and any laches on his part in executing it is chargeable to the assignor, and not to the corporation.]

[In bankruptcy. Suit by the assignee in bankruptcy of Bachman to recover the balance due on a stock-subscription. On demurrer to answer. Sustained.]

Karnes & Ess, for plaintiff.

Johnson & Botsford and Gage & Ladd, for defendant.

KREKEL, District Judge. The assignee in bankruptcy brings this his suit to recover of defendant six thousand dollars, balance of stock subscription of seven thousand five hundred dollars, on which two payments, one of seven hundred and fifty dollars, prior to organization, and another of seven hundred and fifty dollars, on call after organization, had been made. The petition is in the usual form, declaring on balance of subscription. The answer is, that on the 9th day of Novem-

ber, 1871, the defendant sold and assigned to one Keefer, sixty-five shares of the stock by him held (on which twenty per cent. had been paid, twenty-two dollars and sixty-six cents per share); that he assigned the certificate in due form, and that the transfer was duly entered upon the books of the bank; that Keefer at the time of the sale and transfer was solvent, and that defendant did not make the sale to avoid any responsibility on his part to the bank: that at the time of said transfer on the books of the bank, he received the notes which he had executed for his stock to the bank, to the amount of six thousand five hundred dollars, and therefore claims that he is discharged from any liability to the bank on account of said subscription to the extent of six thousand five hundred dollars. As to the remaining ten shares, the answer sets up a similar assignment to Tobener, who was president of the bank, but does not allege that the assignment and transfer were entered upon the books of the bank (but alleges knowledge on the part of the bank of the assignment), and avers that the remainder of his stock notes were delivered up. This last assignment was made on the 10th day of February, 1873, is alleged to have been bona fide and for value, and that Tobener was then and is now solvent, and therefore claims to be discharged of any liability on account of these ten shares. The bank was declared bankrupt on the 12th of April, 1873.

To this answer a demurrer is interposed, assigning for causes, that the assignments and transfers set up constitute no defense as to the sixty-five, nor ten shares of stock, because the defendant at the time of making the assignment and transfers was indebted on stock subscription to the bank, and that being so indebted, he could not make a valid assignment and transfer, on account of a by-law prohibiting it, so long as he was indebted to the bank. As to the ten shares, the demurrer assigns in addition to the indebtedness, that the transfer was never made on the books of the company. This bank was organized under the general incorporation act of the state of Missouri, containing this provision, among the enumerated powers of organization under it: "To make by-laws not inconsistent with existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock." One of the by-laws of the bank provides as follows: "Certificates may be assigned by indorsement on the back, but no transfer of stock shall be valid except when made upon the books of this bank, on return of said certificate, and no transfer shall be made or allowed by any stockholder who at the time is indebted to the bank. Stock may be transferred by the owner or by a legally authorized agent." The reasons assigned by defendant why this by-law does not apply to the case before the court, are, that stock subscription is not a debt within its meaning; that if it is, the officers of the bank had a right to, and have waived it, and that the construction contended for by plaintiff would make the stock unassignable while not fully paid up, thus coming in conflict with the law of the state which declares its personal estate transferable in the manner prescribed by the laws of the company; "but no shares shall be transferred until all previous calls shall have been fully paid in." 1 Wag. St. p. 292, § 16.

The stock certificates of the bank are as follows: "Kansas City, Mo., Feb. 12, 1870. This certifies that Q. A. Bachman is the owner of —— shares of the capital stock of the Union German Savings Bank, of Kansas City, Mo., transferable only on the books of said bank, in accordance with the by-laws thereof, in person or by attorney, on the surrender of this certificate. P. W. Ditsch, President. Signed. John S. Harris, Cashier." On the back of said certificate there was a printed blank form for the transfer thereof, in words and figures as follows: "For value received —— hereby sell, transfer, and assign —— shares of stock within mentioned, authorize the cashier of said bank to make the necessary transfer on the books of the bank. Witness —— hand and seal, this —— day of ——, 187-. ——." [Seal.] The answer regarding the assignments alleges that these blanks were properly filled when assignments and transfers were made.

Chief Justice Waite in Pollard v. Bailey, [20 Wall. (87 U. S.) 520,] says that "the individual liability of stockholders in a corporation, for the payment of its debts, is always a creature of the statute. At common law it does not exist." We must then look to the statutes of Missouri to determine the liability of the defendant. As the question mainly turns upon the by-law regarding transfers of stock, while stock subscription remained unpaid, the first inquiry is: Does it conflict with any law of the state if it is construed to prohibit assignment of stock, while part of the subscription for it remained unpaid? The supreme court of Missouri has said, that even if such by-law did conflict with the general law governing transfer of property in this state, it is valid. St. Louis Perpetual Ins. Co. v. Goodfellow, 9 Mo. 150; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513. In what it would be said to conflict with the statute law governing the transfer of personal property, is not easy to be seen. Here is the creation of a peculiar kind of property by the state, by virtue of its incorporation acts, and to say that it cannot attach conditions looking to the better security of creditors regarding the transfer of stock, is to deny it a control which experience is demanding. Nor must it be overlooked that it is not interfering with the disposition of the stock, further than requiring it to be done on conditions. The by-law is held not to be in conflict with the statute law, but proper and reasonable.

The next inquiry is: Was the unpaid subscription conflicting with the case of Hall v. U. S. Ins. Co., 5 Gill, 484, a debt within the meaning of the by-law? The Missouri cases decide that it makes no difference whether the debt is due or to become due, that either fall within the by-law. The difference between the cases cited and the case before the court, is, that they were ordinary debts, such as loans and indorsements, and here it is a balance on stock subscription. This is certainly a debt, and a debt of a very high nature. Justice Miller in the case of Sawyer v. Hoag, 17 Wall. [84 U. S.] 610, speaking of stock subscriptions, and the right of creditors of insolvent corporations to look into and assail the transaction by which defendant claims to have paid it, says: "Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last four years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern for the occasion, for it could no sooner have arisen."

But it is said, and so alleged in the answer, that the by-law was never understood, construed, or intended by the officers or directors of the bank, as prohibiting or preventing the transfer of stock by reason of being indebted on unpaid stock subscription. The answer to this is, that a creditor of an insolvent bank is not bound by what the officers and directors may have understood, or now, after the bank is insolvent, understand, by the by-law. No act of the corporation, as distinguished from acts of its officers, is pleaded to show its understanding, and still, if it were, it is very questionable whether they could thus indirectly be permitted to fritter away a by-law which the law authorized them to make, and which they did make. The allegations of the answer, that the purchasers of the stock were insolvent at the time of making the transfers, may show the prudence of defendant with reference to further liability, but cannot change his obligation as a subscriber of stock. Could the officers of the bank who entered the transfer of the sixty-five shares of the stock to Keefer on the books of the bank, and delivered up the stock notes, waive the by-law regarding the indebtedness to the bank, and thereby make the transfer valid? But for the delivering up of the stock notes, all other acts of theirs could well be construed as not intending to release the original subscriber, for they may have viewed it as getting additional security. Be this as it may, for the want of power in them, their acts are void and of no avail, so far as it affects the liability of this defendant to the bank and its creditors, here represented by the assignee.

A more difficult question, however, arises in case the views expressed as to the argument and transfer of the stock and the powers of the officers of the bank are erroneous, and that is: Can a stockholder, even by the consent of the officers of the bank, discharge the liability of an original stock-subscriber, and undertake to substitute another party in his place, without the stock being paid up when creditors are to be affected? In the case of Sawyer v. Hoag, already cited, it is said that "the governing officers of a corporation cannot, by agreement or other transaction with the stockholder, release the latter from his obligation to pay to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration." Assuming that the officers of the bank intended to act fairly and honestly, they certainly did not obtain any consideration whatever in the transfer. They seem even to have failed, so far as the pleadings show, to take any obligation of Keefer, whatever, a requirement necessary, according to a number of decided cases, to make the transfer valid. That they acted in violation of the by-law, if it applied to stock-subscription, cannot be doubted. Looking into the nature of the transaction itself, we find a number of subscribers taking stock, all, perhaps (except the first), because of the known ability of co-subscribers to meet their undertakings. In order to avoid having others not known to them substituted in their place, they cause a by-law to be passed that no stock shall be transferred, unless it be done upon the books of the bank and on return of certificate, and no transfer to be made or allowed by a stockholder who at the time is indebted to the bank. Well may the supreme court of Missouri consider this a reasonable by-law; and no less strong is the appeal to this court not to interfere with the security which subscribers for stock have thus provided for themselves and creditors. The stock certificate sets out on its face that transfers must be made in accordance with the by-laws of the bank, so that all parties had notice, and therefore cannot complain if their attempt to violate it is held nugatory and of no avail. Holding original subscribers to stock liable, so far as creditors are concerned, until the whole of the stock subscribed is paid, avoids all conflicts, so far as the various provisions of the statute in reference to collecting dues are concerned, and is on that account to be favored, as well as because it affords the remedy intended when the organization was effected.

In reference to the transferring of stock, the statute, as we have seen, provides that no shares shall be transferred until all previous calls thereon shall have been fully paid up. It is contended that, the law limiting the transfer of stock to unpaid calls, the

board had no right by by-law to still further limit it. This is not the view of the supreme court of Missouri in the cases cited. The legislature may well have intended that, so far as calls were concerned, they should, at any rate, be paid in order to afford security to that extent, at least, and to avoid disputes as to who should pay them, leaving any further limitation and security to be provided by the stockholders, which they did in the legitimate exercise of their authority.

The foregoing views apply to the ten shares as well as to the sixty-five shares. But the fact that the transfer of the ten shares was not entered upon the books of the bank, and that the transferee is responsible, calls for an opinion as to the effect of the difference. The by-law, aside from the provision that the assignor shall not be indebted to the bank at the time of making the transfer, also provides that it must be done on the books of the bank. It is not sufficient to have authorized an officer of the bank, by filling up the blank on the back of the certificate. That officer, by virtue of the authority given him, became the agent of the defendant, and not the bank, and if he failed to act, the laches were those of the defendant. The fact that Tobener was the president of the bank, and that the assignment was brought to the notice of the officers of the bank, cannot be substituted for the requirements of the by-law. That Tobener, the assignee, is insolvent, might become a question if the assignor was insolvent, and an attempt was made to collect the balance of unpaid stock on the ten shares of him. An assignee of stock may, no doubt, do such acts as make him liable to the corporation and its creditors, but under the holding, this is not necessary to be determined. The law on the demurrer is with the plaintiff, and the demurrer sustained.

Case No. 708.

BACHMAN v. EVERDING et al.

[1 Sawy. 70.][1]

District Court, D. Oregon. March 21, 1870.

PLEAS—WHEN MAY BE STRICKEN OUT—SEPARATE PLEAS CANNOT HELP OR DESTROY ONE ANOTHER.

1. A plea false upon its face, may be stricken out, but this falsity cannot be shown by comparing it with another plea or defense in the same answer.

[Cited in Witherell v. Wiberg, Case No. 17,917.]

2. A plea which expressly, or in effect, admits the plaintiff's cause of action, cannot be stricken out as frivolous.

3. A motion to strike out is not allowed, if matter properly pleaded is included in it.

4. A defendant may plead separately as many distinct defenses as he may have, and one cannot be taken to help or destroy the other.

[Cited in Bank of British North America v. Ellis, Case No. 859.]

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

[At law. Action by Joseph Bachman, trustee of Kattenhorn, against H. Everding and Edward Bebee, for money had and received. Heard on plaintiff's motion to strike out defendant's answer, and for judgment. Motion denied, with costs.]

J. W. Whalley, for motion.
Erasmus D. Shattuck, contra.

DEADY, District Judge. This is an action for money had and received. It was commenced February 24, 1870. The complaint alleges that on August 28, 1869, Kattenhorn was adjudged a bankrupt in this court, and that, thereafter, such proceedings were had thereon, that the plaintiff on October 14, 1869, was confirmed by this court as trustee of said estate, and is still such trustee; and that said defendants on September 4, 1869, received from the firm of Everding & Co., of San Francisco, $374.47 gold coin, for the benefit of said bankrupt's estate, and to the use of this plaintiff; and afterwards, the plaintiff demanded payment of said money from said defendants, which demand defendants refused, and that, by virtue of the premises, there is now due to the plaintiff the sum aforesaid, in gold coin.

On March 2, defendants demurred to complaint, because the same did not state facts sufficient to constitute a cause of action.

After argument the demurrer was overruled; and on March 10, the defendants filed an answer. The answer contains two separate pleas or defenses:

First—A denial that the defendants on, etc., received the sum aforesaid or any other sum from Everding & Co., of San Francisco, or "that the same or any other sum was received by them for the benefit of the estate of said Kattenhorn, or for or to the use of the plaintiff."

Second—That said Everding & Co., about September 4, 1869, did "credit to defendants the said sum of $374.47, received by them from the sale of property belonging to Kattenhorn before his bankruptcy, "which property was sold by E. & Co." before August 28, 1869; and that about said day in September "said sum of $374.47 of the proceeds of said sale was placed to the credit of these defendants by said E. & Co."

On March 14, plaintiff moved to strike out the answer and for judgment, which motion was then argued and submitted.

The grounds specified in the motion to strike out are that the answer is sham and frivolous. In argument, counsel maintained that the first plea was shown to be false by the second one. That both could not be true. That the second one admitted what the first one denied—the receipt of the money belonging to the estate of which the plaintiff is trustee; and that the second one being in contemplation of law an admission of the cause of action, is therefore frivolous.

Under the Code, as under the statute of 4 Anne, a defendant is entitled to plead as

many defenses to an action as he may have; and one cannot be taken to help or destroy another, but each must stand or fall by itself. Gould, Pl. 432; Jackson v. Stetson, 15 Mass. 58, note a; Bell v. Brown, 22 Cal. 671; Ketcham v. Zerega, 1 E. D. Smith, 560.

A plea is called sham when it is palpably false on its face. But this falsity cannot be shown by comparing it with another plea or defense in the same answer. Otherwise the privilege of pleading several defenses would, in practice, be restricted within very narrow limits, for fear of one being considered by implication of law to contradict the other. The admissions in each plea or defense, if any, are to be taken as made only for the purpose of the issue made or tendered by it.

In this view of the matter, there is no ground for saying that the first plea is false and therefore sham. It is a mere denial that the money was received to the use of the plaintiff, and for aught that appears may be true. Besides, the motion being to strike out the whole answer as sham, is too broad. A motion to strike out, like exceptions for impertinence in chancery, is not allowed, if any of the matter included in it is properly pleaded.

The application to strike out the whole answer on the ground that the second plea is frivolous, is open to the same objection.

Nor do I consider such second plea frivolous. Admit the claim of the plaintiff, that the plea is merely an admission that the money in question was received by the defendant to plaintiff's use, may not a party defendant expressly admit the plaintiff's cause of action by his answer, as well as impliedly so by nil dicit—a failure to answer?

Where no other defense is made than by a plea which the plaintiff conceives to be in legal effect a confession of the cause of action, he should move for judgment on the pleadings, and not to strike out. Motion denied with costs.

Case No. 709.

BACHMAN v. PACKARD.

[2 Sawy. 264;[1] 7 N. B. R. 353; 4 Pac. Law Rep. 193.]

Circuit Court, D. Oregon. Nov. 18, 1872.

CONCURRENT JURISDICTION OF CIRCUIT AND DISTRICT COURTS—ORIGINAL JURISDICTION OF DISTRICT COURTS.

1. The concurrent jurisdiction conferred upon the circuit court by section 2 of the bankrupt act is limited to cases where there is a controversy concerning the right to, or some interest in, some specific thing between the assignee and a third person, and does not include an action to collect a simple debt.

[Distinguished in Brooke v. McCracken, Case No. 1,932. Approved in Smith v. Crawford, Id. 13,030. Disapproved in Walker v. Towner, Id. 17,089.]

2. The district courts have original jurisdiction of all cases and controversies between third persons and the assignee in bankruptcy as such.

[Cited in Olney v. Tanner, 10 Fed. 104.]

At law. This action was commenced on May 30, 1872, by the plaintiff as assignee in bankruptcy of the partnership and undivided estates of M. S. Hart, E. K. Packard and W. H. Moulthrop, doing business as M. S. Hart & Co., to recover a sum of money alleged to be due upon a promissory note made by the defendant on February 3, 1870, to said Hart or order, for $800 in gold coin, with interest at twelve per centum per annum.

It appears from the complaint that the partnership of M. S. Hart & Co. was duly adjudged bankrupt in this court on February 6, 1872, and that on the nineteenth of the same month plaintiff was duly chosen assignee of said estate.

Defendant demurred to the complaint, and assigned for cause that "the court has not jurisdiction of the subject of the action." [Demurrer sustained.]

John W. Whalley, for plaintiff.
Richard Williams, for defendant.

DEADY, District Judge. The question made upon the argument of the demurrer turns upon the construction to be given to the following clause of section 2 of the bankrupt act [of March 2, 1867; 14 Stat. 517, c. 176.]

"Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in, such assignee."

Is the defendant in this action a "person claiming an adverse interest * * * touching any property or rights of property of said bankrupt," etc.? If he is not, the court has no jurisdiction, and the demurrer is well taken.

For a better understanding of the subject reference may be had to section 1 of the act, defining the jurisdiction of the district courts. From this it appears that such jurisdiction not only extends "to all matters and proceedings in bankruptcy," strictly speaking, but in effect, "to all cases and controversies" consequent upon the proceeding in bankruptcy, and until the close thereof.

The clause quoted from section 2 of the act does not give the circuit courts concurrent jurisdiction with the district courts of "proceedings in bankruptcy," but only "of all suits at law or in equity" brought by or against an assignee in bankruptcy concerning certain property and rights of property. And

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

this tends to show further that congress did not intend to hereby give the circuit courts jurisdiction of any or all suits at law or in equity, by or against an assignee, as it is conceded it had already done in the case of the district courts. Goodall v. Tuttle, [Case No. 5,533.] Otherwise there would have been no use of the qualification that one party or the other to the suit in the circuit court must be one "claiming an adverse interest" in or "touching the property or rights of property * * * vested in the assignee."

In such case the clause would most naturally have read: Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity which may be brought by or against the assignee in bankruptcy, as such —or "under and in virtue of the bankruptcy." From this view of the matter it appears more than probable that the concurrent jurisdiction of the circuit courts was intended to include only a certain class of suits by or against an assignee, as such, and that therefore it is a matter to be ascertained whether this action is within this class or not.

This action is one brought to recover a simple debt due the estate—a means of collecting an asset of the bankrupt. So far as appears, the debtor does not deny the debt, but simply neglects to pay it according to his promise. He either owes the debt or he does not. In the first case, he certainly cannot claim an adverse interest in it or anything concerning it, as against the plaintiff; and in the second case, there being no debt, nothing exists in which any one can have or claim an interest.

The sum which it appears the defendant owes, and the plaintiff seeks to recover is not any specific money or property. At present, the assignee only has a right of action against the defendant, whereby he seeks to judicially establish the existence of the alleged debt, and thus be enabled to enforce its collection out of any property which the defendant may then have subject to seizure and sale on execution.

The term "interest," as used in the act, signifies an estate, share or part, and a suit to be maintained in the circuit court by or against an assignee must be concerning some property or right of property derived from the bankrupt, and in which it must appear, that one party or the other claims an interest, adversely to, that is, against the other.

In this case, the defendant does not appear to claim any interest in the debt alleged to be due the plaintiff, and as has been shown, it is impossible in the nature of things that he should have such interest.

I should not have considered it necessary, in deciding this question, to do more than state it, and cite the act upon which the plaintiff relies, but for certain decisions made under a precisely similar clause in the act of 1841.

In Mitchell v. Great Works M. & M. Co., [Case No. 9,662,] Mr. Justice Story held that the circuit court had jurisdiction of a suit in equity to recover a debt. The case before the court was a suit for an account by the assignee. It appears that the principal question in the case was, whether any national court had jurisdiction. The court proceeds at length to show that congress did not intend to leave the administration of the bankrupt system to the state courts, but that the district courts had ample jurisdiction for all purposes of the act, including "the jurisdiction to entertain all suits, to adjust all adverse claims, and to collect all outstanding debts," and thence concludes that the circuit courts have the same. The reasoning in support of this latter conclusion is brief, and, to my mind, unsatisfactory. It rests mainly upon the mere assumption that an "adverse party" in an action to recover a debt is necessarily a party claiming "an adverse interest" in property or a right of property derived from the bankrupt.

In McLean v. Lafayette Bank, [Case No. 8,885,] Mr. Justice McLean held that under the act of 1841, the concurrent jurisdiction of the circuit courts "reaches every possible controversy which can arise in the collection and distribution of the effects of the bankrupt." This conclusion is simply an arbitrary deduction from the fact that such jurisdiction was vested in the district courts.

It is also to be noted in this case as in Mitchell v. Great Works M. & M. Co., supra, that the principal question made before the court was not whether the circuit or district courts had jurisdiction, but whether the jurisdiction did not belong to the state court: and that the opinion was given in a suit in equity by the assignee against parties claiming liens upon the property of the bankrupt, which the assignee alleged were obtained in fraud of the bankrupt law, and which were then being enforced in the state court. If the district court had jurisdiction, undoubtedly the circuit court had also. It was not a mere action for the collection of a simple debt, but a suit to ascertain and adjust adverse claims to specific property. These are the only authorities that have been found to support the position of the plaintiff that this court had jurisdiction of this action. Notwithstanding my respect for the learned and great judges who gave these opinions, I cannot concur with them, and am satisfied that in this respect they spoke inadvertently and without due consideration. Neither have these opinions been followed by any of the judges before whom this question has arisen under the bankrupt act of 1867. In Bump, Bankr. (4th Ed.) 291, the cases of Morgan v. Thornhill, [11 Wall. (78 U. S.) 65;] Woods v. Forsyth, [Case No. 17,992,] and In re Alexander, [Id. 160,] are cited, as deciding that controversies to be cognizable under the concurrent jurisdiction clause of section two in the circuit courts "must have respect to some property or right of property of the bank-

rupt, transferable or vested in the assignee," and the suit "must be in the name of one of two parties described in this clause and against the other;" and that such jurisdiction "is confined to cases in which there is a disputed title or claim to property or assets adverse to that of the assignee is set up. The circuit courts cannot entertain suits brought by the assignee to collect debts due to the bankrupt estate."

Goodall v. Tuttle, supra, was like this, an action to recover a debt due the bankrupt. In the course of a learned and able opinion upon the question whether a district court other than the one where the bankruptcy proceedings are pending can take jurisdiction of an action by the assignee to collect assets of the bankrupt, Hopkins, J., says: "That section two clothes the circuit court with concurrent jurisdiction with the district courts in certain (not all) cases arising under the act, but not of the character of this case."

In Sedgwick v. Casey, [Case No. 12,610,] Blatchford, J., held that a suit to collect a debt did not come within this clause, and therefore was not within the limitation of two years made applicable to suits of which the circuit court has concurrent jurisdiction.

In my judgment this action is not within the letter of the clause or reason of it. The defendant is not a person claiming an adverse interest, as against the assignee, touching any property of the bankrupt involved in this action, neither does the plaintiff claim any such interest as against him. The jurisdiction of the action is vested in the district court. If it had been intended to confer the same jurisdiction upon the circuit and district courts in all suits at law or in equity which might be brought by or against the assignee, as distinguished from the summary proceedings which take place in the court of bankruptcy proper, and to which creditors are deemed to be parties, it was only necessary to say so in so many words. But the act, after giving the district courts unlimited jurisdiction in this respect, confers concurrent jurisdiction upon the circuit courts specially, and in language which cannot be fairly construed to include other than a certain class of suits, as controversies growing out of conflicting claims to, or interests in, some specific property or thing. In such cases congress deemed the matter of so much importance as to permit the plaintiff to commence his suit in the circuit court in the first instance. But in the matter of the collection of a debt, original jurisdiction is confined to the district courts, with the right of appeal to the circuit court, "when the debt or damages claimed amount to more than five hundred dollars." See section 8, Bankruptcy Act, [March 2, 1867; 14 Stat. 517, c. 126.]

The demurrer is sustained.

BACHOF, (FRESE v.) See Cases Nos. 5,109 and 5,110.

BACKHAUS, (SECKEL v.) See Case No. 12,599.

Case No. 710.

BACKHOUSE v. JETT et al.

[1 Brock. 500.] [1]

Circuit Court, D. Virginia. May Term, 1821.

SLAVERY—FRAUDULENT CONVEYANCES—RIGHTS OF CREDITORS — ISSUE AND PROFITS — EXECUTORS AND ADMINISTRATORS.

1. Where a chancery suit is depending against an administrator, and the cause has been referred by the court, to a commissioner, to ascertain the amount due by the administrator to the estate of his intestate, it is error in the commissioner to admit an administration account of the said administrator, which has been settled before another commissioner in the country, under the direction of a distinct tribunal, and while the suit in this court was pending, without the knowledge or participation of the complainant. The commissioner should require vouchers for each item in such account, and reject all items that are not established by competent testimony.

2. A father, in 1783, made a voluntary deed of gift of certain slaves to his only son, and possession followed and accompanied the deed. In 1785, the father died, having appointed his wife and another, executrix and executor of his last will. Subsequently, the son and donee qualified as administrator de bonis non upon his father's estate, and in that capacity, a judgment at law when assets was rendered against him for a considerable sum of money, the jury having found for the administrator on the plea of fully administered. Many years after the date of this judgment, the plaintiffs filed a bill in chancery against the administrator and others, assailing the deed of 1783, as fraudulent as to creditors, and claiming to have their debt discharged out of the property conveyed by that deed. *Held*: That the slaves conveyed by such voluntary deed, are not assets in the hands of the representative of the donor's estate, although such representative was the donee himself.

3. That though such voluntary deed is void as to creditors, whether the transaction involves moral turpitude or not, it vests in the donee a title that is good against all the world save creditors, and defeasible by them only. Though creditors have a claim upon the slaves, conveyed by such deed, for the payment of their debts, they have no title to the slaves themselves. The donee does not seem to be a mere trustee for creditors, and is not liable for the hires and profits of the slaves and their issue or for interest on the sales of such as have been sold, from the time that he received them, or that the slaves were sold, but is responsible only for the slaves themselves, and their issue, that were in being when the demand was made by the creditors, and their profits from that date, and for the money actually received for those which have been sold, and interest thereon, from the time that the demand was made; viz. from the institution of the suit.

[Cited in Merrill v. Dawson, Case No. 9,469; Fowler v. Merrill, 11 How. (52 U. S.) 396.]

[See Collinson v. Jackson, 14 Fed. 305; In re Grant, Case No. 5,693.]

In equity. On the 10th day of June, 1783, Thomas Jett, of the county of Westmoreland, Virginia, made a deed of gift of one half of all his lands in fee simple, and twenty-one

[1] [Reported by John W. Brockenbrough, Esq.]

slaves, which are mentioned in the deed by name, and also a moiety of all his other personal property of every kind, whatsoever, to his only son, William Storke Jett, for his support and advancement in life. This deed of gift was duly recorded in the county court of Westmoreland, on the 29th day of July, of the same year. In the month of February, 1785, Thomas Jett, the father, made his will, ratifying and confirming the deed of gift to his son William, and making sundry devises, and giving sundry specific legacies to his wife Sukey Jett, and other relatives. The testator appointed his wife and another, executrix and executor of his will; and during the spring or summer of 1785, he departed this life. Some time after the death of Thomas Jett, the then representatives of John Backhouse, the intestate of the complainant, instituted an action of assumpsit against William Storke Jett, the administrator, with the will annexed of Thomas Jett, deceased. The defendant pleaded the general issue of non assumpsit and plene administravit, and the jury found for the plaintiffs on the first issue, and for the defendant on the last. At the June term of this court, 1799, judgment when assets was rendered in favour of the plaintiffs for the sum of $3,378.56. A few years after the rendition of this judgment at law, the plaintiffs filed their bill in equity, in this court, against William Storke Jett, in his own right, and as administrator de bonis non of Thomas Jett, deceased, and the other legatees of Thomas Jett, alleging, that they had in their possession property belonging to the said Thomas Jett's estate, of which the jury had no knowledge at the trial of the issue of fully administered, and praying a discovery of the amount and value of said property, which was in their hands respectively, and that it might be subjected to the payment of the debt for which their judgment, at law, was rendered. No specific claim, however, was asserted in the bill, to the property conveyed by the deed of the 10th of June, 1783, to William Storke Jett. The principal defendant, William Storke Jett, admitted in his answer, that his father, Thomas Jett, died considerably indebted to the plaintiff's intestate, but insisted that all the assets that had come to his hands to be administered, had been faithfully applied to debts of equal, or superior dignity, to that due to the estate of John Backhouse. He denied that he had, as charged in the bill, delivered the specific legacies to the respective legatees, but affirmed that the subjects of those legacies had been, several years before the date of the will, given to the legatees, who had ever since had them in possession, and that they were mentioned in the will, as legacies, by way of confirming gifts, theretofore, made by the testator to his children, and also denied that they had ever gone into the hands of Thomas Jett's representatives as assets, or ever could in truth be so considered, as the gifts, being of personalty, were complete by the delivery, and an absolute title had thereby vested in the donees. Various orders were from time to time made in the cause, and in July, 1817, the surviving plaintiff filed his amended bill, assailing the deed made by Thomas Jett to his son William Storke Jett, before recited, as fraudulent and void as to creditors, the grantor being (as was alleged) largely indebted at the time of its execution, to an amount more than sufficient to absorb the residue of his estate, as was shown by its subsequent insolvency, under the administration of the donee himself. The amended bill, also charged that several debts of Thomas Jett had been paid from the personal fund, in the hands of the administrator, in discharge of specialties, which bound the land thus fraudulently conveyed, and to the amount of such disbursements, claimed that the plaintiff should be substituted in the place of the bond creditors, and have the benefit of the charge they might have asserted against the land, &c. William Storke Jett, in his amended answer maintained, that the deed of June, 1783, was valid, inasmuch as it was made by a man universally deemed solvent at the time, and affirming that the debts referred to in the amended bill, as specialty debts, were in truth but simple contract debts, being due upon bills of exchange, which did not bind the land: but that if the court should consider the said deed as void as to creditors, still in no event could he be charged with the increase and profits of the slaves, or for the value of such of them as were dead, or for interest upon the sales, &c., no notice having been given until the amended bill was filed, after a lapse of thirty-three years from the date of the deed, that the property thereby conveyed, would be sought to be made liable for the plaintiff's claim. At the June term of this court, 1819, the court "without deciding at present upon any of the points stated in the answer," made an interlocutory order, directing any commissioner of the court, to execute a prior order made in the cause, and recommitting it to the same commissioner, with specific instructions to report further, inter alia, accounts of the values of any estates derived, by any of the defendants, under gifts from the said Thomas Jett, in his lifetime, distinguishing in such accounts the real from the personal estate so derived, &c., and report thereof, to the court. In pursuance of this order, the commissioner made his report, stating that William Storke Jett. the administrator of Thomas Jett, had, at two different times, made up his administration accounts on Thomas Jett's estate, before commissioners appointed by the county court of Westmoreland, &c., dated the 22d day of September, 1798, showing a balance due the administrator, of £200 0 11½, and the last on the 18th of May, 1818, showing a balance in his favour of £1639 15 5½, "neither of which has been surcharged and falsified, nor attempted to be; therefore, the commissioner

has (agreeably to the rule of our state courts) taken them as correct." The commissioner also reported the estimated value of the property, real and personal, conveyed by Thomas Jett to William Storke Jett, by the deed of 1783, allowing interest on the whole amount, from the 31st day of December, 1786. The estimated value of the slaves alone, with interest from that date, would more than satisfy the whole demand of the complainant. To this report various exceptions were taken, both by plaintiff and defendant, which are fully stated, and considered in the following opinion, delivered on the 6th day of June, 1821, by—

MARSHALL, Circuit Justice. In this case, the plaintiff had instituted a suit on the common law side of the court, to which the defendant pleaded the general issue, and fully administered. The first was found for the plaintiff, and the second for the defendant, and judgment was rendered for the plaintiff, to be satisfied out of the assets of his testator, when they should come to his hands to be administered. This bill is filed, alleging, that assets were in the hands of the administrator, at the time the verdict was given, which were not known to the plaintiff, and were not shown to the jury, and that assets have since come to the hands of the administrator, which are liable for this debt. The bill, also, asserts a claim on the real estate, upon the principle of marshalling assets. The accounts were referred to a commissioner, and his report has been excepted to by both parties.

The plaintiff excepts, because the commissioner has given to an ex parte report, made by the county commissioners, to the county court of Westmoreland, while this suit demanding an account, was depending in this court, the same effect as would be allowed to such report, had it been made before the institution of this suit. This exception is sustained. While a suit for an account is depending, neither of the parties ought to be permitted to change their relative situation by a proceeding, without the knowledge, or the participation of the other. The commissioner, therefore, ought to have required vouchers for this account. It is said, that the deposition of Mr. Campbell, is a sufficient voucher for the most considerable item in it. The objection made to this deposition is, that this debt was not mentioned in the account, which was taken before the commissioners in 1798, nor in the answer filed in this cause.[2]

These omissions certainly throw some doubt over the claim for this credit, and require that it should be sustained by clear testimony; but they do not conclusively negative the right to it. When an administrator supposes himself to have fully administered the assets in his hands, he may be careless about adding to the sum he has overpaid; and when a plaintiff himself comes into a court of equity, after a verdict against him, on the plea of fully administered, to show assets at that time, in the hands of the administrator, he cannot be permitted to contest the right of the administrator, to show the disbursement of those assets. I shall, however, reserve the decision on this claim, till the report shall come in.[3]

The principal controversy between the parties, respects a number of slaves, comprised in a deed of gift made in his lifetime by Thomas Jett, the original debtor, to the defendant, his son, for his establishment in life. This deed being voluntary, is said to be fraudulent as to creditors, and the plaintiff claims the slaves and their hire, from the death of the donor. The defendant contends, that he is liable only for the slaves now alive, for the price of such as have been sold, and for interest and hires, if at all, only from the filing of the bill, in which the claim is made. The commissioner has charged the administrator, with the value of all these slaves, and with interest on this sum. Several exceptions have been made to this item of the account, and the instructions of the court, for regulating the conduct of the commissioner, have been required.

The plaintiff contends—1st, That these slaves were assets in the hands of the administrator. 2d, That a person, holding under a voluntary deed, is liable for profits. If the first point be decided in favour of the plaintiff, it will determine the question, for it has never been doubted that an administrator is liable for the profits, which have been made on the assets in his hands.

Are slaves then which are given by the owner in his lifetime, assets in the hands of his representative, if required for the payments of debts? If this was a case of the first impression, it would be decided by the words of the act of our state legislature, which makes such deeds of gift void against those only who may have been injured by them. As between the parties, they are to all intents and purposes valid. William Storke Jett, so far as respected any claim to be set up by Thomas Jett, was the owner of these slaves; and if this be true, they could not be assets in the hands of the representatives of Thomas Jett. But our statute is in a great degree copied from that of England, and so far as it is copied, Virginia is supposed to have adopted, with the statute, the settled English construction of it. It is therefore proper to examine the English cases on this point.

The counsel for the plaintiff relies much on Roberts, on Frauds, (volume 2, pp. 592, 593.)[4] Roberts says, "But, wherever a man makes a fraudulent gift of his goods and chattels, and dies indebted, the rule, upon the statute

[2] [See note at end of case.]

[3] [See note at end of case.]

[4] Rob. Fraud. Conv. 592, 593.

of Eliz. c. 5, has always been to construe the gift as utterly void against all his creditors, and the debtor to have died in full possession, with respect to their claims, so that the effects are just as much assets in the hands of the personal representatives, as to creditors, as if no such attempt to aliene them had been made." It is admitted, that Roberts lays down the rule, in broad and explicit terms. But very little attention to what immediately follows, will be sufficient to show that his expressions are very unguarded; and that if his proposition is true in any case, it is only in the case of the donor's retaining possession. This was the point determined in Bethel v. Stanhope, Cro. Eliz. 810.

In Bethel v. Stanhope, the donor died in possession, and the defendant had intermeddled with the goods, so as to become executor in his own wrong, before administration was granted to him. After administration granted, he delivered the goods to the donee, who was the daughter of the donor. The court determined, 1st, That the defendant might be sued as executor, and 2d, That the goods which had been in his possession, were assets, and remained such, notwithstanding the delivery to the donee. In addition to the very essential fact, that the donor, in this case, died in possession of the goods, there was a clause in the deed, that it should be void upon the payment of 20s, and the jury expressly find that it was made by covin, to defraud his creditors. As covin implies participation in the actual fraud on the part of the donee, it is presumed that she could not have recovered these goods in a suit against the donor, or his administrator. He was, therefore, in possession of the goods, which he might lawfully retain, and which were assets in his hands for the payment of debts. He could no more divest himself of these assets, or of his liability for them to creditors by delivering them to a donee, not having a legal right to demand them, than by delivering them to a legatee.

Roberts adds, "To give substantial effect to this construction, the voluntary donee is considered as liable to be charged as executor de son tort, if he take possession of the goods after the decease of the donor." Now, to me it seems difficult to reconcile this determination with the idea, that these goods are assets in the hands of the rightful executor. If any other person take them from the possession of the executor, he is a trespasser, and not an executor de son tort, unless he claims to take them as executor, or does other acts of an executor. This is expressly determined in Read's Case, 3 Coke, 33, pt. 5. It seems to me, that charging the donee, in this case, as executor de son tort, when another person would not be so charged for the same act, instead of proving, that they are assets in the hands of the rightful executor, goes far to prove the contrary. Read's Case contains another principle, which is decisive on the general question, where the possession has been parted with by the donor. The court says: "When the defendant takes the goods before the rightful executor hath taken upon him or proved the will, he may be charged as executor of his own wrong, for the rightful executor shall not be charged but with the goods which come to his hands after he takes upon him the charge of the will."

Now, if the executor shall not be charged with goods of which the testator died possessed, until they are reduced to actual possession, he shall not, a fortiori, be charged with goods of which the testator did not die possessed, but which he had given away in his lifetime. But to return to Roberts. He says, that where the goods are taken by the donee, after administration granted to another, he may be charged as executor de son tort: "and this," he adds, "seems to be a rule much in favour of the rightful executor and administrator, who cannot excuse himself upon the statute of Elizabeth, from delivering up the subject of his testator's, or intestate's fraudulent gift to the donee, if he demand it."[5]

Now, this proposition appears to me to be in direct opposition to that before laid down by the same author. If, under the statute, the executor is obliged to surrender the thing given to the donee, even where the donor dies in possession, and the thing is in his hands, he is not afterwards chargeable with the same property as assets, and, a fortiori, he cannot be charged with it, if it never came to his hands, but was delivered to the donee, in the lifetime of the testator.

This last doctrine of Mr. Roberts, is completely sustained by the case in Cro. Jac. 271.[6] In that case, the donor died in possession, and the donee sued the administrator, who pleaded, that the gift was fraudulent, and that his testator was indebted, and did not leave other assets sufficient to pay his debts. The plaintiff demurred, and the court gave judgment in his favour. This case seems to me to be entirely decisive of the whole question. If the administrator could not maintain his own possession against the donee, it is very clear that he could not defeat the possession of the donee; and if he could not, it is equally clear, that the law cannot consider the goods as assets in his hands.

Mr. Stanard also quoted 1 Madd. 218, and 2 Term R. 587.[7] But Maddox goes no further than to say, that the goods "shall still be considered as a part of the donor's estate for the benefit of his creditors;" that is, as I understand him, they shall be so considered in the hands of the donee; and the case

[5] Rob. Fraud. Conv. 594.

[6] Hawes v. Leader, 3 Cro. Jac. 270, 271.

[7] Edwards v. Harben, 2 Durn. & E. [2 Term. R.] 587. Creditor took an absolute bill of sale of the goods of his debtor, but left them in debtor's possession a limited time, during which he died, and creditor took the goods and sold them. The bill of sale gave no title, as possession did not follow and accompany it, and creditor liable as executor de son tort.

in 2 Term R. only determines, that the donee may be considered as executor de son tort. I think, then, it is very clear, that, according to the English cases, as well as on the words of the statute, these slaves are no assets.

2d, This leads to the inquiry into the extent of the liability of the donee.

It is not denied that this is a case free from any charge of covin. There is no fraud in fact, or bad faith on the part of the donee. I think there was none on the part of the donor, for the case presents no reason for supposing that the deed was made in contemplation of insolvency, or with a view to defraud creditors. It is made two years before the death of the testator, and before the date of his will, and it is not pretended, that he was at the time in bad health. He does not appear to have been pressed by creditors, nor does the administration account exhibit debts of which he might be particularly apprehensive. There are no judgments, or even bonds; there is nothing to induce a suspicion, that he was not in good credit, or that he doubted his ability to pay any claim which might be brought against him. In this situation, he gives half his estate to his only son for his establishment in life. The policy of the law very properly declares this gift void as to creditors, but looking at the probable views of the parties at the time, there appears to be no moral turpitude in it. In such a case, is the donee responsible for more than the slaves themselves, including their issue now in existence, and their profits from the time they were claimed by creditors, and for the money actually received for those which have been sold, and for interest on that money, from the same time? Is he responsible for profits, which accrued before the creditor made his demand?

There is some difficulty in this question, considered merely on principle. The donee has title against all the world, except against creditors. He has a title defeasible by creditors only. It is good against the donor and his executors. Where a person having no title, holds the property of another, the profits belong to that other; but in this case, the slaves are not the property of the creditors. They have a claim upon them for satisfaction of their debts, but no title to them. Profits, in the hands of an executor, are liable for debts, because they form a part of the estate of the testator, and the executor receives them as trustee for that estate. But the donee is not a trustee for the estate of the testator; and it is not clear that he is a trustee for the creditors, since he has always held the property in his own right. It is by no means clear upon principle, where the title is not to the thing itself, but to have it sold in satisfaction of a debt, that this title can extend to the profits previously made of that thing, by a bona fide possessor.

It might be expected, that these questions had frequently arisen under a statute, passed in the reign of Elizabeth, and had been long settled. But I have been able to find no case in which it has arisen; and I am the more inclined to think it never has been made, because the gentlemen concerned in this cause would, I think, have found the case, had it existed. In Partridge v. Gopp, Amb. 596, a gift of money to daughters was declared void, and directed to be refunded, but no claim appears to have been made for interest. Viner, in his first volume, page 186, pl. 9, lays down the broad and general principle, that a bona fide possessor receives the profits as his own. But I should be much better satisfied could I see the case itself, and the reasoning on which the decision was made.

In the absence of decisions in cases of personal property, those which have been made respecting the profits of real estate have been resorted to on both sides, and gentlemen, reasoning from analogy, have applied the law in such cases, to voluntary gifts of chattels. It has been affirmed, and denied, that heirs, devisees, and all persons holding real estates as volunteers, are accountable to creditors for profits. The case of Davies v. Topp, 1 Brown, Ch. 524, has been relied on, as showing that the heir is accountable for profits. The report of that case, is remarkably confused and unsatisfactory. John Topp died in April 1778. The bill was brought for an account and application of the personal estate, not specially bequeathed, to the payment of debts; and in case the personal estate should not be sufficient, to have the deficiency raised by sale or mortgage of the real estate. The cause was heard at the rolls in February 1780, when it was directed, that the real estate should be sold, to make up any deficiency in the personal estate; and it was declared, that if the real estate should not be sufficient, the rents and profits should be applied to make up the deficiency. There are several parts of this decree, as stated, which appear to me to be very extraordinary; but I shall not notice them, because they do not apply to the question before the court, though they certainly bring the whole case into some doubt. But the decree, so far as it respects rents and profits, is expressed in general terms, not declaring, whether the rents and profits shall be computed from the death of the testator, or from the filing of the bill. In the particular case, it could not have been of much consequence, for the cause was heard at the rolls, in less than two years after the death of the testator, which leaves it probable, that no profits accrued between the death of the testator, and the filing of the bill. It does not appear, certainly, from the opinion of the chancellor, whether this case was affirmed or reversed, and in his opinion, not a syllable is said on that part of it which respects profits. The principal question, that on which the parties were desirous of obtaining the opinion of the court, appears to have

been, whether, after purchased lands which descended to the heir, or specific legacies and lands, specifically devised, but charged with debts and legacies, should be first liable for those debts. The complexion of the case, gives some reason for the opinion, that the question of profits was, in fact, of no importance, and was not raised in the bill. This case, I think, leaves that question where it was found.

The cases in 2 Atk. are so obscurely reported, as to give no decisive information on the subject. In Sims v. Urry, 2 Ch. Cas. 225, the chancellor decreed profits only, from the time of pronouncing the decree.

Baron Weston's Case, as cited in 1 Vern. 174, was this: Baron Weston brought debt on a bond against the heir, but for three descents the heir continued an infant, so that the parol demurred. The guardian received the profits of the estate, and converted them to her own use. The baron brought an action against her, as administratrix of the children, but did not succeed. In the principal case, the counsel admitted that profits could not be demanded during minority.

In Waters v. Ebrall, 2 Vern. 606, it was determined, that a guardian was not compellable to apply the profits of a ward's estate, to the payment of bond debts.

In the case of Chambers v. Harvest, Mos. 124, the question was, whether the heir should account for profits from the time of filing the bill?

In 6 Ves. 93, (Pulteney v. Warren,) the chancellor says; "Where there has been an adverse possession, and upon an application to this court, upon grounds of equitable relief, the plaintiff appears entitled to an account of rents and profits, if there has been a mere adverse possession, without fraud or concealment, or an adverse possession of some instrument, without which the plaintiff could not proceed; the court has said, the account shall be taken only from the filing of the bill, for it is his own fault not to file it sooner."

In 7 Ves. 541, (Pettiward v. Prescott,) the amount of rents and profits was restrained to the time of filing the bill. These two cases from Vesey, are not cases where the heir is made liable for the debt of the ancestor. They are cases of title, which is much stronger. Even in them, the account has been restrained, where there was nothing to prevent the plaintiff from having proceeded, to the time of filing the bill.

In the case of Shetelworth v. Neville, 1 Term R. 454, which was an action of debt against the heir, Ashhurst says: "Till the possession is recovered against him, (the heir,) he is entitled to the rents and profits; and he is entitled to receive them till judgment is given against him." Id. 457.

At common law, the heir who had aliened before action brought, might plead, that he had nothing by descent at the time of suing out the writ or filing the bill. Had the profits been assets, this plea could not have been maintained. The profits, therefore, were not assets. The statute of the 3d and 4th of William & Mary, which has rendered the heir, in cases of alienation, liable for the value of the land, does not make him liable for the profits, or for interest on the money. It is to be fairly presumed, that the statute has adopted the rule of the court of chancery.

Upon the best consideration I can give to the cases, I am well satisfied, that chancery does not make an heir responsible for profits accrued before the filing of the bill, and I think the analogy between real and personal estate, in this respect, is a strong one. This question was well considered in Munford's Case, and decided against the claim to profits. I regret that the opinion then given, has been mislaid. Chief Justice's note at the end of the case of Mutter's Ex'rs v. Munford, [Alston v. Munford, Case No. 267.] The plaintiff's counsel has relied on a case reported in 5 Munf. 492, (Baird v. Bland.) In the construction of a state statute, the courts of the Union have uniformly adopted the rule of decision, given by the state courts. If, therefore, the court of appeals had decided, that under our statute of frauds, a donee was responsible for profits, I should have followed the precedent, however erroneous I might have thought it. But the case to which the plaintiff has referred, is not a case under the statute. It is not the case of a creditor, but of a person having title to the slave recovered.

I think the defendant, William Storke Jett, is responsible for the slaves now alive, at their present value, or for the slaves themselves; and for profits from the filing of the amended bill which claims them; and for the money actually received for those which have been sold, with interest thereon, from the same time. And the report is to be made up in conformity with this opinion.

Decree.—In conformity with the above opinion, an interlocutory decree was rendered, allowing the exceptions of both parties, and recommitting the report to the commissioner, with instructions, not to admit any account taken before commissioners in the country, subsequent to the institution of this suit, further than the same shall be supported by vouchers or evidence. And the court doth further direct the commissioner to charge the defendant, William Storke Jett, with the present value of such of the slaves contained in the deed, of the 10th of June, 1783, in the amended bill mentioned, and with their issue, as are now in possession of the said defendant William Storke Jett, and with the profits thereon, from the 7th day of July, 1817, when the amended bill in this cause was filed, and also with the price of the slaves contained in the said deed, or of their issue, who may have been sold, or with the value of those otherwise disposed of, at

the time when disposed of, together with interest on such price or value, to be calculated from the said 7th day of July, 1817.

NOTE, [from original report.] The question of the liability of a fraudulent donee of personalty, for hires and profits, was considered by the court of appeals, in the late case of Blow v. Maynard, 2 Leigh, 29. The court determined that the donee was responsible for the hires and profits, but a very slight examination of that case will, it is believed, lead to the conviction, that the above opinion of the chief justice, so far from being impugned, is strengthened by the opinion of the judges delivered in Blow v. Maynard. The points of dissimilitude between the two cases, are very striking. In Blow v. Maynard there was evidence that convinced, at least one of the court, that the bill of sale of the personalty (slaves) was antedated, which is in itself a very cogent circumstance, to show the fraudulent intent with which it was executed. The nominal purchaser is treated by the court as a donee, because, although the instrument conveying them, purported to be a bill of sale, there was no title of evidence to show, that any valuable consideration had ever passed. It was executed by a party greatly embarrassed at the time, to a maiden aunt of the debtor's wife, who was a member of his family, and the pretended sale was not accompanied with any change of possession, and the debtor continued in possession of them, up to the period of his death, which occurred four years afterwards. The case was very much like that of Edwards v. Harben, reported in 2 Term R., cited ante, except that it was a much stronger one against the pretended vendee, and the decision of the court accorded with the determination of the court in Edwards v. Harben, viz; that the bill of sale was fraudulent, and void as to creditors, and that the nominal vendee was accountable for the slaves thereby conveyed, and their increase, hires, and profits, accruing since the death of the vendor, (the slaves having then passed into her possession, and never having been under the control, or in the possession, of the administrator,) as executrix in her own wrong, in like manner as a rightful executor would be accountable.

The question of the liability of the heir, for the rents and profits of the real estate, descended to him, was also involved, and was elaborately discussed by the judges. Two judges, in a court consisting of three, decided, that the heir was not accountable for the rents and profits, but from the date of the decree; and Carr, J., while he expressed some doubt of its correctness, seemed to acquiesce in the decision.

The deposition of Campbell, respected a debt due of £450, due from Thomas Jett, in his lifetime, to the estate of the deponent's father, which debt had been paid by William Storke Jett, executor of Thomas Jett, in 1788. This debt was omitted in the administration account of William Storke Jett, settled before the commissioners in 1798, but the executor was credited with it in the settlement made in 1818, before the commissioners of the county court of Westmoreland, during the pendency of this suit.

It has always been the practice in Virginia, for the county courts, at the instance of an executor, or administrator, or any party interested in his accounts, to make an ex-parte order for the settlement of the administration account before commissioners, without any summons to the parties concerned. Taylor, Ch., in Mountjoy v. Lowry, 4 Hen. & M. 428. And this account, when so settled, without notice, is taken as prima facie evidence of the correctness of the charges and credits, therein contained; but any party interested, may, by bill in equity, surcharge and falsify it, if capable of adducing satisfactory evidence for that purpose. Tucker, J., in Anderson v. Fox, 2 Hen. & M. 260; Atwell's Adm'r v. Milton, 4 Hen. & M. 253; Wall's Ex'rs v. Gressom, 4 Munf. 110. Upon a bill to surcharge and falsify an account of an executor, settled by commissioners, under an order of the court before which the will was proved, if the answer discloses nothing improper in the account, and the complainant exhibit no evidence to sustain his allegations, it is not incumbent on the court of chancery, to refer the account to a commissioner, but the bill should be dismissed. Wyllie v. Venable's Ex'r, Id. 369. But while the plaintiff must specify the items of surcharge and falsification, it is competent for him to show error upon the face of the account. Garrett v. Carr, 3 Leigh, 407; Lee v. Stuart, 2 Leigh, 76. And, although, under circumstances, an executor ought not to be charged with interest on balances in his hands, yet, in general, he is so chargeable; and where in an ex-parte settlement of an executor's account, the commissioners omit to charge interest, without assigning any good reason therefor, such omission may be corrected, upon a bill brought to surcharge and falsify. Burwell's Ex'r v. Anderson, 3 Leigh, 348. The presence of a legatee, during the progress of the ex-parte settlement, and his failure to state any objections, when desired to do so, (the legatee not being present when the accounts were closed, and the results stated,) will not preclude him from bringing his bill to surcharge and falsify. Garrett v. Carr, supra. And where, on a bill to surcharge and falsify, if an order be made for a new settlement, and the vouchers cannot be still produced, they will be presumed to have existed, especially, after a great lapse of time: the onus probandi is thrown upon the contesting party. M'Call v. Peachy's Adm'r, 3 Munf. 295, 301, 305; Tabb v. Boyd, 4 Call, 453. The above is a condensed summary of the decisions of the court of appeals on this subject, which are collected by Mr. Robinson, 2 Rob. Pr. 113–115. The question, whether the settlement of an administration account, made ex-parte, under the order of another court, pending a suit against the executor, before a distinct tribunal, will be taken as prima facie evidence by the latter court, has never yet, it is believed, been decided by a court of last resort. The editor, however, is informed by Judge P. P. Barbour, [circuit justice,] that the invariable practice of the court of chancery at Fredericksburg, while he practised there, was not to regard the account settled pendente lite; and to require vouchers for each item.

Case No. 711.

BACKSTACK v. BANKS.

[7 Ben. 355.][1]

District Court, S. D. New York. June, 1874.

ASSAULT AND BATTERY—MATE AND SEAMAN.

1. The mate of a vessel, thinking that one of the boys on board had stolen some money from him, accused him of theft, while he was seated at the breakfast table, with the mate and two others. The boy retorted with an opprobrious epithet, and the mate struck him in the face, and he fell over in his chair against a partition. The boy filed a libel against the mate to recover damages for assault and battery: *Held*, that as the blow was not given in the course of discipline, and as the mate used opprobrious words first, the assault was without excuse.

[See Benton v. Whitney, Case No. 1,335;

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

Cushman v. Ryan, Id. 3,515; Morris v. Cornell, Id. 9,829.]

2. That, as the libellant was not shown to have suffered any permanent or serious injury, the court would award him $20, and costs.

[In admiralty. Libel by Paul J. Backstack, seaman, against Charles A. Banks, mate, to recover damages for an assault and battery. Decree for libellant.]

W. R. Beebe, for libellant.
R. D. Benedict, for respondent.

BLATCHFORD, District Judge. The libel represents this as a case of great hardship. It alleges that the respondent beat the head of the libellant against the cabin ceiling, and knocked him down, and pulled his hair, and jumped on his back with heavy boots after he was down, and severely injured him, and kicked him in the head, and cut and severely wounded him; and that the libellant was unable for a long time to perform his duties. It claims $2,000 damages. The oath of the libellant to the foregoing statement of the libel was admitted by consent, as evidence, and he was not examined or cross examined as a witness. The master's affidavit was admitted by consent as evidence, setting forth that he found the libellant bleeding and his head cut open, and that he was otherwise severely injured and suffering. The master was not examined or cross-examined.

The respondent testifies, that, suspecting the libellant of having stolen two francs from his pocket, he accused the libellant, while he was seated at the breakfast table with two other persons and the respondent, of having taken the money; that the libellant then applied an offensive epithet to the respondent; and that thereupon the respondent hit the libellant on the face, and he fell over in his chair against a partition. The respondent denies the other violence alleged. The evidence of the respondent is sustained by that of one of the other two persons who were at the table.

The blow given by the respondent, who was the mate of the vessel, the libellant being an ordinary seaman, was not given in the course of discipline, or to enforce obedience to orders, or by way of punishment. As for opprobrious words, the mate used them first by accusing the libellant of stealing. The assault by the respondent was without legal excuse. But the libellant is not shown to have suffered any permanent injury from it, nor can I conclude, on the evidence, that it was serious in its character or consequences. It is not established that the libellant was rendered by it unfit for attending to his duties. I award to the libellant the sum of $20 and costs.

BACKUS, The, (FRANCONET v.) See Case No. 5,048.

Case No. 712.

BACKUS v. The MARENGO.

[6 McLean, 487.][1]

Circuit Court, D. Michigan. June Term, 1855.[2]

SHIPPING—CHARTER-PARTY—CHARACTERISTICS OF BILL OF LADING.

1. A bill of lading is conclusive to establish the articles shipped, unless fraud or mistake be shown.

[See Bradstreet v. Heran, Case No. 1,792. Contra, The Henry, Id. 6,372.]

2. Such an instrument has some of the characteristics of a bill of exchange.

3. Good faith in the agents of commerce is requisite.

[Cited in Robinson v. Memphis & C. R. Co., 9 Fed. 139.]

[On appeal from district court of the United States for the district of Michigan.]

[In admiralty. Libel by Frederick W. Backus against the schooner Marengo on a contract of affreightment. Decree for libellant, (unreported.) Respondents appeal. Affirmed. A prior motion in the appellate court for a continuance was overruled in Backus v. The Marengo, Case No. 713.]

Howard & Gray, for plaintiff.
Mr. Holbrook, for respondents.

This is an appeal in admiralty, from the district court. A libel was filed by the plaintiff on a contract of affreightment of five thousand, seven hundred and ninety and forty-six hundredths bushels of wheat from the ports of Amherstburg and Colchester, in Canada, to Buffalo, for the consideration of two hundred and forty dollars. The bill of lading, signed by the captain of the vessel, specified the above number of bushels, and which being received in good order was safely to be delivered at Buffalo. The wheat received fell short of the quantity specified, at the port of delivery, seven hundred and sixty bushels.

The defence relied on is, that all the wheat received was delivered except about ten bushels, which, being wet, the consignee refused to receive. The libellant on the bill of lading paid for the quantity specified. The two witnesses who kept tally of the wheat received at Malden were sworn, and they agree in the quantity. And the amount of wheat received at Colchester was also sworn to, by the person who kept the tally at that place, and from these two ports the entire cargo was received. In support of the defense the deposition of the mate of the vessel was read, who stated that twelve hundred bushels of wheat were received at Malden, which he tallied; and that no account was taken of the quantity of wheat received at Colchester. He says that he nailed down the hatches and consequently,

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

[2] [Affirming an unreported decree of the district court.]

that no wheat could have been taken from the vessel until it arrived at Buffalo. The hatches, he says, were not raised until the vessel went under the elevators at Buffalo, to discharge her cargo. And he swears that all the wheat received was delivered at Buffalo; and he states the vessel could not carry more than five thousand one hundred bushels. H. Rowell, a hand on board, con firms the statements of the mate, except that on another occasion, the vessel being filled to her utmost capacity, carried five thousand three hundred bushels. Several witnesses on board the vessel corroborate, generally the statements of the above witnesses. The person who built the vessel stated that she was overhauled some years since and her capacity considerably enlarged.

It is clearly proved that the wheat delivered at Buffalo was carefully weighed and tallied. As the accounts agreed, kept by the witnesses, who were highly respectable men, there could have been no mistake. The captain swore to the manifest, which contained a statement of the amount received at the two ports. And it is proved that he declared at Malden that he had engaged to transport six thousand bushels of wheat, and he should charge for the transportation of that amount. It is clearly and satisfactorily proved that thirteen hundred and fifty-two bushels were delivered at Malden, instead of twelve hundred, as sworn to by the mate; and it is proved that the vessel instead of being two or three miles from the shore when loaded at the port of Colchester, as sworn to by the mate, was only about one-quarter of a mile from the land.

H. Reynolds, a colored man, who was cook, says, that he was on board the vessel the above trip, and that after she was unloaded at Buffalo she was taken into a canal or slip where witness saw that water, to the depth of about eighteen inches, had been in the hold of the vessel. There was a considerable amount of wheat in the vessel, but it being wet the consignees refused to receive it. This wheat covered the floor of the vessel, about eighteen inches deep. There was some wheat sold after the schooner left the elevator. He heard the mate ask the captain what should be done with the wet wheat. At first he answered that he did not know; but afterwards he told the hands to throw it overboard. The next morning the crew threw a considerable part of the wet wheat overboard. They were engaged, the witness says, two or three hours in throwing the wheat overboard. A Dutchman came on board and offered to buy it, and he paid three dollars for the wet wheat that remained. This sale was sanctioned by the captain and mate. The captain was told that about eighty bushels were sold to the man. The hands were engaged in removing the wheat from seven in the morning to near twelve. The seams of the vessel were open and she leaked badly.

The bill of lading is an instrument of commerce. It possesses some of the qualities of a bill of exchange. It is considered as conclusive evidence of the cargo shipped, and cannot be contradicted unless fraud or mistake be shown. The purchase money was paid on the faith of this instrument, and no fraud or mistake is shown. The witnesses for the defence are so contradicted, in regard to the amount of the wheat shipped and delivered, as to render their testimony unworthy of credit. It is extraordinary that the mate and the hands on board should swear that all the wheat received into the vessel was delivered at Buffalo, when they were engaged for several hours in throwing the wet wheat overboard, and in selling some eighty bushels that remained. These facts were within the knowledge of the defendant's witnesses, while they swore that all the wheat received, was delivered.

The quantity of wheat shipped at Malden and also at Colchester is so clearly proved as to remove all doubt on the subject. And the deficiency is accounted for by the leakage of the vessel, the refusal of the consignees to receive the wet wheat, and the subsequent disposition of it.

In all commercial transactions the strictest morality and truth should be observed. If these shall be disregarded, commerce will become a curse instead of a blessing. The richness of its products will be more than counterbalanced by the evils it will disseminate. Especially, when the sacredness of oaths shall be violated by the agents of commerce, it will destroy the confidence of high and honorable men, which is essential to commercial prosperity. The decree of the district court is affirmed with costs.

Case No. 713.

BACKUS v. The MARENGO.

[6 McLean, 499.][1]

Circuit Court, D. Michigan. June Term, 1855.

APPEAL—DELAY IN PERFECTING—CONTINUANCE.

1. If the appellant delay to perfect his appeal, so that the record is filed a very short time before the term of this court, the appellee may notice the cause for hearing or continue it, at his option.

2. No one should take advantage of his own remissness, to the prejudice of the other party.

[In admiralty. Libel by Frederick W. Backus against the schooner Marengo on a contract of affreightment. Decree for libelant, (unreported.) Respondents appealed, and now move for a continuance. Denied. Appeal subsequently heard on merits, and affirmed in Backus v. The Marengo, Case No. 712.]

Mr. Holbrook, for appellant.

Mr. Howard, for respondent.

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

OPINION OF THE COURT. On the 6th of June last, the notice of appeal in this case was entered in the district court. The record was filed a day or two since, and a motion is now made by the appellant to continue the cause.

The rule on this subject declares, "that eight days' notice of hearing on appeal shall in all cases be given, by the service thereof on the adverse party, or on his proctor. When an appeal from a decree in the district court is interposed less than twenty days before the next stated session of this court, the appellee may, at his option, notice the cause for hearing at such session, on the first or either day thereof, or have the same continued to the next stated session. When an appeal from the decree of the district court is interposed, twenty days before the next stated session of this court, it may be noticed for hearing at such session by either party."

As this case was appealed within less than twenty days before this term, the appellee has a right to notice the cause for hearing on the first day of court, or to continue it as he may prefer. This avoids delay and is just. If the appellant do not file the record in time, the other party may continue the cause. The motion for a continuance is overruled.

BACKUS, (MILLER'S FALLS CO. v.) See Case No. 9,598.

BACKUS, (UNITED STATES v.) See Case No. 14,491.

Case No. 714.

BACON v. BANCROFT.

[1 Story, 341;[1] 3 Law Rep. 386.]

Circuit Court. D. Massachusetts. Oct. Term, 1840.

CUSTOMS DUTIES—GUNNY CLOTH—COMMERCIAL USAGE.

The tariff being a statute regulating commerce, the terms of it must be construed according to commercial usage and understanding. In this case, it was submitted to the jury, to determine, whether gunny cloth and cotton bagging were different articles of commerce.

[Cited in U. S. v. Wotton, 53 Fed. 346.]

[See Curtis v. Martin, 3 How. (44 U. S.) 106; Elliott v. Swartwout, 10 Pet. (35 U. S.) 151; Arthur v. Morrison, 96 U. S. 111.]

At law. This was an action [by Samuel C. Bacon] against the defendant, [George Bancroft,] as collector of the port of Boston, to recover back the amount of duties, paid under protest, upon a quantity of gunny cloth, imported by the plaintiff, and by the collector charged with the duty on cotton bagging. [Verdict for plaintiff.]

It was agreed, that gunny cloth was imported and used extensively for the purpose of covering cotton in bales, and as a substitute for the article commonly known as cotton bagging. And it was submitted to the jury, under the instruction of the court, to find, whether the article in question was that known in commerce as cotton bagging, or was another and different article. It appeared by the testimony, that cotton bagging and gunny cloth were both well known in this country before the passing of the tariff, and that they were considered as different articles of commerce, and known by different names.

Dexter, for plaintiff. Mills, Dist. Atty., for defendant.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice, instructed the jury, that the tariff being a statute, regulating commerce, the terms of it must be construed according to commercial usage and understanding; and that if they found, of which there appeared no doubt, the evidence being uniform to that effect, that the two articles were understood and known among merchants to be different articles of commerce, and that the article in question had not been known in commerce as cotton bagging, it was not subject to the duty, whatever might be the use to which it had been applied.

The jury immediately returned a verdict for the plaintiff.

[1] [Reported by William W. Story, Esq.]

BACON, (DE BUTTS v.) See Case No. 3,717.

BACON, (DEN v.) See Case No. 3,783.

BACON, (HURLIKI v.) See Case No. 6,921.

BACON, (LEMON v.) See Case No. 8,241.

BACON, (RINGGOLD v.) See Case No. 11,842.

Case No. 715.

BACON v. STARK.

[2 Sawy. 644.]

[See note to Starr v. Stark, Case No. 13,317.]

BACON, (UNITED STATES v.) See Case No. 14,492.

BACON, (VOWELL v.) See Case No. 17,018.

Case No. 716.

In re BADENHEIM et al.

[15 N. B. R. 370.]

Circuit Court, S. D. Mississippi. Nov., 1876.

BANKRUPTCY — ASSIGNMENT — JUDGMENT LIENS—PRIORITY—COMMENCEMENT OF PROCEEDINGS.

[1. A judgment lien operates only upon such property as is subject to levy and sale under legal process issued for its payment, and therefore does not operate upon property which is at the time in the possession of the sheriff under attachments. Such attachments are dis-

solved, not by the commencement of proceedings in bankruptcy, but by the adjudication, and the deed of assignment relates back to such commencement, and divests all right and title in the bankrupts, and in the sheriff, and vests them in the assignee, as of that date, but at that very moment the judgment lien ceases, so there is no time at which it attaches. In re Loder, Case No. 8,458, followed.]

[See Hudson v. Adams, Case No. 6,832.]

[2. The act of 1828, (4 Stat. 278,) adopting the state process laws, does not make a judgment without process a lien, from its rendition, for the lien derives its force only from the process.]

[3. Property held by purchasers from the bankrupts in fraud of the bankrupt act of 1867, (14 Stat. 517,) at the time of the judgment, is subject to the judgment lien, for the legal title has not passed, and the proceeds of such property in the hands of the assignee are alike liable.]

[4. Any other property which the bankrupts held after the rendition of the judgment, and before the commencement of the proceedings in bankruptcy, and which might at the time have been levied upon and sold for the payment of the judgment, is subject to the judgment lien.]

[In bankruptcy. Petition by Schaeffer & Co. against the assignee in bankruptcy of H. Badenheim & Co. to have certain funds applied to the payment of a judgment obtained prior to the commencement of proceedings in bankruptcy. Denied in part.]

HILL, District Judge. The question now presented arises upon the petition of Schaeffer & Co., against the assignee, to have applied to the payment of a judgment obtained by petitioners against the survivors of said firm, prior to the commencement of proceedings in bankruptcy, out of the funds derived from the proceeds of the sales of said estate made by the assignee and out of funds collected from purchasers of the goods belonging to said firm, and held void by the judgment of this court, and upon which it is alleged the judgment of petitioners, obtained in the circuit court of the United States for this district, operated as a lien. The answer of the assignee sets up as a defense: 1. That no such judgment as is set out in the petition is in existence. 2. That all the property sold by the assignee, the proceeds of which are sought to be applied to the payment of petitioner's judgment, was at the time of the rendition of said judgment, and up to the commencement of proceedings in bankruptcy, in the possession of the sheriff of Warren county, under and by virtue of seizures under attachments sued out against said bankrupts in the circuit court of Warren county, and that there was no time from the rendition of said judgment at which said property was liable to seizure and levy under an execution issued upon said judgment, and therefore no lien ever attached to said goods for the satisfaction of petitioners' demand.

The issuance and seizure under said attachments is admitted. So that upon that point there is no question of fact disputed. I am satisfied, from an inspection of the record, that before the commencement of proceedings in bankruptcy there was such a judgment as is described in the petition, and that it did operate as a lien upon such property belonging to the bankrupts, the defendants to the judgment, as was then liable to seizure and sale under an execution issued to collect the same or any other property which they assigned, and was so liable before the commencement of proceedings in bankruptcy, which leaves for determination the other point of defense, and that is whether any of the property described, the proceeds of which are sought to be applied to the payment of petitioners' judgment, was so liable. I think it well settled that a judgment lien only operates upon such property as is subject to levy and sale under legal process issued for its payment. A careful consideration of this rule, as applied to the property seized and held by the sheriff in this case, convinces me that there was no time when it was so liable. It is true that, by operation of law, these attachments were dissolved as soon as the proceedings in bankruptcy were commenced. The commencement of the bankrupt proceedings did not of itself have that effect, but the adjudication did; and the deed of assignment by force of the law related back to the commencement of the proceedings, and divested all the title and right of bankrupts, and also the qualified right and title vested in the sheriff by means of the seizure and levy under the attachments, and vested them in the assignee; but the very moment this was done the judgment lien ceased, so that there was no time at which it attached. This position is fully sustained by Judge Benedict, in the case of Lewis B. Loder, bankrupt, [In re Loder, Case No. 8,458.] The learned counsel for the petitioners insists that this is founded upon the statutes of New York, by which nothing short of a levy, under legal process for the satisfaction of the judgment, creates a lien upon personal property; but I am satisfied the point upon which the case turned was, that the seizure under the attachment being first made held the property free from the lien under the execution up to its dissolution by the bankrupt proceedings, so that there was no time at which the lien under the execution could attach. I am aware of no adjudicated case holding the contrary doctrine. It is also urged by the petitioners' counsel that the act of 1828, [4 Stat. 278,] adopting the state process laws, makes the judgment from its rendition without process a lien; but the adjudications holding this judgment to be a lien placed it as deriving its force from the process, and consequently if the property cannot be reached by the process, the lien does not exist; it is this liability that creates it.

I am satisfied that the proceeds of the property so held under these attachments are not

liable to the payment of petitioners' judgment. But any property that was sold by the bankrupts and held by parties purchasing in fraud of the bankrupt law, [Act March 2, 1867; 14 Stat. 517,] and in existence, and in the hands of such fraudulent vendees at the rendition of the judgment, was subject to a lien for its payment and for the reason that the legal title did not pass from the bankrupts. This being so, the proceeds stand in the place of the property and are alike liable. So with regard to any other property which the bankrupts held after the rendition of the judgment and before the commencement of the proceedings in bankruptcy against them, and which might at the time have been levied upon and sold for the payment of the judgment. To ascertain what fund may be now or hereafter in the hands of the assignee or other custodian of said estate, the petitioners may have a reference to the master.

BADGELY v. The JUNIATA PATON. See Case No. 7,584.

Case No. 717.

BADGER et al. v. BADGER et al.

[1 Cliff. 237.][1]

Circuit Court, D. Massachusetts. May Term, 1859.

JUDGMENT—RES JUDICATA—DISMISSAL OF BILL BEFORE PUBLICATION OF TESTIMONY.

Where a cause in equity was set down for hearing, and before any of the testimony taken was published, the complainant moved to dismiss his bill, and, no objection being made thereto, the motion was granted, and the bill in equity dismissed without any hearing upon the merits. *Held*, that the record of the former suit and decree was no bar to the bill of complaint.

[Cited in The American Diamond Rock Boring Co. v. Sheldon, Case No. 296; Evory v. Candee, Id. 4,583; Sutherland v. Straw, 2 Fed. 284; Stevens v. The Railroads, 4 Fed. 107; Kelly v. Town of Milan, 21 Fed. 863; Brush v. Condit, 20 Fed. 826; Keller v. Stolzenbach, Id. 48; Griswold v. Bragg, 48 Fed. 520; W. U. Tel. Co. v. American Bell Tel. Co., 50 Fed. 665.]

[In equity. Bill by James W. Badger and others against Daniel B. Badger and others to recover certain alleged interests of complainants in certain real property. A demurrer to the plea was overruled. Thereafter, a replication was filed, and the hearing is now upon the sufficiency of the replication. Decree for complainant. Upon the hearing on the merits the bill was dismissed in Badger v. Badger, Case No. 718. An appeal was then taken to the supreme court, where that decree was affirmed in 2 Wall. (69 U. S.) 87. See note at end of Case No. 718.]

This was a bill in equity, wherein the complainant sought to recover certain alleged interests of the heirs of Daniel Badger, deceased, in certain parcels of real estate, which the complainant alleged were fraudulently obtained and wrongfully held by the first-named respondent, who was a co-heir with the complainant. The respondents pleaded a former suit and decree in bar of the bill of complaint, alleging that the former suit involved the same subject-matter as the present; that it was between the same parties; and that it was regularly disposed of, on the merits, by a final decree dismissing the bill with costs for the respondents. After this suit was commenced, the name of David Badger, one of the complainants, was stricken from the bill. The other complainant, instead of replying to the plea filed by the respondents, set it down for hearing under the twenty-third [thirty-third] rule. Both parties were heard upon the demurrer, and the court held the plea sufficient, under the admissions of the demurrer, that the facts therein stated were true. In giving the order, however, to enter the decree, the court also gave the complainant leave to withdraw the demurrer, and to reply to this plea in bar. That leave was granted, because the plea set forth certain matters of fact which it would be competent for the complainant to controvert by a proper replication to the plea in bar, but which were admitted by the demurrer. Availing himself of the leave granted, the complainant withdrew the demurrer, and filed a replication to the plea in bar, controverting all of the matters of fact therein set forth. The respondents set down the replication for hearing under the before-mentioned rule, and the question in the case was whether the replication was a good answer to the plea.

According to the admissions of the replication, all of the matters of complaint set forth in the bill were substantially the same as those set forth in the former suit, and the replication also admitted that the suit was between the same parties, and that the respondents made answer thereto, and that testimony was taken, but denied that publication was ever made, or that the cause ever came on for hearing, or was ever heard by the court, and alleged that before the cause was set down for hearing, and before any of the testimony taken was published, the complainant moved for leave to dismiss his bill; and no objection being made thereto, the motion was granted by the court, and it was ordered that the bill of complaint should stand dismissed. The complainant also denied that the case was ever heard and considered by the court or that the court ever pronounced any judgment or decree on the merits thereof, or that the court ever determined that the complainant had no right to the relief sought by his bill.

James B. Robb and C. W. Huntington, for complainant, cited Carrington v. Holly, 1 Dickens, 280; Dixon v. Parks, 1 Ves. Jr. 402;

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

Anonymous, Id. 140; Fidelle v. Evans, 1 Brown, Ch. 267; Knox v. Brown, 2 Brown, Ch. 186; Curtis v. Lloyd, 4 Mylne & C. 194; Sea Ins. Co. v. Day, 9 Paige, 247; Neafie v. Neafie, 7 Johns. Ch. 1; Perine v. Dunn, 4 Johns. Ch. 140; Cummins v. Bennett, 8 Paige, 79; Walden v. Bodley, 14 Pet. [39 U. S.] 156, 160; Aspden v. Nixon, 4 How. [45 U. S.] 467, 497; Conn v. Penn, 5 Wheat. [18 U. S.] 424; Bank of U. S. v. Beverley, 1 How. [42 U. S.] 134; Homer v. Brown, 16 How. [57 U. S.] 354.

E. Merwin, for respondents.

1. The final decree in the former suit was an absolute, unqualified decree, dismissing complainant's bill. It was made after the cause was at issue, and after the evidence had been taken, and order of publication passed. It is therefore conclusively presumed to have been a decree on the merits, or what is equivalent thereto, by consent or arrangement, as a settlement of the controversy. Such a decree, unless qualified as "without prejudice," or "reserving right to bring another bill," or other equivalent qualification, is conclusive as to all matters involved in that suit. 2 Daniell, Ch. Pr. 1200; Foote v. Gibbs, 1 Gray, 413; Bigelow v. Winsor, 1 Gray, 301.

2. But this case does not depend upon the effect simply of an unqualified decree dismissing the complainant's bill; for this final decree was preceded by an order of the court disallowing the complainant to dismiss his bill without prejudice. There was a specific and positive adjudication that the complainant should not be allowed to dispose of that suit so as to bring another for the same cause, and that the controversy ought to be, and must be, determined. It is well settled that a suitor, after the testimony has been taken, and the cause is ready for a hearing, has no right as of course to have his bill dismissed, so that such dismissal shall operate only as a nonsuit at law. Such leave will be granted only under proper circumstances. Pickett v. Loggon, 14 Ves. 232; Bigelow v. Winsor, 1 Gray, 299–301.

CLIFFORD, Circuit Justice. All the matters of fact affirmatively set forth in the replication, which are well pleaded and material to the issue of law raised by the demurrer, must be considered as admitted.

Conceding that rule to be correct, it then appears that, before the cause was set down for hearing, and before any of the testimony taken was published, the complainant moved to dismiss his bill, and no objection being made thereto, the motion was granted, and the bill of complaint was accordingly dismissed without any hearing whatever upon the merits. On this state of the case I am of the opinion that the replication is a good answer to the plea, and that the record of the former suit and decree is no bar to the bill of complaint. At the argument the attention of the court was specially drawn to the docket entries in the former suit, and, to prevent any further controversy upon this preliminary point, it may be well to refer to those entries. They are substantially as follows: On motion of the complainant, the time for taking testimony was extended to the 10th of May, 1858; and on the 3d of the same month the complainant moved the court further to enlarge the time for taking testimony, which motion was opposed by the respondents, and on the 10th of the same month the complainant renewed his motion, and the same was again objected to by the respondents, and thereupon it was ordered by the court, among other things, that leave be granted to the complainant to take a certain deposition; interrogatories to be filed on or before the 17th of May, in behalf of the complainant, and the deposition to be taken and returned within eighteen days from the time when the cross-interrogatories of the respondents are filed, and that publication be deferred until that time. Afterwards, on the 6th of September following, no such interrogatories or cross-interrogatories having been filed, the complainant moved the court that his bill of complaint be dismissed without prejudice, and after hearing had thereon the complainant's motion was denied by the court, and the complainant then moved that his bill of complaint be dismissed, and the court, having considered the motion, ordered and decreed accordingly, "that the bill of complaint in this cause be, and the same is, hereby dismissed with costs for the respondents." From this statement it is quite evident that the allegations of the replication are correct. No order for publication was ever passed, and there was no hearing upon the merits of the controversy. Publication was expressly postponed, to give the complainant time to take a certain deposition; and to prevent unnecessary delay in taking it, the order was made that he should file interrogatories within a given time, and that the deposition should be taken and returned within eighteen days from the time when the cross-interrogatories were filed by the respondents. Such interrogatories and cross-interrogatories were never filed, and in point of fact the deposition had not been taken at the time the complainant moved to dismiss his bill without prejudice. That motion was denied; but the complainant subsequently moved to dismiss his bill, omitting from the motion the words "without prejudice," and the order was accordingly made that the bill of complaint be dismissed with costs for the respondents. It is insisted by the respondents that the decree in the former suit dismissing the bill was final and conclusive between these parties in all matters at issue in that suit, and that the effect of the decree in that behalf is not varied or diminished by the fact that the motion to dismiss it emanated from the complainant. On the other hand, it is insisted by the re-

spondents that a decree or order dismissing a former suit, even though it was between the same parties, can only be pleaded in bar to a new bill for the same subject-matter when it appears that the dismissal was decreed or ordered after a hearing on the merits. Elementary writers usually lay down the rule in the first instance in general terms, that a decree or order of the court by which the rights of the parties have been determined, or another bill for the same cause has been dismissed, may be pleaded in bar to a new bill for the same matter. Such writers, however, generally admit that the decree or order in such cases can only be pleaded in bar where the dismission actually took place upon the hearing. 2 Daniell, Ch. Pl. & Pr. 758; Coop. Eq. Pl. 270; 2 Madd. Ch. Pr. 248; 1 Smith, Ch. Pr. 222; 1 Barb. Ch. Pr. 126. Judge Story says a decree or order dismissing a former bill for the same matter may be pleaded in bar to a new bill, if the dismission was upon the hearing, and was not in terms directed to be without prejudice. But an order of dismission is a bar only where the court has determined that the plaintiff had no title to the relief sought by his bill, and therefore an order dismissing a bill for want of prosecution is not a bar to another suit. Story, Eq. Pl. (6th Ed.) § 793, p. 700. Prior to the new orders in England, the better opinion is that the plaintiff could obtain the common order dismissing his bill with costs at any time before the cause was actually heard by the court. All the cases agree that he could do so before the cause was called on for final hearing, and in many cases it is held that he could do so afterwards, and that the decree or order of dismission could not be pleaded in bar to a new bill, provided it appeared that it was made without any determination of the merits. Take, for example, the case of Carrington v. Holly, 1 Dickens, 280, where it appears that, at the time when the cause was called on for hearing, an issue was directed by the court, but the complainant, being advised that the bill and the matter put in issue were insufficient to support his claim, applied by motion, and obtained the common order to dismiss his bill upon payment of costs. Afterwards the respondent applied to discharge the order for irregularity, upon the ground that the cause having been properly brought on to a hearing, the bill could not be dismissed except on a solemn judgment. Lord Hardwicke, however, held otherwise, and remarked in effect: "There has not been any determination, for the directing of an issue is merely to satisfy the conscience of the court prefatory to their giving judgment. The issue has not been tried, and until there has been a determination," I hold a plaintiff may, in any stage of the cause, apply to dismiss his bill upon payment of costs. It would have been otherwise, he said, had the issue been tried, and a verdict in favor of the defendant, because the defendant might then have set the cause down as in equity reserved, in order to have the bill dismissed upon the solemn judgment of the court, so as to make the order of dismission pleadable. To the same effect also is the case of Curtis v. Lloyd, 4 Mylne & C. 194, which was decided by Lord Cottenham, in 1838, after it had been twice argued at the bar. When that cause was called on for hearing, the counsel for the complainant stated that it had come on unexpectedly, and at his request it was allowed to stand over until the next day. On the following morning the cause was again called on for hearing, when the same counsel informed the court that he had that morning obtained an order, as of course, dismissing the bill with costs, and that the suit was no longer pending. Objection to that course of proceeding was promptly made by the counsel of the respondent. They insisted that it was not competent for the complainant, after the cause was set down for hearing, and still less after it had been actually called on, and had only been allowed to stand over at his request and for the accommodation of his counsel, to obtain behind the back of his adversary a common order dismissing his bill. Such an order they insisted was irregular, and ought to be treated as a nullity. But the chancellor said, after admitting that he was not before aware that the doctrine had been carried so far as it seemed to have been in the case of Carrington v. Holly, [1 Dickens, 280,] that he could not see why a complainant should be in a worse situation, because he informed the court that he did not intend to proceed with the hearing of his cause than if he made default, and emphatically added that in principle it was substantially the same thing. Several cases were cited at the argument to sustain the propriety of the proceeding, and many others might have been added of like import. Locke v. Nash, 2 Madd. Ch. Pr. 389; White v. West-meath, 1 Beat. 174; Anony., 1 Ves. Jr. 140; Dixon v. Parks, 1 Ves. Jr. 402; Fidelle v. Evans, 1 Brown, Ch. 267; Knox v. Brown, 2 Brown, Ch. 185; Gilbert v. Faules, Freem. Ch. (Ed. 1823,) 158. From these authorities it clearly appears that a complainant, prior to the adoption of the new orders by the English chancery court, might dismiss his bill at any time before a hearing upon the merits, upon payment of costs, unless perhaps there had been some order or proceeding in the cause conferring rights upon the respondent, which would be defeated or impaired by allowing that order.

General authority is given to the supreme court, by the sixth section of the act of congress of the 23d of August, 1842, to regulate the whole practice of the circuit and district courts of the United States, but no rule specifically applicable to the matter in question has ever been adopted. 5 Stat. 518. By the ninetieth rule regulating the practice in equity suits, it is provided, that in all cases where the rules prescribed do not apply, the prac-

tice of the circuit court shall be regulated by the present practice of the high court of chancery in England, not as positive rules, but as furnishing just analogies to regulate the practice. That rule adopts the English practice, as it was known and understood in 1842, at the time this rule was ordained. Consequently the practice of this court remains unaffected by the new orders so called, which the courts of that country have since incorporated into their practice. What the practice was in the courts of that country prior to the adoption of the new orders has already appeared, and the authorities upon that subject need not be repeated. Several decisions of the supreme court may be adduced, which go very far to show that the practice here is substantially the same. Of these, the case of Walden v. Bodley, 14 Pet. [39 U. S.] 160, is directly in point. Suits had been twice before instituted in that case, but it appeared that the first bill had been dismissed for the want of jurisdiction, and the second had also been dismissed on motion of the complainant at rules; and the court held that neither was a bar to the new bill, because it appeared in both records that the cause had not been heard on the merits. Where a party asking the aid of a court of equity, says Marshall, C. J., in Conn v. Penn, 5 Wheat. [18 U. S.] 427, refuses to comply with the conditions on which the aid must depend, the court is certainly correct in refusing its aid, and may dismiss the bill. But in such a case we think it would be harsh to make the decree of dismission a bar to a future action. Some of the parties had been heard in that case, and a decree rendered which to a great extent decided the merits of the cause. Strong doubts, however, were expressed whether the decree was rendered on such a hearing as would make it a bar to a new bill; but as it appeared that one of the respondents was not before the court, and that another person concerned in interest was not made a party, the point as to the sufficiency of the hearing was not decided. Whenever a suit in chancery is heard upon the merits, a decree of a court having jurisdiction of the parties and of the subject-matter is a final determination of the controversy, unless the court making the decree qualify it and expressly order that it be made without prejudice. Accordingly it was held by the supreme court, in the case of Bank of U. S. v. Beverley, 1 How. [42 U. S.] 149, that a fact which has been directly tried and decided by a court of competent jurisdiction cannot be contested again between the same parties in the same or any other court. Hence the judgment of a court of record or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suit. In this there is, and ought to be, no difference between a verdict and judgment in a court of common law, and a decree of a court of equity. They both stand on the same footing. Hopkins v. Lee, 6 Wheat. [19 U. S.] 109. Notwithstanding this rule, still it is well settled that a judgment of nonsuit at common law is no bar to a new suit, and cannot be pleaded in bar to a second action, although it is between the same parties, and for the same subject-matter, not even when the judgment of nonsuit was rendered upon an agreed statement of facts. It was so held by the supreme court in Homer v. Brown, 16 How. [57 U. S.] 354, and the same rule prevails in the state courts. Bridge v. Sumner, 1 Pick. 371; Morgan v. Bliss, 2 Mass. 113; Wade v. Howard, 8 Pick. 353; Knox v. Waldoborough, 5 Me. 185. So it would seem, from analogy, that whenever a bill of complaint is dismissed without a hearing, and without any consideration of the merits, whether with or without the consent of the complainant, that the order of dismission, being in the nature of a nonsuit at common law, ought not to be considered a bar to a new suit, because the matters in controversy are not thereby judicially determined. More direct authorities upon the subject, however, are to be found in the decisions of the state courts, where the question has often been presented. Where the respondent in a suit in equity pleaded a former suit, and a decree dismissing the bill in bar of a pending suit, Chancellor Kent held, that the decree was not a bar, because it appeared that no person was present on the part of the complainant when the decree was made. Rosse v. Rust, 4 Johns. Ch. 300. Some of the remarks of the chancellor on that occasion are quite applicable to the present case. He said the merits of the former cause were never discussed, and no opinion of the court had ever been expressed upon them. It is, therefore, not a case within the rule rendering a decree a bar to a new suit. The ground of this defence by plea is that the matter has been already decided, and there has been no decision on the matter. And he also referred with approbation to the remarks of Lord Hardwicke in Brandlyn v. Ord, 1 Atk. 571, in which that learned judge said that, where the defendant pleads a former suit, he must show that it was res judicata, or an absolute determination of the court, that the plaintiff had no title. But the cases of Perine v. Dunn, 4 Johns. Ch. 140, and Neafie v. Neafie, 7 Johns. Ch. 1, are direct decisions of the questions here presented. In the former it was held that where a bill is dismissed on the merits, without any direction that the dismission shall be without prejudice, it may be pleaded in bar to a new bill for the same matter, and in the latter it was held that a bill regularly dismissed on the merits may be pleaded in bar of a new bill for the same matter; but to make a decree of a dismissal of a bill on the merits a bar, it must be an absolute decision on the same point or matter, and the new bill must be between the same parties.

Numerous other decisions affirm the same principles, and indeed the decided cases are nearly unanimous upon the subject. Cummins v. Bennett, 8 Paige, 79; Simpson v. Brewster, 9 Paige, 245; Smith v. Sherwood, 4 Conn. 276; Kennedy v. Scovil, 14 Conn. 61; Smith v. Smith, 2 Blackf. 232; Seymour v. Jerome, Walk. Ch. 356. Reference is very properly made in the argument to the opinion given by this court on the demurrer to the plea. All of the facts stated in the plea were then admitted by the demurrer, and the docket minutes in the former suit were not before the court. That opinion, therefore, was necessarily based upon the legal construction of the plea under the admissions of the demurrer. But whether correct or not, it is better to be right at last than finally to adhere to an error. Replication adjudged sufficient.

Case No. 718.

BADGER et al. v. BADGER et al.

[2 Cliff. 137.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1862.[2]

EQUITY — LACHES — KNOWLEDGE OF FRAUD FOR FIVE YEARS—PLEADING — RESPONSIVE ANSWER —DENIAL BY TWO WITNESSES—FRAUD.

1. Where the answer is responsive to the bill of complaint, and positively denies the matter charged, and the denial has respect to a transaction within the knowledge of the respondent, the answer is evidence in his favor, and unless it is overcome by the satisfactory testimony of two opposing witnesses, or of one witness corroborated by other facts and circumstances, which give to it greater weight than the answer, or are equivalent in weight to a second witness, it is conclusive, so that the court will neither make a decree or send the case to trial, but will dismiss the bill.

[Cited in Hayward v. Eliot Nat. Bank, Case No. 6,273; Godden v. Kimmell, 99 U. S. 202.]

[See Lenox v. Prout, 3 Wheat. (16 U. S.) 520; Union Bank of Georgetown v. Geary, 5 Pet. (30 U. S.) 99; Tobey v. Leonard, 2 Wall. (69 U. S.) 423; Voorhees v. Bonesteel, 16 Wall. (83 U. S.) 16.]

2. Accusations charging that probate accounts which had been settled for a long time were fraudulent, must be specific, and must point out the items of account charged to be false; especially when, as in this case, it appears that all the parties implicated, some of whom had the best means of knowledge in regard to the transaction, were dead.

[Cited in Pulliam v. Pulliam, 10 Fed. 55.]

3. If express fraud be charged, the rule is that he who made it must prove it; so where license was granted by the supreme court of a state for the sale of real estate by administrators, and the complainant, in a bill of equity, prayed that the deeds of conveyance executed pursuant to the license granted, might be declared null and void, nothing less than proof of fraud could possibly avail the complainant, as the court to whom the petition was addressed was bound to inquire whether debts were due and unpaid by the estate before they granted the license, and, in the absence of fraud, it must be presumed that the finding of the court was conclusive.

4. In many cases courts of equity act upon the analogy of the limitations at law, as where a legal title would, in ejectment, be barred by twenty years' adverse possession; but there is a defence peculiar to courts of equity, founded on lapse of time, where no statute of limitations governs the case.

[Cited in Marsh v. Whitmore, Case No. 9,122; Godden v. Kimmell, 99 U. S. 202; Pulliam v. Pulliam, 10 Fed. 55.]

[See note at end of case.]

5. In such cases courts of equity often act upon their own inherent doctrine of discouraging antiquated demands, by refusing to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights.

[See note at end of case.]

6. Where the bill of complaint set up that fraudulent acts had been committed more than thirty years previous to the bill of complaint, but the complainant averred that the same were unknown to him until five years previous to the same, without setting up that the fraudulent acts were in any manner concealed from him, it was *held*, that a court of equity could not regard in such a case such general allegations of excuse.

[See note at end of case.]

7. If the complainant seeks to avoid the effect of lapse of time, on the ground of concealed fraud, he must set forth, with particularity, when and by what means the fraud was discovered, and the averments so made must be supported by the proofs.

[See Wilcox v. Plummer, 4 Pet. (29 U. S.) 172; Moore v. Greene, 19 How. (60 U. S.) 69.]

[See note at end of case.]

8. In the case of a stale claim, barred by lapse of time, by gross laches, and long unexplained acquiescence in the operation of an adverse right, courts of equity will often treat the lapse of a period less than the one specified in the statute of limitations as a presumptive bar to the claim.

[Cited in Sullivan v. Portland & K. R. Co., Case No. 13,596.]

[See note at end of case.]

[In equity. Bill by James W. Badger and others against Daniel B. Badger and others to recover the interest of complainants in certain real property. The case was heard on plea and replication, and the replication adjudged sufficient, in Badger v. Badger, Case No. 717. The case is now heard on bill and answer. Bill dismissed. On appeal, the supreme court affirmed this decree in 2 Wall. (69 U. S.) 87. See note at end of case.]

This was a bill in equity, wherein the complainant prayed, for an account of the rents and profits of certain real estate, that certain deeds of conveyance might be declared null and void, and that the respondent first named, or his representative, might be ordered to convey to the complainant his interest in certain real estate, and pay over the proper proportion of whatever sums he or they might have received as rents or profits of the same. The bill of complaint was filed September 6, 1858. When filed, David J.

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirmed by supreme court in Badger v. Badger, 2 Wall. (69 U. S.) 87.]

Badger was also joined in the suit as a complainant, but on the 4th of October following, the bill of complaint as to him was dismissed, on motion of the respondent, for the reason that he was joined in the suit without his authority or consent. A plea in bar was filed by Daniel B. Badger, alleging that the complainant, with others, had previously brought a bill of complaint against him for the same matters, and that the former bill of complaint, after testimony was taken, and other proceedings had, was dismissed with costs for the respondents; but the court decided that the former decree was not a bar to the present suit. Pending those proceedings, the first-named respondent deceased, leaving his son, Erastus B. Badger, as his sole devisee, and the suit having been duly revived as against him, he came in, and made answer to the bill of revivor. Joseph Badger, who was joined as a respondent in the present bill of complaint, after appearing and filing an answer, died also, but the bill of complaint as against him was never revived; and the parties to the suit in all other respects remain as they were described in the original bill.

The former suit, already alluded to, was instituted May 8, 1857, and was dismissed on the day the present bill was filed. In the former suit James W. Badger, Augustus H. Badger, Almira A. Badger, B. P. Sturges and Mary H. B. his wife, M. M. Smith and Eliza M. his wife, Alfred C. Badger, and Jacob Badger were complainants. James W. Badger and D. B. Badger were brothers, and the children of Daniel Badger, of Boston, who died in September, 1818, intestate, leaving a widow, Ann Badger, and ten children, to wit, Daniel B., James W., David I., Augustus H., Jacob, Almira A., Mary H. B., Eliza M., Ann J., and Alfred C. Badger. The complainant admitted that David I., on the 25th of September, 1828, conveyed all his right, title, and interest in and to the estates situated in Broad street and North Federal court to D. B. Badger, and not being a party to the suit, there was no question as to his share involved in the controversy. Ann J. intermarried with Thomas Richardson, and they, by deed of warranty, on the 5th of May, 1830, conveyed all their interest in the estate of the intestate to the first-named respondent. Administration on the estate was granted February 29, 1819, to Daniel B. Badger, and Joseph Badger, his uncle, who was the brother of the intestate.

On the 18th of October following, the inventory was filed in the probate court, by which it appears that the personal estate was appraised at $1,721.10, and the real estate at $12,470. Other personal estate having come to the knowledge of the administrators, to the amount of $714, they caused the same to be appraised, on the 8th of May, 1820, and filed an additional inventory for that amount. Their first administration account was presented September 25, 1820, and was allowed on the 9th of October following. The administrators charged themselves with $6,742.04, and claimed an allowance for $6,475.52, leaving a balance of $266.52. The decree allowing that account bore date October 9, 1820, and on the same day, the administrators presented a schedule of the debts due to the estate, amounting to $3,475.72, and also a list of the debts due and owing by the intestate, at his decease, amounting to $6,707.58. Both of these schedules were received and ordered to be filed and recorded; and on the same day the administrators petitioned the court for leave to sell so much of the real estate of the deceased as would raise the sum of $6,451.83. Pursuant to that petition, the administrators, on the 13th of November following, were empowered to sell so much of the real estate as would raise that sum, and incidental charges, amounting in the whole to $6,511.37. The license to that effect was accordingly granted, and they sold under it, as the complainant alleged, the house and land on Lynde street, the land and store on Greene's wharf, one twenty-fourth of house and land on Fleet street, and house and land in Cambridgeport, amounting in the whole to the sum of $3,635. Certain payments were subsequently made by the administrators, to discharge certain mortgage debts due from the estate; but as all such were included in the second administration account, it is not necessary to specify them.

On March 12, 1827, the widow petitioned that her dower in the real estate of the intestate might be set off to her, and on the 6th of April following, the estates in Broad street and North Federal court were duly assigned to her in full of her dower. None of these preliminary proceedings in the settlement of the estate were called in question. On the 17th of September, 1827, the administrators filed their second administration account. In that account they charged themselves with the proceeds of the sale of the real estate before mentioned, and with other sums, amounting in the whole to $4,354.02, and claimed credit for the sum of $6,810.35, alleged to be for money expended on account of the estate, including $1,309 for services alleged to have been rendered by D. B. Badger as administrator, in settling the estate. The complainant averred that those allegations were false; and that the administrators on the same day filed in the probate court a further list of debts amounting to $2,220, falsely alleging that the same were due from the estate; but the complainant charged that these claims were false, and there was nothing due from the estate to the administrators or either of them, or to the holder of the notes specified in the list of debts, or to any person or persons whatever, for which the estate of the deceased was in any way liable. On the contrary, the complainant alleged that the balance of the account was claimed by D. B. Badger, and that the list of debts was filed by him, in violation of his trust and duty as

administrator, to enable him to obtain possession for his own use and benefit, of all the remaining real estate of the intestate, situated in Boston, to wit, the estate known as the house and land in Distil House square, and the house and land situated in Broad street. Imputing that motive, the charge was, that to accomplish this design, he, on the first Tuesday of March, 1830, petitioned the supreme judicial court for the county of Suffolk for leave to sell so much of the real estate as was necessary to pay the balance of that account, and that such proceedings were had that the court empowered the administrators to sell so much of the same as would raise the sum of $4,676.33, and $50 for incidental charges. Having made these statements, the complainant then charged that the order of the court and the authority to sell were procured by deception and fraud, and alleged, that in order to procure the consent in writing of Thomas Richardson and Ann J., his wife, to the granting of the petition, he purchased all their right, title, and interest in and to the estate; and that in order to procure the consent in writing of Jacob Badger to the same, he purchased all of his interest in and to the estate in Broad street and North Federal court, whereupon those parties consented in writing to the granting of the prayer of the petition; Jacob Badger consenting for himself, and as guardian of Augustus H. Badger. The complainant alleged also that the signature of Almira A. Badger was procured by falsehood and deception, as was also that of her mother, to various papers which the first-named respondent fraudulently used; by means whereof, and of the false representations and fraudulent acts and doings, the authority to sell the estate was granted; that in pursuance of the fraudulent design the house and land in Distil House square were advertised to be sold at auction in Boston, on the 20th of July, 1830, without giving any notice whatever of the place at which the sale was to be made; that the first-named respondent procured one William P. Hart to bid off the estate for him, and that Hart bid $2,820, and that the estate was struck off to him for that sum, which was much less than the value of the premises; that subsequently, D. B. Badger, the first-named respondent, caused to be advertised for sale at auction so much of the real estate in Broad street and North Federal court, subject to the life estate of the widow, as would raise the sum of $786, for the payment of alleged debts and incidental charges, and procured the same person to bid off that property for him. On that occasion, the estate situated in North Federal court was struck off to one Adin Hall for the sum of $400, and only about one-fifth part of the Broad street estate was struck off to William P. Hart; but the complainant alleged, that the respondent pretended to offer those estates for sale at auction again, but without any legal notice, and that the respondent procured the same person to bid off the Broad street estate for his own benefit, and that the same was struck off to the bidder for $636, being less than one half of the value of the premises, subject to the incumbrance. Both the house and land in Distil House square and the Broad street estate were, as the complainant alleged, conveyed by the administrators to the bidder, without his paying anything therefor, and were by him conveyed to D. B. Badger, the first-named respondent, without any further consideration than what was paid to him by the latter for his fraudulent services. On this last occasion, sale was also made of the house and land on North Federal court, which had previously been bidden off by Adin Hall, and the charge was that the same respondent procured one Daniel Gilpatrick to attend the sale and bid off the property for his benefit; that the same was struck off to the bidder for the sum of $150, being a sum greatly less than the value of the premises, subject to the incumbrances; that the same was conveyed to the bidder without consideration, and was by him in the same way conveyed to the first-named respondent. Two mortgages were made by the said respondent to Samuel D. Parker, who was also joined as a respondent in the bill of complaint. He mortgaged the house and land in Distil House square to Parker on the 1st of July, 1854, to secure the payment of $6,000, payable in three years, and the other mortgage was of the Broad street estate, and was dated February 14, 1855, to secure the sum of $1,000, also payable in three years. Conveyance was also made by D. B. Badger, the first-named respondent, to the city of Boston, of the house and land in North Federal court, and the corporation was also joined as respondent in the bill of complaint.

The complainant also alleged that Samuel D. Parker well knew that his grantor was not possessed of any interest in the estates so conveyed to him, beyond four tenths of the Broad street estate, and one tenth of the other estate. He also alleged that before the city of Boston paid the consideration and took the delivery of the deed conveying the estate in North Federal court, the city was duly notified of the rights of the complainant, and of those under whom he claimed. Further the complainant alleged that on June 11, 1858, six of the other heirs, to wit, Augustus H., Almira A., Mary H. B., Eliza M., Jacob, and Alfred C., transferred to him all their interest in and to the before mentioned estates and the profits and proceeds thereof, whereby he became possessed of the same, both at law and in equity, and he finally alleged, that the fraudulent acts and doings of the first-named respondent were unknown to him or to his coheirs, until within five years before the filing of the bill, and that as soon as the discovery thereof, they requested him, the first-named respondent, to account, pay over what was due, and

convey to them their respective interests in the estates, which he refused to do.

Answer was filed by Joseph Badger, during his lifetime, in which he denied every material allegation of the bill of complaint; that the administrators' accounts or lists of debts were false, or were filed in the probate court with any fraudulent design, were especially denied, and it was averred that they were so rendered and filed because it was the duty of the administrators to render the same. It was admitted, that leave was obtained to sell the real estate of the intestate to pay debts due from the estate, and that the estates mentioned in the bill of complaint were sold in pursuance of the order so obtained, but it was denied, that the license was procured for the fraudulent purpose or enabling the co-administrator to get possession of the estates, or that any fraud or misrepresentation was employed to induce any person to assent to the petition or sale; it was also denied that the sale of the several estates was not duly notified, or that they were not sold at the time they were advertised. Separate answers were also filed by the other respondents, also denying every material allegation of the bill.

J. B. Robb and J. G. Abbott, for complainants.

A person cannot legally purchase on his own account that which his duty or trust requires him to sell on account of another. A purchase by a trustee or per interpositam personam, of the particular property of which he has the sale, carries fraud on the face of it. Blood v. Hayman, 13 Metc. [Mass.] 231. A purchase so made by executors will be set aside. Michoud v. Girod, 4 How. [45 U. S.] 503. The purchase of the estates by Daniel B. Badger was accomplished by a series of frauds. An administrator is bound to plead the special bar of four years, and it will be waste if he does not do it. Scott v. Hancock, 13 Mass. 164, 165; Richmond, Petitioner, 2 Pick. 567; Heath v. Wells, 5 Pick. 140. Mrs. Badger could not bind her wards by giving her consent to the sale of the estates; it would have been a fraud in her to do so, as she was dowager in the estates to be relieved of the mortgage, which secured the debt. Scott v. Hancock, 13 Mass. 168. If the sales were void, the heirs would have a right to the relief prayed for in the bill, and Daniel B. Badger would hold the estate, if living, as tenant in common with his coheirs, or as trustee for them, unless they were barred by the statute of limitations, or want of diligence in prosecuting their claim, as contended for by the defendant. Michoud v. Girod, [supra.] If the sales were voidable merely, then Badger is answerable in this suit as trustee. In equity, length of time is no bar to a trust clearly established, and in cases where fraud is imputed, length of time ought not, upon the principles of justice, to be admitted to repel relief. Baker v. Whiting, [Case No. 787;] Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 168; Prevost v. Gratz, 6 Wheat. [19 U. S.] 481. In either case, the action may be maintained by the present plaintiff as assignee of his coheirs. Baker v. Whiting, [supra;] Michoud v. Girod, [supra.] The conveyances of the estates in mortgage were void as against the plaintiff.

B. R. Curtis and E. Merwin, for respondents.

The title which the complainant sets up in his bill is invalid, and one that a court of equity will not recognize. The sales of real estate by the administrators at auction, in pursuance of the order of the supreme court, and their deeds, conveyed the legal title to the grantee; and the right of the heirs to avoid this sale is only a right to bring a suit in equity for relief against the alleged fraud, and this right cannot be assigned. Harrington v. Brown, 5 Pick. 519; Prosser v. Edmonds, 1 Younge & C. 489; 2 Story, Eq. Jur. 356. A court of equity will not countenance an assignment made under circumstances like those in the present case, for the purpose of enabling the parties to come in, and support it as witnesses by their own testimony. Bell v. Smith, 5 Barn. & C. 188. No weight will be given to the testimony of witnesses thus made for the case. Myre v. Ludwig, 1 Pa. St. 47–52. Mrs. Sturges could only transfer her interest by a deed in which her husband joined with her, they being residents of Massachusetts. Rev. St. Mass. [1836, p. 405,] c. 59, § 2. Courts of equity will not, upon the suggestion of fraud, undertake collaterally to revise the decree of a competent tribunal; but the party must seek his remedy directly in the forum whose decree he desires to have revised or annulled, by proper proceedings therein. Jennison v. Hapgood, 7 Pick. 1; Paine v. Stone, 10 Pick. 75; Vaughn v. Northup, 15 Pet. [40 U. S.] 1; Laughton v. Atkins, 1 Pick. 535–547. These decrees, therefore, are conclusive upon the complainant in the present controversy, and must be taken to have been just and well founded. This bill does not contain such allegations in regard to fraud as are necessary to induce a court of equity to re-examine the decrees. The particular errors must be specified, and the bill must allege how, when, and in what manner the fraud was perpetrated. Stearns v. Page, 7 How. [48 U. S.] 819; 1 Daniell, Ch. Pr. 424. Fraud will not be presumed, but must be clearly proved; and a court of equity will apply this just rule most rigidly in a case like the present one, where the claim is so stale, and the complainants have neglected to present it, not through any misapprehension, but for purposes of their own, until the means of proving the truth are lost, and the parties most interested are dead. To avoid the effect of the statute of limitation, or the lapse of time, on the ground of concealed

fraud, the complainant must set forth with particularity, when and by what means the fraud was discovered, and the averment must be supported by the proofs. Stearns v. Page, 7 How. [48 U. S.] 829; Wagner v. Baird, Id. 258; Fisher v. Boody, [Case No. 4,814;] Carr v. Hilton, [Id. 2,437;] Moore v. Greene, [Id. 9,763.] See, also, Andrew v. Wrigley, 4 Brown, Ch. 125; Beckford v. Wade, 17 Ves. 94, 97, et seq.; Jenkins v. Pye, 12 Pet. [37 U. S.] 241; Hovenden v. Annesley, 2 Schoales & L. 636. The statute of limitations is a positive bar, and operates in equity, ex vigore suo, as well as at law, in all matters of concurrent jurisdiction, or of a similar nature. 2 Story, Eq. Jur. § 1520, and notes; Farnam v. Brooks, 9 Pick. 212, 243; Wagner v. Baird, 7 How. [48 U. S.] 234, 258; Moore v. Greene, [Case No. 9,763.] And where it is not directly applicable, courts of equity will apply the bar, and will refuse their aid after a lapse of twenty years, and often within a less period. 2 Sugd. Vend. (7th Amer. Ed.) 899; Roberts v. Tunstall, 4 Hare, 257; Gregory v. Gregory, Coop. 201; McKnight v. Taylor, 1 How. [42 U. S.] 168; Bowman v. Wathen, Id. 189; Andrew v. Wrigley, 4 Brown, Ch. 125; Morse v. Royal, 12 Ves. 377.

CLIFFORD, Circuit Justice. Where the answer is responsive to the bill of complaint, and positively denies the matter charged, and the denial has respect to a transaction within the knowledge of the respondent, the answer is evidence in his favor, and unless it is overcome by the satisfactory testimony of two opposing witnesses, or of one witness corroborated by other facts and circumstances, which give to it greater weight than the answer, or which are equivalent in weight to a second witness, it is conclusive, so that the court will neither make a decree nor send the case to trial, but will simply dismiss the bill of complaint. 2 Story, Eq. Jur. (8th Ed.) 1528; Pember v. Mathers, 1 Brown, Ch. 52; Walton v. Hobbs, 2 Atk. 19; Clark's Ex'rs v. Van Riemsdyk, 9 Cranch, [13 U. S.] 160.

Keeping that principle constantly in view, it will become necessary to look at the evidence with some care in order to ascertain what is the true state of the facts in regard to the matters in controversy between the parties. The administrators were lawfully appointed and duly qualified according to law to discharge their duties as such, and it is not denied, that an inventory of the estate of the intestate was duly made and returned, nor is it pretended that the administrators have not fully and justly administered the personal estate. They settled their first administration account on the 9th of October, 1820, and no attempt is made to impeach the decree allowing the same and ordering it to be recorded. By the copy of the record it appears, that they charged themselves in that account with all the personal estate as the same was appraised, which, with other charges, as therein specified, amounted to $6,742.04, and were allowed for sums paid out on account of the estate, $6,475.52, which left only a balance of $266.52 in their hands. On the same day they filed a list of debts due and owing by the estate, and a schedule of debts not collected, and supposed to be due to the estate. The debts due to the estate might not be collected, but such as were owed by the estate must be paid, and they accordingly, on the same day, petitioned the court of probate for license to sell real estate for that purpose; and the bill of complaint admits that on the 13th of the same month, they, as such administrators, were authorized to sell so much of the real estate of the intestate as would raise the sum of $6,511.37. Pursuant to that authority, sales of real estate were made by the administrators, to the amount of $3,635, and no fraud or irregularity in that behalf is charged upon the administrators. Other debts to a large amount were due and unpaid by the estate, but the authority conferred upon the administrators to sell the real estate for that purpose, although not exhausted, was not further exercised, and the creditors appear to have acquiesced in the delay. Nothing further was done in the probate court until the 12th of March, 1827, when the widow of the intestate petitioned to have her dower set off to her, and on the 6th of April following, the estates mentioned in the bill of complaint were assigned to her in full of her dower. The second administration account was presented by the administrators on the 10th of September, 1827, and, on the 17th of the same month, the same was allowed and ordered to be recorded. All sums received by the sales of the real estate were duly charged in the account, and it is not even suggested that there is any error in that part of the account. The list of debts filed and recorded on the 9th of October, 1820, included three notes, described as notes in bank, secured by mortgage, dated November 1, 1818, and were carried out in the account as amounting to $3,000. Immediately under the same is also another sum of $345, described as interest on the above. Included in the same list, is a note to D. Pulsifer, for $100, but whether on interest or not does not appear. When the administrators presented their second administration account, they also filed another list of debts due by the estate, amounting in the whole to the sum of $2,220. Three items only are included in that list, consisting of two notes at bank, secured by mortgage, amounting to $2,000, and one year's interest on the above carried out $120; and the remaining item is one note to D. Pulsifer, $100, which plainly is the same note as that specified in the first list of debts. Decree was entered on the same day the second administration account was allowed, ordering the list of debts to be filed and recorded. The former license to sell real estate having

expired by lapse of time, these proceedings in the probate court were necessary to lay the proper foundation for an application to the supreme judicial court for a renewal of the authority to sell. Notice to all persons interested, however, is required before decree, unless the parties voluntarily appear, and assent to the same, or in some way signify their assent in writing, which is often done in probate proceedings, in order to save the expense of publication. Accordingly, both the second administration account and the second list of debts were respectively examined and approved by and in behalf of all the heirs to the estate, and there is no allegation in the bill of complaint that the signatures of the parties to these papers are not genuine, or that they were unfairly obtained. Those writings are signed by each of the four heirs, who were then of age, and by the widow, for herself and the six minor children. The complainant charges that the account was false and fraudulent, and that there was nothing due from the estate to the administrators, or to any other person, but he does not allege that the guardian was guilty of any fraud in approving the account and list of debts, or that her signature to these writings was improperly procured.

Accusations like these, appertaining as they do to probate accounts formally settled more than thirty years ago, ought to be specific, and point out the items of the account which are alleged to be false, especially when, as in this case, it appears that all the parties implicated, and many of those who had the best means of knowledge in regard to the transactions are dead. The administrators charged $1,309 for the time and trouble of the first-named respondent, in settling the estate, and that amount was allowed in the account for his services. A specification of that item as a false one, is made in the bill of complaint, and it is the only one pointed out in that account as false.

Much testimony was introduced to show that D. B. Badger, when he was appointed, agreed to serve without charge, but after the lapse of thirty-five years the written assent of the heirs to the account, certifying that they had examined and approved the same, must be regarded as a conclusive answer to that imputation. Falsity is also imputed to the second list of debts, as recorded on the 17th of September, 1827; but it is evident, upon comparing the same with the list recorded on the 9th of October, 1820, that the two are the same so far as respects the items embraced in the second list. Three mortgage notes were filed in the first list, and but two in the second. Interest to the amount of $345 was charged in the first, as arising on those mortgage notes, but the amount set down in the second list is but $120. Taking the facts as they appear on the face of the papers, it is a reasonable presumption that one of the notes had been paid, and that all the interest on the other two had been paid, except for the last preceding year before the list was filed. Inference, however, need not be resorted to, as it expressly appears that the first note, and interest on the three notes to the amount of $378.30, were paid by the administrators, and the amount was allowed in the second administration account. Evidently, therefore, the notes were payable with interest, and the clear inference is, that all the accruing interest, except for one year, had been paid, or in some manner liquidated, when the second list of debts was presented. The petition for a renewal of the license to sell real estate, was presented by the administrators on the first Tuesday of March, 1830, to the supreme judicial court for the county of Suffolk. They state in their petition that they obtained such license from the probate court on the 13th of November, 1820; that they refrained from exercising the entire power so granted, at the request of the heirs and their guardians, and in the belief that the price of the real estate would be increased by the delay. The receipt of notice was acknowledged by the widow, heirs, and guardians, and they waived all objection to the granting of the prayer of the petition. Notice having been acknowledged, and all objections waived, the decree ordering the license was entered at the same term in which the petition was presented. Sales were accordingly made of the house and land in Cambridgeport; houses and land in Distil House square; an undivided part of an estate situated in Lynn; house and land situated in North Federal court, subject to the life estate of the widow; and house and land in Broad street, which was also subject to the widow's right of dower. The aggregate amount of the sales was $4,723.50, as fully and regularly appears, by the respective returns of sales duly made and sworn to by the administrators on the 25th of April, 1831, filed in the probate court for the proper county. Having completed these proceedings, and given public notice to all persons interested, the administrators presented their third administration account. Credit was duly given to the estate for the amount received for the sales of real estate; and they were allowed, for payments made and expenses incurred on account of the estate, the sum of $4,774.65, leaving a small balance against the estate. It is not pretended that there is any error in the form of these proceedings, and the pretence, if set up, could not be sustained for a moment, as it is obvious, from an inspection of the record that so far as form is concerned, from the appointment of the administrators to the final settlement of the third administration account, every step taken in the proceedings was correct and according to law.

Four principal objections are taken by the complainant to the legality of the proceedings: first, the one before mentioned, that the charge for services in the second administration account, and the second list of debts pre-

sented on the same day to the probate court, were false and fraudulent; secondly, that the license granted by the supreme judicial court, for the sale of real estate, was fraudulently obtained; thirdly, that the administrators intentionally neglected to give proper notice of the time and place of sale of the estates, for the fraudulent purpose of enabling the first-named respondent to purchase the same at a price below their real value; fourthly, that he employed two persons to attend the sales, and bid off the estates, and that they accordingly attended, and bid off certain parcels of the estates for his use and benefit, and subsequently conveyed the same to their employer, without any compensation except what was paid to them for their illegal services.

Sufficient has already been remarked to show that the first objection cannot be sustained. More than thirty-one years have elapsed since the third administration account was settled, and now, when the administrators who made the account, and presented the list of debts, and the guardian of the complainant, who approved the same, are dead, it is but just to hold that a party making such a charge, under such circumstances, shall be required to prove the charge by full and satisfactory evidence.

Express fraud, also, is the foundation of the second objection, and in respect to that charge the rule is, that he who makes it must prove it. Nothing less than proof of fraud could possibly avail the complainant in this case, as the court to whom the petition was addressed was bound to inquire whether debts were due and unpaid by the estate, before they granted the license, and, in the absence of fraud, it must be assumed that the finding of the court is conclusive. Grignon v. Astor, 2 How. [43 U. S.] 319. Several suggestions are made to show that the license was obtained by fraud, but no one of them is satisfactorily proved. One is, that the notes embraced in the second list of debts were barred by the statute of limitations, but the clear inference from all the circumstances is otherwise, as has already appeared. Those notes were subsequently paid by the administrators, and charged in their third administration account, and no one of the heirs made any opposition to the decree allowing the same, although duly notified to appear and show cause, if any they had, why the same should not be approved. Another suggestion is, that the assent of the widow and heirs to the petition for the license to sell was improperly obtained, but the suggestion is not sustained by any satisfactory proof. Some attempt was made to show that the signature of the widow is not genuine, but the weight of the evidence clearly shows, that she either signed her name, or authorized it to be placed to the instrument.

Satisfactory proof that notice of the time and place of sale was given is exhibited in respect to every parcel sold under the license obtained from the supreme judicial court. None of the sales effected under the license from the probate court are drawn in question, and of course nothing need be remarked in regard to those sales.

Testimony was introduced by the complainant, tending to prove that the first-named respondent, who was one of the administrators of the estate, employed one William P. Hart to attend the sale of real estate on the 20th of July, 1830, for the purpose of bidding off, for his own use and benefit, some portion of the estate which was advertised to be sold on that day, and that he accordingly attended the sale, and on that occasion he was the highest bidder, on the parcel situate in Distil House square, and the same was struck off to him for the sum of $2,820, as specified in the third administration account. The administrators conveyed the same to William P. Hart, on the 23d of July, 1830, and, on the 14th of March, 1831, the grantee in that deed conveyed the same to the first-named respondent. Evidence was also introduced by the complainant, tending to show that he procured in like manner the same person, and also one Daniel Gillpatrick, to attend the sale of the real estate advertised to be sold on the 12th of March, 1831, to bid off some portion of the estate for his own use and benefit, and that the former was the highest bidder for the house and land situated in North Federal court, and that the same was struck off to him, subject to the life estate of the widow, for the sum of $150, and that the latter was the highest bidder for the house and land situated in Brown street, subject to the widow's right of dower, and the same was struck off to him for the sum of $613, as appears by a copy of the proceedings, as recorded in the probate court on the return of the sales. Conveyances were duly made by the administrators to the respective bidders, and they subsequently conveyed their respective interests to the first-named respondent. A fraudulent design is charged by the complainant in respect to the employment of these persons to bid on the real estate, but proof to that effect is wholly wanting in the record. On the contrary, the evidence shows to the satisfaction of the court, that the sales were properly advertised, and in all other respects properly conducted, and that every reasonable exertion was made by the administrators to procure the attendance of bidders, and to obtain the best prices for the estates. The evidence clearly shows that the senior administrator neither employed those persons to bid, or had any knowledge that they or either of them had been employed by his associate. It is insisted by the complainant on this branch of the case, that the sales to Hart and Gillpatrick were absolutely void, because in bidding off the same they acted as the agents of the administrators. Michoud v. Girod, 4 How. [45 U. S.] 552.

On the other hand, it is insisted by the respondents, that inasmuch as the case made

in the bill of complaint is one of actual, positive fraud, that the complainant is not entitled to relief, unless he proves those allegations; that having charged actual fraud, he cannot now abandon that ground and show himself entitled to relief by proving constructive fraud, arising out of the peculiar relation between himself and the first-named respondent. Support of that proposition is certainly found in Eyre v. Potter, 15 How. [56 U. S.] 54; but in the view taken of this case, it will not be necessary to decide that question in the present controversy, because I am of the opinion that the claim of the complainant is barred by lapse of time. Courts of equity, says Mr. Justice Grier, in Wagner v. Baird, 7 How. [48 U. S.] 258, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation, which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy. In many other cases they act upon the analogy of the limitations at law, as where a legal title would, in ejectment, be barred by twenty years' adverse possession, courts of equity will act upon the like limitation, and apply it to all cases of relief sought upon equitable titles, or claims, touching real estate. Moore v. Greene, [Case No. 9,763;] 2 Story, Eq. Jur. (8th Ed.) 1520; Farnam v. Brooks, 9 Pick. 243. But, says the same learned judge, there is a defence peculiar to courts of equity, founded on lapse of time, and the staleness of the claim, where no statute of limitation governs the case. In such cases, courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere, where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. 2 Sugd. Vend. (7th Amer. Ed.) 899; Roberts v. Tunstall, 4 Hare, 257; Jenkins v. Pye, 12 Pet. [37 U. S.] 241; Hovenden v. Annesley, 2 Schoales & L. 636; Sullivan v. Sullivan, [Case No. 13,598;] McKnight v. Taylor, 1 How. [42 U. S.] 168. Long acquiescence and laches by parties out of possession, are productive of much hardship and injustice to others, and cannot be excused, but by showing some actual hindrance, or impediment, caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor. Sales in this case, which the complainant seeks to set aside, were made in 1830 and 1831, more than thirty years ago, and no reason or excuse is assigned for the delay. Present suit was instituted on the 6th of September, 1858. Complainant, it is true, alleges that the fraudulent acts and doings of Daniel B. Badger were unknown to him until within five years last past, but the bill of complaint does not allege that the same were in any manner concealed from him, or when or by what means the fraud was discovered. Such general and unsubstantial allegations of excuse cannot be regarded by a court of equity as sufficient. On the contrary, it is well settled, that if the complainant would avoid the effect of lapse of time, or of the statute of limitations, on the ground of concealed fraud, he must set forth with particularity when and by what means the fraud was discovered, and the averment so made must be supported by the proofs. Stearns v. Page, 7 How. [48 U. S.] 829; Wagner v. Baird, Id. 258; Fisher v. Boody, [Case No. 4,814;] Carr v. Hilton, [Id. 2,437;] Moore v. Greene, [Id. 9,763.] Many of the heirs have been examined as witnesses, and not one of them has testified to any concealment on the part of the respondent, or any ignorance upon the subject. His counsel insist that the claim is not barred, because the properties were subject to a life estate which did not terminate until the 24th of September, 1855, when the widow of the intestate deceased; but I am of the opinion that the continuance of her life estate has no effect upon the question of limitation in this case. The purchasers took an absolute title in the estates as against the complainant, and those under whom he claims; and in equity the rule is, that the question of acquiescence is not affected by the circumstance that the particular estate had not determined during the lapse of time, since the conveyance might at any time have been avoided, if obtained by fraud, as alleged. Sullivan v. Sullivan, [supra;] Andrew v. Wrigley, 4 Brown, Ch. 125; Beckford v. Wade, 17 Ves. 94, 97; Jenkins v. Pye, 12 Pet. [37 U. S.] 241; Hovenden v. Annesley, 2 Schoales & L. 636; Bowman v. Wathen, 1 How. [42 U. S.] 193.

Applying these principles to the present case, I am of the opinion that the claim in this case is barred by the limitation of twenty years. When the sales were made, the complainant, and those under whom he claims, were minors, and consequently within the exception of the statute, but the proof is full to the point, that all of them, except the complainant, had been of age more than twenty years when the first suit in this case was commenced. The age of the complainant does not distinctly appear, and it may be that he had not been of age twenty years on the 8th of May, 1857, when the former suit was commenced. Proofs on this point are not clear, and perhaps it would be going too far to say that his original share of one tenth is barred by that limitation. But if that be so, still I am of the opinion that the entire claim is barred, as a stale claim, upon the ground of gross laches, and long unexplained acquiescence in the operation of an adverse right. Under such circumstances courts of equity will often treat a lapse of a less period than the one specified in the statute of limitations as a presumptive bar to the claim. Smith v. Clay, Amb. 645; Kane v. Bloodgood, 7 Johns. Ch. 93; Dexter v. Arnold [Case No. 3,859;] Prevost v. Gratz, 6 Wheat. [19 U. S.] 481; 2 Story, Eq. Jur. (8th

Ed.) § 1520. Another answer to the claim may also be given, which is as applicable to the complainant as to those under whom he claims. Actions for lands sold by executors, administrators, or guardians cannot be maintained in this state by any heir or other person claiming under the deceased testator or intestate, unless the same be commenced within five years next after the sale. Rev. St. Mass. c. 71, § 37, p. 458; Id. c. 72, § 19, p. 461. Objection is made by the complainant that this limitation cannot operate, because it is not set up in the answer. But the objection, I think, is not well taken, as applied to the present case. Courts of equity, says Judge Story, act upon the analogy of the law, as to the statute of limitations, and will not entertain a suit for relief, if it would be barred at law. If the objection does not appear on the face of the bill, it may be taken by way of plea or by way of answer; but the clear inference is, that the learned author did not regard the plea or answer as necessary when the objection was apparent on the face of the bill of complaint. Story, Eq. Pl. § 503; Coop. Eq. Pl. 167; Mitf. Pl. by Jeremy, 212; Maxwell v. Kennedy, 8 How. [49 U. S.] 222; Hovenden v. Annesley, 2 Schoales & L. 638.

In view of the whole case, I am of the opinion that the complainant is not entitled to relief, and the bill of complaint is accordingly dismissed with costs.

[NOTE. An appeal was taken from this decree to the supreme court by the complainants, and the judgment was thereupon affirmed, the court, by Mr. Justice Grier, holding that:

["Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy.

["In many other cases they act upon the analogy of the like limitation at law. But there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case. In such cases, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands; refuse to interfere where there has been gross laches in prosecuting the claim or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor.

["The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance. and how and when he first came to a knowledge of the matters alleged in his bill; otherwise, the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer.

["The bill in this case is entirely defective in all these respects. It is true there is a general allegation that the 'fraudulent acts were unknown to complainant till within five years past,' while the statement of his case shows clearly that he must have known, or could have known, if he had chosen to inquire, at any time in the last thirty years of his life, every fact alleged in his bill. That his mother was entitled to dower in the land if the sale was set aside was no impediment to his pursuit of his rights, while her death may have removed the only witness who was able to prove that his complaint of fraud was unfounded, and that it was by the consent and desire of the family that the property was kept in the family name by the only one who was able to advance the money to pay the debts of the deceased,—a fact fairly to be presumed from her silence and acquiescence for twenty-four years." Badger v. Badger, 2 Wall. (69 U. S.) 87.

[Also see Marsh v. Whitmore, 21 Wall. (88 U. S.) 178; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587; Hayward v. Eliot Nat. Bank, 96 U. S. 611; Godden v. Kimmell, 99 U. S. 201; Wood v. Carpenter, 101 U. S. 135; Etting v. Marx, 4 Fed. 673; Livingston v. Ore Bed, Case No. 8,418. The decree of the supreme court was distinguished in James v. Atlantic Delaine Co., Id. 7,177, and Forbes v. Overby, Id. 4,928a.]

BADGER, (BYRD v.) See Cases Nos. 2,265 and 2,266.

BADGER, (EDDY v.) See Case No. 4,276.

BADGER, (KENDALL v.) See Case No. 7,691.

BADGER, (ORR v.) See Case No. 10,587.

BADGER, (REYNOLDS v.) See Case No. 11,726.

BADGER, (UNITED STATES v.) See Case No. 14,493.

Case No. 719.

BADISCHE ANILIN & SODA FABRIK v. COCHRANE et al.

[16 Blatchf. 155; 4 Ban. & A. 215; Merw. Pat. Inv. 172.] [1]

Circuit Court, S. D. New York April 15, 1879.[2]

PATENTS FOR INVENTIONS—APPLICATION — SPECIMENS OF COMPOUND ARTIFICIAL ALIZARINE.

1. Reissued letters patent No. 4,321, division B, granted April 4th, 1871, to Charles Graebe and Charles Liebermann, for artificial alizarine produced from anthracine, are valid.

2. The decision of this court in Anilin v. Higgin, [Badische Anilin & Soda Fabrik v. Higgin, Case No. 722,] confirmed.

3. Artificial alizarine, made according to the process of the patent, was a new product, and was patentable.

4. The application for the patent was not accompanied by any specimen of ingredients or of the compound; but it was for the patent office to determine whether the nature of the case admitted of specimens, and the want of them is not made a statutory defence to a patent.

5. The artificial alizarine of the patent is different from chemically pure alizarine, and the patent covers the invention.

6. The patent is infringed by an article produced by the process of letters patent No. 153,-

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[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 215; and here republished by permission. Merw. Pat. Inv. 172, contains partial report only.]

[2] [Reversed by supreme court in Cochrane v. Badische Anilin & Soda Fabrik, 111 U. S. 293 4 Sup. Ct. 455.]

536, granted July 28th, 1874, to Heinrich Caro, Charles Graebe and Charles Liebermann.
[See note at end of case.]

[In equity. Bill by Badische Anilin & Soda Fabrik against Alexander Cochrane and others for infringement of letters patent. Decree for complainant. Reversed by supreme court in Cochrane v. Badische Anilin & Soda Fabrik, 111 U. S. 293, 4 Sup. Ct. 455.]

George Gifford and John Van Santvoord, for plaintiff.

Dickerson & Beaman, for defendants.

WHEELER, District Judge. This bill is brought upon division B of reissued letters patent No. 4,321, dated April 4th, 1871, to Charles Graebe and Charles Liebermann, for artificial alizarine produced from anthracine, now owned by the plaintiff. The cause was heard upon the pleadings and the plaintiff's evidence, at October term, 1877. While it was under consideration, a motion to open it for taking further evidence was filed by the defendants, and evidence was taken upon that motion. Pending the motion the parties, with the consent of the court, stipulated all that evidence and some other into the case, to be used as if taken in chief, and it has again been fully heard upon the pleadings and all this evidence and arguments of counsel.

The original patent was for the process of making this alizarine. It was surrendered and reissued in two divisions, one for the process, and the other, this one, for the product. This division of the patent, and the question of infringement by the same means as those by which the defendants are now claimed to infringe, were under consideration in a cause in favor of this plaintiff [Badische Anilin & Soda Fabrik] against Hamilton Manufacturing Company [Case No. 721] in the Massachusetts district, February 4th, 1878, and in another cause, [Badische Anilin & Soda Fabrik,] against Higgin, in this district, September, 1878, [Case No. 722.] Several questions were made there about the regularity of the reissue, which have not been insisted upon here. The questions now raised in argument are, whether this product is, in fact, so new a product as to be patentable under the law in any form? and, if it is, whether this division of the patent, as granted, covers it? and, if both, whether the defendants infringe it? These questions were considered and determined in those cases, as there presented. But there is considerable evidence in this case not in either of those; and, therefore, it has been fully heard, examined and considered, by itself, without resting its decision upon the authority of those.

Alizarine is a natural dye-stuff, found in the root of the madder plant, and has long been known as such, in the art of coloring. It is formed and held in the fibre of the root, and reached by disintegrating the substances which it is among, separating it from them, and securing it by long and well known processes. It is essentially an extract from among other natural products, and not in any sense an artificial compound. Its structure was carefully studied by chemists, and its molecular formation ascertained to be composed of fourteen atoms of carbon, eight of hydrogen, and four of oxygen, represented by the formula $C_{14}H_8O_4$ of chemists. The defendants insist that the production of Graebe and Liebermann is the same thing.

Anthracene was a waste product of coal-tar —a hydro-carbon—its molecules consisting of fourteen atoms of carbon and ten of hydrogen, in formula $C_{14}H_{10}$. A chinone had been formed from it, by replacing two atoms of hydrogen with two of oxygen, called anthrachinone, with the formula $C_{14}H_8O_2$, having two atoms less of oxygen than chemically pure alizarine. Anthracene was not in any sense a dye-stuff, neither was anthrachinone; and neither did either contain anything that was a dye-stuff, or any coloring matter which could be extracted in any manner, for none was there. But their molecular structure was so like that of alizarine, that Graebe and Liebermann were led to investigate whether there was anything there from which any substance, embodying the coloring principle of alizarine, could be produced. To produce what would have the same chemical formula, it was necessary to add two atoms of oxygen, or to replace two atoms of hydrogen with two of hydroxyl. That accomplished would not insure the production of the same thing, although having the same formula, nor anything with like properties. The molecules to be acted upon were very complex, and their atoms very liable to be disarranged by any process of addition or substitution. Graebe and Liebermann devised a method, involving various steps, for effecting the changes desired, tried it, and succeeded in obtaining a substance whose formula would be the same, and whose properties the same or like those of alizarine, and which they termed alizarine. When they had done this they had not discovered natural alizarine anywhere, and extracted it, but they had made an alizarine synthetically, from substances never before containing it, nor anything like it. What they made was a worthy substitute for, whether more or less nearly or exactly like, the natural alizarine of madder.

If this substance should be found to be so like natural alizarine that no one could tell the difference between them, or know them apart except by their source, the question would be presented, whether, even then, it would not, of itself, be subject under the law to a patent granting to its inventors an exclusive right to it, and whether this patent is not valid for that purpose. The statute entitled an inventor of any new and useful art, machine, manufacture or composition of matter to a patent for it on application, accom-

panied by a drawing, with references, "where the nature of the case admits of drawings, or with specimens of ingredients, and of the composition of matter, sufficient in quantity for the purpose of experiment, where the invention or discovery is of a composition of matter." Act July 4, 1836, § 6; 5 Stat. 119. The application for this patent was not accompanied by any specimen of ingredients or of the compound. It is urged, in argument, that this product is not a patentable composition of matter, and that the absence of specimens shows it is not, and that it is not a manufacture, nor anything mentioned in the patent law as patentable. These terms in the statute are not understood to be placed there as stools, betwixt which inventors may fall to the ground, but to cover the whole range of useful invention, to every piece of which some one of them, and to many, more than one of them, will apply. This product may fall under the head of either a manufacture, or a composition of matter. If it is a composition of matter only, the statute, from the context as quoted, may be construed to mean that specimens are to accompany the application, when the nature of the case admits of specimens. If the statute is so construed, whether the nature of a case so admits, must be left to the determination of the patent office, subject to its requirement. And in this case it must have been determined that the nature of the case did not so admit, and so none have been required. And, however this may be, the statute has not placed the lack of specimens among the defences to a patent, and, as it was granted, it cannot fail for that reason.

The English statute, (21 Jac. 1, c. 3,) only saved grants and privileges of the sole working or making of any manner of new manufacture within the realm, to the first and true inventors of such manufactures, from the prohibition of monopolies; but, under the liberal construction which the word manufacture in the statute, from the nature of the subject, required, and, at the hands of the courts, received, to carry out the intention, it was extended so as to cover all subjects of invention of material things that were useful. Boulton v. Bull, 2 H. Bl. 463; Hornblower v. Boulton, 8 Term R. 95.

This production of Graebe and Liebermann, however like natural alizarine, was not that. It was entirely new in its source and its coming. No one had ever seen or known of such a thing before. Its addition to the productions known before was, in the language of Buller, J., in Rex v. Arkwright, Webst. Pat. Cas. 71, a vast "improvement of the trade." According to Heath, J., in Boulton v. Bull, [supra,] the product only, and not the process alone, would have been patentable, under the English statute. He said, referring to the statute: "What then falls within the scope of the proviso? Such manufactures as are reducible to two classes. The first includes machinery, the second substances, (such as medicines,) formed by chemical and other processes, where the vendible substance is the thing produced, and that which operates preserves no permanent form." "I asked, in the argument, for an instance of a patent for a method, and none such could be produced. I was then pressed with patents for chemical processes, many of which are for a method, but that is from an inaccuracy of expression, because the patent in truth is for a vendible substance." This, of course, does not show that, under a statute which includes the term art, a process merely would not be patentable; but, a product patentable under one would be under the other. In Steiner v. Heald, 6 Eng. Law & Eq. 536, the patent was for the invention of a new manufacture of garancine. Garancine was an extract from madder, having its pure red coloring matter, and was well known. The plaintiff produced it from spent madder, by the same process by which it had before been produced from fresh madder. It was ruled at the trial, that, because it was the same substance, it was not a new manufacture. This ruling was reversed in the exchequer chamber, on the ground that spent madder "might be a very different thing from fresh madder, in its properties, chemical and otherwise," and that whether it was or not would be material to the validity of the patent. If it was, the novelty of the manufacture would consist wholly in the material from which it was produced. There would be a combination of new materials, which would be a new combination; and so there would be here. In the case of The Wood Paper Patent, 23 Wall. [90 U. S.] 566, the paper pulp sought to be covered by the patent was not made at all by the new process, but was merely extracted by it. It was cellulose before the treatment and after; an extract and not a compound; and its patentability appears to have been denied on that ground. There was no new combination about it.

The plaintiff does not, however, rest the claim of novelty upon the production from a new source, but claims, upon the evidence, that the thing itself, independent of its source, when compared with the alizarine of madder, is different from it. The defendants deny this, and the evidence, although all credible, in view of the honesty and sincerity of the witnesses, is somewhat conflicting. The question is one of fact, and quite intricate, involving a high degree of skill in the subject, and requiring the aid of persons possessed of it, which has been furnished by both sides.

Considerable of the testimony, and especially of that from abroad, taken probably without the presence of counsel who manage the cause, goes to show only what Graebe and Liebermann sought after, and thought they had found, when they had succeeded with their experiments, rather than to show what they actually did discover and invent. But, what they sought for, intended, or

thought, does not seem to be of so much importance here. An invention is not like a will, depending on intention. It is a fact, and, if the fact exists, it does not appear to be material whether it came by design, or accidentally without being bidden. The question here is, whether this substance which they produced is, in its structure and properties, old or new; and not whether they looked for something old or new, or thought they had found either one or the other. Separated from the rest, the testimony as to whether this product is actually different from the other, in some respects material to dye-stuffs, is full, and not very conflicting. Each has the formula $C_{14}H_8O_4$, but that is not conclusive. Alone it is hardly a circumstance. Chemists on each side of the case agree about this. Prof. Chandler, at page 204, so expresses himself, and instances diamonds and plumbago as having the same formula without any resemblance. The testimony of President Morton at page 466, and that of Prof. Hedrick at page 52, is to the same effect. As an example akin to this question, shown by the evidence, there is the purpurine of madder, whose formula is $C_{14}H_8O_5$. Perkin discovered a purpurine from anthracene, which he called anthrapurpurine; Auerbach, a purpurine from the same source, which he called isopurpurine. Some say these two are the same and others that they are different, but all agree that both are different from the purpurine of madder, yet each has the same formula $C_{14}H_8O_5$.

The presence of these newly discovered purpurines in the artificial alizarine, where they are said to have and appear to have an important influence, is relied upon largely as showing that it is different from the natural alizarine. The testimony of several eminent and reliable chemists is to the effect that it is so present. The testimony of Prof. Chandler, who is also eminent and reliable, is largely depended upon to show to the contrary; yet after spending a great deal of time in investigating the subject, and after having testified in regard to it several times before, and as late as November, 1878, he testified further, speaking of the process of the patent: "I am to-day unable to say whether anthrapurpurine or isopurpurine is a necessary by-product of the bromine process of Graebe and Liebermann." He appears to depend largely upon what they intended and thought, in settling in his own mind what they did. The little importance of their intentions and suppositions becomes more apparent, when it is considered, in this connection, that isopurpurine and anthrapurpurine, whether the same or different, were not discovered at all until 1870, long after the invention and patent. On this question it seems sufficient to say, without specifically referring to the evidence further, that it is satisfactorily found, as a matter of fact, that this artificial alizarine of the patent is essentially different, in capabilities and properties, from chemically pure alizarine, madder alizarine, or any coloring matter before known and used.

It has been argued with much plausibility, for the defendants, that the patent itself is, in intention and effect, a patent for chemically pure alizarine; that the various steps of the process described in it might as well be represented by chemical notation, in equations and formulae which would end in the formula $C_{14}H_8O_4$; and that, if the finding should be as just stated, the invention would be of one thing, and the patent for another, and that patented old and well known. Here, in view of the evidence relied upon in support of these propositions, the distinction between what the inventors actually did, and what they intended to do and supposed they had done, as well as the difference between this patent and others and other documents, must be attended to. In the specification of an English patent, and elsewhere in writings, they characterized this product as chemically pure alizarine. There is considerable controversy among experts about the meaning of that expression where used. But neither that expression, nor the formula for it, is used in this patent, and this patent must speak for itself, and be understood as expressing what is to be gathered from what is there. Considering anthracene, or anthrachinone, as the starting point, the patent describes a series of chemical reactions ending with the "yellow flocks of alizarine." These reactions might be stated in equations, but it is to be remembered that, as shown before, the successive formulae, when stated, would not show all the characteristics or properties of the corresponding substances. So, the fact that they could be expressed in equations, and that chemists would understand the same things when so expressed that they do as now expressed, is not at all decisive. Neither could the actual effect of such reactions be accurately calculated beforehand. They must be first tried and their effect found from the actual result.

The question here is what in fact this result, the alizarine in yellow flocks, is. There can be no fair doubt, upon the evidence, but that the process can be carried out to a practical result. Several persons testify that they have done it, and no one testifies that these persons have not done it, nor really that it cannot be done. Those who have done it to any considerable extent agree, also, in testifying, that a practical dye-stuff is produced, which, although represented in formula like chemically pure alizarine, and probably containing it, is different from it. Upon this testimony, considered with all the other testimony and evidence, it is found that the product of the patent is different from chemically pure alizarine, and that the patent covers the invention.

It remains to be considered whether the defendants infringe. That they deal in an article produced by the process of subse-

quent letters patent, No. 153,536, dated July 28th, 1874, to Heinrich Caro, Graebe and Liebermann, is proved and not disputed. If that substance is the same, they do infringe.

In the patent in controversy, anthracene was to be converted into anthrachinone by a known process mentioned; and anthrachinone into alizarine, according to Prof. Chandler, by adding, by means of bromine, two atoms of oxygen; or, according to President Morton, by substituting two atoms of hydroxyl for two atoms of hydrogen, by introducing in place of the hydrogen, bromine, which could be replaced by the hydroxyl; or, according to Prof. Ordway, by replacing the hydrogen with hydroxyl by the use of bromine as a radical. These are understood to be merely different descriptions of the same chemical process, in which the bromine, as said by Prof. Hedrick, does not inhere at all in the result. It served only as a sort of vehicle to carry in what was necessary, and fetch away what was not wanted, without disarranging the rest. It was discovered that sulphuric acid was superior to bromine for this purpose, performing the same offices in the same way. The Caro patent is for this improvement. Some say this was merely substituting one well-known equivalent for another; others, that it involved inventive skill. Which are right is of no consequence here now. There is but little, if any, disagreement about the result being the same.

The defendants stoutly invoke Graebe and Liebermann themselves in support of some of their positions. Their statements upon this subject have been observed. They state that they tried sulphuric acid at first, but made the mistake of using too low heats. That "Caro first noticed that anthrachinone, if heated with sulphuric acid to above 200°, would give sulpho-acids, which on fusing with hydrate of potash, formed alizarine, the same as the bromine compound." They describe the development of this process further, and then say, further: "The first process is, therefore, identical with the first bromine method given above." They then describe the second method, and add, in conclusion: "On fusing the two sulpho-acids, they give alizarine exactly like the monobrom-, and dibrom-, anthrachinone." The patent is to the same effect. The specification commences: "This invention relates to improvements on an invention described in letters patent of the United States, granted to Charles Liebermann and Charles Graebe, for improvements in preparing coloring matters, dated the 5th day of October, 1869, No. 95,465, in which the preparation of artificial alizarine is based upon the action of caustic alkalies upon bibrom-anthrakinon or bichloranthrakinon. We have now discovered that a similar result may be obtained by substituting sulphuric acid for bromine or chlorine, in the above process."

Both the intended and the actual identity between the products, as to both source and properties, seem to be clearly established. And the establishment of this is of some importance, bearing upon the question of fact, before considered, as to the likeness between the natural and artificial alizarine. Prof. Chandler, upon whose testimony the defendants appear to most strongly rely, claims that the differences between them have been found in the product of the latter patent and not in that of the former. This may well have been, because they have not been so much looked for in the former. But, if the products of the two patented processes are identical, as is here found, what he recognizes as differences to some extent in the product of the latter patent would be found in that of the former, if persistently sought after.

These conclusions are more satisfactory, because they are in accordance with those reached in the two former cases upon this same division of this patent, in the one of which, in this district, [Badische Anilin & Soda Fabrik v. Higgin, Case No. 722,] much reliance was placed upon the decision of that in the district of Massachusetts, and the opinion of Judge Shepley there [Badische Anilin & Soda Fabrik v. Hamilton Manuf'g Co., Case No. 721.]

Let there be a decree establishing the validity of this division of the patent, and for an injunction and an account, according to the prayer of the bill, with costs.

[NOTE. On appeal to the supreme court this decree was reversed, (Cochrane v. Badische Anilin & Soda Fabrik, 111 U. S. 293, 4 Sup. Ct. 455,) on the ground that reissued letters patent No. 4,321, claiming "artificial alizarine, produced from anthracene or its derivatives, by either of the methods herein described, or by any other method which will produce a like result," if construed so broadly as to cover the article produced by the process of the Caro patent, is wider in its scope than the original actual invention, and wider than anything indicated in the specification of the original patent; and that, if construed so as to cover only the product which the process described will produce, the reissue is not infringed by the different article produced by the process of the Caro patent. [For other suits involving the same letters patent, see Badische Anilin & Soda Fabrik v. Cummins, Case No. 720; Same v. Hamilton Manuf'g Co., Id. 721; Same v. Higgin, Id. 722.]

Case No. 720.

BADISCHE ANILIN & SODA FABRIK v. CUMMINS.

[4 Ban. & A. 489.][1]

Circuit Court, D. Massachusetts. Sept., 1879.

PATENTS FOR INVENTIONS — INFRINGEMENT — NEW PROCESS OF MANUFACTURE.

1. The complainant's patent was for an article produced from anthracene, called by the patentees "artificial alizarine," and the patent described two modes of its production, by means of bromine. Subsequently, it was discovered

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

that the article could be produced more cheaply by using sulphuric acid, or other agents, instead of bromine: *Held*, that the article produced by the sulphuric acid process was an infringement of the complainant's patent.

[Cited in Cochrane v. Badische Anilin & Soda Fabrik, 111 U. S. 298, 4 Sup. Ct. 457.]

2. The words "artificial alizarine" in the claim describe the product produced by the process, and do not necessarily mean chemically pure alizarine, and the claim is valid as being for a new article of manufacture.

[In equity. Bill for injunction by the Badische Anilin & Soda Fabrik against Thomas K. Cummins. Temporary injunction granted, restraining further infringement of complainant's patent No. 95,465. For adjudication on the same patent, but in another suit, see Badische Anilin & Soda Fabrik v. Cochrane, Case No. 719, reversed in 111 U. S. 293, 4 Sup. Ct. 457; Same v. Hamilton Manuf'g Co., Case No. 721; and Same v. Higgin, Id. 722.]

J. Van Santvoord, for complainant.

Dickerson and Beaman, for defendant.

LOWELL, Circuit Judge. The patent in suit is division B of reissue 4,321, dated April 4, 1871, for the article called artificial alizarine. Alizarine was known to chemists as the substance which gave the principal value to madder as a dyestuff. The patentees, Graebe and Liebermann, assignors of the plaintiff corporation, made the brilliant discovery, in 1869, that this dyestuff, or something which would do substantially the same work, could be artificially produced from anthracene, which was one of the numerous products of coal tar. To effect this metamorphosis, it was necessary to add oxygen to the anthracene, and the patent describes two modes of doing this by means of bromine. Within a year after this process was patented, the patentees, with the assistance of a third chemist, Caro, discovered an easier and cheaper process, in which sulphuric acid is used instead of bromine. Mr. Perkin, an English chemist, discovered a similar modification at about the same time, and other persons have patented other similar processes, all of which depended upon the original discovery of these patentees, so far as one can ever affirm such a conclusion. The result of these discoveries has been that artificial alizarine has replaced madder to a very large extent, and that a great stimulus has been given to the art of dyeing, and to the science connected with it; but the original bromine process is never used.

The American patent of Graebe and Liebermann, granted in 1869, No. 95,465, was for the bromine process, or processes, and the reissue was in two parts; one, A, for the same processes, and one, B, for the product.

Whether the sulpho-acid processes, by which artificial alizarine is now made, are the equivalents of the original bromine processes, is not important to be considered at present, excepting as concerns the resulting product, because the article is always made in Europe. This suit is directed against the use and sale of the product. The question, therefore, is, whether division B of the patent is invalid.

In case of a discovery of the originality and beauty of that which these patentees are admitted to have made of one mode of producing alizarine from the almost worthless material, anthracene, it would seem reasonabl that a valid patent might be obtained for that product derived from that source, although the artificial alizarine, when produced, should be identical with alizarine made from madder. But counsel on both sides agree, for the purposes of this motion, that, by the law of the United States, one who produces an old article, though from the most unexpected source, can only patent the mode of producing it. Granting this to be the law, Judge Shepley, though he appears to have understood the fact to be that pure alizarine had not been produced before 1869, excepting in laboratories, decided [Badische Anilin & Soda Fabrik v. Hamilton Manuf'g Co., Case No. 721] that, at any rate, this patent was valid, because he found that the artificial alizarine, thus produced, was a new article, differing in important particulars from the dyestuffs made from madder. Judge Wheeler, sitting in the southern district of New York, has made two similar decisions, [Badische Anilin & Soda Fabrik v. Cochrane, Case No. 719; Same v. Higgin, Id. 722,] reserving, however, his opinion upon the question whether the patent might not be good, though the alizarine should be identical with an old product. I give no opinion upon this point.

It seems to be beyond doubt that what the patentees sought to discover, and supposed they had discovered, was the dyestuff of madder; and if it be true, as it has heretofore three times been held to be true, that they discovered something more, then, if the law be as it is taken to be, for the purposes of this motion, they have, by a sort of accident, obtained a valid patent for an incident of a most valuable discovery. Accidental justice, however, may be better than none.

Upon this motion the questions have been tried and discussed again with all the care and fulness of a new case, and many facts, not known at the time of the first suit, have been brought out; but not much that was not before Judge Wheeler at the last hearing. [Badische Anilin & Soda Fabrik v. Cochrane, Case No. 719.] The construction of the patent has been very fully argued, and a great amount of expert testimony has been given concerning it, intended to prove that the claim for "artificial alizarine" means, or does not mean, a claim for a certain definite substance represented by a certain formula. In my opinion, as in that of both judges who have considered the point before me, these words do not need, and will not admit of, expert interpretation. The words "artifi-

cial alizarine" are used by the patentees in their claim to describe the product which is the result of their process, and mean exactly what "artificial madder," or any other name which they might have chosen, would have meant. "Artificial alizarine" was not a term of art at the date of the patent, though it may have become so since that time. If it has become so, it is by reason of the numerous experiments and investigations that have followed this discovery, and have determined the meaning by determining the nature of the product. In 1869, it was begging the question to say that the claim was for chemically pure alizarine. Even now the term seems to be commonly used to include all forms of the product from anthracene, while chemists sometimes use it more narrowly to signify alizarine as distinguished from isopurpurine, etc. No patent, deed or contract would be construed so narrowly, at this day, as to hold that if the patentees made a new article they should not hold it because they thought it an old one.

It has been proved that artificial alizarine contains important dyeing substances, not mere impurities, which are not found in madder. Judge Shepley, following the witnesses, called these substances anthrapurpurine and isopurpurine. These two are really one. Still, this one and another, which is now called flavopurpurine, are found in artificial alizarine and not in madder or any of its extracts, and are important materials, giving some valuable results which the extracts of madder cannot give. Witnesses on both sides fully prove this, and, though some of the defendant's witnesses seem to assert that there is nothing which the new article can effect which cannot be as well done by the old dyestuffs, the defendant's experts say that the stability of certain shades of color depends on the presence of the new purpurines. There is purpurine in madder, and its chemical formula is the same as that of isopurpurine and of flavopurpurine, but the three are wholly distinct substances, and purpurine is much inferior to the others as a dyestuff. It is not contained in alizarine, though it can be made from it by adding something.

By constant experiment and effort, these facts concerning the new purpurines have been discovered since 1869, and they can now be separated and produced in a pure state, or nearly so. The defendant, however, insists that these new purpurines are not found in the artificial alizarine made by the bromine processes, but only in those made by the more recent methods. This is the only point upon which the evidence, when carefully examined, is found to be in much conflict. Unfortunately the scientific men who have investigated alizarine and its products, without reference to this litigation, have had no occasion to examine this particular question; and, of course, all their experiments have been made with the alizarine which they find in the market, and that is made by the sulphuric acid processes. Many of the witnesses for the defendant say that Graebe and Liebermann, in a report which they made to the Vienna Exhibition of 1873, truly stated that these purpurines were a product of the sulphuric acid processes, meaning to have it understood, as some of them positively assert, that these gentlemen there stated that these purpurines could only be made by those processes. I have searched the Vienna report in vain for any such statement; and I find that Judge Wheeler was equally unsuccessful. He found, as I do, general statements that the processes produced, or were supposed to produce, an identical article; but nothing definite on the precise point in question.

Perkin, one of the discoverers of isopurpurine, published a "History of alizarine and allied coloring matters, and their production from coal tar," in The Journal of the Society of Arts, London, May 30, 1879, which was handed me by the defendant's counsel, with a passage underscored, which I suppose was thought to contain a statement like that attributed to Graebe and Liebermann. I think it means almost exactly the contrary. It is this: p. 580, "But it was gradually found, when manufacturing artificial alizarine on the large scale, that the smaller the amount of sulphuric acid used to convert the anthraquinone into sulpho acids, the temperature being also kept as low as practicable, that the coloring matter made from such a product yielded with mordant shades of color more nearly approaching those produced with madder, until eventually the unexpected result was arrived at, that it was necessary to have a monosulpho acid of anthraquinone for the preparation of pure alizarine, and that the disulpho acid does not yield this substance at all, so that, in the production of pure alizarine, the following reactions take place: monosulphanthraquinonic acid is first decomposed into monoxanthraquinone; and this, when further heated with an alkali, is oxidized into alizarine. We thus see that this formation of alizarine differs entirely from that originally discovered by Graebe and Liebermann, both as regards the chemicals employed, and the chemical changes which take place. We also see that monoxanthraquinone is an intermediate product, and not a secondary one."

Now, I understand Mr. Perkin to mean, that the process by which pure alizarine is obtained is new, and that the process of Graebe and Liebermann would not produce it. I do not mean to say that he is distinguishing between the bromine and the sulphuric acid processes of Graebe and Liebermann, though he says nothing about Caro, but I do suppose him to mean that he, or some one else, long after 1869, discovered the mode of making pure alizarine. And I think the evidence is that pure alizarine, pure isopurpurine and pure flavopurpurine are all

new products since 1869, though all contained in the patented article.

Whatever the meaning of Perkin, or whatever the fact may be, I do not find it to be proved in this case that the process or processes of the patent produce chemically pure alizarine. I do not undertake to account for the different results which witnesses of skill and integrity have reached on the one side and the other. It does appear, if I understand the evidence, that one set of witnesses took one of the alternative processes described in the patent, while the other set took the other. Whether this fact, if it be one, has anything to do with the difference of results, I do not know. What I find is, that upon the evidence as it stands before me, including the scientific reports and other books, the artificial alizarine of the patent is different in some important respects from any article known before. Whether the alizarine, strictly so called, when obtained from anthracene, is identical with the alizarine obtained from madder, is said by Auerbach, in 1877, to be a disputed question. "Anthracene, etc. By G. Auerbach. Translated by Crookes," Lond., 1877, p. 155. Auerbach himself thinks it is identical; I have assumed it to be so; but the point is unimportant at this time. I agree with Judges Shepley and Wheeler, that the claim is for a new article of manufacture, which was new in fact.

The remaining questions argued are the same that have been passed upon in the other cases. The fact of infringement appears to be made out by evidence not contradicted.

Temporary injunction granted.

Case No. 721.

BADISCHE ANILIN & SODA FABRIK v. HAMILTON MANUF'G CO.

[3 Ban. & A. 235; 13 O. G. 273; Merw. Pat. Inv. 170.][1]

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

PATENTS FOR INVENTIONS—FOREIGN PATENT—EXPIRATION—PROCESS AND PRODUCT.

1. The provision of the statute—Act 1870, § 25, [16 Stat. 198]—providing that, in case of a foreign patent, the United States patent shall expire at the same time with the foreign patent, is not retroactive in its operation, and does not apply to American patents granted before the law took effect, or to the reissues of such patents granted after the law took effect.

[Cited in Goff v. Stafford, Case No. 5,504. Distinguished in De Florez v. Raynolds, 8 Fed. 444.]

2. The right to reissue a patent in two divisions, one for the new process, and one for the new product, illustrated.

[Cited in Badische Anilin & Soda Fabrik v. Cochrane, Case No. 719.]

[See Tucker v. Burditt, Case No. 14,216; Bennett v. Fowler, 8 Wall. (75 U. S.) 445.]

3. When a thing is produced new, in and of itself, it is patentable as a new manufacture.

4. A patent for a new manufacture is infringed by the manufacture of the new product by any process whatever.

5. Before the invention covered by complainants' patent "alizarine" had been used as a generic term, applied to many different dye stuffs, and yellow and green alizarines were in the market. Chemically pure alizarine existed only in the books, and a body approximating to it only in the laboratory of the chemist. The claim of complainants' reissued patent (division B) was for "artificial alizarine produced from anthracene or its derivatives by either of the methods herein described, or by any other method which will produce a like result:" *Held*, under the circumstances of the case, that the reissue was not void for claiming alizarine, which was before well known, but that the invention patented was the new composition, which contained, combined with alizarine, other bodies of themselves effective agents before unknown, and which existed for the first time when produced by the patentees.

[6. Letters patent No. 95,465, issued October 5, 1869, to Graebe and Liebermann, are valid.]

[Cited in Badische Anilin & Soda Fabrik v. Higgin, Case No. 722, and Cochrane v. Badische Anilin & Soda Fabrik, 111 U. S. 297, 4 Sup. Ct. 457.]

[In equity. Bill by the Badische Anilin & Soda Fabrik against the Hamilton Manufacturing Company, for infringement of letters patent. Decree for complainant.]

George Gifford and J. Van Santvoord, for complainants.

Edward N. Dickerson, for defendants.

SHEPLEY, Circuit Judge. An objection is raised to the validity of the reissued letters patent, under which complainants claim that the original patent was taken out in England by Graebe and Liebermann, on the 16th of June, 1869, and was suffered to expire, by reason of the omission to pay the annual fees upon it, on the 18th of December, 1871, after the reissue of the American patent for the same invention, dated April 4th, 1871. It is contended that the patent in controversy was issued under the act of July 8th, 1870, [16 Stat. 198,] and that as the 25th section of that act provided that an American patent "shall expire at the same time with the foreign patent" which has been obtained previous to the American patent, the reissue of the American patent expired on the 18th of December, 1871, when the English patent expired.

The act of March 3d, 1839, [5 Stat. 353, c. 88,] provided that, in all cases where a patent shall be granted after the same invention shall have been patented in a foreign country, "such patent shall be limited to the term of fourteen years from the date or publication of such foreign letters patent." The act of March 2d, 1861, [12 Stat. 246,] provides "that all patents hereafter granted shall remain in force for the term of seventeen years from the date of issue," and repeals all acts and parts of acts before passed, inconsistent with the provisions of the act of 1861. The act of 1870, § 25, provides that in case of a

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 170, contains partial report only.]

prior foreign patent, the United States patent "shall expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term."

The law of July 8th, 1870, (Rev. St. § 4887,) was not retroactive, and did not operate to put an end to American patents granted before the law took effect. The original patent in this case was dated October 5th, 1869, before the passage of the act of 1870. Without a breach of good faith to the patentee, who had complied with the provisions of previous acts by disclosing his invention and paying the required fees, congress could not take away any portion of the term of the patent, or any right to a reissue which existed under the laws in force when the patent was granted, and which formed a part of the contract between the parties. Nor is any such intention to be gathered from the words of the statute. The act of 1870 has not, in the practice of the patent office, been acted upon as retroactive. Apperly v. Clissold, Com. Dec. 1870, p. 164. This long-continued usage and practice of one of the departments of the government is entitled to be considered by courts with great respect. The act of 1870, while repealing prior acts, contains a proviso saving all rights existing and all remedies which have arisen under any of said laws, and § 5,597 of the Revised Statutes contains a similar provision. The patent of Graebe and Liebermann, assigned to the complainants, did not, therefore, expire when the English patent became void by the omission to pay the annual fees.

The subject of the patent is a new and useful composition of matter, being an improvement in dyes or coloring matter produced from anthracene, and styled in the reissue as "artificial alizarine." Before the invention of Graebe and Liebermann the word "alizarine," a word coined from the Arabic and modern Greek names for madder, was commercially applied to a class embracing different varieties of dye-stuffs obtained from the madder plant. These dye-stuffs owed their value not only to a crystallized compound, which can be obtained from the madder and some other plants, known as "alizarine," but also to other materials existing naturally in the madder, or produced by the action of fermentation, heat, and the like, and by the aid of chemicals. The term "alizarine" was also applied by chemists to a theoretically pure crystallized extract from madder, whose formula was $C_{14}H_8O_4$. These madder extracts were among the most valuable dye-stuffs known to the world, and to supply the great and constantly increased demand for them large tracts of land were devoted to the raising of madder.

In 1868, Graebe and Liebermann, by a new process invented by them, produced their new composition of matter, now, for want of a name more accurately descriptive, called "artificial alizarine," a product unknown to both science and the arts at the date of their invention. Coal-tar (a substance containing a large number of the compounds caused by the various reactions which take place when coal is subjected in close vessels to intense heat), when submitted to a second distillation, yields at a very high temperature, as one of its products, anthracene, which, when purified, is a white, waxy substance. From this body named "anthracene," Graebe and Liebermann, by the series of chemical treatments described in the specifications, built up a beautiful and complex product, an artificial dye-stuff, now known as "artificial alizarine." This was not a chemically pure alizarine. Their process stopped far short of the elimination, from the product, of the bodies other than chemically pure alizarine. In fact, the presence of some of the other bodies appears to much enhance the value of the dye-stuff produced by their process. This product was one entirely new. The process by which they produced it was entirely new. Anthrapurpurine, isopurpurine, and other bodies, combined with alizarine in their product, are not known to have existed before they were produced by Graebe and Liebermann.

This composition of matter, which to a great degree has taken the place of madder preparations in the arts of dyeing and calico-printing, was new as to its origin. It was a purely artificial production, built up, as well as described by Professors Morton, Hedrick, and Ordway, by a process of chemical synthesis, from materials none of which contained it, or anything approaching to it, in character or properties. Its composition was new. It contained, combined with alizarine, other bodies of themselves effective dyeing agents before unknown, and existing for the first time when produced by Graebe and Liebermann. It was new not only in some of its new chemical properties, but in its capacity to produce, in dyeing and calico-printing, tints which cannot be obtained with the preparations of madder or any other dye-stuffs previously known.

Objection is made to the validity of the reissued patent upon which this bill is brought. Graebe and Liebermann, on the 5th of October, 1869, obtained letters patent of the United States, No. 95,465, in which, after describing their process in the words contained in the reissue, they made the following claim: "The within-described process for the production of alizarine, by first preparing bibromanthrakinon or bicloranthrakinon, and then converting these substances into alizarine, substantially as above set forth." This patent was subsequently reissued in two divisions, one for the process and one for the product. In division B, upon which this suit is brought, they claim: "Artificial alizarine produced from anthracene or its derivatives by either of the methods herein described, or by any other method which will produce a like result."

The right to reissue in two divisions, one for the new process and one for the new product, is fully sustained by the opinion of Mr. Justice Clifford, in Goodyear v. Providence Rubber Co., [Case No. 5,583:] "No doubt can be entertained that a new product or manufacture, and a new process or method of producing the new article, are the proper subjects of separate and distinct claims in an original patent, and, if so, then it is equally clear that the patentee, under that provision, upon a return of the patent for correction and reissue, and upon complying with the conditions therein specified, may have several patents for the distinct and separate parts of his invention."

When a thing is produced new, in and of itself, it is patentable as a new manufacture. If it be capable of being produced by various different processes, yet, when the product is new, independent of the process, the patent is infringed by the unlicensed manufacture of the new product by any mode of manufacture, the process of manufacture being wholly unimportant. Merrill v. Yeomans, [Case No. 9,472;] Goodyear v. Central R., [Id. 5,563.] But defendants further contend that alizarine was a well-known substance long before the patent, and it could not be made the subject of any letters patent, and that the reissue is void as claiming alizarine broadly, and as claiming more that the invention described in the original. An examination of the original and the reissue will show that the same process and the same product is described in both. Before the invention, the name "alizarine" had been used as a generic term, applied to many different dye-stuffs, and yellow and green alizarines were in the market. Chemically pure alizarine existed only in the books, and a body approximating to it only in the laboratory of the chemist. As the new manufacture was intended to take the place of the dye-stuffs extracted from madder, and as, in common with those dye-stuffs, it owed a large proportion of its value as a dye to the presence of alizarine, it was not erroneous, although not accurately descriptive, to appiy to this product of a distillation of coal treated with chemicals a name which had been applied to preparations from madder, without any more accuracy in one case than the other. Whatever Graebe and Liebermann called their product in the original or the reissue, it was a new product, and they showed what it was and how it could be produced. Pure alizarine, if it ever existed, except in chemical notation or laboratory experiment, could not have been made the subject of a patent. Nor have Graebe and Liebermann undertaken to patent alizarine, if by alizarine is meant what was known before their inventions to chemists as the body existing in dye-stuffs prepared from the madder. What they have patented is the new composition of matter and the new manufacture, having the described properties, produced from anthracene by any process which will produce their new product.

Before the discovery of the aniline dyes, Dahme and Unverdorven, by treating indigo, obtained a new substance, which was called "aniline," from anil, the word used in some countries for indigo, as al-nil is the Arabic for the indigo plant. When a smilar substance was obtained from coal-tar, it was also called "aniline." But calling the dye thus obtained from coal-tar by the same name as the dye extracted from the indigo plant did not make the aniline dyes and the indigo dyes identical, although they are in some respects identical in composition. So, when Graebe and Liebermann's new dye was discovered, they at first called it "alizarine," from the Arabic, Al-zari, name of the madder plant. But calling their extract from anthracene by the same name which had been applied to the extracts from madder, did not necessarily imply that the two things were identical, as most surely they are not in fact, and are shown not to be by the specifications.

Reissue division B must, therefore, be considered as a valid patent for a new manufacture and composition of matter, and as the evidence clearly proves an unlicensed use by the defendants, there must be a decree for injunction and account, according to the prayer of the bill.

[For other suits involving the same patent, see Badische Anilin & Soda Fabrik v. Cochrane, Case No. 719; Cochrane v. Badische Anilin & Soda Fabrik, 111 U. S. 293, 4 Sup. Ct. 457; Badische Anilin & Soda Fabrik v. Cummins, Case No. 720; Same v. Higgins, Id. 722.]

Case No. 722.

BADISCHE ANILIN & SODA FABRIK v. HIGGIN et al.

[15 Blatchf. 290;[1] 3 Ban. & A. 462; 14 O. G. 414.]

Circuit Court, S. D. New York. Sept. 25, 1878.

PATENTS FOR INVENTIONS—REISSUE—PROCESS AND PRODUCT.

1. The reissued letters patent, division B, granted to Charles Graebe and Charles Liebermann, April 4th, 1871, for an improvement in dyes or coloring matters from anthracine, are valid.

[Cited in Badische Anilin & Soda Fabrik v. Cochrane, Case No. 719; Cochrane v. Badische Anilin & Soda Fabrik, 111 U. S. 297, 4 Sup. Ct. 457.]

2. The original patent claimed "the within described process for the production of alizarine, by first preparing bibromanthrakinon, or bichloranthrakinon, and then convertng those substances into alizarine, substantially as above set forth." The reissue describes the same process, producing the same substance, and claims, "Artificial alizarine, produced from anthracine, or its derivatives, by either of the methods herein described, or by any other method which will

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 462; and here republished by permission.]

produce a like result." The case was a proper one for a reissue.

[Cited in Smith v. Merriam, 6 Fed. 718.]

[In equity. Bill by the Badische Anilin & Soda Fabrik against James Higgin and others for infringement of letters patent. Decree for complainant.]

John Van Santvoord and George Gifford, for plaintiff.

Gilbert M. Plympton, for defendants.

WHEELER, District Judge. This suit is brought for relief against an alleged infringement of division B of reissued patent No. 4,321, to Charles Graebe and Charles Liebermann, for an improvement in dyes or coloring matters from anthracine, dated April 4th, 1871, and now owned by the plaintiff. The defences set up are, that the reissue of the patent was unauthorized by law and void, because the original patent was not inoperative nor invalid by reason of a defective or insufficient specification, nor by reason of the patentees' claiming therein, as their own invention or discovery, more than they had a right to claim, and because the reissue covers alleged inventions not shown at all in the original; that the patent is void for want of novelty of the invention, and because it is not for any invention that by law is patentable; and that the defendants do not infringe.

The original patent describes two processes by which a substance is produced, and some other processes by which one of the substances from which it may be derived is produced, and claims "the within described process for the production of alizarine, by first preparing bibromanthrakinon, or bichloranthrakinon, and then converting those substances into alizarine, substantially as above set forth." The reissued patent, Division B, describes precisely the same process, producing the same substance, and claims, "Artificial alizarine, produced from anthracine, or its derivatives, by either of the methods herein described, or by any other method which will produce a like result." The difference between the original and the whole reissue is, that the reissue, in this Division, claims the product, which the original did not claim. Whether the circumstances dehors the patent, required by the statute to authorize a reissue, existed or not, was a matter to be determined by the patent office, and, having been determined there, is not open here. Whether the reissue is for the same invention that the original was, and is such as was warranted upon that original, is open. Russell v. Dodge, 93 U. S. 460. Nothing is seen to show that the original was not valid for what it claimed. There was nothing defective or insufficient about the specification of the invention. If the statute, by specification, meant that and no more, then, on the patents themselves, it would appear that there was no ground for the reissue. But the word seems to be used in a broader sense, and to be intended to cover the specification of the claim, as well. In that sense, there was a defective specification of the invention as patented, and the patent was inoperative and invalid for that part of the invention not covered by the claim. The invention specified in each is precisely the same. The original did not cover the whole of it, and so was inoperative as to part. The reissues do cover the whole. They seem to fall exactly within the intention of the statute, in this particular. Seymour v. Osborne, 11 Wall. [78 U. S.] 516.

It is said, that the reissue attempts to cover more, and is, therefore, void, because it not only claims the substance produced by these processes, but proceeds to claim it if produced by any other method which will produce a like result. If those words enlarge the scope of the claim at all, it does seem that they claim as much as there is of the enlargement that was not in the original, and which, in fact, neither those, nor any other, inventors had then invented. That product, however, is a substance, a composition of matter. If it was new and useful, they were entitled to a patent for it. If entitled to a patent for it at all, they were entitled to one for it, however made. So, if the claim covered it without those words, it covered it as fully, for the purposes of a patent, as with them, and they did not enlarge nor vary the meaning of the claim, nor have any effect upon the patent at all.

It is further said, that the patent professes to be, and is, in fact, a patent for a result, which is not patentable at all. It is true, the claim does make use of the word "result." If it was used to signify an abstraction, it seems true enough that it would not be for anything patentable. But it is to be read with the rest of the words with which it is connected, and, when so read, its meaning is plain. The claim is for the product that will be produced by those processes. It so says. Then, when it says, "or by any other method which will produce a like result," it means any other method which will produce a like product resulting. So, the claim is all the way for a thing tangible, and not for a mere idea.

It is also suggested, that the substance is not so described in the patent as to make what it is determinable with sufficient exactness. It is called artificial alizarine. That may not be the most exact, nor a very exact, name. But, the patent law does not prescribe how patented articles shall be named. It is described by an exact mode of production, that will not produce anything else. Those who are able to produce it, and those who use it, have no difficulty in knowing or using it. Its character is so complex and intricate, that everything to be found in it could not be told then, and, perhaps, cannot be now. There is nothing in the law that requires all its constituent parts to be describ-

ed, set forth, or known. The law required the inventors to file such written description of it, and of the manner and process of making, compounding and using it, "in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound and use the same." Act July 4, 1836, § 6, (5 Stat. 119;) Act July 8, 1870, § 26, (16 Stat. 201;) Rev. St. § 4888. This is all the law required in this behalf, and, it is shown by the testimony, both of those skilled in the art and science to which this substance appertains, and with which it is most nearly connected, and those dealing in and making practical use of it, has been done. Those wishing to use it know what to apply for to obtain it, and how to make use of it, when obtained. It is not a mere scientific abstraction, but it is an article of commerce, useful in the art of coloring, that can be bought, sold, handled and consumed. The inventors appear to have done all that could be done, and all that was required, or would be useful, in describing it.

It is insisted, that, at the time of this invention, this product was old, and as well known as it was afterwards, and that what was invented was, in reality, merely a new process of producing it. Whether the product was new with the invention, or was known before, is a question of fact, to be determined upon the evidence. Chemically pure alizarine was unquestionably well known among chemists. Madder alizarine was well known among chemists and artists in dyes. If this is the same as either, it could not be a new invention. If not the same as either, it is not claimed that it is the same as any other known thing. The chemists examined as witnesses on each side are of such eminent learning and undoubted character, that the solution of this question is not involved with such difficulties as are sometimes to be encountered in settling questions of fact. A careful examination of the testimony of Professor Chandler, a witness for the defendants, and that of President Morton and Professors Hedrick and Ordway, witnesses for the plaintiff, shows that he differs from them more about names of things, the construction of terms, and inferences to be drawn, than about the actual existence of material facts. Madder alizarine contains chemically pure alizarine, expressed by the chemical notation $C_{14}H_8O_4$. So does this product. So far the witnesses agree; and, so far as that particular ingredient is concerned, the two substances are identical. He regards that as the important thing, and the presence of the other things which each contains, as unimportant and useless, if not injurious, accidents. That other things do exist in each, as they testify, he does not deny. They say that this product contains isopurpurine, anthrapurpurine, monoxanthraquinone, and some other less important ingredients, not named, which were not only not ingredients of either pure alizarine, or madder alizarine, but were not known at all until they were brought out by this invention. He says that purpurine was discovered by Collin in 1828, and anthraquinone by Dumas and Laurent in 1832. Purpurine is chemically different from isopurpurine or anthrapurpurine, and anthraquinone from monoxanthraquinone, as here understood. He does not say that any dye stuff before that of Graebe and Liebermann ever contained isopurpurine, anthrapurpurine and monoxanthraquinone, with pure alizarine, as theirs did and does. So, upon the testimony that is not really contradictory, their product was a new composition of matter. He says these things are mere impurities, whose presence is not wanted, and which are tolerated, because it is better to endure them than removing them, and he produces exhibits to show what colors may be made upon fabrics with them and without them. The others say that they are useful coloring agents, and exhibits are produced to show that fact. From all it appears, that they are influential as coloring agents, in producing results different from those that can be produced without them. So that the product of these inventors, containing them, was not only a new composition, but a new dye stuff. That it is useful, as other coloring materials are useful, is beyond any question. From these considerations it appears that Graebe and Liebermann invented a new and useful composition of matter, for which they properly obtained their original patent, and, so far as is open to inquiry here, their reissued patent.

The claim that the defendants do not infringe rests, apparently, upon the idea, that they only use the product of a different process, and not that they do not use or vend dye stuff substantially the same as this.

The case of Badische Anilin & Soda Fabrik v. Hamilton Manuf'g Co., [Case No. 721,] in the district of Massachusetts, before the late eminent Circuit Judge Shepley, covers most of the questions made in this case, but not all of them, for, there is evidence in this case that does not appear to have been in that, and some questions are made here that do not appear to have been made there. So far as that case goes, it is an ample authority for the decision here reached; and, upon the facts found here, it goes nearly, if not quite, as far as this case does.

Let a decree be entered for the plaintiff, establishing the validity of the patent, and for an injunction and an account of profits and damages, occasioned by the infringement, according to the prayer of the bill, with costs.

[For other suits involving the same patent, see Badische Anilin & Soda Fabrik v. Cochrane, Case No. 719; Cochrane v. Badische, Anilin & Soda Fabrik, 111 U. S. 293, 4 Sup. Ct. 455; Badische Anilin & Soda Fabrik v. Cummins, Case No. 720; Same v. Hamilton Manuf'g Co., Id. 721.]

Case No. 723.

In re BAER.

[14 N. B. R. 97.]

District Court, N. D. Ohio. March, 1876.

BANKRUPTCY—EXEMPTIONS—STATE LAWS.

[Under Act March 3, 1873, (17 Stat. 577, c. 235,) providing that exemptions allowed bankrupts "shall be the amount allowed by the constitution and laws of each state respectively, as existing in the year 1871," where the law of a state has been changed, (Act Ohio, May 1, 1873,) so that two different statutes were in force therein at different periods of the year 1871, the state law in force at the close of that year should control all exemptions claimed in proceedings begun after that time.]

In bankruptcy.

WELKER, District Judge. This matter comes before me by exceptions of the assignee to the action of the register, in allowing the bankrupt personal property of the value of five hundred dollars, instead of a homestead. The bankrupt [Anthony Baer] was the head of a family, and not the owner of a homestead. His wife was the owner, in her own right, as her separate property, of a homestead which was occupied by the bankrupt and family as a family homestead. He claims that under the laws of Ohio he is, notwithstanding this occupancy, entitled to the exemption of personal property in lieu of a homestead. Under the laws of the state, as they existed up to the 1st day of May, 1871, the bankrupt would be allowed this exemption when not himself the owner of a homestead; but on that day the exemption law was so changed by amendment that, by reason of his wife's being the owner of a homestead in her own right, he was not entitled to claim it. The supreme court of the state, in 23 Ohio St. 603, decides that under the act of May, 1871, where the husband occupies the homestead of the wife as a family homestead, he cannot hold exempt from execution the personal property allowed by the act, in lieu of a homestead. The act of congress respecting exemptions in bankruptcy, amended in 1873, [Act March 3, 1873; 17 Stat. 577, c. 235,] provides that they "shall be the amount allowed by the constitution and laws of each state respectively as existing in the year 1871." In the year 1871, two different statutes were in force in Ohio, during two several periods of the year, one before the 1st of May, and a different one afterwards.

The question in this case is: What was the provision of the law in Ohio on that subject in the year 1871, as construed in the light of the bankrupt laws? Does it mean the law as it existed at the commencement of the year, at any time during the year, or as it was at the close of the year? It might happen in many of the states that the law might be changed several times during the year, and thus several rules adopted. If it had been intended to be the law at the commencement of the year, in order to prevent the difficulty growing out of such changes, the act of congress would, no doubt, have named the 1st of January, 1871. As it does not do so, to settle the rule, some period in the year should be adopted that would prevent the change. If the question should arise in the year 1871 it could be settled by adopting the law in force when petition in bankruptcy was filed. But in cases commenced since that year, some other construction must be given the bankrupt act as to what part of the year is to be adopted, controlling the rights of the parties. It seems to me that the law in force at the close of the year, for all exemptions claimed by bankrupts in proceedings filed after that time, should be regarded as the meaning of this provision of the bankrupt law. It can hardly be claimed that congress intended, in the act passed in 1873, to recognize as the rule of exemptions, laws that were repealed and ceased to be in force during the year 1871. If so, in states where several rules were adopted during the year, which rule is to be adopted? In this case the register adopted the law as the rule governing the right of the bankrupt, which was changed and ceased to be in force on the 1st of May, 1871. In this construction he erred, and therefore the exceptions are sustained, the allowance made by him is set aside, and the allowance refused.

Case No. 724.

BAETJER v. BORS.

[7 Ben. 280.] [1]

District Court, S. D. New York. April, 1874.

CHARTER—CLASSIFICATION OF VESSEL—PLEADING—CONTRACT AGAINST PUBLIC POLICY—DAMAGES—DEMURRAGE—SUNDAY—GOLD CONTRACT.

1. A vessel was chartered to H. B. in November, 1868, for a voyage from Philadelphia to Europe, with a cargo of petroleum oil. Before she had arrived at Philadelphia, H. B. transferred the charter, at an advance, to C. B., who agreed to perform its conditions, the agreement of transfer containing the words: "H. B. guarantees the vessel to be first class." On the 1st of April, 1869, H. B. notified C. B. that the vessel was then at Philadelphia, ready to load under the charter. The vessel at that time had no classification either in the English, French or American Lloyds. On the 6th of April, C. B. wrote to H. B. that he had found that the vessel was not first class, and that, therefore he must consider the charter cancelled. Some correspondence passed between the parties, and, on April 12th, H. B. wrote to C. B., enclosing a copy of a classification of the vessel, issued to her on April 9th, showing that she had been classed as first class by the American Lloyds, and claiming thus to have performed his guaranty. C. B. replied repeating that he considered the charter cancelled because the vessel was not first class when she was tendered to him on the 1st of April. The vessel lay out her lay days, and was then chartered by her master at a lower

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

rate of freight than was specified in the charter. The owners of the vessel sued H. B. and obtained judgment against him for damages for not loading the vessel under the charter. H. B. thereupon filed this libel against C. B., to recover damages for his not carrying out his agreement. The libel alleged that the notice to C. B. was given on or about the 31st of March, and also that C. B., though duly requested, refused to carry out the conditions of the charter. *Held*, that under the agreement between H. B. and C. B., it was necessary that the vessel should be actually classified;

2. That, H. B., might, under the libel, show a tender of the vessel at any other day, within the terms of the contract, than March 31st;

3. That, as C. B., did not set up any damage resulting to him because of the vessel's not having a classification when she was tendered on the 1st of April, and was not, therefore, in any different position on April 12th, from what he was on April 1st, H. B., must be held to have fully complied with his agreement on April 12th, and C. B., was then bound to have accepted the vessel;

4. That, as C. B., absolutely refused to accept the vessel, H. B., was not bound to keep her any longer in readiness, and it was immaterial whether she remained at Philadelphia during all the lay days mentioned in the charter;

5. That, whether the assignment of the charter at an increased rate was void as against public policy or not, the respondent could not avail himself of the defense because it was not set up in the answer;

6. That, H. B., was entitled to recover the damages sustained by him, by the breach of the agreement by C. B., on the 12th of April.

7. A reference being had to compute the damages, the commissioner reported, as damages:

The difference between the amount the ship was entitled to receive and the sum for which she was afterwards chartered	£341 9 6
The libellant's profits on the assignment of the charter party	98 12 0
Five per cent. for rechartering, and three per cent. brokerage, per barrel	56 4 0
	£496 5 6
Amounting, in currency, on June 19th, 1869, to	$3,280 19
Interest thereon to date of report	1,157 57
Demurrage, 28 days, from May 22d, 1869, to June 19th, 1869	1,295 48
	$5,733 24

The respondent excepted to the report: *Held*, that the decree awarded to the libellant the damages sustained by him, not the damages sustained by the master or owners of the vessel;

8. That, as their interest under the charter was not directly assigned to the libellant and the libel did not allege that he had paid the judgment recovered against him by the master, or had paid anything to the master or owners on account of damages sustained by them, the item of £341 9/6 must be rejected;

9. That, as to the item of profit on the charter, it did not appear how it was arrived at, and the report must be referred back for further information on that point;

10. That the item of £56 4 must be rejected, because it was damage sustained by the master or owners of the vessel, if by any one;

11. That, as to the demurrage, the libellant was not bound to keep the vessel in readiness for the respondent after the 12th of April, and could not claim demurrage without showing due diligence thereafter in rechartering;

12. That, at any rate, too many days were allowed, as Sundays were not excepted in the calculation;

13. That, as the contracts were in gold, the report should have been in gold dollars, and not in currency;

14. That the respondent could not have an advance in the price of oil from April 1st to April 12th taken into consideration, as the libellant was not bound to tender the ship on any particular day, and the answer said nothing of any such advance.

[In admiralty. Libel by Herman Baetjer against Christian Bors to recover damages for a failure to carry out an agreement to transfer a charter party. Interlocutory decree for libellant. Respondent excepted to the commissioner's report. Report overruled in part, and referred back for further proceedings.]

W. R. Beebe and H. R. Wing, for libellant.
G. H. Forster, for respondent.

BLATCHFORD, District Judge. On the 14th of November, 1868, at London, the agents of the master of the Russian barque Kaleva entered into a charter party, in writing, with the agents of Herman Baetjer, of New York, wherein the former contracted that the vessel should proceed to Philadelphia, and, after discharging her cargo, should there load, from the factors of the latter, a cargo of refined petroleum in barrels, and proceed therewith to Queenstown or Falmouth, for orders, and discharge at a port in the United Kingdom, or on the continent, between Havre and Hamburgh, on being paid, as freight, six shillings sterling per every 42 gallons gross gauge of barrels shipped, whether full, partly full, or empty; and ten per cent. additional, if ordered to the continent; and fifteen pounds sterling gratuity to the master; and, if ordered to a direct port of discharge, on signing bills of lading, the freight to be one sixpence less per barrel of petroleum; 40 running days, Sundays excepted, to be allowed for loading and discharging; the freighter to have the option of keeping the vessel ten days on demurrage, over and above the said laying days, at seven pounds sterling per day. On the 4th of January, 1869, the barque not having yet arrived at Philadelphia, Herman Baetjer, the libellant, entered into a written agreement with Christian Bors, the respondent, at New York, such agreement being signed by them and endorsed on the back of a copy of the said charter party, and being in these words: "For a proper consideration, the within charter is hereby transferred to Christian Bors, of New York, he agreeing to carry out all its conditions, and to pay H. Baetjer, or order, when vessel is loaded, the difference between the within chartered rate, and six shillings and three, if ordered from Cork to the United Kingdom, or six and nine, if ordered to the Continent, with sixpence off, if ordered to a direct port, all per 42 galls., with 5 per cent. primage. H. Baetjer agrees to pay the gratuity of (£15) fifteen pounds, and to place the vessel in one safe loading berth. H. Baetjer guarantees vessel to be first class."

The controversy in this suit arises on the foregoing last clause of this transfer of the charter party. It was at first written, before signature, thus: "H. Baetjer guarantees vessel to class 3-3 1-1." Before signature, the words "be first" were interlined between the word "to" and the word "class," and "3-3 1-1" was erased, by drawing the pen through it, but so as to be still visible. The paper was signed with such interlineation and such erasure thus visible.

The libel avers, that, the vessel having arrived at Philadelphia and discharged her cargo, the libellant was ready to place her in one safe loading berth; that the respondent, on or about the 31st of March, 1869, was notified thereof, and of her readiness to receive cargo; that the vessel continued ready to receive cargo, as required by the charter party, until after the expiration of the forty running days allowed for loading and discharging, and the ten days allowed for keeping the vessel on demurrage; that the respondent refused to load the vessel or to carry out the conditions of the charter party, and the agreement under which it was transferred to him; that, by reason thereof, the master of the vessel, after the expiration of the fifty days, was compelled to, and did, procure, at Philadelphia, a cargo for the vessel, from other parties, but at a much less rate of freight than that agreed to be paid by the terms of the charter party, with which cargo she afterwards proceeded to the continent of Europe; that, on the 31st of July, 1871, the master of the vessel, in a suit brought by him in this court, in admiralty, against the libellant in this suit, on the charter party, to recover damages for a breach of it by the libellant in this suit, such suit being brought in June, 1869, recovered a judgment against the libellant in this suit for $3,939 16 gold, and $50 currency, damages, and $151 67 costs, the respondent in this suit having been notified, at the time, of the commencement of such suit by said master, and invited to take part in defending it; that the libellant has expended, in disbursements and counsel fees in said action, $250, and has, by the refusal of the respondent to load the vessel, been otherwise damaged in the amount of $1,000; that the respondent has not paid said judgment or the damages sustained by the libellant by reason of the failure of the respondent to perform the agreement under which the charter party was transferred to him; and that the master of the vessel performed all the conditions of the charter party on his part to be performed, and the libellant performed all the conditions of the agreement by which the charter party was transferred, on his part to be performed. The libel claims to recover, as damages, $3,939 16 in gold, and $1,401 67 in currency.

The substance of the answer is, that the libellant, by the clause, in the instrument of transfer, guaranteeing the vessel to be first class, guaranteed her to be first class on either Lloyds' Register of British and Foreign Shipping (commonly called the English Lloyds), or on Bureau Veritas, Registre International de Classification de Navires, (commonly called the French Lloyds), or on the American Lloyds' Register of American and Foreign Shipping (commonly called the American Lloyds); that, on the 1st of April, 1869, when the vessel had not obtained any certificate, and was not first class, but, on the contrary, had not been classified, and had no class on said English, French or American Lloyds, the libellant informed the respondent that the vessel was at Philadelphia, ready to receive cargo, and that the lay days would commence to count from the 1st of April, 1869; and that thereupon the respondent rescinded the agreement of January 4th, 1869, by reason of the breach of it by the libellant, in that the vessel was not first class on either the English, the French or the American Lloyds, but had no class whatever.

The transfer of the charter party to the respondent does not provide that the vessel shall be tendered to the respondent at or by any particular time. Nor is it set up in defence, that there was any improper or hurtful delay in tendering her to him. The parties are agreed that the words "first class" have reference to the classing of vessels by some one of the three Lloyds referred to. The libellant contends, that the import of the agreement is, that the vessel shall be such in character, to bind the defendant to accept the tender of her, that she would, when tendered, if then offered for classing to the three Lloyds, be classed by some one of them as first class, in its mode of classing; and not that she shall, when tendered, have been, in fact, classed by some one of them, by a classing still then in force, as first class, in its mode of classing. The respondent contends for this latter construction, and, still further, that the agreement extends to requiring that the libellant shall, with the tender of the vessel, present to the respondent a certificate from some one of the three Lloyds, of a subsisting classing of the vessel by it as first class. It appears that the object of such classing of vessels by the Lloyds is, that the insurance company to which the shipper of cargo by the vessel, or her owner, applies for insurance on such cargo or vessel, may have, in the record of the vessel, by a continuing and subsisting classing of her, on the books of the particular Lloyds, evidence and a guaranty, in such examination of her as is known to be made by the competent persons conducting the Lloyds, that she is of a certain class or character. Unless the vessel is recorded on the books of the Lloyds as being classed in a continuing and subsisting class, the fact that she is in a condition to be capable of being so classed is of no value, in the premises, to the insurance company or to the person applying for insurance. The record is the thing of value. It is not reasonable to con-

strue the agreement on the part of the libellant so as to relieve him from the duty of procuring the actual classing of the vessel and making of the record, and throwing that duty on the respondent. This is further shown by what transpired before the agreement of transfer was signed. The broker who negotiated the transfer by communicating directly with the parties, was told by the respondent that he would not take any vessel but such as was first class. Thereupon the broker, in drawing the agreement, drew it that the vessel was to class 3-3 1-1. That is a class of the French Lloyds, and is the first class therein. When the agreement, so drawn, was taken to the libellant, he informed the broker, that, although the vessel had been classed in the French Lloyds as 3-3 1-1, (and which fact he had communicated to the broker before the agreement was drawn), yet such class, being for a specified time, had expired, and all he would do would be to guarantee her to be first class. Thereupon the language was changed, as stated. I cannot but regard it as incumbent on the libellant to see that the vessel had a recorded classing as first class on the books of some one of the three Lloyds, in order to make it incumbent on the respondent to accept a tender of the vessel.

The respondent was duly notified, in writing, at New York, by the libellant, on the 1st of April, that the vessel was then at Philadelphia ready to receive cargo, and that the lay days would commence to count from that day. At that time the vessel had no recorded subsisting classing in any one of the three Lloyds. On the 6th of April, the libellant was informed by the respondent, by letter, that he had found that the vessel was not first class, and that, therefore, he must consider the charter as cancelled. On the 8th of April, the libellant informed the respondent, by letter, that the libellant adhered to his agreement guaranteeing the vessel to be first class, and would furnish evidence thereof, if required, and should consider the charter to be in full force, and added, that, while he had refused, in the instrument of transfer, to warrant the class of 3-3 1-1, he had guaranteed her to be first class, knowing of the intention of her master to have her reclassed in Philadelphia. This shows that the libellant regarded an actual classing procured by some other party than the respondent, as necessary to answer the guaranty that the vessel should be first class, and that the libellant was conscious that he had not yet fulfilled his agreement, and that he was willing to consider it a part of his agreement, to furnish, if required, evidence of such actual classing. In reply to the libellant's said letter of April 8th, the respondent informed the libellant, by letter, that he still refused to accept the charter, and had no interest in the vessel, and considered the charter cancelled, on the ground of the vessel's not being first class. In reply, the libellant on the 9th of April, informed the respondent, by letter, that, if the respondent required any certificate, proving the vessel to be first class, as guaranteed, he would furnish the same to him. In reply, the respondent, on the 9th of April, informed the libellant, by letter, that, from the libellant's said letter of the 9th of April, he, the respondent must conclude that the vessel had a certificate of first class, when tendered to him ready for loading, on the 1st of April, and that, if the libellant could produce such certificate from one of the three Lloyds, not later than April 1st, he, the respondent, wished it to be sent to him, for inspection. In reply, the libellant, on the 10th of April, informed the respondent, by letter, that he had sent to Philadelphia for a copy of a certificate of classification, which was in the hands of the master of the vessel, and would transmit it to the respondent as soon as it should be received, and that, when he guaranteed the vessel to be first class, he was satisfied he should be able, at any time, when called upon, to prove his words by actual facts. On the 12th of April, the libellant wrote to the respondent thus: "In conformity with my note to you of the 10th inst., I now beg to hand you enclosed a copy of certificate of the Russian bark Kaleva's classification, rating A 1½, thereby verifying my guaranty, as per endorsement on charter party, since you have called upon me * * * to furnish the same." In reply, the respondent, on the same day, wrote to the libellant thus: "I received your letter of this day with enclosed certificate, which now is of no interest to me, as I informed you a week ago that I consider the charter of bark Kaleva cancelled, you being unable to furnish me with proofs of her being first class when the vessel was tendered to me April 1st, and you certainly could not expect me to wait twelve days before it would be decided if she would get a first class certificate or not." In reply, the libellant, on the 13th of April, informed the respondent, by letter, that he considered the charter of the vessel transferred to the respondent in full force, and should hold the respondent to the fulfilment of the same.

The certificate of classification which the libellant sent to the respondent on the 12th of April, was a certificate dated at Philadelphia, April 9th, 1869, issued by the American Lloyds, certifying that the bark Kaleva had been duly surveyed by a surveyor of the Society of American Lloyds, and found in good order and fit to carry dry and perishable goods, and would be entered in the American Lloyds' books, and classed A 1½ for one year from the date of survey. The date of the survey was April 9th, 1869, or a day or two before. It is shown that a vessel classed A 1½ in the American Lloyds is first class. The vessel remained at Philadelphia for fifty days after the 1st of April, and then her master chartered her to take a cargo of petroleum in barrels from Philadelphia

to Cronstadt, at a rate of freight from one shilling and nine pence to two shillings per barrel less than the rate specified in the charter party. She arrived safely at Cronstadt with her cargo.

The theory of the answer is, that, as the vessel had no first-class certificate on the 1st of April, when the libellant tendered the vessel, the respondent could and did rescind the agreement. It is true, that the libel avers that the notice to the respondent was given on or about the 31st of March, but it also avers that the respondent, although duly notified and requested, refused to carry out the conditions of the charter party or of the agreement of transfer. Under the libel, I think the libellant may show a tender of the vessel at any other day within the terms of the contract. As before remarked, no particular day is specified or limited by the contract; and the answer sets up no damage to the respondent by reason of his supplying the place of this vessel with another one, because of the failure of the libellant to have a recorded classing of the vessel on and by the 1st of April, when the tender was received, or any other damage to the respondent resulting from such failure, so as to show that the position of the defendant was different, by reason of such failure, on the 12th of April from what it was on the 1st of April, nor is there any evidence tending to show any such fact. On the whole case, I think it must be held that the libellant did not comply with his agreement until the 12th of April, when he sent the certificate to the respondent, but that he did fully comply with it on the 12th of April, and that the respondent was then bound to accept the vessel. As the respondent then absolutely refused to accept the vessel, the libellant was not bound to keep her longer in readiness, so that it is immaterial whether or not she remained at Philadelphia, ready for the respondent, for fifty days from the 12th of April.

It is urged, that the notice to the respondent was not a tender of the vessel, that the libellant did not place the vessel in a loading berth, and that the libellant did not pay the gratuity to the master. It was sufficient, the vessel being at Philadelphia, for the libellant to notify the respondent of that fact, and of the readiness of the vessel to receive cargo, and it was then for the respondent to designate the loading berth, and the libellant would then have been bound to put the vessel there, if it was a safe one. As to the gratuity, the libellant only relieved the respondent from paying it. The objection taken by the respondent, in the correspondence, concerned only the classing of the vessel, and no other objection was specified; and, when the difficulty as to the classing was remedied, the original notice remained and became operative as a tender on the 12th of April, in connection with the sending of the certificate and the insisting by the libellant on the continuance of the respondent's obligation.

As to the objection, that the assignment of the charter party at an advance on the charter rate was void, as against public policy, it is sufficient to say that the answer does not take that defence. Independently of this, I am not prepared to hold that such a contract as this, assigning a charter party, has about it any element of invalidity. See Story, Cont. (3d Ed.) § 547.

The libellant is entitled to an interlocutory decree, that he recover the damages sustained by him by the breach, by the respondent, of the agreement of January 4th, 1869, as a breach committed by him on and from the 12th of April, 1869, such damages to be ascertained by a reference. No directions are given as to the rule of damages, as it was not discussed at the trial. All other questions are reserved until the coming in of the report.

The reference ordered was thereafter held, and the commissioner reported as follows: "The original charter, with the assignment thereon, shows that the ship was to receive six shillings sterling for each cask of forty-two gallons, and, by the terms of the decision, the lay days were to commence on the 12th of April, 1869, and, by the terms of the charter party, 40 lay days expired on the 22d day of May, 1869.

The difference between the amount the ship was entitled to receive, and the sum for which she was afterwards chartered is.....	£341 9 6
The libellant's profit on the assignment of charter party.....	98 12 0
Claim 5 per cent. for rechartering and 3 per cent. brokerage per barrel	56 4 0
	£496 5 6
Amounting in currency, June 19th, 1869, to.....	$3,280 19
Interest thereon from June 19th, 1869, to July 4th, 1874.....	1,157 57
	$4,437 76
Demurrage, 28 days, from May 22d, 1869, to June 19th, 1869, at £7 sterling per day, £196 0 0, amounting, in currency ($4 86 in gold to the £ sterling, and 36 % premium on gold, the basis of calculation), to.....	$1,295 48
Total	$5,733 24."

To this report the respondent excepted, in ten exceptions:

1. That the commissioner adopted an erroneous measure of damages, in that he allowed to the libellant not merely the damages sustained by him by the breach, by the respondent, of the agreement of January 4th, 1869, as a breach committed by him on and from the 12th of April, 1869, but other large sums for items of damages not sustained by the libellant.

2. That the commissioner allowed to the libellant the difference between the amount the ship was entitled to receive from the libellant, and the sum for which she was rechartered May 29th, 1869, at which date the market price for charters had fallen to four

shillings and three pence (at which rate per barrel she was then rechartered) from five shillings and sixpence, which was the rate on April 12th, 1869.

3. That the commissioner allowed to the libellant, as profit on the assignment of the charter party, £98 12 sterling, when the amount of such profit, after deduction of the gratuity of £15, which the libellant agreed to pay, was only £28 2 6 sterling.

4. That the commissioner allowed to the libellant 5 per cent. for rechartering, and 3 per cent. brokerage per barrel, £56 4 0.

5. That the commissioner allowed to the libellant, in currency, June 19th, 1869, $3,280 19, when he should not have allowed him any greater sum than $137 50, in gold coin.

6. That the commissioner allowed for interest from June 19th, 1869, to July 4th, 1874, $1,157 57, when he should not have allowed any greater sum than $41 59, in gold coin.

7. That the commissioner allowed to the libellant demurrage.

8. That the commissioner allowed to the libellant, in the item of difference, £341 9 6, the sum of £241 13 11, which arose from the decline in the rate of petroleum charters from April 13th, 1869, to May 29th, 1869, and allowed, in the 28 days' demurrage, for 21 days after the vessel was rechartered, and while she was loading under such recharter.

9. That the commissioner erred in the computation of the difference between what the ship was entitled to receive and what she was afterwards rechartered for, and in the computation of the libellant's profit on the assignment of the charter party.

10. That the commissioner should have considered the consequences to the respondent by reason of the failure of the libellant to perform his guaranty until the 12th of April, 1869, in the advance in the price of oil from April 1st to April 12th, 1¾ cents per gallon, whereby it would have cost the respondent $3,600 more to purchase cargo for the Kaleva on the 12th of April than on the 1st of April.

BLATCHFORD, District Judge. The interlocutory decree was, that the libellant recover the damages sustained by him by the breach, by the respondent, of the agreement of January 4th, 1869, as a breach committed by him on and from the 12th or April, 1869. It did not award to the libellant a recovery for the damages sustained by the master or owners of the vessel by such breach. Their interest under the charter party was not directly assigned to the libellant, nor was it assigned to him indirectly, by the libellant's having paid the judgment recovered against him by the master of the vessel for breach of the charter party. The libel, after averring that the respondent refused to carry out the conditions of the charter party, and of the agreement under which it was transferred to him, avers, as damages, that, by reason thereof, the master of the vessel was compelled to procure a cargo at less freight than that agreed to be paid by the terms of the charter party, and that such master recovered a judgment against the libellant for a breach of the charter party by the libellant, and that the libellant expended money in such suit, and had, by the refusal of the respondent to load the vessel, been otherwise damaged. The libel does not aver that the libellant has paid the judgment, or has paid anything to the master or owners of the vessel on account of any damages sustained by them. The libellant, therefore, has sustained no damages in respect of any difference between any amount the vessel was entitled to receive and any sum for which she was afterwards rechartered. The report does not state what amount the ship was entitled to receive. The charter party fixes the freight at so much per barrel, but does not specify the number of barrels, and the report does not state what number of barrels is taken as the basis of the calculation. Nor does the report state for what sum the vessel was afterwards chartered. But this becomes immaterial, as the whole item of £341 9 6 must be rejected.

The item of £56 4 0 must be rejected. The report does not state how it is made up, or how much the item for rechartering is, or on what sum the percentage for rechartering is calculated, or on how many barrels the brokerage is calculated. I infer that there is a mistake in calling this brokerage a percentage per barrel. It ought probably to be so many cents brokerage per barrel. But the libellant does not aver in his libel, or show, that he has paid the item, or any part of it. It is an item of damage sustained by the master or owners of the vessel, if by any one. For the same reason, the item for demurrage must be disallowed.

As to the demurrage, as the libellant was not bound to keep the vessel in readiness for the respondent, after his refusal, on the 12th of April, to accept her, so, as against the respondent, the libellant and the master of the vessel were bound to use all diligence in rechartering the vessel, and could in no event claim demurrage without showing such diligence and inability to charter the vessel. In any event, too many days were allowed, as Sundays were not excepted in the calculation in the report.

Of course, the calculation of interest in the report is erroneous; and, as the contracts were payable in gold, the report should have been for a sum in gold dollars, and not for a sum in currency.

There remains the item of £98 12 0 allowed in the report as profit on the assignment of the charter party.

How that item is made up does not appear. It is probably intended to be the difference, at so much per barrel on a given number of barrels, between the chartered rate and a rate deduced from the agreement of January 4th, 1869. Whatever the proper sum for such profit may be, the £15 gratuity, for

the reasons before given, should not be deducted from it. But it is impossible to make any decision as to the item until the report states how the item is arrived at.

The respondent, instead of excepting to the report, should have moved to send it back for ambiguity and uncertainty and insufficiency.

As to the 10th exception, the advance in the price of oil is not an element in the case, as the libellant was not bound to tender the vessel at any particular time, and the answer says nothing about any advance in oil.

The report is referred back for further proceedings in conformity with this decision.

BAGGOT, (JANNEY v.) See Case No. 7,210.
BAGLEY, In re. See Case No. 1,144.

Case No. 725.

BAGLEY v. YATES et al.

[3 McLean, 465.] [1]

Circuit Court, D. Michigan. Oct. Term, 1844.

UNITED STATES MARSHALS — DEPUTIES — LIABILITIES—ATTACHMENT OF DEPUTY.

1. Where a deputy marshal receives money on a judgment, after he has returned the execution, he may be attached, on a neglect to pay over the amount in pursuance of the order of the court.

2. The marshal is responsible for the acts of his deputy, done in the line of his duty. But when the deputy does not so act, the marshal is not responsible.

[Cited in The Laurens, Case No. 8,122.]

3. The deputy is an officer of the court, and may be held responsible as such.

[At law. Action by Bagley against Yates and Prentiss. Judgment for plaintiff. Heard on plaintiff's motion to attach Alexander H. Stowell, deputy marshal, for retaining certain moneys received on execution. Attachment granted.]

Mr. Seaman, for plaintiff.

Mr. Abbott, for defendants.

OPINION OF THE COURT. This is a motion for an attachment against Alexander H. Stowell, deputy of the late marshal, Conrad Ten Eyck. The affidavits showed that the judgment in the above case was rendered in November, 1838, for $832 50 damages, besides costs. That execution was issued the 23d November, 1838, which was delivered to Stowell, as deputy marshal. That said Stowell collected of the defendants $80, January 3, 1839; $200, 28th February, 1839, and paid over to the plaintiff's attorney, $247, and afterwards returned the execution, made on the execution $247, and paid the same to the plaintiff. After the return of the execution, he received and receipted for $519 75, some of which he paid over to the plaintiff, but retained a part in his own hands, after deducting his fees. The marshal is authorised by statute, to appoint one or more deputies, who are required to take an oath of office, and they are recognised as officers of the circuit and district courts, and liable to be removed by them. It is objected that this proceeding should be had against the marshal, who is responsible for the acts of his deputies.

The marshal is responsible for the acts of his deputies, while acting in the line of their duty, but beyond this he is not responsible. In the case before us, the deputy received the principal part of the money after the return of the execution, when he had no authority to receive it, a part of which has not been paid over. For this act the marshal cannot be held responsible. The deputy is an officer of the court, and is subject to its power as such. He has been ordered to pay over the money in his hands, in the above case, which he has not done. And the question is, whether he is not liable to be attached for the disobedience. The deputy acts in the name of the principal, and it is contended he is not liable to be sued by the plaintiff, whose money he collects on execution. In such case, the principal or his deputy is liable, at the option of the plaintiff. Certainly the plaintiff is not bound to look to the deputy, but may proceed against his principal. But, as before remarked, he cannot take this course where the acts of the deputy, complained of, were not done in the line of his duty.[2] Having received the plaintiff's money, under the pretence of an authority, by virtue of his office, he is responsible to them. The payment by the defendant, to the deputy, not being authorised, did not discharge him, but having received money on account of the plaintiffs, they may compel him to pay it over to them. And, as he acted under the assumed authority of the process of this court, he must be held responsible in this mode of proceeding.

It would be disreputable to the court, and to the institutions of justice, if in such a case, the court should not afford a summary remedy against one of its officers. In the case of U. S. v. Mann, [Case No. 15,716,] the chief justice held, that a deputy marshal might be attached for not paying over moneys collected by him. If a deputy marshal, clerk or attorney, receive in such capacity, money which he refuses to pay over on the order of the court, he may be attached. An attachment is grantable against an officer of the court, where he misdemeans himself in office. 1 Bac. Abr. "Attachment A."

The court grant the attachment.

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

[2] NOTE, [from original report.] It is laid down in Knowlton v. Bartlett, 1 Pick. 271; Marshall v. Hosmer, 4 Mass. 60; Bond v. Ward, 7 Mass. 123; and in other cases decided in Massachusetts, that the sheriff is liable for the acts of his deputy done under color of office, whenever the deputy would be liable for the same acts. We are not prepared to admit this doctrine to the extent as laid down; but if it were admitted, it does not affect the personal liability of the deputy.

BAGWELL, (UNITED STATES v.) See Case No. 14,494.

BAILEE v. COMINGS. See Case No. 733.

Case No. 726.

In re BAILEY.

[1 N. Y. Leg. Obs. 18; 5 Law Rep. 320.][1]

District Court, S. D. New York. Aug. 15, 1842.

BANKRUPTCY—VOLUNTARY PETITION — CONCEALMENT OF PROPERTY—EVIDENCE.

[1. To defeat a voluntary petition to be declared a bankrupt, under Act Aug. 19, 1841, (5 Stat. 440, c. 9,) creditors must prove that the petitioner had property at the time of his application which he knowingly and intentionally omitted to state in his inventory.]

[2. Evidence that the bankrupt had earned and possessed property in past years is not sufficient to support the objection to his petition, or to cast on the bankrupt the onus of accounting for it, unless it is also shown that he had property at or near the time of his alleged insolvency.]

[3. A want of providence in the management of property, or a refusal to appropriate it to the payment of debts, or even proof that it was dissipated or squandered dishonestly, does not afford a bar to a petition under the bankruptcy act of August 19, 1841, (5 Stat. 440, c. 9.)]

[4. The purchase of the bankrupt's furniture by his son-in-law at an execution sale, though the goods were subsequently left in the possession of the bankrupt's family, (but not remaining with him at the time of his application,) and the purchase of his real estate at a mortgage sale by another son-in-law, do not afford presumptive evidence of an ownership remaining in the bankrupt, which would require him to account for the property in his schedules, under Act Aug. 19, 1841, (5 Stat. 440, c. 9.)]

In bankruptcy. This was an opposition by the creditors of John Bailey (who had petitioned for a decree in bankruptcy, [under Act Aug. 19, 1841, 5 Stat. 440, c. 9] on the report of the commissioner, to whom the case had been referred, showing cause against the petitioner being declared a bankrupt. The evidence went into the dealings and transactions of the petitioner from the year 1820 to the present time, but no particular specific fraud or concealment of property appeared to be made out. [Objections disallowed.]

Mr. Monell, for creditors.
Mr. Jansen, for bankrupt.

BETTS, District Judge. The question whether the petitioner shall be deemed a bankrupt comes upon objections filed by his creditors, and the report of the commissioner of the proofs thereon. A wide extent of proof has been allowed the creditors, and the general bearing of it as a whole seems to be, that the petitioner has, since the year 1820, been in possession of property, or entitled to receive it, which is not clearly accounted for by him. Admitting the inference is supported by the facts in evidence, that the appreciation of real estate purchased in Goshen by the petitioner, the profits of his various copartnerships, his rents, the monies retained by him on loan, &c., placed at his disposal an amount of money greatly beyond what he has shown to have been expended or appropriated by him, it by no means follows that such inference supports the objections taken in this case. The petition was filed on the first of March last, and the question at issue accordingly is, whether the petitioner set forth a true account of the property, rights and credits belonging to him at that time. He asserts that he has done so. This the creditors deny, and undertake to establish their allegation by proof. The pertinency and effect of the evidence to maintain this point on their part is, therefore, the essential subject for consideration. It is obvious, however, that, as the periods compared recede in point of time, the force of the presumption weakens so as to become exceedingly feeble, and even amounts to no evidence at all unless supported by corroborative circumstances.

In the case before the court, proof that the petitioner had $1,000 in cash on the first of February or first of January, 1842, would import that it remained his on the first of March, unless some clear explanation of its disposition was furnished. But evidence that such amount went into his hands in 1826, would be but an exceedingly slight ground for inferring that he had it in 1842, in the absence of any statement of his denying its possession, and would raise no suspicion in impeachment of his oath upon the subject.

Two or three other general features of the case will be adverted to as illustrative of the doctrine upon which this decision will be grounded.

The creditors undertake to trace the circumstances and course of business of the bankrupt for twenty years and more, from his removal to Goshen, in the year 1820, with his family, where he commenced the grocery business with a capital of $500, and household furniture worth about $200, through his various employments as merchant by himself and in partnerships; as tavern-keeper; keeper of the county gaol; butcher, and clerk in a store, and though, during the running of this period of time, and in his shifting avocations, it is in proof that money had been earned and property acquired by him, which sums up in the aggregate to a considerable amount; and, although his own statement of his affairs, and the receipts and expenditures of monies be admitted loose and unsatisfactory as a matter of debit and credit or strict accounting, yet his income and means are not shown to be of a magnitude that they might not, in that long period of time, have been absorbed in the ordinary expenses of a family, or be lost through his own improvidence or prodi-

[1] [5 Law Rep. 320, contains partial report only.]

gality without exciting special remark or notice. Furthermore, it does not appear upon the proofs, the bankrupt was ever regarded a man of affluence, nor is there evidence of any clear investment of property by him whilst he so continued in business.

On the contrary, the general complexion of the evidence denotes that his circumstances must have been during the time rather straitened and embarrassed; for his real estate was placed under mortgages, and was ultimately sold on their foreclosure, and judgments were at times obtained against him, on one of which his personal effects were ultimately all sold.

The most the whole of this description of proof makes out, in my judgment, is, that the bankrupt was placed in circumstances where, by prudence and good judgment, he might have secured property to himself; but it failed to prove he ever acquired means which placed him independent of his debts and liabilities. But, taking the view of the proofs urged on the part of the creditors, that they show the bankrupt realized several thousands of dollars from the profits of his various businesses, this fact will in no way support the objections, unless the right to such property is shown to have continued with him at the period of this application. If it has been squandered by extravagant living, or dissipated by improvident management, or some supposition of an opprobrious character be involved in its disappearance, no such circumstances would support the objections. The act demands of the bankrupt the surrender of the property actually his when he presents his petition, but holds him to no accountability for past improvidence or vice in the disposition of his estate. The creditors, in resisting his prayer for a discharge, take upon themselves to prove he has not produced and surrendered all his property—that there is property still at his command, or in which he has a subsisting equity.

The testimony very clearly shows, that at least when the bankrupt left Goshen and removed to Middleton, he had been, by various proceedings at law and equity, stripped of all the property he was known to possess. It is thought there are badges of fraud discerned in those proceedings, because one of his sons-in-law purchased his personal property at a sheriff's sale, and another acquired a portion of his real estate from the mortgagee who had bid it in on a mortgage sale. To give any significance to these imputations of fraudulent contrivance, it is necessary that the right of property should have been left in the bankrupt after the sale as it was before; that he should have advanced the money to make the purchases, or that a possession should have been allowed him, which might be regarded a fraud on creditors. No rule of law or equity inhibits the purchase of a father-in-law's property at public sale by his son-in-law, the relationship only availing to help out or give point to proofs of mala fides in the transaction. There is no such proof in this case to be helped by the presumption or suspicion. The bankrupt had ceased to have any possession of the personal property for more than a year before his application under the act, and the testimony is direct and positive that he retained no interest whatever in the real estate after the foreclosure of the mortgage and sale under it. It is not intended to assert that this is a plain case of open and ingenuous proceeding in all respects on the part of the bankrupt. There are doubtless many matters disclosed by the proofs that give occasion to doubt whether he had dealt with entire fairness towards his creditors while he was in credit and had command of means which might have been applied in part to their benefit, and the want of plain and full accounts of his business transactions, not only tends to embarrass inquiry into the state of his affairs, but is calculated to awake suspicion that there is an intentional concealment of facts which would operate to his prejudice.

Be the effects of these investigations what they may upon the general correctness or integrity of the bankrupt's dealings, I think the evidence as it stands will justly admit of only one conclusion bearing on the issue now to be decided, and that is, that it does not show the bankrupt to have had property of any kind at the time this petition was filed. Admitting there are circumstances brought to light in the review of the bankrupt's affairs, which might most naturally excite suspicion in minds of his creditors, I should still do injustice to my own impressions, deduced from the testimony, if I did not add that I discover no deficiency in his means that might not be readily accounted for from ungainful adventures in business—an expenditure in living fully up to, if not above, his income, and losses in his bad speculation in Middleton. It is not however of moment now to adjust the weight of evidence applicable to either of these hypotheses; the point submitted upon these objections is disposed of by pronouncing that the creditors have failed to sustain them by proof. It is accordingly ordered, that the objections be disallowed, and the petitioner have leave to put his case on the docket, and move for a decree of bankruptcy.

Case No. 727.

In re BAILEY.

[15 N. B. R. 48.]

District Court, D. Massachusetts. Nov. 6, 1876.

BANKRUPTCY—AFFIDAVIT TO SCHEDULE—POWERS OF NOTARY.

[Though Rev. St. § 5017, requires the schedule of a bankrupt to be verified by oath before a district judge, register, or commissioner, a verification before a notary is sufficient, under Act Aug. 15, 1876, (19 Stat. 206, c. 304,) em-

powering notaries to take affidavits in the same manner and with the same effect as commissioners.]

In bankruptcy.

Petition by creditors of the bankrupt setting forth that the schedules filed by Bailey were not properly verified, because they were not sworn before the district judge, or a register, or a commissioner, but before a notary public, and asking that an order might be entered requiring Bailey to verify the schedules according to law.

F. Dabney, for petitioning creditors.

H. W. Suter, for bankrupt.

W. E. L. Dillaway, for creditors against the petition.

LOWELL, District Judge. This petition is denied, because the statute of 15th August, 1876, (19 Stat. 206, c. 304,) gives authority to notaries public to take depositions and do all other acts in relation to taking testimony to be used in the courts of the United States, and to take acknowledgments and affidavits in the same manner and with the same effect as commissioners of the circuit court. Rev. St. § 5017, requires the schedule and inventory to be verified by the oath of the petitioner before a district judge, register, or commissioner; and section 5110 says that no discharge shall be granted to a bankrupt if he has willfully sworn falsely in his affidavit annexed to his schedule or inventory; showing, conclusively, that this verification is an affidavit, which is the only point on which a doubt occurs to me. Petition denied.

Case No. 728.

In re BAILEY.

[2 Sawy. 200.][1]

District Court, D. Oregon. June 1, 1872.

"ARMIES" OF THE UNITED STATES DOES NOT INCLUDE MARINES—ACT JULY 17, 1862.

The word "armies," as used in the acts of congress, and particularly in section 21 of the act of July 17, 1862, (12 Stat. 597,) [admitting to citizenship aliens enlisted in the armies of the United States upon proof of one year's residence, and without previous declaration of intention,] does not include "marines."

[In the matter of Robert Bailey's application for naturalization. Denied.]

Section 21 of the act of July 17, 1862, (12 Stat. 597,) provides: "That any alien, of the age of twenty-one years and upwards, who has enlisted or shall enlist in the armies of the United States, either the regular or volunteer forces, and has been or shall be hereafter honorably discharged, may be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become a citizen of the United States, and that he shall not be required to prove more than one year's residence within the United States, previous to his application to become such citizen; and that the court admitting such alien, shall, in addition to such proof of residence and good moral character as is now provided by law, be satisfied by competent proof of such person having been honorably discharged from the service of the United States as aforesaid."

"On May 6, 1872, Robert Bailey presented his petition in this court praying to be admitted to become a citizen of the United States, under said section. The evidence produced upon the hearing of the petition satisfactorily showed that the petitioner was born in England more than twenty-one years prior to the application, and that on May 14, 1866, he enlisted in the marine corps of the United States, from which he was honorably discharged on May 14, 1870, and that he was otherwise qualified to be admitted to citizenship under said section."

The court being in doubt whether the petitioner's case came within the statute, the matter was continued for advisement.

DEADY, District Judge. The case turns upon the question, does the phrase "armies of the United States" include "the marine corps" of the United States?

The matter was submitted by the petitioner without argument, and I have not been able to find any direct authority upon the question. It may be admitted that the word armies or army, in its unlimited and most general sense, might be taken to include all the organized and armed power of the republic—its fighting forces, whether operating on sea or land, or both. But such does not seem to be the sense in which it has been used in prior acts of congress. The constitution, (article 2, § 2,) in providing that "the president shall be commander-in-chief of the army and navy of the United States," recognizes them as different and distinct bodies or organizations. For some years after the organization of the government, the term "army" was not used in the legislation of congress. At the first session of congress, after the adoption of the constitution, congress passed an act "to adapt to the constitution of the United States the establishment of troops," raised under the resolution of the continental congress of October 3, 1787, (1 Stat. 95.) This was the nucleus of the present army of the United States. No mention is made in the act of seamen or marines, and at the time, the United States had neither a navy nor a marine corps. The act does not use the term "army," but describes the force as "troops in the service of

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

the United States," and the organization as an "establishment."

This act was superseded by the "act for regulating the military establishment of the United States," passed April 30, 1790, (1 Stat. 119,) which provided that "1216 non-commissioned officers, privates and musicians" should be "raised for the service of the United States," and that with their officers they should be "formed into a regiment of infantry, to consist of three battalions and one battalion of artillery." This act was followed by the acts of March 3, 1791, (1 Stat. 222;) March 5, 1792, (1 Stat. 241;) March 28, 1792, (1 Stat. 246;) June 7, 1794, (1 Stat. 390;) all of which are entitled acts to fix the military establishment of the United States or to provide for protecting its frontiers. They all describe land forces as infantry and artillery, but are silent on the subject of the navy or marine corps. In section two of the last named one the word army is used for the first time. It declares that the pay of the "army" shall not be in arrears more than two months.

These were followed by the acts of March 3, 1795, (1 Stat. 430,) and of May 30, 1796, (1 Stat. 483,) both of which are entitled as acts concerning "the military establishment of the United States" and provided exclusively for land forces. Then came the act of April 27, 1798, (1 Stat. 552,) providing for an additional regiment of "artillerists and engineers." Next came the act of May 28, 1798, (1 Stat. 558,) which authorized the president "to raise a provisional army," and provides for the appointment of a lieutenant-general, who "may be authorized to command the armies of the United States." The act of March 2, 1799, (1 Stat. 725,) authorized the president "to augment the army." The act of March 3, 1799, (1 Stat. 749,) provides "for the better organizing of the troops of the United States." It uses the word army frequently, and provides (section 9) that a commander of the army shall be appointed and commissioned by the style of "general of the armies of the United States."

None of these acts contain any direct provision concerning seamen or marines, nor do the words army or armies as used therein appear to include in any instance persons serving in the navy or marine corps.

The first act for the establishment of the navy of the United States, was passed March 27, 1794, (1 Stat. 350,) and is entitled "an act to provide a naval armament." By this act the marines were constituted an integral part of the navy—each vessel having as a part of her officers and crew one lieutenant and a certain number of marines. The marines continued upon this footing until the passage of the act of July 11, 1798, (1 Stat. 594,) entitled "an act for the establishing and organizing a marine corps." This act provided for the organization, "in addition" to the then "military establishment," of a separate "corps of marines." The "companies or detachments" of this "corps" were to serve on the "armed vessels" of the United States, "in lieu of the quotas of marines" previously provided. This corps was made "liable to do duty in the forts and garrisons on the sea cost, or any other duty on shore," as the president might direct; and was to be governed by "the rules and articles of war, prescribed for the military establishment of the United States," and "the rules for the regulation of the navy * * * according to the nature of the service" in which they might be employed.

In the case of U. S. v. Freeman, 3 How. [44 U. S.] 564, it was held that although the marine corps was declared by the act of July 11, 1798, (supra,) to be an addition to the military establishment of the United States, yet the officers of the marine corps were not, therefore, included in the phrase "officers of the army."

In Wilkes v. Dinsman, 7 How. [48 U. S.] 125, it was held that prior to the act of 1798 the marines were a part of the crew of a vessel of the navy, and that ever since they have been associated with the navy, except when specially detailed by the president for service with the army; and that they were to be considered as embraced "in the spirit of the act of 1837 by the description of persons 'enlisted for the navy.'"

By the act of February 11, 1847, (9 Stat. 125,) congress provided that each officer and private "enlisted or to be enlisted in the regular army or regularly mustered in any volunteer company for a period not less than twelve months, who has served or may serve during the present war with Mexico," etc., should receive certain bounty land. I have not been able to find any decision or ruling as to whether this description of persons included marines or not. But it would appear, that although two battalions of the corps served with the army on land from Vera Cruz to the city of Mexico they were not considered as embraced in the description of persons—officers and privates of the army, and therefore, congress by joint resolution of August 10, 1848, (9 Stat. 340,) declared that the officers and privates "of the marine corps who had served with the army in the war with Mexico" should "be placed in all respects as to bounty land * * * on a footing with the officers and privates of the army."

So the act of September 28, 1850, (9 Stat. 520,) which gave certain lands as a bounty to the officers and privates "who performed military service in any regiment, company or detachment in the service of the United States," in certain wars, appears not to have been considered sufficient to describe seamen or marines, and accordingly congress by the act of March 3, 1855, (10 Stat. 101,) gave a similar bounty to the officers and privates of the navy and marines.

Is there anything in the matter of the act of 1862, or the circumstances under which it was enacted, to require or authorize the court to give the word army or armies a broader or different signification than appears to have been given to it in the instances above cited?

And first, the act was passed early in the progress of the late civil war, which in the main was a conflict upon land. It offered the boon or privilege of American citizenship to any person who would honorably serve in the armies of the United States, upon only one year's residence in the country, and otherwise upon terms more favorable than it was offered to others.

The object of the provision is apparent. The government was endeavoring to raise large bodies of troops to carry on a gigantic war upon land, and this was a means to aid in accomplishing that end—to induce aliens to enlist in the armies of the United States. By the act of July --, -061, (11 Stat. 318,) the maximum of the marine corps was fixed at 2,500 privates. It is not reasonable to suppose that congress would resort to this extraordinary means to keep up a marine corps of only 2,500 men, particularly when it is remembered that persons serving in that corps were by law entitled to the extraordinary privilege of prize money.

No alien has a right to become an American citizen, except upon such terms and conditions as congress, in legislating for the common weal, may prescribe. The act under consideration entitles persons who may honorably serve in the armies of the United States, to this high privilege, and the court is not authorized to enlarge it, by construction, so as to include a class of persons, who do not appear to be within its spirit or letter.

The term army or armies has never been used by congress, so far as I am advised, so as to include the navy or marines, and there is nothing in the act of 1862, or the circumstances which led to its passage, to warrant the conclusion that it was used therein in any other than its long established and ordinary sense—the land force, as distinguished from the navy and marines.

On a former occasion, this court decided orally, that a seaman was not within the provision of this act. Upon further and careful examination of the subject, I am unable to find any substantial reason for concluding that there is any difference in this respect between a seaman and a marine, or that persons who have served as either are to be regarded as having served in the armies of the United States, within the ordinary and long established meaning of that term. And if I am mistaken in this conclusion, the petitioner is not without remedy. Congress, if it sees proper, may extend the act of 1862, to marines by name, as it did the bounty land acts of February 11, 1847, and September 28, 1850.

Case No. 729.

In re BAILEY et al.

[2 Woods, 222.][1]

Circuit Court, D. Louisiana. April Term, 1876.

BANKRUPTCY—COMPOSITION—AUTHORITY OF CHILDREN AND MARRIED WOMEN TO VOTE FOR—RATIFICATION BY HUSBAND — DAMAGES AGAINST BANKRUPT FOR TORT.

1. One of the members of a bankrupt firm had been the guardian of his own children. The firm was indebted to the children in a large sum, for which the guardian held its notes, payable to himself as guardian, but not indorsed by him to his wards. Under these circumstances, *held*, that the children, having become sui juris, were competent to vote as creditors of the firm in favor of a composition proposed by it.

2. One of the said children, being a married woman, voted for and signed the resolution for the composition without producing the authority of her husband therefor; but the husband afterwards made and filed an affidavit that he had given her his authority, and that her vote had his approval. *Held*, that such affidavit was both a ratification and estoppel, and made good the wife's act.

3. Damages for a tort are not provable against a bankrupt's estate until they have been assessed.

4. Unliquidated damages for a tort placed by the bankrupts on their schedule, but denied by them to be a valid claim, were properly excluded from the debts of the bankrupt estate, when it was to be ascertained whether creditors holding one-half the debts had assented to a proposed composition.

[See Dusar v. Murgatroyd, Case No. 4,199; In re Hennocksburgh, Id. 6,367; In re Smith, Id. 12,975.]

[In bankruptcy. Petition of J. M. & J. Lockhart and Paul Fourchy for review, asking that the decree of the district court confirming the composition made by the bankrupts G. M. Bailey and Pond with their creditors be set aside. Decree affirmed.]

John E. Austin, for petitioners.

John H. Kennard, W. W. Howe, and S. S. Prentiss, contra.

BRADLEY, Circuit Justice. The petition of review in this case asks the court to set aside a decree of the district court, [unreported,] made May 2, 1876, confirming a composition made by the bankrupts with their creditors, under Rev. St. § 5103, and the act of 1874, and directing the resolution of composition to be recorded.

The errors assigned are, that the district court allowed to stand votes amounting in the aggregate to about $45,000, by the three children of G. M. Bailey, one of the bankrupts, and struck out a claim for damages for $30,000, which had been placed on the schedule by the bankrupts, thus increasing the vote in favor of the composition by three names and $45,000 in amount, and diminishing the amount of the entire indebted-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

ness by one name and $30,000 in amount, which changed the result. There is no charge that the amount voted on by the children was not due to them; but it is alleged that the claim was mostly secured by notes of the bankrupts, given therefor, payable to the order of the said G. M. Bailey, guardian, and not indorsed by him to the children. But if they are sui juris and competent to act in their own behalf, I do not see why this fact should prevent them from agreeing to the compromise. They proved their debts regularly, and were entitled to the privileges of creditors. The presumption is, that they were entitled to demand the notes from their father at any time. He holds them merely for their benefit, and if the compromise stands, the claims of the children against the bankrupt firm, whether represented by the notes or not, will be discharged the same as the claims of other creditors. They stand in all respects on an equality with the other creditors. But it is said that one of the children is a married woman, and voted and signed the resolution without authority of her husband. If she actually had such authority, whether it was exhibited or not, her act would be binding on her and on him. Since this petition has been pending, her husband has made and filed an affidavit in this court that she had his full authority for what she did, and that her votes in favor of the composition had his full approval. He can never go behind this affidavit. It binds and estops him forever. And, as a ratification goes back to the first act and gives it validity, this affidavit, viewed merely as a ratification, validates the wife's acts. But it is more than a ratification. It is a full estoppel and proof against the husband that his wife acted by his authority at the time.

The striking out of the claim of $30,000 for damages, thereby reducing the sum total of the schedule that amount, presents a question of more difficulty. On the original schedule this claim is put down in the following words: "Marshall & Bateman, Shreveport, La., merchants, $30,000, 1873, about. This claim is not admitted. Suit pending in one the district courts, in and for the parish of Orleans, state of Louisiana, for damages alleged to have been sustained by them in our agent closing up their store in order to force settlement of debt due us."

Out of abundant caution, the bankrupts put this claim down. They do not admit it at all. They deny it. It does not seem reasonable that a claim which any man may choose to make against another, however futile, can stand as a bar to that other's adjustment and composition of his debts. If so, a man sued for libel, a newspaper proprietor for example, might never be able to get a composition. Persons often sue for $100,000 or $200,000, and as often recover nothing at all. This $30,000 is not put down as a debt, but only as an unjust claim. It has never been proven. It has never been heard from in the bankruptcy proceedings. Surely it cannot be possible that such a claim should stand as a barrier against a composition. There must be some remedy in such a case. Injustice and absurdity can never be law.

By section 19 of the original bankrupt act of 1867, (Rev. St. § 5067,) it is provided that when the bankrupt is liable for unliquidated damages arising out of any contract or on account of any goods wrongfully taken or withheld, the court may cause such damages to be assessed in such mode as it may deem best; and the sum so assessed may be proven against the estate. It would appear from this, that unliquidated damages of this kind are not provable until they have been assessed. The claim in question not being provable, and not being admitted to be a valid claim, but denied to be such, I think it was rightfully excluded from the estimate of debts, of which one-half is required to validate a composition. The composition would be good as to the other claims, if not as to that; and as to that, should it ever be substantiated in whole or in part, the composition may not apply. The bankrupt may, perhaps, be subject to the risk of its not applying. On this point it is unnecessary to express any opinion. The decree of the district court is affirmed.

Case No. 730.

In re BAILEY.

[1 Woolw. 422.][1]

Circuit Court, D. Kansas. Oct. Term, 1869.

ARREST IN ONE DISTRICT AND REMOVAL TO ANOTHER FOR TRIAL—WHETHER POWER TO GRANT ORDER IS IN THE CIRCUIT JUDGE.

1. A person arrested in one district, for an offense committed in another, who has not been indicted, nor committed by a commissioner, is entitled to an examination in the district in which he is arrested.

[Cited in U. S. v. Jacobi, Case No. 15,460; U. S. v. Brawner, 7 Fed. 88; In re Ellerbe, 13 Feb. 532; In re Graves, 29 Fed. 66; In re Burkhardt, 33 Fed. 26.]

[See In re Clark, Case No. 2,797; U. S. v. Shepard, Id. 16,273.]

2. The power to order the removal of a person so accused from the district in which he is found to the one in which he should be tried, seems to rest in the district judge, and not in the circuit judge. So Mr. Justice Miller intimates; Mr. District Judge Love contra.

[See U. S. v. Burr, Case No. 14,693.]

Letters upon the subject of the arrest in one district of a person accused of crime committed in another district.

A warrant issued by a commissioner in the northern district of Illinois for the arrest of Chauncey Bailey, for an offence committed in that district, was, with affidavits supporting the charge, submitted [by Vallette and

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

Bearce] to Mr. Justice Miller, with the request for an order to the marshal of the district of Iowa to make the arrest, in order that the accused might be removed to the district in Illinois for trial. [Denied.]

The request was accompanied by the statement that it was recommended by Mr. District Judge Drummond, as if he approved it and considered it proper to be granted. The same question having presented itself on a previous occasion to Mr. District Judge Love, upon a like application for the arrest of one Cook and one Tracy, similarly proceeded against, Mr. Justice Miller applied to him for his views. It may be proper here to state, that in what Judge Drummond had said in respect of the matter, he had not intended to be understood as approving the proceeding. He had not examined or considered the question, and the result reached by the learned judges, whose opinions are given herein, is believed to have met his approval.

In answer to Judge Miller's request, Judge Love gave his opinion in the following letter:

"Keokuk, August 30, 1869.

"Dear Judge,—I never before had a case presented to me exactly like the one referred to in the papers herewith returned. In each of the numerous instances in which application has been made to me for the removal of offenders, excepting that of Tracy and Cook, indictments had been found in the district where the offence was alleged to have been committed. When this application was made, the young gentleman who brought it said that Judge Drummond had told him the same as he seems to have told Messrs Vallette and Bearce; and further, that the universal practice was to have the preliminary examination in the district where the offence was committed. I, however, without giving any opinion upon the general question, held, as I had always done in cases of indictment, that the prisoner should be brought before me, in order that the fact of identity might be inquired into. In this, I proceeded upon the idea that the finding in the other district, whether by indictment or otherwise, established nothing with regard to the identity of the prisoner.

"The marshal, in making the arrest, might mistake the man, and remove to a remote state an individual not charged with any offense whatever.

"There were no affidavits accompanying Judge Drummond's order in this case, and when the prisoners were brought up, the young man filed affidavits charging that the alleged offence was committed at the town of Brunswick in Scott county, Iowa. Upon this showing I discharged them, upon the ground that it would be futile to take the prisoners to a state where the court had no jurisdiction to punish the offence.

"Upon looking closely at the law, I see nothing whatever to warrant Judge Drummond's view. I hardly suppose we could look behind an indictment; but I see no reason whatever, either in the words of the law or the reason of the thing, why, in a case where there has been no finding by a grand jury, or even by a commissioner, the prisoner should not be entitled to an examination before his removal to a distant state.

"I find upon this subject, in Brightly's Digest, the following:

" 'Offenders committed to prison in a district other than that in which the offense is to be tried, may be removed to the latter for trial by a warrant of the judge of the district where they are imprisoned.

" 'The due course of law is that any individual, on an accusation against him, may be committed, if the offence be proved. The circuit judge may inquire whether the crime has been committed in the United States or not; and if committed within the United States, he is to commit him; and then the district judge is to remove him to the district where the crime was committed.' [U. S. v. Burr, Case No. 14,693.]

"A distinction seems here to be taken between the power to commit and the power to remove for trial. The language of the law is, 'It shall be the duty of the judge of the district to issue the warrant for the removal of the prisoner,' &c. May not the circuit judge be regarded as a judge of the district, quaere? As to many purposes, he certainly is, although that is not his title. In most respects, he is indeed the paramount judge of the district.

"Yours very truly, J. M. LOVE."

"Keokuk, August 31, 1869.

"Messrs. Vallette and Bearce.

"Gentlemen,—Your favor of the 17th inst., inclosing an affidavit charging Chauncey Bailey with violation of the internal revenue law, at Napeerville, Illinois, together with Commissioner Haynes' warrant of arrest, directed to the marshal of the northern district of Illinois, is received, with your request that I would issue an order to the marshal of the district of Iowa, directing him to arrest said Bailey, and deliver him to the marshal of the northern district of Illinois.

"I owe you an apology for the delay in responding to your letter. No statute was pointed out by you as authority for such proceedings, and the examination which I made hastily of the subject, resulted in a strong impression that there was none. With this, I should have been satisfied to return you the papers, but for the statement that Judge Drummond had suggested the application which you made to me.

"My respect for Judge Drummond's opinion on a question like this, which it seems probable he has fully investigated in the course of his judicial experience, made me hesitate very much before settling down to an opposite conclusion. I therefore sent the papers to Judge Love, of this district, at Ottumwa, requesting his views upon the

question. Owing to his absence from home, I did not receive his reply until yesterday. He expresses himself as entirely satisfied that a person arrested in one district for an offence committed in another, who has neither been indicted, nor had any preliminary examination, is entitled to have that examination in the district where he is arrested, and in this proposition I fully concur.

"The 33d section of the judiciary act 1 Stat. 91, enacts, 'That for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States, where he may be found, agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offence. * * *

" 'And if such commitment of the offender or the witnesses shall be in a district other than that in which the offence is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had.'

"The act of August 23, 1842, (5 Stat. 516,) which confers upon the commissioners of the United States, of whom Mr. Haynes is one, the same authority that the act of 1789 conferred on the state magistrates, did not enlarge those powers, or provide for any different mode of exercising them. Nor do I know any act of congress which has repealed or essentially modified the mode of proceedings pointed out by that act. The section, which I have quoted verbatim so far as it concerns the question before me, does not, in express terms, say that a person charged with an offence against the laws of the United States must have an examination in the district where he is arrested, though the offence be committed in another state. It does not, in so many words, say that he shall undergo any examination at all. The language is, that he may be arrested, and imprisoned, or bailed. But this is to be done according to the usual mode of process against such offenders in the state where he is arrested. It would be a waste of time to attempt to show that an imprisonment or order for bail is never made in any state without a previous examination into the probable guilt of the prisoner, unless he voluntarily waives such examination. Nor would any well-informed lawyer hesitate to hold that the act of congress in question was not intended to authorize imprisonment without such preliminary examination by the committing magistrate as should satisfy him that there was enough evidence of the prisoner's guilt to justify a reference of the case to the grand jury of the proper district.

"Where, then, is the preliminary examination to be had?

"The most careless reading of the provisions of the act can leave no doubt on that subject.

"For any crime against the United States, the offender may be imprisoned, or held to bail, after, as I have shown, an examination by the proper officer of the state or district where he may be found.

"If this language left any doubt on the subject, it would be removed by a subsequent provision in the same section, that, if the commitment takes place in a district other than that in which the offence is to be tried, the judge of the district where the delinquent is imprisoned shall make the necessary order for his removal to the proper district for trial. This so clearly contemplates an examination and imprisonment in the district where the offender is found, without regard to that in which the offence was committed, that comment could not make it plainer.

"The power to order removal in these cases seems to rest alone on the judge of the district court. Such is the language of this act; and, in the absence of any statute authority, I should doubt very much the right of a judge of any other court to make such an order; though, possibly, the words 'judge of the district' may, by a liberal construction, be held to include any judge who exercises jurisdiction within the district. See, however, [U. S. v. Burr, Case No. 14,693.]

"I am therefore of opinion that no authority exists in any judge to order the removal of Mr. Bailey into the district of Illinois, until he shall have had a hearing, or been committed to prison in Iowa by some proper officer.

"I therefore return you the papers, and am, your obedient servant,

"SAMUEL F. MILLER."

Case No. 731.

BAILEY'S CASE.

Circuit Court, District of Columbia. 1821.

[Cited in Channing v. Reiley, Case No. 2,596. Nowhere reported; opinion not now accessible.]

Case No. 732.

BAILEY v. ATLANTIC & P. R. CO. et al.

[3 Dill. 22;[1] 1 Cent. Law J. 418.]

Circuit Court, E. D. Missouri. 1874.

TAXATION—RESTRAINING COLLECTION OF TAXES.

1. Under the circumstances, a temporary injunction against the collection of taxes by and under state authority, was granted.

[See Parmley v. St. Louis, I. M. & S. R. Co., Case No. 10,768.]

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

2. Whether the exemption from taxation granted to the Southwest Branch of the Pacific Railroad by section 12 of the act of December 25, 1852, [Laws Mo. 1852–53, p. 13,] continues in favor of the Atlantic & Pacific Railroad Company, quaere. See Parmley v. St. Louis, I. M. & S. R. Co., [Case No. 10,768.]

[See Atlantic & P. R. Co. v. Cleino, Case No. 631; Trask v. Maguire, Id. 14,145; Same case, on appeal, 18 Wall. (85 U. S.) 391.]

In equity. This is a bill by certain stockholders of the Atlantic and Pacific Railroad Company against that company, its directors, and the officers of the counties through which the road runs, to restrain the collection of taxes levied by state authority on the property of the company for the year 1873. The bill, in theory, is like that in Dodge v. Woolsey, 18 How. [59 U. S.] 331. One ground on which an injunction is asked is that the property of the company is, by legislative contract, exempt from taxation for the year 1873. [Temporary injunction granted, with the reservation of a right to defendants to move to dissolve it on the first day of the next term, or as soon thereafter as counsel could be heard. For opinion on previous motion for the allowance of a temporary injunction, see Parmley v. St. Louis, I. M. & S. R. Co., Case No. 10,767.]

Baker & Lytton, for plaintiff.

H. Clay Ewing, Atty. Gen., and Mr. Clover, for counties.

DILLON, Circuit Judge. The special ground of relief in this case rests upon the twelfth section of the act of the legislature of the state, approved December 25, 1852, [Laws Mo. 1852–53, p. 13,] by which the Pacific Railroad, and the Southwest Branch Railroad, were, for a certain period, exempt from taxation, and upon the question whether the present company, the Atlantic and Pacific Railroad Company, is entitled to the benefit of that exemption, as the successor of the Southwest Branch Railroad. The twelfth section, above mentioned, provides that "the said Southwest Branch Railroad shall be exempt from taxation until the same shall be completed and in operation, and shall declare a dividend. * * * Provided, that if said company shall fail, for a period of two years after said road shall be completed and put in operation, to declare a dividend, then said company shall be no longer exempt from payment of said tax."

The undenied allegation of the bill is that the company has never declared a dividend, and that the road was not completed until the month of May, 1871.

The exemption, if it exists, in favor of the Atlantic and Pacific Company, would continue until May, 1873. The taxes now in question are taxes for 1873, and the learned counsel for the state have conceded in argument that, under the decision of the supreme court of the United States in Pacific R. Co. v. Maguire, 20 Wall. [87 U. S.] 39, holding that this twelfth section did constitute an irrepealable legislative contract for the temporary exemption from taxation therein provided for, that the property of the Atlantic and Pacific Railroad was not taxable for 1873, provided that company is entitled to the benefit of provisions of the aforementioned twelfth section of the act of December 25, 1852. But the counsel for the state denies that the original exemption remains in force, or that it was granted, or after July 1, 1865, could be granted to the present company, or to the South Pacific Company, its vendor or predecessor, and claims that in this respect the case is like that of Trask v. Maguire, 18 Wall. [85 U. S.] 391, (the Iron Mountain Case,) in which this court held, and whose holding was affirmed by the supreme court, that the original exemption in that case did not survive or continue in favor of the present company.

Judge Treat has written an opinion in which he distinguishes the two cases, and seems to think that the Atlantic and Pacific Railroad Company is entitled to the legislative exemption from taxation granted by section 12, before mentioned. Atlantic & P. R. Co. v. Cleino, [Case No. 631.] As the report of that case shows, I formed and expressed no opinion on this point, and placed my judgment distinctly upon another ground.

On the present argument, three recent opinions of the supreme court were produced—Southern Pac. R. Co. v. Laclede Co., [57 Mo. 147;] Lawrence Co. v. Atlantic & P. R. Co., [Id. 149,] and Barry Co. v. Atlantic & P. R. Co., [Id.]—in which that court, in favor of the company above named, set aside the taxes levied by the counties, on the ground that the company was entitled to the legislative exemption in said section 12. The opinions were brief, but this is the very point involved, and, although it is not discussed, it is, perhaps, fair to presume that it was not overlooked.

I have purposely refrained from examining, at this time, the question whether, in view of the provision of the constitution of 1865, (article 11, § 16,) by which the state was prohibited from thereafter exempting private property from taxation, this case can be distinguished from the Iron Mountain Case, because I think the question ought to be brought before a full bench and decided upon a more careful consideration than I am at present able to give to it. In view, however, of the judicial decisions mentioned, particularly those of the state supreme courts in favor of the company on the very point here involved, it would seem the wiser course to grant a temporary injunction against the collection of the tax. This is done, however, with the reservation of a right to the defendants to move to dissolve it on the first day of the next term, or as soon thereafter as counsel can be heard. It is ordered accordingly.

Ordered accordingly.

NOTE, [from original report.] The exemption claimed by the company was held at the

term not to exist. See Mr. Circuit Justice Miller's opinion, [Parmley v. St. Louis, I. M. & S. R. Co., Case No. 10,768.]

BAILEY v. ATLANTIC & P. R. CO. See Cases Nos. 10,767 and 10,768.

BAILEY v. ATLANTIC & P. R. CO. See Case No. 10,845.

BAILEY, (CHEMICAL NAT. BANK v.) See Case No. 2,635.

BAILEY, (CLARK v.) See Case No. 2,814.

BAILEY, (COLLENDER v.) See Case No. 2,998.

Case No. 733.

BAILEY v. COMINGS.

[16 N. B. R. 382; 4 Law & Eq. Rep. 684; 10 Chi. Leg. News, 49; 25 Pittsb. Leg. J. 51.]

Circuit Court. E. D. Missouri. Oct. 25, 1877.

BANKRUPTCY—HOMESTEAD EXEMPTION—"HEAD OF A FAMILY."

[1. In 1873, the owner and occupant of a farm left it on account of his health, and went to reside with his brother in M., about 12 miles away, leaving his farm in charge of a family which he had engaged to come and live in the house with him, and work the farm on a division of the crops, etc. In M., he did enough work about his brother's mill to equal the value of his board. In 1876, he returned to the farm. While at M., he once voted, and there was some evidence that he spoke of M. as his home, and that during his stay there he was nominated as a candidate for justice of the peace, but he never authorized his name to be so used. *Held*, that his right to a homestead exemption under 1 Wag. St. Mo. pp. 603, 604, 697, was not abandoned by his residence at M.

[2. A family engaged by the owner and occupant of a farm to live in the house with him, and work the farm on shares, but subject to his management and control, are tenants under a special arrangement, and not relatives or dependents of the owner, and do not form part of or constitute the owner's family, within the meaning of the homestead exemption to heads of families, (1 Wag. St. Mo. pp. 603, 604, 697.)

[3. C., a bankrupt, was a bachelor, and from 1853 lived on a farm with a sister, who furnished money for its purchase and improvement. The brother and sister furnished money and labor in unequal proportions. Another sister, an invalid, formed part of the household until her death, in 1861. In 1869, the surviving sister married. In 1872, after her husband's death, she returned to the home of the bankrupt, and made it her home, having her furniture there; but, her health being poor, she visited much of the time in the east, and also with brothers in the neighborhood. In 1876, C. was declared a bankrupt, and afterwards the sister returned to the farm. She was in charge of the household and domestic affairs at the farm, and paid no board. *Held*, that she was part of the bankrupt's family, and that he was entitled to an exemption as the "head of a family," under the Missouri homestead exemption laws, (1 Wag. St. pp. 603, 604, 697,) and under the bankrupt act of March 2, 1867, (14 Stat. 517, c. 176.)]

In bankruptcy. This was a bill of review, seeking to reverse the decision of Judge Treat [upon the bankrupt act of March 2, 1867, (14 Stat. 517, c. 176,)] sustaining the bankrupt's exceptions to his assignee's report, refusing to set him off a one thousand five hundred dollar homestead and certain personalties amounting to five hundred dollars. The assignee's refusal was on the ground that the bankrupt was not a housekeeper or head of a family. The exceptions alleged that he was such a housekeeper when he filed his petition in bankruptcy. The issues were tried before United States Register Enos Clarke, who held that the bankrupt was not such a housekeeper, and overruled the exceptions. On application to Judge Treat to reverse the decision, he heard the same evidence that had been heard by Register Clarke, and held that the bankrupt was such head of a family, and sustained the exceptions. [Affirmed.]

Mr. Dudley C. Comings, the bankrupt, was a bachelor, and from 1852 or 1853, lived on a farm about twelve miles from Monroe City, on which the exemption is claimed, with a sister, who, from that date until the farm was paid for, furnished funds for its purchase and improvement, she and he furnished money and labor in unequal proportions. Another sister, an invalid, formed part of the household until her death, in 1861. In 1869, the surviving sister married and moved away, and remained away until her husband's death in 1870. In 1872, she returned to the home of bankrupt, which she made her home, and where she left her furniture and her room furnished. Her health being critical, she visited much of her time in the east, and also with her two brothers living at Monroe City. The bankrupt's health failing him, he also went to Monroe City, and lived or slept, ate, etc., with a brother, doing such work as he could in consideration for his board. When his health was recovered, he returned to the farm, and was living there when he filed his petition in bankruptcy. There was also another view relied on by the bankrupt. In 1871, the bankrupt becoming feeble, engaged a family (Algers) to come and live in the house with him, and operate or work the farm on a division of the crops, etc. They were all the time subject to his management and control, and were with bankrupt at the filing of this petition. It was complained that while at Monroe, the bankrupt once voted, and there was some evidence that he spoke of Monroe as his home, and that during his stay there he was nominated as a candidate for justice of the peace. It appeared, however, that he never authorized his name to be so used.

DILLON, Circuit Judge. The district court sustained the claim of the bankrupt to a homestead exemption under the Missouri statute on that subject. The assignee contests the correctness of this ruling and brings the case here for review. I have read the evidence contained in the record, covering over one hundred pages. The statute of Missouri gives to each housekeeper or head of a family resident in the county "his home-

stead used by him as such," to the extent of not over one hundred and sixty acres, and in value not over one thousand five hundred dollars. 1 Wag. St. pp. 603, 604, 697. Certain other limited exemptions are made to each "head of a family." If the bankrupt is entitled to a homestead, I am of opinion that that right was not abandoned by his residence at his brother's in Monroe City, he having left his property on the home farm, except his wearing apparel and a few tools, and having gone to Monroe City because of his feeble health, and to be with his brothers, and having resumed his usual residence on the farm in which the exemption is claimed, before filing the petition in bankruptcy. I am of opinion that if it was essential to maintain the bankrupt's claim to the exemption to hold that the Algers (who were tenants under a special arrangement, and not relatives or dependents of the bankrupt) were part of or constituted the bankrupt's family, that this position could not be sustained.

The bankrupt had never been married, and if he had any family, it was constituted of himself and his widowed sister, Mrs. Metcalf. Years before, when the farm was being opened and improved, two unmarried sisters lived with him and were then part of his family. One of these sisters died, the other married Mr. Metcalf, say about 1869. She resided with her husband until his death in 1870. She was without children. I infer she had very limited means. In 1872, she returned to the bankrupt's farm as her home, brought her household goods there, and managed his house and household affairs. She paid no board. She was quite advanced in years, her health was poor, and the work was too hard; and by the advice of her physician she went in 1873 to reside with her brothers (two of them living as one family) at Monroe City, about twelve miles distant. She always paid her board at her brothers in Monroe City. The bankrupt's health was also poor, and about the same time he left his farm with the Algers, and went to live with the same brothers at Monroe City, doing enough about the brothers' mill to equal the value of his board. In the spring of 1876, shortly before the bankruptcy, the bankrupt went back to the farm. The brothers who owned the mill at Monroe City failed. Mrs. Metcalf went east and did not return to the farm until after the bankruptcy.

If we regard the direct statements of the bankrupt and Mrs. Metcalf, as to their purposes and intentions, the homestead right exists. While the facts cloud or render somewhat doubtful these declared purposes and intentions, on the whole, I think the circumstances, the undisputed facts, show that the right exists. I am clear that the right, if it ever existed, was not abandoned by the bankrupt's residence at Monroe. The case turns upon the question whether Mrs. Metcalf was part of the bankrupt's family. She lived there years before her marriage. It was her home prior to that event. After her husband's death she went there, and her brother received her as a member of his family, gave her a room, and she was in charge of his household and domestic affairs. She intended to remain there. She had no home of her own. Her household goods were there. She paid no board, and was not expected to. Her health failed, and she went, under the advice of her physician, to Monroe. Her relations to her brothers there were very different from her relations with her brother the bankrupt. Mrs. Metcalf says in her testimony that the bankrupt's house was regarded by her as her home, and she explains her absence therefrom by the condition of her health. The case is a close one, but under all the circumstances, I am of opinion that the district court was justified in regarding the bankrupt as a housekeeper or head of a family within the meaning of the Missouri statute, and its order in this respect is affirmed.

Case No. 734.

BAILEY v. CRIM et al.

[9 Biss. 95;[1] 8 Reporter, 455; 11 Chi. Leg. News, 383; 4 Cin. Law Bul. 574.]

Circuit Court, D. Indiana. Aug., 1879.

DEEDS IN ESCROW—INNOCENT MORTGAGEE.

Where persons exchanging lands place their deeds in escrow and transfer their possession, and the depositary records one of the deeds without the knowledge of the grantor, and the grantee procures a loan on the land, a mortgagee in good faith acquires a valid lien upon the land, though the mortgagor misappropriates the money. [Berry v. Anderson, 22 Ind. 40, and Everts v. Agnes, 6 Wis. 453, distinguished.]

[In equity. Bill by Henry Bailey against James Moorman and the assignee in bankruptcy of Noah Crim. James Moorman, in a cross bill, prayed for protection as an innocent mortgagee. Heard on exceptions to master's report. Overruled, and decree for cross complainant.]

Wm. Grose and Marls E. Forisner, for complainant.

Herod & Winter, for defendant.

GRESHAM, District Judge. On the 18th day of September, 1877, Henry Bailey, of Randolph county, and Noah Crim, of Henry county, entered into a written agreement for the exchange of the farms upon which they were then living, each surrendering to the other full possession. Crim's farm was incumbered, and by the terms of the agreement he was to pay all the liens, except $2,000, on or before the 25th of December. Deeds were duly signed and acknowledged and placed in the hands of James Brown, a loan agent residing at New Castle, Henry county,

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

there to remain until the terms of the contract were complied with. At the time Brown became custodian of the deeds, it was understood and expected by the parties that Crim, through Brown, would raise money on the land conveyed to him, to remove the incumbrances, less $2,000, upon the land which he conveyed to Bailey. This seems to have been the reason for depositing the deeds with Brown. On the 22d of November, 1877, Brown, without the knowledge of either party, had Bailey's deed to Crim recorded in Randolph county, and made one or more unsuccessful efforts to negotiate a loan for Crim. Just what Bailey was to do before being entitled to his deed from Crim, the agreement and evidence fail to show, but on the 29th day of January, 1878, he demanded and received from Brown, Crim's deed for the Henry county land. On the 22d of April, 1878, James Moorman, of Randolph county, loaned Crim $2,100, and took a mortgage on the land described in Bailey's deed to Crim, to secure the loan. This Moorman did in good faith, and without any knowledge of the circumstances under which the deeds had been placed in the hands of Brown, or of Bailey's rights. Instead of applying the money obtained from Moorman to remove the incumbrances on the lands conveyed to Bailey, Crim used it for other purposes, and a few days thereafter went into bankruptcy. Bailey paid off the incumbrances and filed his bill against Moorman and Crim's assignee to enforce his vendor's lien, for the amount so paid, against the land conveyed to Crim, demanding priority over the mortgage held by Moorman.

Moorman set up his mortgage in a cross-bill, demanding protection as an innocent purchaser. The master reported in favor of Moorman, and the case is now submitted on exceptions to the report. Moorman had reason to believe, and did believe, that Crim was the absolute owner in fee of the lands upon which he took the mortgage. He found Crim in full and undisputed possession under a deed from Bailey, which was duly recorded. It is not pretended that he knew any fact or circumstance which was sufficient to put him on inquiry as to Bailey's rights. While laches cannot be imputed to Bailey for depositing his deed to Crim with Brown as an escrow, yet in doing so Bailey put it in Brown's power to mislead Moorman. On account of Brown's conduct either Bailey or Moorman must suffer loss, and I think the latter has the better equity.

The agent of Bailey, in disregard of instructions, had his deed recorded before Crim had complied with his agreement to remove the liens on the lands conveyed to Bailey. This was Bailey's misfortune. He put it in the power of Brown to inflict the injury, and it would be against natural justice to require Moorman to sustain the loss.

At the time of the exchange, Bailey understood that Brown was to assist Crim in raising money by mortgaging the land described in Bailey's deed. It was in this way that Crim was expected to be able to comply with his agreement to remove the liens, and it may be that Bailey was less surprised at finding his deed to Crim and the latter's mortgage to Moorman recorded than he was by Crim's refusal to use the money in discharging the liens.

It is urged by counsel for plaintiff that the paper placed in Brown's hands by Bailey was no more than an escrow; that the recording of it did not make it a deed; that its delivery without compliance with the conditions upon which it was held passed no title to Crim, and that therefore Crim conveyed no title to Moorman.

Berry v. Anderson, 22 Ind. 40, and Everts v. Agnes, 6 Wis. 453, are cited in support of this position. In Everts v. Agnes it was held that the fraudulent procurement of a deed deposited as an escrow, from the depositary, by the grantee, did not operate to pass the title, and that a subsequent purchaser from such grantee, without notice and for a valuable consideration, derived no title thereby, and could not be protected. In Berry v. Anderson the deed was procured from the custodian, who held it as an escrow, by fraud, and the grantor still remained in possession, which latter fact, of itself, was sufficient to put the purchaser on inquiry. It has been held that a deed delivered to an agent as an escrow, and by him delivered to the grantee contrary to the conditions, passes a title voidable only. Blight v. Schenck, 10 Pa. St. 285; Pratt v. Holman, 16 Vt. 530. Without deciding that Bailey's recorded deed to Crim was voidable only, I hold, for the reasons already given, that Moorman cannot be postponed in favor of Bailey. Blight v. Schenck, supra; Haven v. Kramer, 41 Iowa, 382.

Exceptions overruled and decree in accordance with the master's finding.

BAILEY, (GARDNER v.) See Case No. 5,221.

Case No. 735.

BAILEY et al. v. GOODRICH.

[2 Cliff. 597.] [1]

Circuit Court, D. Massachusetts. May Term, 1867.

CUSTOMS DUTIES—ENTRY AND APPRAISEMENT—AD VALOREM DUTY—DETERMINATION OF APPRAISERS CONCLUSIVE.

1. The determination of appraisers under the fifth section of the act of the 5th of March, 1823, [3 Stat. 732,] as to the true and actual market value and wholesale price of an importation, in the principal markets of the coun-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

try from which it was exported, is conclusive in the premises.

[Cited in Hilton v. Merritt, 110 U. S. 105, 3 Sup. Ct. 553.

[See Bartlett v. Kane, Case No. 1,077; same case, on appeal, 16 How. (57 U. S.) 263; Iasigi v. Collector, 1 Wall. (68 U. S.) 375; Tappan v. U. S., Case No. 13,749; Harding v. Whitney, Id. 6,052; Saxonville Mills v. Russell, 1 Fed. 118; Hertz v. Maxwell, Case No. 6,432; Roller v. Maxwell, Id. 12,025; Morris v. Maxwell, Id. 9,834; McCall v. Lawrence, Id. 8,672; Stewart v. Merritt, 2 Fed. 531.]

2. But these duties of the appraisers are, by the first section of the act of March 3, 1851, [9 Stat. 629,] limited to goods, wares, and merchandise, subject to ad valorem duty.

3. Values of imported goods subject to specific duty are, by section 8, of the act of February 10, 1820, [3 Stat. 542,] ascertained in the same manner as those of goods subject to ad valorem duty, but the requirement is for statistical purposes different from those described in the acts of congress making provision for the appraisement of articles subject to ad valorem duty.

4. In the appraisement of goods subject to specific duty the decision of the appraisers is not conclusive as in the case of goods subject to ad valorem duty.

At law. Motion for new trial. This was an action of assumpsit [by Adam Bailey and others against John Z. Goodrich] brought against the defendant as collector of the port of Boston, to recover the duties paid on two importations of rice from Calcutta, by the plaintiffs, one in December, 1861, by the ship Dolphin, and one in March, 1862, by the ship Fleetwing. [Verdict and judgment for defendant. Heard on motion for a new trial. Granted.]

Both importations were invoiced by the plaintiffs as "first quality Patna table rice." The plaintiffs entered the cargo of the Dolphin as "uncleaned rice," and dutiable at one half a cent per pound. The appraisers reported it to be "cleaned rice," and dutiable at one cent per pound, and duties were exacted accordingly. The importers protested against the levying of these duties, and appealed to the secretary of the treasury, who sustained the decision of the officers of the customs. In the case of the Fleetwing, the plaintiffs entered the cargo as rice, one cent per pound. The appraisers reported it as "cleaned rice correct," and duties were accordingly assessed; and the plaintiff protested against the levying of this rate of duty. The court instructed the jury that the finding of the appraisers in the case of the Dolphin, that the importation was clean rice, and dutiable at one cent per pound, after appeal, and after confirmation of that finding by the secretary of the treasury, was conclusive as to the character of the importation, and that the decision of the collector, based on that finding, after the same was confirmed on appeals by the secretary of the treasury, fixed the true rate of duty to which the importation was subject. They also instructed the jury in the case of the Fleetwing, that the plaintiff having entered the importation as rice, at one cent per pound, it became the duty of the collector, in the absence of any appeal to the secretary of the treasury, to assess the duties on that basis, and that the protest is not sufficient to recover back the duties on the ground that the plaintiffs were required by the collector to make such an entry. The court accordingly directed a verdict for the defendant, subject to the right in the plaintiffs to move for a new trial.

The hearing was had before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

C. L. Woodbury and S. W. Bates, for plaintiffs.

W. A. Field, for defendant.

CLIFFORD, Circuit Justice. The jury in this case, under the instructions of the court, returned their verdict in favor of the defendant, and the plaintiff now moves the court to set the verdict aside and grant a new trial, upon the ground of error in the instructions. The substance of the instructions was, that the finding of the appraisers that the importation was cleaned rice, under the circumstances disclosed in the evidence, was conclusive. The tenth section of the act of 10th of March, 1861, imposed a duty of one cent per pound on cleaned rice, and fifty cents per one hundred pounds on uncleaned rice or paddy. 12 Stat. 183. Two importations of rice were made by the plaintiffs, one in the Dolphin, and the other in the Fleetwing, and the importations were separately entered at the custom-house. Entry in the first case was "uncleaned rice," and in the second case it was "rice, at one cent per pound."

In both cases the claim of the plaintiff was, that the rice was uncleaned, and consequently that it was subject only to a duty of fifty cents per one hundred pounds. The decision of the appraisers was that it was cleaned rice, and that it was subject to a duty of one cent per pound. Adopting their report, the collector classified the importations as cleaned rice, and assessed the duty accordingly. Plaintiff appealed to the secretary of the treasury, and he confirmed the decision of the collector. Whereupon the plaintiff paid the duties under protest, and brought this suit to recover back the excess beyond the amount properly levied on uncleaned rice. The proposition of the plaintiff is, that the instructions in the case of the Dolphin were erroneous; and that is the only question in the case, as the plaintiff declines to argue the other question.

The appraisement act of the 1st of March, 1823, in its fifth section prescribed the manner in which ad valorem rates of duties on imports should be estimated, and the sixteenth section provided for the appointment of certain appraisers, and required that they should make oath diligently and faithfully to examine and inspect such goods, wares, or merchandise as the collector may direct, and truly to report to the best of their knowledge and belief the true value thereof, according

to the provisions of the fifth section of the act. 3 Stat. 732, 735.

Collectors of the customs were required by the act of the 28th of May, 1830, to cause one package of every invoice, and one at least out of every twenty packages of each invoice to be opened and examined. . . . . And if such goods were subject to ad valorem duty the requirement was, that they should be appraised. 4 Stat. 410. Appraisers were required by the sixteenth section of the act of the 30th of August, 1842, and it was made their duty, by all reasonable ways and means in their power, to ascertain, estimate, and appraise the true and actual market value and wholesale price of goods, wares, or merchandise subject to "any ad valorem rate of duty" at the time purchased, and in the principal markets of the country whence the same shall have been imported into the United States. 5 Stat. 563. Packages to be opened for that purpose and examined and appraised, were to be designated by the collector, and ordered to the public stores.

The precise requirement is, that he shall designate on the invoice one package at least of every invoice, and one package of every ten packages of the goods imported, to be sent to the public stores for examination.

Where it became necessary that the appraisers, in order to ascertain, estimate, and appraise the true and actual market value and wholesale price of the importation, should determine what were the principal markets of the country from which it was exported, the supreme court held that their decision in the premises was conclusive. Stairs v. Peaslee, 18 How. [59 U. S.] 524.

The duties of appraisers are also limited by the first section of the act of the 3d of March, 1851, to the appraising, estimating, and ascertaining the actual market value and wholesale price of goods, wares, and merchandise subject to "ad valorem rate of duty." They are to appraise, estimate, and ascertain the actual market value of such importations at the period of the exportation, in the principal markets of the country from which the same shall have been imported, and all charges, except insurance, and a charge for commission at the usual rates, are to be added, and the amount so computed is declared by the act to be the true value of the goods at the port where the same may be entered, upon which the duties shall be assessed. 9 Stat. 630.

Repeated decisions of the supreme court have established the rule that the report of the appraisers made to the collector, in pursuance of their duty to appraise, estimate, and ascertain the actual value or wholesale price of such goods at the period of the exportation, in the principal markets of the country from which the same were imported, is final and conclusive as to such value. Belcher v. Linn, 24 How. [65 U. S.] 522; Bartlett v. Kane, 16 How. [57 U. S.] 272; Rankin v. Hoyt, 4 How. [45 U. S.] 327. Required as the appraisers are to appraise, estimate, and ascertain such value, the supreme court has in effect determined that every matter necessarily involved in that inquiry and determination, must also be considered as conclusively decided in the suit to recover back duties assessed on the importation. Stairs v. Peaslee, 18 How. [59 U. S.] 524; Belcher v. Linn, 24 How. [65 U. S.] 523.

All of those decisions, however, were made in respect to importations subject to ad valorem duties, and in cases where some act of congress made it the duty of the appraisers to appraise, estimate, and ascertain the actual market value or wholesale price of the importation at the period of exportation, in the principal markets of the foreign country, as the basis upon which the ad valorem duties should be assessed. Importations, subject only to specific duties are not required to be so appraised and estimated, or the market value to be so ascertained for any such purpose. Values of all imported articles subject to specific duties are required to be ascertained by the eighth section of the act of the 10th of February, 1820, [3 Stat. 542,] in the manner in which the values of imports subject to duties ad valorem are ascertained, but the requirement is for statistical purposes, and not for any such purpose as that described in the acts of congress making provision for the appraisement of importations subject to ad valorem duties.

Our conclusion is that the instructions of the court in respect to the effect of the appraisers' report in the case of the Dolphin were erroneous, and the verdict must be set aside and a new trial granted.

Case No. 736.

BAILEY v. HANNIBAL & ST. J. R. CO.

[1 Dill. 174.][1]

Circuit Court, D. Missouri. 1870.[2]

RAILROAD COMPANIES — CONSTRUCTION OF PREFERRED STOCK CERTIFICATE, ETC.

Preferred stock certificates issued by the railroad company, construed, and held to give the holders thereof a preferable right to the first seven per cent of the net earnings each year; after which the holders of common stock are entitled to next seven per cent, and if any surplus it is to go to holders of the preferred and common stock equally.

[See note at end of case.]

[In equity. Bill by John Bailey against the Hannibal & St. Joseph Railroad Company to restrain respondent from paying certain moneys as a dividend on its common stock. Bill dismissed. This decree was affirmed on appeal in 17 Wall. (84 U. S.) 96. See note at end of case.]

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed by supreme court in Bailey v. Hannibal & St. J. R. Co., 17 Wall. (84 U. S.) 96.]

The complainant is the owner of 800 shares of the preferred stock issued by the defendant. The only question in the case is as to the extent of the respective rights of the preferred and common stock to dividends.

The certificates for the preferred stock recite that they are "issued in adjustment of the bonds of the company bearing date," etc., "and subject to the terms and conditions of an indenture between the said corporation, and Wm. Swift and others, trustees, dated April 1, 1863, and with the rights therein set forth, and certifies that the holder is entitled to ——— shares of the preferred stock of the said corporation, and shall be entitled to receive all the net earnings of said company, which may be divided pursuant to said indenture, in each year up to $7 per share, and to share in any surplus beyond $7 per share, which may be divided upon the common stock." In the indenture of April 1, 1863, is an agreement "that said preferred stock shall be entitled to a dividend of 7 per cent from the net earnings of said road, in each year, before any dividend shall be declared upon other unpreferred shares of the said corporation, and to an equal dividend with said other shares, in the net earnings of said corporation beyond said seven per cent."

The history of the issue of this preferred stock is briefly this: The war and other causes had in 1862 greatly embarrassed the company, and on the 15th day of October of that year the directors adopted a "plan" to extricate the company from its difficulties, which was set forth at length in a circular to the owners of bonds under the different mortgages. This project contemplated a relinquishment by them of a certain amount of their bonds, and the taking in the place thereof preferred stock. The character of the preferred stock to be taken is thus described in the plan: "The preferred stock to be 7 per cent and not cumulative, but to share with the common stock any surplus which may be earned over and above 7 per cent upon both, in any one year." It was this plan, without modification, to which the bondholders consented, and they signed an instrument to that effect, agreeing to surrender bonds "in accordance with the provisions of the plan of October 15, 1862, hereunto annexed," and to receive preferred stock therefor. The assent of all the bondholders having been obtained to this plan by the latter part of February, 1863, the aforementioned indenture of April 1, 1863, was drafted; and the evidence (the competency of which is objected to by the complainant) establishes that the purpose was to carry out and not to change the provisions of this plan. Indeed there was no authority in the committee having the matter in charge to change it. On the 30th day of May, 1863, pursuant to notice, a meeting of the stockholders of the company ratified what had been done and consented to and adopted the indenture of April 1, 1863, a printed copy of which was submitted to it, and certificates of preferred stock, in the form above mentioned, were from time to time issued to the bondholders by the company. No dividends were made prior to the year 1870. On the 29th day of June, of that year, a 7 per cent dividend was voted to the holders of the preferred stock, and 3½ per cent dividend was voted to the common stock out of the earnings of the first six months of 1870, and it was also voted that the earnings of the road for the remaining six months be applied to pay the further dividend of 3½ per cent on said common stock. To the carrying out of this vote in favor of the common stock the complainant objects, and files this bill for an injunction and relief.

Glover & Shepley, for complainant.

Thomas T. Gantt and James Carr, for railroad company.

Before DILLON, Circuit Judge, and TREAT and KREKEL, District Judges.

DILLON, Circuit Judge. It is admitted on both sides that the holders of the preferred stock are entitled to receive all the net earnings in each year, up to 7 per cent. The dispute relates to the net earnings over 7 per cent. The defendant claims that when the preferred stock has in any one year received its seven dollars per share, the common stock is entitled to receive seven dollars per share if so much shall have been earned, and that if there be any surplus beyond this, the two kinds of stock shall share it equally. For example: if the net earnings for a year shall be just 12 per cent, the preferred stock first gets its 7, and the common stock the remaining 5 per cent; if the earnings shall be 16 per cent, the preferred and common stock will each get its 7, and then share equally in the other 2 per cent.

On the other hand, the complainant claims that the preferred stock is first entitled to 7 per cent, and that it and the common stock share equally in any surplus beyond the 7 per cent, admitted to be first due to the preferred stock. For example: if the net earnings in any one year are 12 per cent, the complainant insists that the preferred stock is first to get its 7 (and this is admitted), and then to get one-half of the remaining 5 per cent. and the common stock the other half. This is controverted by the defendant, who insists as above stated, that the common stock is in such a case entitled to the whole of the 5 per cent. Both parties maintain that their positions are warranted by the language of the stock certificates. And the complainant insists that if there is any doubt upon the face of the certificate of the stock, it is removed by the language of the indenture of April 1, 1863, which it recites, and to which by its terms it is subject. On the other hand, the respondent contends that such is not the true construction of the indenture, especially when taken as it should

be, in connection with the certificate, and that this is indubitably shown by the history of the issue of the preferred stock, and the aliunde testimony mentioned in the statement of the case. The complainant stands upon the stock certificate and indenture, and objects that all testimony outside of these is inadmissible to vary their construction or to affect his rights. The competency, in this proceeding, of the testimony aliunde it is not necessary to discuss, for after a careful consideration of the language of the stock certificate the court is of opinion that it does not support the claim of the complainant, but does sustain that of the respondent. The "surplus" mentioned in the certificate refers to what may remain after the preferred and the common stock has each had its $7 per share. If the intention had been as claimed by the complainant, all the language after the word "surplus," would be unnecessary; and the construction put upon it by the company is the only one which will give effect to all the language employed. The use in the indenture of the word "said," in the phrase "said 7 per cent," is a clerical error, and construing the certificate and indenture together, it should not have the effect to change the rights of the holders of the common stock.

We will not say that the language used does not raise a difficulty, but we think the result we have reached fairly warranted by the stock certificate and indenture, and we know (if it be proper to consider the extraneous evidence) that it is the one which was contemplated by all parties to the arrangement under which the preferred stock was issued.

The injunction will be dissolved and the bill dismissed.

TREAT and KREKEL, District Judges, concurred.

Ordered accordingly.

[NOTE. In affirming this decree, the supreme court, by Mr. Justice Clifford, held that seasonable objection that the indenture is the only evidence of the contract between the parties could not have availed the complainant if it had been made, "as it is well-settled law that several writings executed between the same parties substantially at the same time, and relating to the same subject-matter, may be read together as forming parts of one transaction; nor is it necessary that the instruments should in terms refer to each other, if in point of fact they are parts of a single transaction. * * * Until it appears that the several writings are parts of a single transaction, either from the writings themselves, or by extrinsic evidence, the case is not brought within the rule, as it may be that the same parties may have had more than one transaction in one day of the same general nature. Doubt upon that subject, however, cannot arise in this case, as the due relation of the several writings to each other is conceded by both parties." Continuing, the court said: "Standing alone, it may be admitted that the indenture furnishes some support to the views of the complainant, but it is clear that all ambiguity disappears when it is read in connection with the writings which preceded and followed it in respect to the same subject-matter. Ample justification for that remark is found in the plan which preceded it, and which was approved and signed by all the bondholders, and in the form prepared for the certificate of the preferred stock, which was adopted subsequently to the execution of the indenture, and which was accepted by all the holders of the preferred stock as a complete fulfillment of the arrangement between them and the company. Holders of preferred stock, as there provided, are entitled to receive all the net earnings of the company, which may be divided pursuant to the indenture in each year up to $7 per share, and to share in any surplus beyond $7 per share which may be divided upon the common stock, which, in substance and legal effect, is the same regulation as that contained in the circular or plan, and all the other writings upon the subject which were given in evidence at the final hearing." Bailey v. Hannibal & St. J. R. Co., 17 Wall. (84 U. S.) 96.]

Case No. 737.

BAILEY v. HENDERSON.

[9 Ben. 534.][1]

District Court, D. Vermont. May, 1878.

BANKRUPTCY—CONDITIONAL SALE — MINGLING OF ASSETS—PREFERENCE.

Where a bankrupt made a conditional purchase of logs which were sawed at his mill, and, the conditions not being fulfilled, the seller, after insolvency of the bankrupt, took back a quantity of sawed lumber instead of his logs: *Held*, that while he had a right to take such share of the sawed lumber as was in proportion to his interest in the logs, the taking of the rest of the lumber by consent of the bankrupt after insolvency in settlement of his claim, was in effect to give him a preference, and rendered the transaction void.

[In bankruptcy. This was a proceeding by John Bailey, Jr., assignee in bankruptcy, against Charles T. Henderson, to recover the value of the bankrupt's interest in certain lumber. Decree for orator.]

E. W. Smith and W. L. Burnap, for orator.

Leslie & Rogers and Orin Gambell, for respondent.

WHEELER, District Judge. This cause has been heard on pleadings, proofs, and agreements.

The logs in question were to be delivered by the defendant to the bankrupt "at his saw-mill." They had not been delivered when the absolute sale was changed to a conditional sale. The first note, if received in payment, would take the cause out of the operation of the Statute of Frauds, but it would not obviate the necessity of delivery according to the contract. After it was received the defendant had the logs to haul to the mill in order to fulfil the contract. While that remained to be done, the sale was not executed. Gibbs v. Benjamin, 45 Vt. 129. Until it was executed, the parties could by mere agreement change it from an absolute to a conditional one. The bankrupt could sell them back and no delivery or change of pos-

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

session would be necessary. Having done that, he could buy them again conditionally. They did this in effect when they agreed to change the sale, and the lien reserved was valid. Wright v. Vaughn, Id. 369, differed from this case. There the property had been fully delivered before the parties to the sale undertook to change it.

This lien appears to have been recorded in ample season. The time begins to run from the delivery of the property, not the date of the lien. Laws Vt. 1872, p. 90.

These logs appear to have been mingled with others, and sawed and piled so the lumber could not be distinguished, with the consent of the defendant, by the bankrupt. Under these circumstances they owned the lumber in common in proportion to their respective interests in the logs. Inst. lib. ii. tit. I. § 27; 2 Kent, Comm. 364; Ryder v. Hathaway, 21 Pick. 298; Pratt v. Bryant, 20 Vt. 333. The share held by the defendant by virtue of his lien he had the right to take, as he did take. The rest of this common lumber, and some other, he appears to have taken in part payment of his claim, at a time when the bankrupt was insolvent, with such a view on the part of the bankrupt to give him a preference, and such knowledge of the purpose and of the insolvency on his part as to make the transaction void.

On these conclusions the orator, as assignee, is entitled to recover the value of the bankrupt's interest in the whole of the lumber taken. This is found at the price they agreed upon, with interest, to be $237.94. Let a decree be entered for the orator accordingly, with costs.

BAILEY, (IRWIN v.) See Case No. 7,079.

Case No. 738.

BAILEY v. LANSING.

STEWART v. SAME.

[13 Blatchf. 424;[1] 2 N. Y. Wkly. Dig. 562.]

Circuit Court, N. D. New York. June 20, 1876.

TOWN BONDS IN AID OF RAILROADS—ISSUE WITHOUT AUTHORITY—RIGHTS OF COUPON HOLDERS.

1. By a statute of New York, the county judge was authorized, on a petition by a specified number of tax-payers, to ascertain, by judicial inquiry, whether the majority of the tax-payers of a town, in number and in taxable property, desired the town to issue its bonds in aid of a railroad company, and, if he ascertained such to be the case, he was authorized to appoint three commissioners to execute and issue bonds in behalf of the town, and invest them in the stock or bonds of the company. On a petition and proofs, the county judge adjudged that the bonds should be issued by a town, and appointed commissioners to do so. Opposing tax-payers obtained a writ of certiorari for the review by the supreme court of the state of the decision of the county judge. After the writ had been issued, and the commissioners and the company had had notice of it, they executed the bonds and delivered them to the company. The supreme court reversed the judgment. The bonds had interest coupons, and B. subsequently brought suit against the town on some of the coupons. It did not appear how he acquired title to the coupons, or whether he ever owned the bonds to which the coupons belonged, although it appeared that he had the coupons in his possession before they fell due: *Held*, that he was not entitled to recover.

2. The issue of the certiorari suspended the operation of the judgment, and the company acquired no title to the bonds, which they could enforce as against the town.

[Cited in Stewart v. Lansing, Case No. 13,432.]

3. It appearing that the bonds were issued in fraud of the rights of the town, the burden was upon B. to show that he was a purchaser of the coupons in good faith and for value.

[Cited in Tracey v. Town of Phelps, 22 Fed. 634.]

4. But, certain of the bonds, with their coupons, having come into the hands of E., as a holder of them for value, before maturity, and then having passed to S., it was *held*, that S. was entitled to recover in a suit on some of such coupons, against the town.

[Cited in Stewart v. Lansing, Case No. 13,432; same case, on appeal, 104 U. S. 508.]

[See Lytle v. Lansing, 147 U. S. 59, 13 Sup. Ct. 254.]

5. Various defences overruled, as against S., as a bona fide holder.

6. The reversal of the judgment of the county judge could not invalidate the title of a bona fide purchaser.

[Suits by Manassah Bailey and John L. Stewart against the town of Lansing on interest coupons of certain town bonds. Judgment against Bailey and for Stewart.]

James R. Cox, for plaintiffs.

Milo Goodrich, for defendant.

WALLACE, District Judge. The suit by Bailey is brought upon interest coupons originally attached to bonds issued in aid of the Cayuga Lake Railroad Company, by commissioners appointed for that purpose by the county judge of Tompkins county, under the provisions of the bonding acts of 1869, 1870 and 1871, of the state of New York. Laws 1869, p. 2303; Laws 1870, p. 2049; Laws 1871, p. 2115. These acts authorize the county judge, upon the presentation of a petition by the requisite number of the tax-payers of the county, to ascertain, by judicial inquiry, if the majority of the tax-payers, in number and in taxable property, desire the town to issue its bonds in aid of the railroad, and, if he ascertains such to be the case, authorizes him to appoint three commissioners to execute and issue bonds in behalf of the town, and invest them in the stock or bonds of the railroad company. The county judge having entertained the petition of the tax-payers, and taken proofs, adjudged that the bonds should be issued, and appointed commissioners for the purpose. Opposing tax-payers contested the proceedings, and, pur-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 2 N. Y. Wkly. Dig. 562, contains partial report only.]

suant to the statute, obtained a writ of certiorari, for the review of the decision of the county judge by the supreme court of the state. Upon review, the supreme court reversed the judgment. This reversal, in legal effect, vacated the entire proceedings taken before the county judge. The certiorari was the common law writ. After it was issued, and notice thereof given to the commissioners, and before the commissioners had taken the oath of office required by law, preliminarily to entering upon the duties of their trust, they executed and delivered the bonds to the railroad company, the latter having full notice of the certiorari and giving to the commissioners a bond of indemnity.

It does not appear how the plaintiff acquired title to the coupons in suit, but it does appear that they were in his possession before they fell due. It does not appear whether or not he ever owned the bonds to which the coupons were originally attached. Upon the facts, I do not think the plaintiff is entitled to recover. The bonds were originally negotiated between the commissioners and the railroad company in violation of good faith. The parties to the transaction were aware that proceedings were pending to annul the authority of the commissioners to issue the bonds. When the certiorari issued, the judgment and the proceedings upon which it was founded were removed to the supreme court, and the effect was, that all proceedings under the judgment, which had not actually been put in motion, would be suspended. The decisions in this state are uniform, that, upon the allowance of a certiorari, the effect of the judgment which it is taken to review, except in the single case of an execution already issued and in the process of being executed, is suspended as to all proceedings under it and as to all collateral matters. The judgment is not even evidence in a case between the same parties. It is as completely suspended as though it had never been rendered. Launitz v. Dixon, 5 Sandf. 249; Conover v. Devlin, 24 Barb. 636. Under these circumstances, the commissioners were no more justified in attempting to issue bonds in behalf of the town than they would have been if their agency had been revoked; and the railroad company, having knowledge of the facts, acquired no title to the bonds, which they could enforce as against the town. The case is not analogous to that where property has been sold under an execution upon a judgment subsequently reversed. I do not intend to intimate, that, if the bonds had been issued by the commissioners after the certiorari, and had come to the hands of an innocent purchaser, the latter would have acquired no title. Although the authority of the commissioners to act as agents of the town was suspended, such a purchaser would acquire the rights of a bona fide holder of commercial paper, and could recover against the principal as though the authority once conferred upon the agent had never been revoked. But, in such case, it would be incumbent upon the plaintiff to show that he had purchased innocently, relying upon the ostensible authority of the agent. Coddington v. Bay, 20 Johns. 637.

These views lead to the conclusion, that, when it appeared that the bonds were issued in fraud of the rights of the defendant, the burden was cast upon the plaintiff to show that he was a purchaser in good faith and for value. He could not rest upon the presumption derived from his possession of the coupons before they became due. Rogers v. Morton, 12 Wend. 484; Smith v. Sac Co., 11 Wall. [78 U. S.] 139.

Judgment is ordered for the defendant, in the suit by Bailey.

The suit by Stewart differs from the one by Bailey, in that it appears that the bonds were pledged as collateral, in February, 1873, to Elliott, Collins & Co., of Philadelphia, and sold by them after consultation with the officers of the railroad company. Elliott, Collins & Co. were holders for value and before maturity, and their sale to satisfy the pledge conveyed their title to the purchaser. Whether the plaintiff was the purchaser from them directly, or not, is not clear; but, however this may be, he succeeds to all the rights of Elliott, Collins & Co., and occupies the position of a bona fide purchaser.

As against a bona fide holder of the coupons, none of the defences interposed are tenable. Most of these defences are unavailing, within the doctrine of Munson v. Town of Lyons, [Case No. 9,935.] The petition upon which the county judge took cognizance of the proceedings for bonding the town was sufficient to call for the exercise of his judicial judgment; and, in an action on the bonds by a bona fide holder, this determination is conclusive.

It is urged, that there was no organized railroad company in behalf of which the town could extend its aid, because the articles of association fail to state the counties through which it is to run, as required by the general railroad act under which it is organized, and specify only the termini of the road. I am utterly unable to appreciate the argument. The road was actually organized, and if, in the manner of its organization, it failed to comply with such provisions of the statute, this could only be taken advantage of by the sovereign power; and after its corporate existence has been recognized by two subsequent acts of the legislature, it would, I think, be too late for the state to assail it.

It is also urged, that the bonds, when issued, were not sealed. I do not stop to inquire whether they were required to be sealed. It suffices that there is no sufficient evidence to show that they were not. The testimony of witnesses, that they do not remember to have seen seals on the bonds when they were delivered, in the absence of

any pretence, even, that their attention was directed to the circumstance whether the seals were on, is entirely insufficient to authorize the conclusion that the offence of forgery has been committed by any one.

It is also urged, that the bonds contravene the statute under which they were issued, because not payable at the time required by it. The act of 1871, does not repeal section four of the act of 1869, but confers the right to issue bonds payable in less than thirty years, and, when thus issued, they are subject to the condition therein imposed. But, the right to issue pursuant to the terms of the first act still exists, and the bonds in suit conform to the terms.

The reversal of the judgment of the county judge by the supreme court cannot invalidate the title of a bona fide purchaser. The bonds had been issued and put in circulation prior to the reversal. The judgment was effectual when they were put in circulation. After they were given currency, no decision of the court could strip them of their negotiable character.

Judgment is ordered for Stewart.

Case No. 739.

BAILEY v. LOEB et al.

[2 Woods, 578;[1] 11 N. B. R. 271; 2 Cent. Law J. 42.]

Circuit Court, M. D. Alabama. Jan., 1875.

BANKRUPTCY—CLAIM FOR RENT AFTER BANKRUPTCY—LIEN UNDER STATE LAW.

1. The bankrupts became the lessees of premises for one year, and were adjudicated bankrupt within two months after the beginning of the term: *Held*, that rent, which accrued after the adjudication, could not be proved or allowed as a debt against the bankrupt estate, [under the bankrupt act of March 2, 1867, (14 Stat. 517, c. 176.)]

2. Where the law of the state gave the landlord a lien upon the goods and chattels on the demised premises to secure the rent for one year, and the lessees were adjudged bankrupt before the end of the year: *Held*, that the landlord had no lien on the goods and chattels, for rent which accrued after the bankruptcy and after the premises were surrendered.

3. The law of Alabama (Rev. Code, § 2878) does not give the landlord a lien for rent upon goods and chattels of a tenant found upon the premises, held by lease for one or more years; but as between an execution creditor and the landlord, simply declares that the latter shall be entitled to priority of payment out of the proceeds of the goods, to the extent of one year's rent.

[On appeal from the district court of the United States for the middle district of Alabama.

[In bankruptcy. Application by Loeb & Brother for an order compelling Bailey, assignee of the bankrupts, Shulman, Frankferter & Co., to pay rent for certain premises occupied by the bankrupts. The district court granted the order in part. Heard on the assignee's petition for a review and reversal of this decision. Granted, and order of district court annulled.]

At chambers.

This cause was a petition to review the action of the district court, [unreported,] sitting as a court of bankruptcy. The conceded facts were as follows: The defendants, Loeb & Brother, were the owners of a store room in the city of Montgomery. They leased the same to the bankrupts, Shulman, Frankferter & Co., for the term of one year, commencing on the first day of October, 1873, for a yearly rent of $1,800, payable in monthly installments of $150. A petition in involuntary bankruptcy was filed against the lessees on the 25th of November, 1873, and they were soon after adjudged bankrupts. At the date of the adjudication, they were the owners of a stock of goods which was upon the demised premises. The goods were seized by order of the bankrupt court, and remained on the premises until they were sold out by the assignee, who received the proceeds of the sale, which were more than enough to pay the rent for the entire year. The bankrupts did not occupy the store after they were adjudicated bankrupts; but it was occupied by the assignee from that date up to the 28th of January, 1874. After the last mentioned date, the assignee did not occupy the premises, nor did he let them to any other person. The rent of the store room was paid in full up to the time of the bankruptcy, and the assignee paid, as a part of the expenses of administration, the rent from the date of the bankruptcy up to the 28th of January, 1874. On that day he gave up the possession of the premises to the landlords, it being stipulated that they would not hold the assignee individually liable, upon any claim for rent, and the assignee agreeing that the acceptance of the premises by the landlords should not affect any rights or liens against the bankrupts' estate, which the landlords might have for the payment of rent to accrue after January 28th. Loeb & Brother claimed to have a lien upon the goods which were upon the premises at the time of the bankruptcy, for the eight months and three days' rent, from January 28th to October 1, 1874. They applied to the district court to order the assignee to pay out of the proceeds of the goods the said rent, amounting to $1,200. That court directed the assignee to pay them $600, and required the lessors to give up any further claim. The assignee, claiming to be aggrieved by the action of the district court, filed this petition and asked that the order of the district court might be reviewed and reversed. The defendants, Loeb & Brother, claimed that the rent which fell due after the 28th of January, 1874, was a debt provable against the bankrupt estate, and that under

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

the laws of Alabama, they had a lien for its payment upon the stock of goods which were stored upon the leased premises at the date of the bankruptcy, and that they were entitled to priority of payment out of the proceeds of the goods, for the rent up to October 15, 1874.

M. D. Graham and H. A. Herbert, for petitioner.

David Clopton, contra.

WOODS, Circuit Judge. The first question for decision is, can rent, to accrue in future, after an adjudication in bankruptcy, be proven and allowed as a debt against the bankrupts' estate?

The 19th section of the bankrupt act [March 2, 1867; 14 Stat. 525] (Rev. St. §§ 5067–5072) describes what debts may be proven, and it declares that no other debts than those specified in this section shall be proven or allowed against the estate. The case of rent falling due in the future, at fixed and stated periods, is specially provided for as follows: "When the bankrupt is liable to pay rent or other debt, falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods." The meaning of this clause admits of no doubt. In the case of rent falling due at fixed and stated periods, the creditor may prove his claim for so much rent as had accrued at the date of bankruptcy. For instance, if the rent is $1,200 per annum, payable in quarterly installments of $300, and at the close of the second month of a quarter the lessee is adjudged bankrupt, although there may be no rent yet due, nevertheless the landlord may prove his claim for $200, the rent accrued at the time of bankruptcy. But the last clause of the 19th section says, he shall prove for nothing more. So a proportionate part of debts, other than rent falling due at fixed and stated periods, may be proven in the same way. For instance, a business man has a manager or bookkeeper hired by the year, at a salary payable quarterly. At the end of two months he is adjudged bankrupt. His manager or bookkeeper may prove for a proportionate part of his salary up to the time of the bankruptcy, but he cannot prove for any part that may accrue and fall due after the bankruptcy. The clear purpose of the bankrupt act is, to cut off all claims for rent to accrue, or for services to be rendered, after the date of the bankruptcy. These views, so far as the question of rent is concerned, are supported by the following cases: Ex parte Houghton, [Case No. 6,725;] In re Webb, [Id. 17,315;] In re May, [Id. 9,325.] The only case I have found where a contrary view is taken is In re Winn, [Id. 18,117.] In the Case of Trim, [Id. 14,174,] cited by counsel for defendants, it does not appear whether the landlord was allowed to prove for rent which accrued after the bankruptcy or not. The case of Longstreth v. Pennock, [Id. 8,488,] also relied on by defendants, only decides that the assignee should pay the rent up to the date of bankruptcy, and for such time as he actually occupied the premises after bankruptcy. It does not decide that a claim for rent after the bankruptcy is provable; for what the assignee pays for the time during which he occupies the premises is part of the expenses of administration, and is not paid as a debt of the bankrupt estate. In the case of Longstreth v. Fenner, [Pennock,] no rent was claimed or allowed beyond the time when the assignee delivered up the premises. The 19th section of the bankrupt act is so clear upon the point under discussion, that it would require very great weight of authority to show that the rent, falling due at fixed and stated periods after the date of the bankruptcy, could be proven as a debt against the bankrupt estate. The law says plainly that such a claim shall not be proven or allowed. I am, therefore, of opinion that the claim of Loeb & Brother, for rent falling due after the 28th of January, 1874, which was after the bankruptcy, and after the surrender of the premises by the assignee, cannot be proven or allowed as a debt against the bankrupt estate.

It seems to be a necessary consequence of this, that Loeb & Brother can have no lien upon the assets of the bankrupts for any such claim. The bankrupt estate owes them nothing; they have no debt which the bankrupt estate is liable to pay. The existence of a lien upon the bankrupts' goods presupposes a debt which their goods are liable to pay. As there is no claim or debt, there can be no lien. The language of the 20th section of the bankrupt act [14 Stat. 526] seems to sustain this view. It is when a creditor has a lien on the real or personal estate of the bankrupt "for securing the payment of a debt owing to him from the bankrupt," that provision is made for preserving the lien. Rent to accrue in the future cannot be called a "debt owing." In fact it is well settled that it is not a debt at all, contingent or otherwise. Auriol v. Mills, 4 Term R. 94; Lansing v. Prendergast, 9 Johns. 127; Savory v. Stocking, 4 Cush. 607; Bosler v. Kuhn, 8 Watts. & S. 183; English v. Key, 39 Ala. 115. In the case last cited, it was held by R. W. Walker, J., that "except where it is payable in advance, no claim for rent arises until the lessee has enjoyed the premises for the whole time for which the payment of rent is stipulated to be made."

But even conceding that at the date of the bankruptcy there was a debt owing from the bankrupts to Loeb & Brother, on account of rent yet to accrue, which might be proved and allowed against the bankrupt's estate, is it a fact that under the laws of Alabama, such debt was secured by a lien upon the goods of the bankrupts found upon the leased prem-

ises? The statute under which Loeb & Brother claim their lien declares that "no execution must be levied on goods or chattels in possession of, and upon the premises of a tenant, held by lease for one or more years until the rent due, or to fall due during the current year, is paid or tendered to the landlord; * * * and the sheriff executing the writ must levy and sell as well for the repayment of the rent so tendered as for the satisfaction of the execution." Rev. Code Ala. § 2878. Clay's Digest of Laws of Alabama (page 506, § 3) contains a similar provision applicable to crops. It declares that "the crop grown on any rented land in this state shall not be taken by virtue of any execution, or removed off the premises of any such rented land, unless the party so taking the same shall, before removal of the crop from such premises, pay or tender to the landlord or lessee thereof all money due for the rent of said premises at the time of taking such crop in execution; provided such rent or arrears do not amount to more than one year's rent; * * * and the sheriff, or officer levying the same, is hereby empowered and required to levy and pay to the plaintiff, as well the money so paid for rent as the execution money." This last cited law has been construed by the supreme court of Alabama. In Frazier v. Thomas, 6 Ala. 169, it was held that this law did not give the landlord a lien upon the crop raised on rented land; it merely declared that, as between the landlord and an execution creditor, the former should be entitled to preference to the extent of one year's unpaid rent. See, also, Whidden v. Toulmin, 6 Ala. 104. I am unable to distinguish any material difference between the two statutes cited. If the latter does not give a lien, neither does the former. The ruling of the supreme court of Alabama, just cited, is followed in North v. Eslava, 12 Ala. 240, and Denham v. Harris, 13 Ala. 465. However much these rulings may be opposed by high authority, they are a construction of a law of this state which this court feels bound to follow. As there was no execution levied in this case, I am of opinion that Loeb & Brother did not acquire any lien for rent on the goods of the bankrupt found on the demised premises. On all grounds, therefore, their claim to priority of payment, out of the proceeds of said goods, should be disallowed. The result is, that the district court fell into error in recognizing the claim and lien of Loeb & Brother for $600. The order of the district court complained of is therefore annulled, and the claim and lien of Loeb & Brother disallowed.

[NOTE. For the operation of state laws under the bankrupt act, see Marshall v. Knox, 16 Wall. (83 U. S.) 551; Austin v. O'Reilly, Case No. 665; Wylie v. Smith, Id. 18,110; In re Joslyn, Id. 7,550; In re McGrath, Id. 8,808.]

BAILEY, (MEYER v.) See Case No. 9,516.

Case No. 740.

BAILEY v. MILNER.

[1 Abb. (U. S.) 261;[1] 35 Ga. 330; 7 Amer. Law Reg. (N. S.) 371; 1 N. B. R. 419, (Quarto, 107;) 1 Amer. Law T. Rep. Bankr. 15; 2 Amer. Law Rep. 570.]

District Court, N. D. Georgia. Feb. 18, 1868.

PAYMENT—CONFEDERATE NOTES—THEIR INVALIDITY.

1. The securities known as "Confederate Treasury Notes," issued by the self-styled Confederate States, during the Civil War of 1861–65, although not "bills of credit," issued by a state, and as such prohibited by the constitution of the United States, (article 1, § 10, subd. 1,) were, nevertheless, illegal; because they were issued by a pretended government, organized in the name of certain states, by subjects of the United States, who were at the time in rebellion against the rightful government of the United States, with design to dismember and destroy it.

2. A promissory note given in consideration of such bills is void, and does not constitute a debt provable in bankruptcy.

[Followed in Scudder v. Thomas, Case No. 12,567.]

[3. Where a person during the Rebellion accepted Confederate notes in exchange for his property, the transaction having been fully executed and free from fraud, covin, misrepresentation, or undue influence, the federal courts will leave the parties where they placed themselves.]

[Cited in Cuyler v. Ferrill, Case No. 3,523.]

Question upon the certificate of a register in bankruptcy.

ERSKINE, District Judge. In 1863, John Neal loaned twenty-five hundred dollars in "Confederate Treasury Notes," to Milner, the bankrupt, for which amount he made his promissory note to Neal. Subsequently Neal, in making a disposition of some of his property among his children and grandchildren, gave this note to his son-in-law, Samuel Bailey, in trust for minor children of Susan Beall, a daughter of Neal.

Bailey, as trustee, sought to prove this claim against the estate of the bankrupt. Counsel for the latter objected: First, because the consideration for the contract was Confederate treasury notes; secondly, because these notes were borrowed for the purpose of hiring a substitute to serve in the Confederate army, with the knowledge of Neal; and that the notes were so appropriated, and the substitute hired therewith did go into the said army.

Evidence being heard on these points, the register rejected the claim, and the proceedings were certified to the judge. The conclusion at which the register arrived was approved.

The party whose claim was thus rejected petitioned the judge for a re-hearing, on the ground that the testimony adduced—in proof of the second objection, in particular—was wholly insufficient to warrant the decision

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

of the register, or affirmance by the court. A new hearing was granted before the register. The testimony on both sides is long and contradictory, with the exception that all agree that the loan was made in Confederate treasury notes.

The register adhered to the course of reasoning previously entertained by him, and gave the same judgment as before. Mr. Bailey being still dissatisfied with the ruling, the matter was again certified for review.

From the views which I entertain of the legal principles involved in this proceeding, it is not essential to an approval or disapproval of the conclusion at which the register arrived, that these Confederate treasury notes, or any portion of them, were used to procure a substitute to serve in the Confederate army, or that they were employed for any other purpose. The register holds, as he held at first, that the contract was illegal and void; and this result I approve and affirm. But I do not concur with him in one of the principal reasons advanced for his decision; and which reason is more prominently argued in his first written opinion than in his last, namely, that these notes are bills of credit within the sense of that term, as understood in the constitution.

"No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit," etc. Const. [U. S.] art. 1, § 10, subd. 1.

No disquisition on the origin of bills of credit, or history of their rise and progress, or of their fall, under the inhibition just cited, would aid in the determination of this case. Therefore, I will but remark that the great minds that framed the constitution were, from recent experience, aware of the blighting effect on the domestic and foreign commerce of the states, and on the welfare of the whole country, which flowed from the almost indiscriminate issuing of these bills by the colonies, and afterwards by the states, as money, among the people, to suffer its perpetuation, or to longer tolerate it to the states; and time has proven the wisdom of their statesmanship.

So far as I have been able to ascertain, all paper answering to bills of credit put forth during the war of independence were promises to pay. But be this so or not, the supreme court of the United States, in Craig v. Missouri, 4 Pet. [29 U. S.] 410, held that a paper currency emitted by a state, and receivable in discharge of all debts and taxes due the state, and of all salaries and fees of office, &c. &c.—and pledging the faith and funds of the state for the redemption of these paper issues—was within the constitutional prohibition.

The same court, in Briscoe v. Bank of the Commonwealth of Kentucky, 11 Pet. [36 U. S.] 258, gave the following comprehensive definition of a bill of credit: "The definition, then, which does include all classes of bills of credit emitted by the colonies or states, is a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money."

Taking this definition, as imparted by the highest judicial tribunal in the land, as a guide, it will conduct to a correct conclusion of the endeavor to ascertain whether these treasury notes, or bills, issued by the so-called Confederate States, fall within it.

Although it is declared that no state shall emit bills of credit, yet if two or more of the states ally themselves, or confederate together, and on their faith and credit issue these bills, I apprehend the inhibition would apply with a force equally as direct and controlling against the allied or confederate states as against a single one.

Here is a copy of one of these treasury notes: "Fundable in eight per cent. stock or bonds of the Confederate States. Six months after a ratification of a treaty of peace between the Confederate States and the United States, the Confederate States of America will pay five dollars to bearer. Richmond, September 2, 1861. Receivable in payment of all dues except export duties."

Then follow the names of a register and treasurer. One decision—and only one—on this subject has been brought to my notice; that is the case of Bank of Tennessee v. Union Bank of Louisiana, [Case No. 899,] lately tried before Judge Durell and a jury, in the circuit court of the United States for the eastern district of Louisiana.

The judge is there reported to have said, in his charge to the jury, "That Confederate treasury notes issued by said government, and circulated as money, were bills of credit within the meaning of the constitution, and therefore an unlawful issue." The views which present themselves to my mind do not terminate in accord with the opinion expressed by the learned judge.

During the latter part of the year 1860, and in the early part of 1861, South Carolina, Georgia, Louisiana, Virginia, and other states, by similar modes, called on the people to send delegates to meet in convention. Accordingly, these conventions assembled, and each passed an ordinance of secession, as it is generally termed, by which ceremony these conventions severally adventured to withdraw the states from the Federal Union, and to release the people from their subjection to the laws of the land, and their allegiance to the nation. The constitutional state governments were overthrown, and superseded by spurious and revolutionary governments. The setting up of a pretended central or general government, styled "The Confederate States of America," followed; and, soon thereafter, open rebellion and war of portentous magnitude burst upon the nation. Prize Cases, 2 Black, [67 U. S.] 635; Shortridge v. Macon, United States circuit court, district of North Carolina, opinion of the

court delivered by Chief Justice Chase, [Case No. 12,812.]

In the seceded states (so-called) the sovereign authority being, for the time, displaced, consequently there ceased to be, within any of them, a government under the constitution of the United States. Then, can it be said that the usurping power could pledge the faith of the state by a public law, or otherwise, for the payment of the notes or bills issued by the so-called Confederate States of America? Or could this pretended central government bind any of those states for the redemption of these notes?

But these Confederate treasury notes or bills do not pretend to have been emitted by a state, or a combination of states of the Union; nor can it be inferred from indicia found upon them—nor can their recondite history show—that they emanated from the sovereign power, and on the faith of any of the states. And thus it will be seen, that they did not possess the characteristic attributes of bills of credit, in accordance with the definition of the supreme court of the United States;—they did not issue by virtue of the sovereignty of the state, nor did they rest for their currency on the faith of the state pledged by a public law. Darrington v. State Bank of Alabama, 13 How. [54 U. S.] 12.

Notwithstanding these notes or bills were not, in my judgment, bills of credit within the prohibition contained in section 10 of article 1 of the constitution, yet they were none the less illegal; they were issued by a pretended government, organized in the name of certain states, by subjects and citizens of the United States, and who, at the very time, were in rebellion against their rightful government, and whose design and object it was to "dismember and destroy it." Prize Cases; Shortridge v. Macon, supra.

It may not be wholly unimportant to remark that it is a well established doctrine of the courts that a wide distinction exists between an executed and an executory contract. In the former case courts of justice will not, as a general rule, interfere between the parties, to set the contract aside, but will leave them where they placed themselves; and this, too, notwithstanding the contract be in part only founded on an illegal consideration.

Nevertheless, any person owning property may, if no fraud be put upon him, and no misrepresentation, or circumvention, or covin enter into the transaction, alienate it conditionally or absolutely, for what currency or thing he chooses, or even give it away.

But an executory contract, like this claim of Bailey, the trustee, [against the bankrupt Milner,][2] nevertheless, will not be enforced. The principles of law directly applicable to executory contracts, based upon illegality, were long since determined by the courts, both in England and in this country. One case only will be referred to. The doctrine on this subject, as laid down by Mr. Justice Washington, in Toler v. Armstrong, [Case No. 14,078,] is so succinctly announced that it is best it be given in his own words: "I understand the rule, as now already settled, to be, that where the contract grows immediately out of, and is connected with an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it."

If this demand of twenty-five hundred dollars were allowed, the dividends of the creditors, arising from the assets would, of course, be diminished that amount—and this without any fault on their part, but wholly through the illegal dealings of the bankrupt and Neal. Bankruptcy Law, § 22, [Act March 2, 1867, § 22; 14 Stat. 537.]

I may add that the law, in allowing a guilty party to take advantage of the illegality of his own act—as is here done by the bankrupt—does so, not with a view of conferring a benefit on him, but upon grounds of public policy; and also, in this case, that injustice may not be done to the creditors of the bankrupt.

The decision of the register is approved. The clerk will certify this opinion to Mr. Register Murray.

NOTE, [from original report.] This case and Cuyler v. Ferrill, [Case No. 3,523,] should be read in connection with the later decision of the supreme court in Thorington v. Smith, 8 Wall. [75 U. S.] 1. It is there held, in an action to recover the agreed price in a contract of sale of property made in the usual course of business, and which price was, by the actual intent and understanding of the parties, payable in Confederate notes, that a contract made between persons residing in the so-called Confederate States, during the Rebellion, and expressed to be payable in Confederate notes, but having no other tendency or purpose to aid the Rebellion than the mere fact of its treating Confederate paper as the currency in which it should be discharged, may be enforced by action in the courts of the United States. Although the government of the Confederate States was not a de facto government in the highest sense known to the law, it was for the time being a government of paramount force. It acquired an actual supremacy, which indeed is not a legal defense for acts of hostility performed under it towards the United States, but which rendered submission to its authority in civil and local matters, not only a necessity but a duty. The notes issued by its authority must be regarded as a currency imposed on the community by an irresistible force. They must be regarded in our courts in the same light as if they had been issued by a foreign government temporarily occupying a part of the territory of the United States. Contracts stipulating for payment in such currency cannot be regarded, merely for that reason, as made in aid of the insurrection. They are free from blame except proved to have been made with actual intent to promote the insurrection. And they should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation.

[See Thorington v. Smith, 8 Wall. (75 U. S.) 1; Delmas v. Merchants' Mut. Ins. Co., 14

[2] [From 1 N. B. R. 419.]

Wall. (81 U. S.) 661; Planters' Bank v. Union Bank, 16 Wall. (83 U. S.) 483; Taylor v. Thomas, 22 Wall. (89 U. S.) 479; Holleman v. Dewey, Case No. 6,607; Hatch v. Burroughs, Id. 6,203; Evans v. City of Richmond, Id. 4,570.]

Case No. 741.

BAILEY v. NICHOLS et al.

[2 N. B. R. 478, (Quarto, 151;) 2 Amer. Law T. Rep. Bankr. 60; 1 Chi. Leg. News, 185.]

District Court, N. D. Ohio. April, 1869.

BANKRUPTCY—PROOF OF NOTES PLEDGED AS COLLATERAL.

[Promissory notes for $1,100, which were invalid in the hands of the payee, were pledged by him to secure an indebtedness of $147.35. *Held*, that on the bankruptcy of the maker the pledgee was entitled, under the bankrupt act of March 2, 1867, (14 Stat. 517, c. 176,) to prove against the bankrupt estate the full amount of the notes, and to receive dividends thereon to the extent of $147.35, and that the proof should not be restricted to the sum of $147.35, the amount of the debt secured by the pledge of the notes.]

[In bankruptcy. Petition by Bailey, assignee of Warner & Curtis, bankrupts, against T. W. Nichols, payee of promissory notes made by the bankrupts, and Hower & Co., indorsees. Prayer that the notes be canceled, except as to the interest of Hower & Co. Granted. Prayer that Hower & Co. be allowed to prove and receive dividends on only the amount of the notes. Denied.]

SHERMAN, District Judge. In March, 1868, Warner & Curtis purchased of T. W. Nichols a patent right, which was afterwards discovered to be of no value, and gave, among other things, their two promissory notes, one for five hundred dollars, due in eight months, and one for six hundred dollars, due in twelve months. In May, 1868, Nichols purchased goods of Hower & Co., to the amount of one hundred and forty-seven dollars and thirty-five cents, and gave them the above-named notes as collateral security for the payment of his indebtedness. It is admitted that the notes are valid in the hands of Hower & Co., but as to Nichols, they are void, the patent for which they were given being worthless, and he, in fact, subsequently agreeing to cancel them. Warner & Curtis were declared bankrupts, June 1, 1868, and Bailey appointed their assignee June 16, 1868. The petition prays: First, that Nichols may be decreed to surrender the two notes and they be cancelled, except so far as the interest of Hower & Co. is concerned; and second, that Hower & Co. may only prove said notes to the amount of one hundred and forty-seven dollars and thirty-five cents, and receive dividends on that sum. The first prayer is, of course, granted, as it carries into effect the agreement made between Nichols and Warner & Curtis.

The second involves this question. Can Hower & Co. prove against the estate of Warner & Curtis such an amount on the two notes that the dividends thereof will be sufficient to pay the full amount of one hundred and forty-seven dollars and thirty-five cents, or is it only allowable to prove to the extent of one hundred and forty-seven dollars and thirty-five cents, and receive dividends on that amount. When negotiable paper is deposited as collateral security, as this was, it is a pawn or pledge vesting a special property in the pawnee, with a right to detain it as security for the debt, and leaving the general property in the pawnor. Garlick v. James, 12 Johns. 146. When the pledge is negotiable paper, the pledgee cannot compromise with parties to the paper for less than the whole sum due on the paper, and if he does, he will be compelled to account to the pledgor for the full value. 15 Mass. 534; 12 Ind. He has a right to sue the paper and recover the full amount in his own name. Indeed, it has been held, that in the absence of a special power, he has no right to sell, but he may apply to a court of equity for a foreclosure and sale, and the purchaser in that case could certainly prove and receive dividends on the whole amount of the security. The pledge, in all cases, is a security for the whole and every part of the debt. The payment of a part still leaves the whole security a perfect pledge for the residue of the debt. Story, Bailm. § 301.

These principles show very clearly that Hower & Co. can hold the two notes until their debt is paid; that they have no right to compromise without the assent of Nichols; that they may sue and recover on the notes in their own name, and that the whole of both notes are as much security for the last, as the first dollar of their claim. This being so, it follows that they have the right to prove both notes against the estate of the bankrupts, or as much of the same as will secure dividends to the amount of one hundred and forty-seven dollars and thirty-five cents, their claim. This doctrine was expressly ruled by Lord Thurlow in Re Crossley, 3 Brown, Ch. 237; and by Lord Eldon in 6 Ves. 449, 600. And also in 1 P. Wms. 582. I am therefore compelled by these authorities to order, first, that Nichols surrender the two notes and that they be cancelled, except as to the interest of Hower & Co. in them; second, that Hower and Co. are entitled to receive, and that they be paid dividends on the amount of said two notes to the extent of one hundred and forty-seven dollars and thirty-five cents, and no more.

Case No. 742.

BAILEY et al. v. PACIFIC R. CO. et al.

Circuit Court, E. D. Missouri. March 28, 1874.

[Nowhere reported; no opinion rendered. Reversed by the supreme court, on appeal, in Bailey v. Magwire, 22 Wall. (89 U. S.) 215.]

Case No. 743.

BAILEY v. ROSS.

[Nowhere reported; opinion not now accessible.]

Case No. 744.

BAILEY v. SAWYER.

[4 Dill. 463;[1] Syllabi, 151; 9 Chi. Leg. News, 191; 1 Thomp. Nat. Bank Cas. 356; 2 Browne, Nat. Bank Cas. 154; 11 Bankers' Mag. (3d Ser.) 793; 15 Alb. Law J. 235; 23 Int. Rev. Rec. 79.]

Circuit Court, D. Minnesota. Feb., 1877.

BANKS AND BANKING—NATIONAL BANKS—LIABILITY OF STOCKHOLDERS — ASSESSMENT BY THE COMPTROLLER—REMEDY.

1. In winding up an insolvent national bank the comptroller of the currency is vested with authority to determine when a deficiency of assets exists, so that the individual liability of the stockholders may be enforced, and no appeal lies from his decision.

[Cited in Young v. Wempe, 46 Fed. 355.]

2. The liability of a stockholder of a national bank is several. When a specific assessment upon the stockholders is ordered by the comptroller, a suit at law is a proper remedy to enforce it.

[Cited in Young v. Wempe, 46 Fed. 355.]

At law. This is a common law action brought [by C. P. Bailey, receiver, against Andrew J. Sawyer] to enforce the individual liability of a stockholder in the First National Bank of Duluth, and to recover the amount of an assessment ordered by the comptroller of the currency, to the extent of seventy-five per centum of the par value of the shares of the capital stock of said bank, under and by virtue of the act of congress in relation to national banks. A demurrer is interposed to the complaint. [Overruled.]

Upon the argument it is urged:

1. That the complaint should set forth the facts and data upon which the comptroller determined that a necessity existed which authorized proceedings to enforce the individual liability of stockholders.

2. That the suit should have been in equity, and not at law.

Mr. W. W. Billson, for demurrer.

Messrs. Ensign and Cash, contra.

NELSON, District Judge. The comptroller of the currency, by virtue of the national banking law, in winding up an insolvent bank, is vested with authority to determine when a deficiency of assets exists, so that the individual liability of the stockholders may be enforced. This liability is conditional, and was so held in Bank v. Kennedy, 17 Wall. [84 U. S.] 22, but the comptroller, in the exercise of a judicial discretion, decides, upon the data before him, when "it is necessary" to compel contributions from stockholders to pay the debts of the bank. The law clothes him with this authority, and no appeal lies from his decision by a stockholder. He appoints a receiver, and resorts to the ultimate remedy whenever, in his judgment, the condition of the bank requires its enforcement. And, as stated in Kennedy v. Gibson, 8 Wall. [75 U. S.] 504, a more speedy settlement of the affairs of an insolvent bank is thus obtained. Again, this obligation of the stockholder is fixed when he becomes a member of the corporation by taking stock therein, and is several, not joint. There is no necessity for invoking the aid of a court of chancery to determine the sum each stockholder must pay, for that is regulated by the number of shares of stock owned. When the comptroller declares and orders an assessment, the precise amount each stockholder must contribute is a certain exact sum. A suit at law would seem to be the suitable proceeding to collect the assessment.

Demurrer overruled.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

Case No. 745.

BAILEY et al. v. SCHELL.

[5 Blatchf. 195.][1]

Circuit Court, S. D. New York. Nov. 23, 1863.

CUSTOMS DUTIES—PROPERTY SUBJECT TO — CORAL CAMEO ACTS JULY 30, 1846, AND MARCH 3, 1857.

1. Under the tariff act of July 30th, 1846, (9 Stat. 44,) as amended by the tariff act of March 3, 1857, (11 Stat. 192,) coral, cut into the form of a cameo, and not set, and known as a coral cameo, in commerce, is liable to a duty of 24 per cent. ad valorem, under schedule C of the former act, as amended by the latter act, as "coral, cut or manufactured," and is not liable to a duty of only 8 per cent. ad valorem, as "cameos, not set."

2. The specific description in the act of 1846 must prevail over the commercial designation known at the time of the passage of that act.

At law. This was an action [by Eli W. Bailey and others] against [Augustus Schell] the collector of the port of New York, to recover back an alleged excess of duty paid, under protest, on coral cameos, not set. [Judgment for defendant.]

Daniel T. Walden, for plaintiffs.

E. Delafield Smith, Dist. Atty., for defendant.

NELSON, Circuit Justice. The cameos in question were charged with a duty of twenty-four per cent. ad valorem, under the act of March 3, 1857, (11 Stat. 192,) which reduces the duties imposed by schedule C of the act of July 30, 1846, (9 Stat. 44.) The plaintiffs claim that the proper duty was only eight per cent. ad valorem, under schedule G of the act of 1846, as amended by the act of 1857, on the ground that the article is "cameos, not set." It is invoiced as coral cameos. Schedule C of the act of 1846 imposes a duty on "coral, cut or manufactur-

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

ed." The article in question is coral cut into the form of a cameo, and not set; and the question is, whether the commercial designation of the article, which prevailed at the time of the passage of the act of 1846, shall govern, or the construction of the words of the statute. I am inclined to think, the latter. As the article is "coral, cut or manufactured," although it may have had a fixed designation previously, from its shape and fashion, yet, it was quite competent for congress to designate it by a specific material description, which necessarily takes it out of the one known to the trade. This has been a not unusual mode adopted by congress for the very purpose of taking away the power of fixing any other designation in commercial language. Inasmuch as the article comes within the very words of the specific description, I do not see that the evidence of the commercial designation can be allowed to prevail.

Judgment for the defendant.

Case No. 746.

BAILEY et al. v. The SONORA.

[Hoff. Op. 465.]

District Court, N. D. California. Nov. 28, 1859.

CARRIERS OF PASSENGERS—INSUFFICIENCY OF ACCOMMODATIONS.

[1. A passenger on a steamship, whether in first cabin, second cabin, or steerage, is entitled to such accommodations and conveniences as the exercise of reasonable care and the adoption of reasonable means for securing them can afford.]

[2. Second cabin passengers cannot complain of the discomfort necessarily incidental to a tropical voyage in a second cabin below the first, but they may demand that the number of passengers in the second cabin shall not be greater than it is capable of containing; that every reasonable facility for washing, etc., shall be afforded; that men and women shall not have berths or bunks assigned to them promiscuously, without adequate arrangements to secure privacy; that all proper measures to secure cleanliness, ventilation, etc., shall be adopted; and that the second cabin devoted to the use of passengers shall not be lumbered up with baggage belonging to the other passengers, so as to prevent the free use of the accommodations ostensibly given.]

[See Sparks v. The Sonora, Case No. 13,212.]

[3. In a libel for breach of contract with libelants, as second cabin passengers, it appeared that the vessel was crowded. For 198 second cabin passengers, only two wash basins were provided. Two parallel rows of standee bunks, running fore and aft, were erected in the cabin. Only a few inches of space separated the rows, and the berths in some instances were assigned to persons of different sex and strangers to each other. The voyage was through the tropics, and, as is usual, a large number of the passengers occupied the decks at night; but they were unable to retire until 11 P. M., and were aroused at 3 or 3:30 A. M., when the decks were washed. The mattresses used by these passengers were thrown down the hatchway of the second cabin, materially obstructing ingress and egress. The lower tier of standee berths was taken out, and baggage piled up in its place, in such quantities as to obstruct passage and prevent the proper cleansing of the cabin. From these and other causes, the air of the second cabin rendered its occupation incompatible with comfort, and perhaps with health. The drinking water was so hot as to be unfit for use, except after being cooled with ice, and passengers were charged twenty-five cents per pound for the ice. *Held*, that though some of the discomforts were to a certain extent incidental to a tropical voyage in a second cabin, the libelants had established a breach of the contract.]

[4. *Held*, also, that as the discomfort suffered by the women was greater than that experienced by the men, a discrimination should be made in the amount of damages, and that the female passengers should recover the full amount paid for their passage, and the male passengers one-half of that sum.]

[In admiralty. Libel by Bailey and others against the steamship Sonora to recover damages for breach of contract with libelants as passengers. Decree for libelants.]

Robt. Rankin, for libelant.

Hall McAllister, for claimant.

HOFFMAN, District Judge. The libel in this case is filed to recover damages for breach of contract with libellants as passengers. As to the principal facts of the case, the testimony does not leave much room for doubt. The most that can be alleged on the part of the claimants is that the discomforts and sufferings of the passengers, by reason of insufficient accommodations, have been somewhat exaggerated. In a recent case of a similar character, this court had occasion to advert to the extreme difficulty of determining with precision the degree of comfort which the owner of a steamer engaged in the transportation of passengers impliedly agrees to afford. That some inconveniences and discomforts incidental to a voyage in tropical latitudes, and on a steamer conveying passengers in large numbers, must necessarily be submitted to, is obvious. But in the absence of express stipulations, it is not easy to define the character of the accommodations which the passenger has a right to expect, or the degree of discomfort to which he must submit. It may be stated, however, in general terms, that the passenger, whether in first cabin, second cabin, or steerage, is entitled to expect such accommodations and conveniences as the exercise of reasonable care, and the adoption of reasonable means for securing them as the owner can afford him. He cannot, of course, expect that the accommodations of the second cabin shall be as good as those in the first; nor that the discomfort necessarily incidental to a tropical voyage in a second cabin, below the first, and filled with passengers, shall be avoided. But he may demand that the number of passengers in the second cabin shall not be greater than it is capable of containing; that every reasonable facility for washing, etc., shall be afforded; that men and women should not have berths or bunks assigned to them promiscuously, without adequate arrangements to secure privacy; that

all proper measures to secure cleanliness, ventilation, etc., should be adopted, and that the second cabin, devoted to the use of passengers, should not be lumbered up with baggage belonging to the other passengers, so as to prevent the free use of the accommodations ostensibly afforded them.

I do not consider it necessary in this case to recapitulate the evidence. It will be sufficient to state the facts which seem to have been clearly established. It appears that the vessel was crowded with passengers, to an extent which, though not so great as on a previous voyage, nevertheless appears to have been greater than was consistent with their comfort, or, probably, with the provisions of the law. It is shown that for 198 second cabin passengers only two wash basins were provided, thus depriving them, and especially the females, of the means of securing personal cleanliness. That two parallel rows of standee bunks, running fore and aft, were erected in the cabin. These rows were separated by a space only a few inches wide—and the berths were in some instances assigned to persons of different sex and strangers to each other. Such an arrangement it was no doubt the desire of the agents of the company to avoid. But it appears to have been made, in this instance, probably owing to the difficulty of properly regulating the matter with so large a number of passengers on board. It appears, that as is usual, a large number of passengers occupied the decks of the vessel at night. It can hardly be alleged that having enjoyed that privilege, they have nothing to complain of—for it is shown that they could not retire until about 11 P. M., and were aroused in the morning at 3 or 3½ A. M., at which time preparations for washing decks commenced. The mattresses used by these passengers appear to have been thrown down the hatchway of the second cabin, materially obstructing the ingress to and egress from that part of the vessel. It is also shown that the lower tier of standee berths was taken out and baggage piled up in its place —and that this baggage was in such quantities as to obstruct the passage way between the middle and side berths, and in a considerable degree to prevent the proper cleansing of the cabin. It appears that from these and other causes, the air of the second cabin was in such condition as to render its occupation incompatible with comfort, and perhaps with health, a fact which may naturally be inferred from the circumstance that so many of the passengers, and amongst them some women, preferred to sleep on deck on a mattress with no bedding, and where they were compelled to rise every morning at 3 or 3½ A. M. It is also shown that the drinking water furnished to the second cabin during nearly the whole voyage was so hot as to be unfit for use, except after being cooled with ice, and that they were charged twenty-five cents per pound for the ice they obtained for the purpose. The foregoing are the principal matters relied on by the libellants, as showing a breach of their contract.

It is obvious that to a certain extent some of the discomforts complained of were incidental to a voyage of this description, by passengers who had only the right to a second cabin passage. It could not be claimed, for example, that each second cabin passenger should have had a washing basin for his exclusive use; but it might justly be expected that more than two basins would be provided for 198 passengers. That those who occupied the second cabin should suffer some discomfort from foul air, &c., was unavoidable, for a considerable number of passengers could not be placed in a single cabin between decks without being far less agreeably situated than if they had occupied state rooms on the deck above. But they had a right to expect that the floor of their cabin should not be converted into a baggage room for the first cabin baggage; that passengers should not be put in the cabin in such numbers as to make it uninhabitable, and that the number on board the vessel should not be so great as to prevent the ordinary means of ventilation (i. e. opening of port holes) from being available. If standee berths of the construction testified to were to be used, women, at least, had a right to expect that they would not be assigned promiscuously to persons of a different sex. That it may have been necessary to arouse those who slept on the decks at a very early hour for the purpose of washing decks may be admitted; if passengers chose, nevertheless, to occupy the decks, it may be said to have been their own choice to do so. But to make this an available answer to the complaint on this score, it should appear that other accommodations were afforded to such passengers which were as comfortable as their contracts entitled them to claim, and which they could have used without injury to health or exposure to physical suffering. Whatever difference of opinion may exist as to the precise character of the accommodations to which second cabin passengers are entitled on such a voyage, or the degree of discomfort to which they must submit, it must, I think, be conceded that they were at least entitled to a full supply of water fit to drink. It cannot, surely, be claimed to have been a fulfilment of the contract to offer them hot water, which was only palatable after being cooled with ice, which the passengers were obliged to purchase. If it had appeared in this case that every reasonable precaution had been taken, and means adopted to provide for the wants and proper accommodation of the passengers, but that through unforeseen accidents, they had been exposed to more than ordinary annoyances, it might have been urged that such accidents ought not to be regarded as breaches of the passenger contract. But in this case it seems to

me that all the grievances of which they complain can be referred directly or indirectly to the fact that the vessel was overcrowded. The officers, no doubt, did all that lay in their power to promote the comfort of the passengers. But the large number on board rendered their efforts, to a great extent, ineffectual. It is to this cause that we must attribute the confusion which occurred in the assignment of berths—the necessity of stowing the baggage in the second cabin—they take with them good and substantial reasons the inadequate provision for facilities for washing, etc.—and for the same reason, it is testified, it became impracticable to open the port holes and properly ventilate the cabin. It seems to me, therefore, that the grievances complained of must be regarded as breaches of the contract, which the ship could have readily avoided, and for which it should be held responsible.

The amount of damages to be decreed is, necessarily, arbitrary, to a certain extent. No complaint is made as to the provisions furnished the passengers; nor does it appear that sickness prevailed to any considerable extent. No other suffering is shown than that which would necessarily arise from the nature of the accommodations afforded. The passengers arrived in the usual time and in safety. In attempting to estimate the degree of suffering to which, from the various causes mentioned, the passengers were subjected, it is, I think, evident that to the women it must have been greater than to the men. I think, therefore, that a discrimination should be made in the amount of the damages to be awarded. I shall decree to the female libellants the sum admitted in the answer to have been paid by them respectively for their passages on the Sonora, and to each of the men one-half that sum. A decree to this effect must be entered.

BAILEY, (STANLEY RULE & LEVEL CO. v.) See Case No. 13,287.

Case No. 747.

BAILEY v. SUTTON et al.

[1 Cranch, C. C. 551.] [1]

Circuit Court, District of Columbia. July Term, 1809.

PLEADINGS—MOTIONS AND RULES—EXPIRATION OF TIME.

After the rule to plead has expired, the court will not compel the plaintiff to produce his cause of action.

At law. Assumpsit against the defendants as acceptors of a bill of exchange. The rule to plead expired on the third day of this term.

Mr. Youngs, for the defendant, moved to compel the plaintiff to produce his cause of action.

Refused.

[1] [Reported by Hon. William Cranch, Chief Judge.]

BAILEY, (TEAKLE v.) See Case No. 13,811.

BAILEY, (UNITED STATES v.) See Case No. 14,495.

Case No. 748.

BAILEY v. WHITFIELD.

Circuit Court, D. Alabama.

[Cited in Alabama & C. R. Co. v. Jones, Case No. 127. Nowhere reported; opinion not now accessible.]

Case No. 749.

BAILEY v. WRIGHT et al.

[2 Bond, 181.] [1]

Circuit Court, S. D. Ohio. April Term, 1868.

EQUITY—PLEADING—STATUTE OF FRAUDS.

1. Where a bill in equity charges acts of fraud, and sets up, among other things, an agreement by a defendant to execute a mortgage of real estate, and avers a failure and refusal to execute such mortgage, such defendant cannot, by plea, aver the invalidity of such agreement as a parol agreement and void under the statute of frauds, but will be required by answer to respond to the allegations of the bill.

2. The court will require all the facts to be presented to enable it to decide whether the plea of the statute of frauds will be available.

[Cited in McCloskey v. Barr, 38 Fed. 170.]

[In equity. Bill by William Bailey against C. J. Wright and H. Craft charging fraud in their failure to execute a certain mortgage. Heard on motion of complainant to strike defendants' plea from the files, and require them to answer to the merits. Motion allowed.]

R. M. Corwine, for complainant.

John L. Miner and George R. Sage, for defendants.

OPINION OF THE COURT. The bill in this case alleges, in substance, that upon certain false and fraudulent representations by the defendants, the complainant was induced to make an advance to them of $20,000, to be invested in the purchase of cotton for the benefit of all the parties. It is averred, also, that as an inducement for making said advance, and an indemnity therefor, the defendant Wright represented himself as the owner of valuable real estate in Cincinnati, which he promised to mortgage to the complainant to secure him against loss for said advance in money. The bill contains direct allegations of fraud on the part of defendants, prays for an account, and for a decree requiring the defendant Wright to execute a mortgage on the real estate in Cincinnati, according to his promise.

The defendant Wright has filed a plea to the bill, denying all the allegations of fraud, and averring as to the averments of the b that he promised to execute a mortgage of real estate, that if any such promise was made, it was verbal, and therefore void under

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

the statute of frauds. The pending motion in the case is for an order to withdraw the plea from the files, and to require an answer to the merits. The only question intended to be presented on this motion is, whether, under the allegations of the bill, the defendant Wright can rely on his averment that the promise to execute the mortgage was void under the statute of frauds, without an answer in response to the charges of fraud in obtaining the advances of money by the complainant. The defendant has an undoubted right to set up that the agreement to mortgage was by parol, and therefore void. But the law seems now to be well settled, that where facts are asserted in a bill, the effect of which may be to take a verbal agreement out of the operation of the statute of frauds, it is incumbent on the respondent to respond by answer to such facts. This would seem to be the fair construction of the thirty-second rule of the rules of practice in chancery, adopted by the supreme court for the guidance of the courts of the United States. And such seems to be the law applicable to the question, as laid down by Judge Story. Story, Eq. Pl. 591.

It is clear that a plea merely setting up the invalidity of an agreement under the statute of frauds, where other facts are averred in the bill in support of the complainant's equity, and which may be of a character to require a court to ignore the plea of the statute, the defendant should be required to file his answer to such facts. Such, it seems to the court, is in accordance with the spirit and design of the thirty-second rule before referred to. And without deeming it necessary, in deciding the present motion, to refer to the frauds alleged in the bill, and without intimating any opinion upon the question, whether, if the frauds charged were proved, the legal effect would be to supersede the plea of the statute of frauds, and present the entire transaction for inquiry on the broad principles of equity, an order will be entered requiring the defendants to file their answer to the bill. There can be no hardship in such an order. The defendants should gladly avail themselves of the opportunity of denying the frauds charged. I trust they will be able to acquit themselves of all imputations impugning their integrity in the transactions set out in the bill.

Case No. 750.

BAILEY WASHING & WRINGING MACH. CO v. LINCOLN et al.

[4 Fish. Pat. Cas. 379;[1] Merw. Pat. Inv. 108.]

Circuit Court, D. Massachusetts. March, 1871.

PATENTS FOR INVENTIONS—PROCESS AND RESULT—LATER DISCOVERIES—MECHANICAL EQUIVALENTS.

1. Although an inventor may not be informed of the particular value of the material which he employs, yet if he employs it no one else can patent its use in the same way by discovering its peculiar value.

2. Although one element of a combination may be old, and a subsequent inventor may have made in it an immaterial improvement, yet if he have combined it with other devices, he may hold the combination against those who have invented nothing, but have merely substituted the old element in the new combination.

3. A claim for a result, by whatever means obtained, or for a process, to whatever substance applied, which might be applicable to substances yet undiscovered, would be too broad.

4. In patents for a machine, a statement that the parts may be made of any suitable materials, means known materials. If it did not, one who should afterward discover a new material would have no right to make the machine.

5. A process or means would be extended beyond the real invention if they included later discoveries. But a machine is independent of such discoveries.

6. In a patent for a machine the patentee, by the phrase, "any suitable material," intends to point out that the arrangement or combination does not depend on the use of the precise material where others may serve the purpose.

7. Under the decision in Stimpson v. Woodman, [10 Wall. (77 U. S.)] 117, it would not be invention to combine a known tool with a known machine, if the combination required nothing beyond the ordinary skill of the mechanic.

8. In a doubtful case, it can not but exercise great influence on the determination that the defendants have obtained possession of an alleged prior machine and have not produced it.

9. A rubber roller covered with cloth is not the equivalent of a roller having an exterior surface of rubber.

10. Reissued letters patent of John Allender for "improved roller for expressing water from clothes," dated April 18, 1865, examined and sustained.

[Disapproved in Bailey Wringing Mach. Co. v. Adams, Case No. 752.]

In equity. This was a bill in equity filed to restrain the defendants [Alexander Lincoln and others] from infringing letters patent for "improved roller for expressing water from clothes," granted to John Allender, January 11, 1859, assigned to S. A. Bailey, S. S. Cook, and B. M. Cook, and reissued to them June 28, 1864; again reissued November 8, 1864, and again April 18, 1865, and assigned to complainants. [Decree for complainants. For other suits involving the same letters patent, see Bailey Washing Mach. Co. v. Young, Case No. 751; Bailey Wringing Mach. Co. v. Adams, Id. 752; and Eureka Clothes Wringing Mach. Co. v. Bailey W. & W. Mach. Co., 11 Wall. (78 U. S.) 488.]

The claims of the original and the several reissues were as follows:

Original patent:

"I claim a roller I, consisting of a spirally coiled spring J, arranged on a shaft or roller made smallest in the middle (to allow the spring to yield,) covered with India rubber, or some flexible material, that will yield or bend readily, as the spring J yields to the cloth, clothes, or other article being squeezed by the rollers."

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 108, contains partial report only.]

Reissue of June 28, 1864:

"I. A roller so constructed as to yield more at its center than at or near its ends, in combination with a covering of vulcanized rubber of tubular form, as and for the purpose set forth.

"II. Cog-wheels, in combination with elastic rollers, constructed and used substantially as set forth."

Reissue of November 8, 1864:

"I. A roller so constructed as to yield more at its center than at or near its ends, in combination with a covering of vulcanized rubber, of tubular form, as and for the purpose set forth.

"II. Cog-wheels in combination with vulcanized rubber rollers, or any other elastic substance or compounds impervious to water."

Reissue of April 18, 1865:

"I. A roller made of a spirally coiled spring, arranged on a shaft or roller made smaller at the center than at the ends, as and for the purposes specified.

"II. A roller so constructed as to yield more at its center than at or near its ends, covered with vulcanized rubber, or any other compounds impervious to water, substantially as and for the purpose set forth.

"III. Cog-wheels, in combination with rollers of vulcanized rubber, or any other elastic substance or compound impervious to water, for the purpose set forth.

"IV. Rollers made of or covered with vulcanized rubber, or any other elastic substance or compound impervious to water when used in combination with cog-wheels, and a spring or springs around the shaft or roller, for the purpose set forth.

"V. Rollers for washing or wringing machines made of or covered with vulcanized rubber, or any other elastic substance or compound impervious to water when used in combination with adjusting spring or springs.

"VI. Rollers for washing or wringing machines made of or covered with vulcanized rubber, or any other elastic substance or compound impervious to water when used in combination with adjustable spring or springs, and screw or screws to adjust the pressure to the springs and rollers."

M. E. Ingalls and C. L. Woodbury, for complainants.

M. B. Andrus and Geo. Gifford, for defendants.

LOWELL, District Judge. The complainants are assignees of a patent originally granted to John Allender, of New London, Connecticut, in January, 1859, and three times reissued. This bill is founded on the last reissue, which was granted April 18, 1865, and the earlier reissues have not been given in evidence, and were not in any way connected with this case. The descriptive parts of the specification are precisely the same in this last reissue as in the first patent, but the claims are very different and raise the questions discussed in this case.

The specification declares that Allender has "invented a new and useful roller for squeezing the water, drying liquor, etc., from cloth, clothes, etc.," and proceeds to describe its construction and use. It describes, by reference to drawings, a wringing machine consisting of two rollers fitted with a frame and boxes, and with spiral springs and set screws, to give and adjust the requisite pressure to the rollers, and a guide to conduct the clothes properly between the rollers. Each roller consists of a shaft made smaller in the middle and surrounded by a flat metal spring so as to form a cylinder, and around this "there is a cylindrical covering D, made of India rubber, or some flexible material that will yield or bend readily as the spring cylinder inside of it yields to the pressure of the cloth or clothes passing between the rollers." The patentee gives directions for fastening the cylinder of India rubber, and for gearing the rollers and using the whole. The model which accompanied the original specification is in evidence, and appears to represent a wringing machine, as now usually constructed, excepting the internal construction of the roller.

The only claim in the first patent was for the roller; and the evidence tends to show that it was new and useful. But it seems to have been discovered soon after these machines came into use for wringing clothes, that by putting on the roller a sufficient thickness of India rubber, the spiral spring might be discarded, because the covering would then have all the necessary elasticity. When or by whom the change was made, does not appear; but it does appear that the machine, as so modified, has gone into very general use, and is of very great value, the complainants alone making fifty thousand of them in one year.

If this were the whole case, there would be no injustice or difficulty in holding that the roller of Allender contained the later roller, and that whether the latter were a patentable improvement or not, it was still within the scope of the patent.

But upon the evidence, I must assume that John Young first made an India rubber covering for rollers in wringing machines in 1848, because there is put in evidence a copy of a decree upholding a reissue of his patent, which claimed no less than that, and because one of the complainants' witnesses states the fact to be so, and there is no contradicting evidence. Assuming, then, that rollers covered with India rubber were known at the date of the Allender patent, his original claim was only for an improvement in rollers by putting in the spiral spring.

In the complainants' existing reissued patent, there are six claims, one for the roller, three for combinations not in issue here, and two that are the subject of controversy. No.

5 is, "rollers for washing or wringing machines made of, or covered with, vulcanized rubber or any other elastic substance or compound, impervious to water, when used in combination with adjusting spring or springs." No. 6, the same combination, with the addition of set screws for adjusting the pressure of the adjusting springs. No question is made that the defendants use a combination of rollers covered with India rubber, combined with adjustable springs and set screws; but they deny the validity of the claims: 1st, as being too broad; 2d, as being for a different invention from that of John Allender; and, 3d, for want of novelty.

I agree with much that was said at the argument, of the danger of reissues, to expand the scope of a patent, and bring within its reach subsequent inventions, and the courts should be watchful to guard against such abuses. But much of this criticism is not fairly applicable to the complainants' conduct, because the drawings and model show that Allender had made a working machine which seems to be valuable and to contain all the elements of the wringers now in use; and there is no evidence that any thing claimed in the reissue has been invented since his time, excepting the change in the roller, if that be an invention, by which the spiral spring is omitted.

It does appear to be true that he either did not understand the full value and scope of his machine, or was induced or obliged not to claim it. Taking the strongest view against him, namely, that he was not informed of the peculiar value of India rubber as a covering for the rollers, but thought any flexible material would do as well, or nearly as well, still he points out India rubber as the covering which he considers the best; and no one who should afterward discover its peculiar value, could patent its use in the same combination; and if so, Allender may, by reissue, claim its use in that combination, if he invented it; otherwise it must be held that by describing and not fully claiming it, he has abandoned it, which is precisely what he may avoid by a reissue. As Young had invented a roller covered with India rubber, the respondents insist that Allender in reality invented nothing but an improvement on that roller, which turns out not to be of sufficient importance to be retained in general use, and is not used by them. The complainants contend that the description in the first patent, with the drawings and model, show that although Allender may have thought he invented more than he did in one direction and less in another, yet, in fact, he had combined India rubber covered rollers, with set screws and springs, in a wringing machine, and that made an operative machine, so that, if he had made exactly the claims they now make, he could have held them.

The plaintiffs appear to me to have well maintained their position. Taking the Young roller to be well known, and granting that Allender's improvement on it is not important, yet if he invented the combination of his roller with the set springs and screws, and his roller includes Young's and something more, he may hold its combination as against those who have invented nothing, but have merely put back the Young roller in the place of his. In this point of view, that is, so far as the combination is concerned, the case is not different from one in which Allender had invented the whole roller, as he perhaps thought he had; the defendants could not then have used a roller which contained essential parts of his; and if he invents a combination, they can not use it by merely substituting another well-known part for one of his. So that, if the patent ought to be construed as claiming only a combination of his roller with the other elements, the respondents would infringe by using an old one which operated in the same way to produce a like result in the combination.

The fifth and sixth claims are not open to the criticism so strongly urged against them by the respondents, that they cover not only all materials which were then known as coverings for rollers, but all that may be discovered afterward. They do say "vulcanized rubber, or any other elastic substance or compound impervious to water." In this they copy substantially the reissued patent of Young which has been adjudged valid, and which is for the application of India rubber, or other elastic gum impervious to water, etc. If the claim were for a result by whatever means obtained, or for a process to whatever substance applied, which might be applicable to substances yet undiscovered, it would be too broad; but in patents for machines, it is usual to say that the parts may be made of any suitable materials, and that means known materials; but even if it does not, a person who should afterward discover a new material, would have no right to make the machine, and the inventor is protected against a machine when made of any such material, though the second inventor would have the exclusive right to the new material. In the cases cited, the process or means would be extended beyond the real invention, if they included later discoveries. But a machine is independent of such discoveries. In patents for machines, the patentee by such a phrase intends to point out that the arrangement or combination does not depend on the use of the precise material, where others may serve the purpose.

There arises, however, upon the evidence concerning the state of the art, a serious and difficult question, touching the novelty of the combinations of the fifth and sixth claims. This evidence I have studied with a great deal of care, having read over much of it several times. The English patents of Jessup and Underhill show two inventions which, in combination, would seem to cover the claims in suit here. The former is of

squeezing rollers combined with springs and screws; but the rollers are made of wood, and the latter, assuming wringing machines to be well known, describes a roller covered with India rubber, for use in a wringing machine. Under the recent decision of the supreme court, in Stimpson v. Woodman, 10 Wall. [77 U. S.] 117, as I understand its effect, it would not be invention to combine a known tool with a known machine, if the combination required nothing beyond the ordinary skill of a mechanic, and this would be a fortiori, if the combination had been already suggested. But upon the evidence, I think Allender's invention was earlier than the second of these English patents. Indeed, the preponderance of testimony that way is very considerable, and the witness introduced by the defendants to fix a later date does not fairly contradict those of the plaintiffs on this point. Then there is the Carlock machine used in New York for a considerable time, and to which a very large amount of the evidence applies. It is not shown to my satisfaction that Carlock had any such springs and set screws, or their equivalent, as the patent calls for. The main witness, Mr. Carlock himself, has made so many different statements on the subject that his memory cannot now be relied on, and the other witnesses are met by counter evidence. In a doubtful case of this character, it can not but exercise great influence on the determination that the defendants, through one of their counsel, have obtained possession of this machine since the suit began, and have not produced it. A very ingenious argument was addressed to me to prove that the machine which Carlock sold to Darcey, and which the defendants now have, was a different machine from that which contained these combinations. There is no doubt that Carlock did have two machines, of which the latter in date is admitted not to have contained the elements of this combination; and if the defendants have procured this machine, and any unfavorable inferences are drawn from their not producing it, still the result is only what was before admitted, that this later machine did not anticipate Allender; and the controversy is, whether the former machine did so or not. This is the argument. To this, one obvious answer is, that the defendants, by taking such pains to procure a machine pending this suit, and secretly, admit it to be the machine which was important to be secured. Besides this, the evidence shows clearly that this was the first machine. I need not review the proofs, but will only say that I have considered them with all possible care and have no doubt on this point.

No question of fact was raised about the Day machine. Day had a factory in New Jersey in which he used, before the date of Allender's invention, a washing and wringing machine, with which he squeezed starch out of flat webs of cloth; and this machine had one, and afterward two rollers covered with India rubber, which again was covered with folds of printer's blanket or felt, and over this with folds of muslin. The rollers were combined with blocks of India rubber, to give the pressure, and with wedges to adjust the pressure, and these are undoubtedly the equivalent of the springs and set screws of the reissued patent. The combination operated in a like way to produce a similar result, provided the rollers of the Day machine are the equivalents in construction and operation of the rollers of the patent. A part of the elasticity of the Day rollers, and probably a considerable part, was due to the cloth; and the practical operation of the machine was different in this respect, that the cloth absorbed water and gave it out again at each operation, thus combining washing with wringing, though there is no doubt that the wringing was well done. For a wringing machine, it is of importance to dispense with the cloth, but the question is, whether there could be invention in dispensing with it. I have had much doubt on this point; but, upon the whole, am of opinion that the rollers of the Day machine are different from those of the complainants. They are not covered with India rubber, and I think there might be invention in combining a rubber-covered roller, as Allender did, with the other elements of the Day machine. The India rubber of Day performs the office of the spiral spring of Allender, and if the latter had not covered his roller with India rubber, but with cloth, and had claimed and continued to claim only any flexible covering, he could have held, perhaps, only his peculiar spring; because Day had already covered rollers with cloth, and had a spring of India rubber beneath it; but to substitute an India rubber covering for one of cloth, appears to be important and valuable, and I do not know that it is any less an invention than to substitute a spiral spring for India rubber underneath. I was much pressed with the argument that a person who should merely wind a piece of cloth over the plaintiffs' rollers, would infringe the patent by using the machine in that way; and if so, one who had done the same thing beforehand had anticipated the invention. Here, I think, the true test is, whether the machine is substantially the same. If a piece of cloth or muslin were so tightly stretched over the roller that it remained for practical purposes covered with India rubber, no doubt there would be infringement; but a roller covered with cloth, as distinguished from one covered with India rubber, would not infringe. In this connection the reissued patent clearly claims only coverings impervious to water, and though there is no such claim or intimation in the original patent, yet the model shows such a roller, and its value being discovered as we have already seen, it may be claimed by a reissue.

It was said that the combination should

have included the guides. If it had done so, I suppose the defendants' machine would be within it, because that appears to have guides, and I confess to some doubt whether the assignees of the patent would not have done better to include them. But as this case stands, that question is decided when the Carlock and Day machines, neither of which had any guides, are disposed of. If the claim had included the guides, the difficult points connected with those machines would have been avoided.

Decree for complainants.

Case No. 751.

BAILEY WASHING MACHINE CO. v. YOUNG et al.

[12 Blatchf. 199; 1 Ban. & A. 362.] [1]

Circuit Court, N. D. New York. June 16, 1874.

EQUITY PLEADING—ANSWER — NOT SWORN TO BY ALL OF THE DEFENDANTS.

An answer, in a suit in equity, put in in the names of all three of the defendants, as their joint and several answer, but signed and sworn to by only two of them, will be stricken from the files, as irregular, but with leave to the two to erase therefrom the name of the third, and file it as their own answer only.

[In equity. Bill by the Bailey Washing Machine Company against John Young, James Young, and John E. Young. Heard on motion to strike defendants' answer from the files. Motion granted.]

Livingston Scott, for plaintiff.

John F. Seymour, for defendants.

WOODRUFF, Circuit Judge. In this case an answer has been put in in the names of the three defendants, and as their joint and several answer, but such answer is signed and sworn to by James Young and John E. Young only. This was irregular. The complainant might, if so advised, have accepted the answer, and replied to it, and thereby have waived the irregularity. Freelands v. Royall, 2 Hen. & M. 575. But this was not done. The complainant moves to take the answer off the files, and for such other relief as may be proper, and, on the motion for such other relief, counsel ask an order that the bill be taken pro confesso as against all of the defendants. That such answer is irregular, and that the complainant, though he may, is not bound to, accept it as the answer of all of the defendants, is according to the rules governing the subject, both in this country and in England. Fulton Bank v. Beach, 2 Paige, 307, 6 Wend. 36; Rogers v. Cruger, 7 Johns. 557; 1 Hoff. Ch. Pr. 229; 1 Barb. Ch. Pr. 141; Denison v. Bassford, 7 Paige, 370; Cooke v. Westall, 1 Madd. 265; Cope v. Parry, Id. 83; 2 Daniell, Ch. Pr. 269; Bayley v. De Walkiers, 10 Ves. 441. An order granting leave to answer without oath or signature is necessary, and, if circumstances render it proper, would be granted. Cases supra, and Codner v. Hersey, 18 Ves. 468; —— v. Gwillim, 6 Ves. 285; —— v. Lake, Id. 171. On the other hand, I do not think that the irregularity should subject the defendants who signed and swore to the answer to serious loss. The answer was manifestly prepared in the expectation that all of the defendants would sign it, and, on the refusal of John Young to sign, his name should have been struck out. Although the bill of complaint is not a bill of discovery, since the defendants were not, under the rules, bound to answer any averment therein except at their option, and because the complainant has propounded no interrogatories, as the rules require, when he desires to enforce a discovery, (rules 40, 41,) nevertheless, the complainant has a right to require that whatever answer is put in be authenticated by the defendants who profess or purport to answer. 1 Barb. Ch. Pr. 168; Denison v. Bassford, 7 Paige, 370; New York Chem. Co. v. Flowers, 6 Paige, 654; Harris v. James, 3 Brown, Ch. 399; and the cases above cited. The answer should, therefore, be taken from the files, but with leave to the defendants who have answered, to erase the name of the other defendant, and file the answer as their own only. An order that the answer, as filed, stand as the answers of two defendants only, would seem to be substantially equivalent. Done v. Read, 2 Ves. & B. 310. But, the more orderly and proper state of the record will be to make the pleadings in form correspond with the fact.

What the complainant will be at liberty to ask, if it is seen fit to bring the case to a hearing upon the bill and the answer of two defendants, and upon the order to which the complainant will be entitled, taking the bill as confessed by the other defendant, it is not necessary, on this motion, to decide.

The complainant is not entitled to take the bill as confessed by the two defendants who have answered. Possibly, they may desire to amend their answer, setting up fraudulent collusion between the other defendant and the complainant, which is intimated in the affidavit. Whether they do so or not, the facts alleged in the bill of complaint they should be permitted to answer. Whether the conduct or implied admissions of a copartner would conclude them on a charge of tortious infringement of the complainant's patents, I do not now decide. Counsel suppose that it is so settled by authority. Colly. Partn. [Perkins's Ed.] 724; Kershaw v. Mathews, 1 Russ. 360; Hilby v. Stanton, 2 Younge & J. 75; Prince v. Haydn, 3 Younge & J. 190; Naylor v. Wellington, 8 Sim. 396. But, on examination of the bill of complaint, I do not find that there is any averment that the tortious infringement was by them as copartners, or that the infringement was by the copartnership firm of which they were members. It

[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 1 Ban. & A. 362; and here republished by permission.]

is true, that, in the introduction of the bill of complaint, the defendants are described as now being copartners, under a specified copartnership name or firm; but, when they became such, or whether they were such at the time of the alleged infringement, or whether the infringement occurred in the conduct of the copartnership business, is not stated. I cannot, therefore, assume that the failure of John Young to answer is to be taken as an admission which concludes, or even affects, the other defendants. Besides, it is not clear that every admission by a copartner is conclusive upon his associate, in a court of equity. It may be evidence against both, and yet, when made with intent to wrong the associate, it may not conclude him, so that he cannot prove the truth touching an alleged tortious invasion of the rights of another by the copartnership. Of that, however, the court will consider further, if the complainant choose to rest its case upon the bill and answer.

Let an order be entered that the answer be taken from the files, but with leave to the defendants answering to erase therefrom the name of John Young, and file it as their own answer only.

Case No. 752.

BAILEY WRINGING MACHINE CO. v. ADAMS et al.

[3 Ban. & A. 96;[1] 5 Cent. Law J. 425; 10 Chi. Leg. News, 41; 5 Reporter, 102; 23 Int. Rev. Rec. 344; 25 Pittsb. Leg. J. 30.]

Circuit Court, W. D. Pennsylvania. Sept., 1877.

PATENTS FOR INVENTIONS—INJUNCTION—PRIOR CASE—NEW EVIDENCE.

1. The rules which should govern courts in granting preliminary injunctions, considered. Upon the motion, the court ought not to undertake the decision of fairly disputable questions of law and fact.

[See New York Grape-Sugar Co. v. American Grape-Sugar Co., 10 Fed. 835; Union Paper-Bag Mach. Co. v. Binney, Case No. 14,387; Parker v. Sears, Id. 10,748.]

2. When the motion is made and contested only upon the evidence which resulted in a judicial decision in complainant's favor in another case, such evidence ought to be taken as conclusively establishing the complainant's title. Not so, however, if new evidence is exhibited of such significance as would probably, if it had been presented, have changed the former decision.

[Cited in Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co., 54 Fed. 679.]

[3. Cited in Washburn & Moen Manuf'g Co. v. Griesche, 16 Fed. 671, to the point that the substitution of known mechanical equivalents, or the changing of parts in a way not essential to the result, nor producing any new and useful result, is an infringement.]

[In equity. Bill by the Bailey Wringing Machine Company against F. F. Adams and another for infringement of letters patent No. 22,539. Heard on motion for preliminary injunction. Denied.]

Marcus A. Woodward, for complainant.
Hill & Ellsworth, for defendants.

McKENNAN, Circuit Judge. A motion for a provisional injunction is always an appeal to the discretion of the court, but, in the class of cases to which the present one belongs, such discretion ought to be exercised only when "the complainant's title, and the defendant's infringement, are admitted, or are so clear and palpable that the court can entertain no doubt on the subject." "The court are not bound, at this stage of the cause, to decide doubtful and difficult questions of law, or disputed questions of fact, nor exercise this high and dangerous power (if exercised rashly) in doubtful cases, before the alleged offender shall have an opportunity of a full and fair hearing." Grier, J., in Parker v. Sears, [Case No. 10,748.] This has long been the rule in this circuit at least.

The bill in this case is founded on a patent issued to the complainant as assignee, for an improvement in wringing machines. It is one division of the fourth reissue of letters patent originally issued to John Allender on the 11th of January, 1859, and extended for seven years. The original patent contained but two claims, the gravamen of which was a wringing roller of peculiar mechanical construction, with a covering of vulcanized India rubber, or any other elastic compound impervious to water. To each reissue new claims have been added, until at last (in the reissue of February 9th, 1875), they are eight in number, all of which, except the two original claims, are for subdivided combinations of devices which, in the aggregate, constitute a complete wringing machine. That these several reissues, and the expansion of the claims of the patent, were induced by the progress of the art to which they appertain, seems to me to be evident, still, they may be all valid, if the combinations claimed were embodied in the original machine, and were the product of the patentee's genius. But to determine this, they must be carefully scrutinized in connection with the state of the art at the date of the patent, and to this end, the fullest opportunity for inquiry and examination is essential. In this stage of the case, and without an opportunity for a full hearing, the court ought not to undertake the decision of fairly disputable questions of law and fact, if there be any such, by an exercise of the power which this motion invokes.

Undeniably the defendants do not infringe the two first, and the fourth claims of the patent. The third, fifth, sixth, seventh and eighth claims they are alleged to have infringed.

The last two of these claims are new, and appear for the first time in the present reissue. They are for combinations in which the

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

guide or guides, described in the specification and shown in drawings and model, are a component element. Now, it is not so clear as to be free from doubt, that the flanges extending over the ends of the rollers in the defendants' machines, which form part of the standard in which the journals of the rollers are supported, are the equivalents of the guide in the complainant's machine. They are formally different devices, and do not seem to have been expressly intended to perform the same functions. The only office of the flanges is to prevent the clothes, passing through the rollers, from running off the ends and becoming entangled around the iron shafts. But although this effect might incidentally result from the use of the guide, such an adaptation of it does not seem to have been contemplated by the patentee. The specification requires—and this is clearly illustrated by the drawings—both faces of the machine between the standards to be covered with boards, which extend over the ends of the rollers, and to which are to be fastened a semicircular spout, simply "to guide the cloth or clothes between the rollers," so as to secure the application of their pressure, at a point upon them, at which, by reason of their peculiar construction, they have the greatest degree of elasticity. Not only is the exclusive function of the flanges not claimed for, or attributed to, any of the devices described in the specification, but, in view of the prescribed structure of the machine, the independent performance of it by the guide is obviously impracticable. Under these circumstances, the applicability of the doctrine of mechanical equivalents, as it is defined in recent cases, may well be questioned; and the infringement of these claims is, therefore, a fair subject of contestation.

But these claims, as well as the others referred to, are contested for want of novelty. Upon this point several affidavits of experienced and intelligent experts have been produced on each side, in which the opinions indicated are as positively expressed, as they are irreconcilably diverse. The weight of such evidence can only be properly estimated after the witnesses have been subjected to the ordeal of a cross-examination. Besides these, a large number of prior patents have been exhibited, which, in the examination I have been able to give them, raise doubts of the validity of some of the contested claims. These doubts may be removed, but the partial proofs which suggest them ought to be remitted to an exhaustive discussion, and more careful scrutiny, at a final hearing.

In reaching this conclusion, I am not unmindful of the weight properly due to a judicial decision in favor of the patent. When made upon final hearing, and upon evidence which is only reproduced at a subsequent interlocutory hearing, it ought to be taken as conclusively establishing the complainant's title. Not so, however, if new evidence is exhibited, of such significance as would probably, if it had been presented, have changed the former decision.

This patent has been repeatedly in litigation, but in one case only—Bailey Washing & Wringing Mach. Co. v. Lincoln, [Case No. 750]—was it subjected to a careful judicial examination, at final hearing. If the able judge, who decided that case, had had before him the new evidence introduced at this hearing, I am not prepared to say that his conclusions might not have been materially modified, if not entirely changed by it. While, therefore, I would, without question, interlocutorily adopt his judgment of the effect of the proofs before him, I cannot discard the influence of doubts caused by new evidence of material pertinency and now decide "that the complainant's title and the defendants' infringement are so clear and palpable that the court can entertain no doubt on the subject."

The motion for a preliminary injunction is, therefore, denied.

[NOTE. Patent No. 22,539 was granted to J. Allender, January 11, 1859; reissued April 18, 1865, (No. 1,934.) For other cases involving this patent, see Bailey Washing & Wringing Machine Co. v. Lincoln, Case No. 750; Eureka Co. v. Bailey Co., 11 Wall. (78 U. S.) 488.]

Case No. 753.

In re BAILY.

[2 Ben. 437;[1] 1 N. B. R. 613, (Quarto, 177.)]

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

VOLUNTARY BANKRUPTCY — FILING PETITION — PLACE OF BUSINESS.

Where a bankrupt did not reside in the southern district of New York during the next six months preceding the filing of his petition, but, before his insolvency, had been in business in New York city, and had, during the whole of the said six months, carried on business in New York city as the agent and attorney of his brother, in buying and selling merchandise, keeping an office for that purpose with his brother's name upon the sign; *Held*, that the petition in bankruptcy was properly filed in the southern district of New York.

In bankruptcy. In this case the petition was filed on February 29th, 1868, and set forth that the petitioner [Tattnall Baily] had carried on business for six months, next immediately preceding the filing thereof, at the city of New York. A paper was afterward filed with the register by the bankrupt's attorney, declaring that the bankrupt did not reside within the southern district of New York during any part of the six months aforesaid; that for some time before his insolvency, he carried on business, on his own account, in the city of New York, and from that time to the filing of his petition, and during the whole of the said six months, had been carrying on business as the agent and attorney of his brother, in buying and selling merchandise, keeping an office for that purpose in the city of New York, with his broth-

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

er's name upon the sign, and well known to those who had dealings with him as so carrying on business at that office, the business having been done under a power of attorney and for a compensation of one half of the profits.

[The register certified to the court the question, whether the bankrupt was carrying on business in the southern district of New York, within said six months, giving it as his opinion that he was, and distinguishing this case from the case of In re Maggie, Case No. 8,951.]

[1] BY THE REGISTER. I am of opinion that he was. He was not carrying on business on his own account, but was the clerk of his brother, and yet it seems to me this is the proper answer. I submit the question with careful consideration in view of the decision of this court in Re Magie, [Case No. 8,951,] upon the certificate of Mr. Register Dwight, and in the belief that this conclusion is supported by the reasoning in that case of the register, and by the authority cited by the judge.

The bankrupt act of 1841 [5 Stat. 440] directed all petitions by any bankrupt, &c., to be filed in the district court of the district where the bankrupt shall reside, or have his place of business, at the time of filing such petition.

The act of 1867 [13 Stat. 517] requires the petition to be filed in the judicial district where the debtor has resided, or carried on business, for the six months next immediately preceding the time of filing such petition.

The petitioner, Magie, "was formerly in business for himself at Chicago, and has been engaged in looking after a personal matter since he came from Chicago, with an intent of returning there. He had been engaged as a book-keeper for a firm in New York city since January 1, 1868. Before that, and from October, 1867, he had been engaged in keeping books for another firm in New York city." He resided with his father in New Jersey.

Mr. Register Dwight, in this case, was of opinion that "the law intended to confer jurisdiction on those courts only where the petitioner would be known publicly as a resident and citizen, or where he had such business relations with the public generally as would equally cause him to be known," and he denied adjudication.

His honor, Judge Blatchford, thought the register correct in his decision, and that the principles laid down by this court in Re Kinsman, [Case No. 7,832,] in reference to a kindred provision in the bankrupt act of 1841, made it improper for the court to assume jurisdiction in this case.

In the case cited, the bankrupt lived with his family in Philadelphia, and between the first and the middle of March, 1842, he came to the city of New York, employed as agent for a machinist, and took board at a public hotel. He was superintending the erection of a building for manufacturing lead, and he described himself in his petition as "agent for machinist." The petition was presented on the 22d of March. If he arrived in New York on the 7th, he had been a fortnight there when he presented his petition; and nothing in the case showed he was there afterwards. The court said:

"To a certain sense the place of the most transient stoppage, a mere purchase, a bargain made by a man on his transit through a place, would render it for the time being his place of business.

"A fugitive or equivocal occupation, that may continue for a long period, or may terminate instantaneously, without any outward indications to mark its continuance or character, will not be sufficient to satisfy this provision of the law.

"More must be shown. It must appear that he has a fixed and notorious employment, pursued by him in such manner as to denote a place of business established by him, distinct from his place of residence."

It appears to me that this authority does not sustain the doctrine, which is supposed to be established without any qualification by the decision in the Case of Magie, [supra,] that where a bankrupt resides in one judicial district, and is employed as a clerk in another, he, therefore, cannot be heard as a petitioning debtor in the latter district. For it is well known that bankrupts, known to be such, cannot "carry on business" upon their own account. The very object of the bankrupt act is to liberate the honest and unfortunate debtor from a state of subjection and poverty, so that his enterprise and industry may be allowed full scope, for the equal benefit of the community and himself and his family. A trader doing business on his own account may indeed be a voluntary petitioner for discharge from his debts, or, under the provisions of the present law, he may for any act specified by the law be forced into bankruptcy; but, in the great number of cases of voluntary bankruptcy, the petitioner will be found to have been for some time, and, perhaps, for a long time, in some subordinate employment. And, I think, the act of congress contemplates such cases as being those where the petitioner "has carried on business" at the place where that employment was had. The speeches made in congress in support of the bill, and especially those of the Hon. Mr. Jenckes, of Rhode Island, chiefly able and influential in preparing it and securing its passage, show this. Judge Betts, in the Case of Kinsman, [supra,] uses this word "employment," and contrasts what is, as we commonly say, permanent employment, with a mere bird of passage, alighting at a hotel to superintend as "agent of machinist" some rising structure, such as the machinist may put up in some given period of time in any part of an extensive country, sending his agent with a

[1] [Opinion of the register reprinted from 1 N. B. R. 614.]

carpet-bag to the hotel of the place, while he superintends it, and soon receiving him back again at the shop.

"Notorious" is a term of relative and not absolute signification as used here. The employment need not be absolutely notorious, else few could be brought within its meaning, but it must be notorious among those to whom the petitioner is known and with whom he associates in a social, or business way, and it is quite certain that many persons who are clerks, and no more than clerks, are in this sense "notoriously" employed as such, and that permanently, using the word with as much accuracy and fitness as it can be used with, in any application of it to human affairs.

As a matter of fact it is notorious (though not, indeed, universally known), that many persons who have been and are petitioning debtors in bankruptcy, residing in other judicial districts, are clerks in the city of New York, employed in well known houses, men of talent, extensive acquaintance, and large influence. And some of these men, though clerks, are much more widely known than some persons who do business on their own account, and have signs over their doors with their names on them.

Many petitions have been filed in the city of New York by clerks residing in other judicial districts, once traders on their own account; and it is too late to file new petitions elsewhere, and if it were not, they are unable to incur the expense of new procedure.

Under these circumstances, and with a strong impression of the correctness of the view here taken, and of its agreement with all the opinions expressed in the cases cited, and of the importance of a rehearing upon this question, I respectfully submit this paper to the consideration of the judge.

EDGAR KETCHUM, Register.

BLATCHFORD, District Judge. I am of opinion that the petitioner was carrying on business for the six months next immediately preceding the filing of his petition, in the southern district of New York, within the meaning of the eleventh section of the bankruptcy act.

BAILY v. MILNER. See Case No. 740.

BAILY, (SHEPHERD v.) See Case No. 12,755.

BAIN, (HARMANSON v.) See Case No. 6,072.

Case No. 754.

BAIN v. MORSE.

[1 MacA. Pat. Cas. 90; 6 West. Law J. 372; 48 Jour. Fr. Inst. 58.]

Circuit Court, District of Columbia. March, 1849.

PATENTS FOR INVENTIONS—APPEAL—INTERFERENCE.

[1. Under the provisions of the act of congress of July 4, 1836, (5 Stat. 120, c. 357, § 8,) that, if an application be made for a patent that may interfere with patents issued or for which applications are pending, the commissioner shall give notice to applicants and patentees; that, if either be dissatisfied with the commissioner's decision "on the question of priority of right or invention," he may appeal therefrom; and that "proceedings shall be had to determine which, or whether either, of the applicants is entitled to receive a patent,"—the jurisdiction of the appellate tribunal over the question of priority of right or invention only arises where there is an interference, and on appeal the question of interference, as well as the question of priority of right, comes before the court for review.]

[Cited in Yearsley v. Brookfield, Case No. 18,131.]

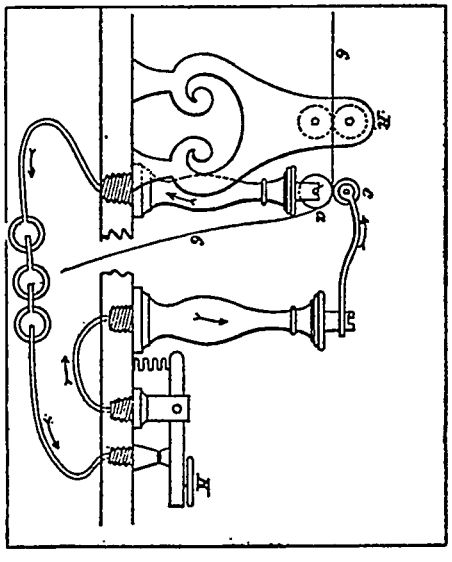
[2. The interference coming before the court for review on appeal under the act of July 4, 1836, (5 Stat. 120, c. 357, § 8,) is only an interference with respect to patentable matters; and, in deciding the question, the claims of the applicants must be limited to the matters specifically set forth as their respective inventions.]

[3. The applications of Morse (afterwards patent No. 6,420, May 1, 1849) and Bain (afterwards patent No. 6,328, April 17, 1849) purported to disclose a new system of telegraphy, consisting in the production of marks or discolorations on paper "chemically prepared" by the direct action of the galvanic current, and without the intervention of magnets or other intermediate devices. Both inventions proceeded upon the theory that the passage of a galvanic current through paper or other suitable material previously treated with any one of a variety of chemical solutions will produce discolorations or marks corresponding in number and length with the pulsations of the current. In the Morse apparatus the operator at the sending station produces currents corresponding to the dots and dashes of the Morse alphabet by the ordinary Morse key. At the receiving station, the prepared strip of paper is drawn by a register between a metallic cylinder or drum mounted upon a suitable standard, and a thin-edged platinum wheel held in contact with the strip by a metal spring, mounted upon a metal standard. The passage of the alternating currents from the platinum roller to the cylinder or drum through the strip produces the discolorations or marks which form the message. Morse claimed "the use of a single circuit of conductors for the marking of telegraphic signs, already patented, for numerals, letters, words, and sentences, by means of the decom posing, coloring, or bleaching effects of electricity acting upon any known salts that leave a mark, as the result of the said decomposition, upon paper, cloth, metal, or other convenient and known markable material." He also claimed the invention of the machinery described for the purpose stated. Bain's invention was designed to transmit a message through one machine by a single operation to any number of distant stations. The transmitting and receiving wires are combined in a single apparatus, one of which is placed at each station. The circuits are changed to transmit or receive at pleasure. The message is prepared or "composed" in permanent form by providing a slip of paper with perforations corresponding in length and arrangement with a predetermined system of signs or characters. This sending slip is wound upon a suitable roller, and is caused to pass between a transmitting roller and a comb or brush, which are normally in circuit. The non-conducting slip interrupts the flow of the current, except at such times as the perforations therein permit the brush to contact with the roller. By passing this slip between a number of transmitting rollers and brushes in separate circuits, but arranged in line in one machine, the message can be simultaneously transmitted to an indefinite

number of stations. In the receiving devices, the prepared paper is wrapped around cylinders or drums. When the cylinders are revolved at a regular speed, they are caused to traverse across the machine under a stylus or contact point, whereby the marks or discolorations are disposed in a regular spiral around the cylinder, and the message is read in lines from left to right, in the ordinary manner of writing or printing, when the sheet is unwound. *Held*, that as the battery, the circuit, the prepared paper, and the marking by the electro-chemical process were not new, and were not patentable by either party, the Morse invention must be restricted to the machine or apparatus by which he combined these elements, and produced the marks; that, as thus restricted, there was no interference between it and the Bain apparatus; and that letters patent should issue to Bain for his invention.]

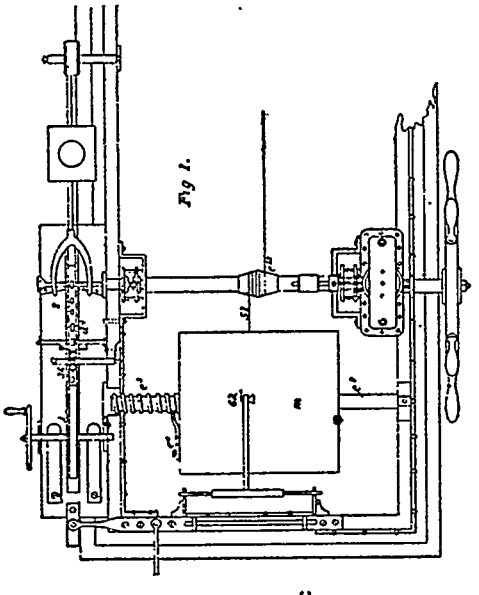
[Appeal from the commissioner of patents.]

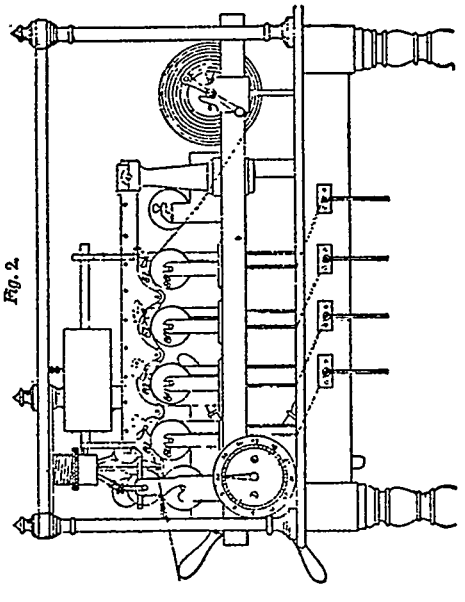
The applications in this case (afterwards patents to Morse 6420, May 1st, 1849, and to Bain 6328, April 17th, 1849) purported to disclose a new system of telegraphy, which consisted in producing marks or discolorations on paper "chemically prepared" by the direct action of the galvanic current, and without the intervention of magnets or other intermediate devices. The inventions of both parties proceeded upon the theory that the passage of a galvanic current through paper or other suitable material previously treated with any one of a variety of chemical solutions, as iodide of tin, sulphate of iron, acetate of lead, iodide of potassium, &c., will produce discolorations or marks corresponding in number and length with the pulsations of the current. The apparatus of Morse, as illustrated in the subjoined cut, was quite simple.



The operator at the sending station produces the alternating currents corresponding to the dots and dashes of the Morse alphabet by the ordinary Morse key K. At the receiving station the prepared strip 6 is drawn by a register R between a metallic cylinder or drum, a, mounted upon a suitable standard, and a thin-edged platinum wheel c, held in contact with the strip by a metal spring mounted upon a metal standard 6. The direction of the current is indicated by the arrows. The passage of the alternating currents from the platinum roller to the cylinder or drum through the strip produces the discolorations or marks which form the message.

Bain's invention was designed to transmit a message through one machine by a single operation to any number of distant stations. The transmitting and receiving wires are combined in a single apparatus, one of which is placed at each station. The circuits are changed to transmit or receive at pleasure. Fig. 1 is a plan view, showing the general arrangements only. Fig. 2 shows the devices for transmitting to a number of stations.





The message is prepared or "composed" in permanent form by providing a slip of paper with perforations corresponding in length and arrangement with a predetermined system of signs or characters. This sending-slip 2 is wound upon a suitable roller 1, and is caused to pass between a transmitting-roller d^4 and a comb or brush 36, which are normally in circuit. The non-conducting slip interrupts the flow of the current, except at such times as the perforations therein permit the brush to contact with the roller. By passing this slip between a number of transmitting-rollers 80 and brushes 81 (Fig. 2), in separate circuits, but arranged in line in one machine, the message can be simultaneously transmitted to an indefinite number of stations. The receiving devices are shown in the centre of Fig. 1. The prepared paper in the form of sheets is wrapped around cylinders or drums M (one of which is shown), either of which can be used while the other is being prepared. Steel slips or tongues e^4 on the cylinder take into a screw-thread e^3 on the fixed-shaft e^2. When the cylinders are revolved at a regulated speed by the cord 51 and the pulley e^{12} they are caused to traverse across the machine under the stylus or contact point 62, whereby the marks or discolorations are disposed in a regular spiral around the cylinder, and the message is read in lines from left to right in the ordinary manner of writing or printing when the sheet is unwound.

R. H. Gillet, for Mr. Bain.

1. Morse has not filed sufficient drawings nor deposited a sufficient model of his invention, nor has he described it in such full, clear, and explicit terms as to enable a person skilled in chemistry, electricity, and mechanics to construct and use the same to transmit intelligence. A local circuit only is shown; no centre connections are shown, nor any means of operating over long distances. No mode of preparing the paper chemically is described which is adequate to produce the results claimed. No telegraphic or other machinist can produce an instrument that will operate as and to the extent which Morse claims, and no chemist can produce the results he describes by complying with the specification. No evidence on this point was produced before the commissioner or is now before the judge. The reviewing tribunal is without any guide, except personally to read the specification and claim, and to examine the model and drawing of Morse's application, and determine whether by following the directions contained therein anything useful or important can be produced. The commissioner and examiners may be called by either party to testify under oath "in explanation of the principles of the machine or other thing" for which a patent is asked, but they cannot state facts or give opinions on other subjects. Bain denied the practicability of Morse's invention before the commissioner, and offered to go into proof upon that subject before the final hearing. The utility of his own invention was not denied. Under these circumstances, there was error in the decision of the commissioner in not ruling against Morse's claim; and the proper mode of correcting that error is to open the case for the production of full testimony on both sides.

2. There is in fact no real and substantial interference between the two applications. The underlying principles common to both machines are old, as admitted by the commissioner. The single circuit, the signs, and the use of chemically-prepared paper are separately old, and the invention of each party is restricted to his own particular combination and arrangement of devices by which these common principles are carried into effect. Bain uses chemical agents and the long telegraphic circuit, the earth making part of it, in a particular manner to produce the consequences which he describes. From a comparison of the drawings and models it will be apparent that the machines differ in form and substance. Morse's machine is incompetent to produce the effects described by Bain, if susceptible at all of practical use. It is denied that any operative machine could be produced by following the directions of those specifications. In a case of this kind proof should be resorted to.

3. The commissioner erred in allowing Morse to go into proof of his invention prior to his caveat and application, and at the same time refusing to allow Bain to make proof of his discovery before the date of his English patent of 1846. Unless the statute creates a difference in clear terms, the parties stand upon an equal footing before the patent office in all respects. The sixth section of the act of [July 4,] 1836, [5 Stat. 119,] removes the previous disabilities of foreigners, and declares that all persons may obtain patents under the circumstances and conditions therein named. The ninth section, it is true, raises a distinction between foreigners and citizens with respect to the payment of fees, requiring a citizen to pay $30, and a subject of Great Britain $500, and other foreigners $300. The question is whether a foreigner, having paid the requisite fee, is to be permitted to substantiate his right to a patent conferred upon him in terms by the sixth section, by showing, upon an issue of priority properly joined, when he in fact made the invention. No claim in the statute in terms makes this distinction between citizens and foreigners, whether they are prosecuting their cases ex parte or in interference. The seventh section, to which reference is made, relates exclusively to the ex-parte examination of an application. It provides that the commissioner shall in all cases issue a patent if it shall not appear, among other things, "that the same (invention) had been invented or discovered by any other person in this country prior to the alleged invention thereof by the applicant." This claim does not prohibit the foreign inventor from showing the date of his

invention and obtaining a patent, but provides that such prior discovery, if not patented or described, will not prevent the American inventor from also obtaining a patent for the same. Nor does the proviso of the fifteenth section of the act furnish any rule governing the issuance of patents. The proviso in question declares that no patent, in a suit brought thereon, shall be held to be void on account of the invention, or any part thereof, having been before known or issued in any foreign country. It does not appear, however, that in such a case the plaintiff could recover. By the enabling clause of the section judgment will be rendered for the defendant, with costs, if it shall appear, among other things, that the patentee was not the first and original discoverer of the thing patented, while the later American inventor cannot recover against a prior foreign inventor; so there is nothing in the section to prevent the prior foreign inventor from sustaining his patent against all subsequent inventors.

The eighth section, establishing and regulating interferences, makes no exception against the foreign inventor.

Amos Kendall, [and with him Alexander H. Lawrence,] for Morse.

1. The only question submitted for decision in case of conflicting claims for patents is "priority of invention." St. [July 4,] 1836, [5 Stat. 120,] § 8; St. [March 3,] 1839, [5 Stat. 354,] § 11.

2. The appeal in such controversies must be decided in a summary way on the evidence produced before the commissioner. St. [March 3,] 1839, [5 Stat. 354,] § 11.

3. The chief justice has no authority to receive additional testimony, except that of the commissioner or examiners of the patent office, and that only "in explanation of the principles of the machine;" (Act 1839, § 11;) nor has he authority to return the case to the patent office for the purpose of taking additional testimony.

4. All the allegations and arguments of the other side, therefore, involving the questions of utility, novelty, and patentability are irrelevant and aside from the point at issue.

5. The contention by Bain that there is no conflict between his claims and those of Morse is an admission that Morse is entitled to all he claims. In this view, Bain should disclaim all that Morse claims, and go his way.

6. But there is an interference. Bain's third claim probably interferes with Morse's first claim. If granted, Bain could do all that Mr. Morse claims an exclusive right to do. He could write Mr. Morse's characters precisely as Morse does; and therein consists the interference.

7. Coming to the question of priority of invention, Morse was the first man in christendom, so far as we are advised, who conceived the idea of a telegraph by the chemical action of the electric fluid. In his application he swears that he conceived the idea in 1832, and the affidavits filed show he was experimenting upon the idea at that time. This was before Davy, Bain, or any other European inventor, so far as we are informed, had considered the subject. In 1846, as shown by the affidavit of his son, he had matured an instrument; in June, 1847, he filed his caveat, and in January, 1848, applied for a patent. By that time he was cut out, like all other inventors, from claiming the general principles of the apparatus by Davy's patent, dated July, 1838, and enrolled January, 1839, which disclosed the use of several circuits for marking parallel series of signs or discolorations, and by Bain's patent of 1843, for copying surfaces by the use of a single circuit of conductors.

8. Can a foreign inventor go behind his foreign patent to prove priority of invention? Mr. Bain says he can. The patent office and the attorney-general say he cannot. It is said that the citizen and an alien, neither having a patent abroad, stand on the same footing with respect to application for patent in this country, and have the same latitude in proving priority of invention. It is sufficient to say that this is not the state of facts before the court. In this case the alien has a foreign patent, and the question is, can he go behind that patent. The privilege is claimed for Mr. Bain for the purpose of putting him on an equality with Mr. Morse. It is singular that Mr. Bain does not perceive that the privilege he claims is not allowed to American citizens. If Mr. Morse had applied for a patent the same day that Mr. Bain did he could not have obtained one, because Mr. Bain had a patent for the same thing in England. The patent office could not allow him to go behind Bain's foreign patent to prove priority; yet it is maintained that Bain himself is subject to no such limitation. Aliens are those to be preferred to citizens. It is only when the application for a patent has been made here before the date of the foreign patent that the citizen is permitted to go behind that patent to prove priority of invention. See, however, Bartholemew v. Sawyer, [Case No. 1,070,] and later cases. If Mr. Bain had made an application here before he took out his patent in England, he also could have gone behind that patent to prove priority. In point of fact, therefore, the law and the decisions of the patent office place the foreigner and citizen upon precisely the same footing in these respects; and the reason Bain cannot go behind his foreign patent is because he made no application for a patent here until after he got one there.

9. The commissioner of patents is arraigned for deciding that in the eye of the American law the specification forms a part of the English patent, and that the date of enrollment, and not the date of sealing, is the true date of such a patent. He might have gone further, and stated that, in the eye of the English law, the specification is part and

parcel of the patent. Hindmarch on Patents. Every patent issued in England is an incomplete instrument until the specification be enrolled; and if it be not completed by enrollment within six months, the inchoate grant becomes absolutely void. Specifications in England sometimes embrace inventions not thought of when the patent was sealed. It cannot be supposed that an invention so made or incorporated into the English patent would bar an American discoverer whose invention was subsequent to the sealing of the patent, but prior to the invention of the Englishman and the sealing of his caveat. Such a state of the law would open the door to great frauds. It is not necessary for Morse to describe fully or at all the chemical solutions used by him. Their capacity to make marks by the action of electricity was well known, and is not here claimed. It is well-settled law that a patentee need not describe in his specification things used by him which are well known, and also that a specification which, instead of describing a well-known thing, refers to a description given in a prior patent, is good.

The following extracts are taken from the reasons of the commissioner in support of his decision:

The decision implied that the invention (regarding the claims of both parties as the same) was new, original, useful, and therefore patentable. It implied, also, that the materials and mechanism, and the modus operandi, as set forth by both parties, were adequate to the results claimed, and that the specifications, drawings, and models of both parties were in substance sufficient to enable the undersigned to understand and comprehend the invention, as well as persons skilled in the particular art to which it relates. All these questions were preliminaries to the question of interference, and are not, therefore, in the opinion of the undersigned, involved in this appeal. The only question involved in the interference declared to exist between the claims of the two parties is the priority, according to the patent law of the United States, of their respective inventions of the matters claimed by each of them as new and original. * * *

The undersigned has decided that the drawings, models, and specifications were sufficient in both applications before he adjudged the interference. The sufficiency of the models, drawings, and specifications is a question, so far as it affects the issue of a patent, which is reserved alone for the commissioner. He determines it upon the evidence submitted by the party making the application. That evidence is the model, drawings, and specifications. The law has made no provision for trying the question in any other way. It has made no provision to allow any party or person to come in and offer testimony to show the insufficiency of the models, &c., of an applicant for a patent. There is no mode pointed out by law for trying the question. * * *

It is proper to remark, further, that Bain offered no evidence to the commissioner of the insufficiency of Morse's model, &c. He merely alleged in argument that they were not sufficient. The commissioner, therefore, had no other evidence before him than the model, &c., and upon that evidence he decided that they were sufficient. As no question as to the admissibility or inadmissibility of evidence on this point came before the commissioner, it is not a proper matter to bring before your honor on this appeal. See section 11, Act Approved March 3, 1839, [5 Stat. 354.] The said Bain alleges, as his second reason for the reversal of the decision of the undersigned, that "there is in fact no real and substantial interference between the two applications." The reply to this reason is substantially set forth above in the answer by the undersigned to the first reason for the reversal of his decision. But, in further reply, the undersigned states that, in support of the proposition contained in his second point, the said Bain supposes a case in which the same ends, being attained by different means, would not justify an interference. It is admitted that some of the features of Bain's invention differ from any found in Morse's; and Bain's claims to these particulars constitute no part of the interference between the two contestants; nor is a patent for those parts refused.

But, as has been before stated, the principal claims in the two applications were identical in substance, and it was upon them that the interference was declared. Parties, however, may come in direct conflict in their claims, though each may use different means to attain the same ends. Such cases often occur. Suppose, for instance, said Bain and Morse both used a chemically-prepared paper upon which to make telegraphic signs, and that each of them described paper prepared with such chemicals as they preferred to use, both differing as to the kind of chemical material adopted, and neither laying any special claim to their own chemicals for this purpose, but both claiming broadly the use of chemically-prepared paper for making these marks as telegraphic signs,—can it be doubted in such a case that an interference exists; that the claims, and in fact the inventions, are identical?—for neither party will limit his invention to the use of a special kind of paper. Indeed this would be obviously futile. It is plain, then, that some of the means may differ, and yet the inventions, in all patentable particulars and claims, be the same. If either party should attach any value to the special points of difference, he should lay separate claims to them. The interference in the present case was declared only upon those claims actually conflicting, and the parties so notified. The objection by Bain that Morse's inven-

tion was impracticable, because he did not describe a long telegraphic circuit, or the use of the earth as a part of the circuit, must be regarded as a cavil. All inventions for telegraphing by galvanism are of necessity made upon the supposition of a long circuit, though the experimental trials may be made through only few feet of wire. A long telegraphic circuit has no special signification in this case, and neither party claims a long or a short circuit or using the earth as a part of the circuit. The earth has been used as a part of the circuit in Morse's telegraph since its first establishment. A single circuit, however, has a special meaning and importance in both their present inventions. It is plainly demonstrable, in fact it must necessarily follow, that a plan of operations which will work successfully in a small room will work equally well upon the most extensive scale, provided the galvanic force be increased in the proper proportion to the increase of the extent of the circuit. * * *

The said Bain, as the third ground of appeal from the decision of the undersigned, alleges "that the commissioner should have declared the true date of Bain's patent to be the one appearing on its face, to wit, December 12th, 1846, which was before Morse's application or caveat." In order that your honor may fully understand the nature of the decision of the undersigned upon this point, and therefore be better enabled to judge of its correctness, he will proceed briefly to state its nature and the grounds on which it was made. The decision, in short, was, that in cases affecting the rights of other persons claiming priority or originality of invention, the true date of the English patent is the day of the enrollment of the specification, and not the day of the sealing of the patent. The grounds of the decision are to be found in the following facts and considerations: The English patent law provides that the inventor may file in the appropriate office the title of his invention, describing it briefly, and have his patent sealed; he is then allowed four months, if he does not intend to procure a patent in Scotland, or six months if he does so intend, to enroll in the appropriate office a full and complete description of his invention, technically called a specification, duly executed under hand and seal, when his right to the exclusive privilege which the patent secures becomes perfect and absolute. Until this full and complete description or specification is enrolled, the public are not advised of the particular nature of the invention of which he claims to be the author. This information he is bound to give, by the enrollment of his specification within the four or six months, as the case may be, or his patent becomes void. Until this enrollment of his specification, the patent is an imperfect or inchoate instrument, liable to be defeated by the non-performance, with the time specified, of the condition on which it was granted. It is not a perfect, complete, and absolute instrument until this condition is performed. Therefore, until the inventor has enrolled his specification, it may in truth be said, notwithstanding his patent has been sealed, that his invention has not been patented. Such, in substance, are the provisions of the English law with regard to the patenting of inventions. See Hind. Pat. pp. 70, 71, 157, 158.

The law and practice of this country are different. Here it is required that the model, drawings, and specification shall be filed, the invention examined, the patent recorded on the records of the patent office, and the specification enrolled on parchment and annexed to the patent before the instrument is sealed. In short, it is required to be a full, complete, and unconditioned instrument before it is delivered to the patentee. His title to his invention is absolute the moment his patent is sealed and signed by the proper officers. Our law knows no such thing as a conditional patent, liable to be confirmed or defeated by the performance or non-performance of some proviso or condition expressed in it. Its issue implies every requisite which is necessary to make it a valid and unconditional instrument, conveying to the patentee an absolute title to the invention which it describes. And in accordance with this view of the subject, our law, when it speaks of an invention as having been "patented" in this or a foreign country, implies that such foreign patent is perfect and complete, and not one liable to be defeated by the non-performance of a condition expressed in it. Section 7 of the act of July 4, 1836, [5 Stat. 119,] makes it the duty of the commissioner to grant a patent to the applicant, provided his invention has not been "patented" or described in any publication in this or any foreign country. Now, how is it possible for the commissioner to know what has been patented in a foreign country if such foreign patent does not contain a full description (or specification) of the thing patented? Suppose, when Mr. Morse made his application for a patent for his invention, some English work had contained the general statement that Mr. Bain had had a patent sealed on a particular day for an electro-chemical telegraph; how is the American commissioner to know from that general description what that invention of Mr. Bain is, and whether or not it is the same which is claimed by Morse? The thing is impossible; and such impossibility shows conclusively the correctness of the construction which the undersigned has put on the word "patented" in our law. Therefore it cannot be said, in the meaning of the American law, that an invention has been patented in England, or anywhere else, until every condition necessary to make such patent complete and absolute has been complied

with by the patentee; and, therefore, the true date of an English patent, when it comes in conflict with the rights of the American inventor, must be the day on which it became a complete, perfect, and unconditional instrument.

And this construction finds an analogy in the well-known principles of common law relating to the dates of deeds and other instruments of writing. An instrument in writing under seal does not become a deed until it is delivered, and the day of its delivery is its true date. It may even be an impossible date—for instance, the 30th of February; yet if it was in fact executed on the first day of January, that would be its true date for all legal purposes. Deeds are also conditional, subject to be confirmed or defeated by the performance or non-performance of some stipulated act between the parties. It may depend also upon some event or contingency, which may confirm or defeat it. In all which cases it is an incomplete or imperfect instrument until the performance of the act or the happening of the event upon which its validity depends, and then it becomes an absolute and unconditional instrument or a nullity. These views seem so conclusive upon the mind of the undersigned that he does not deem it necessary to consider the question further, nor to follow the learned counsel for Mr. Bain, through the ingenious and elaborate argument which he has presented in support of his position, much of which might be very pertinent were the question pending before an English tribunal, under the laws of England, but is not pertinent before an American tribunal and under the laws of the United States. The undersigned respectfully refers your honor to his decision in this case for the precise nature of his adjudication on this point, and the reasons in favor of the same. It is proper to remark that our law makes provision for antedating patents in certain cases; but a patent cannot bear date before the day on which the application was filed in the patent office. The undersigned deems it proper to notice here an authority cited by the learned counsel for Mr. Bain, which he deems conclusive; which authority is found in an abstract of the English patent law prepared by an English solicitor of patents for the undersigned, and published in his annual report to congress for 1847, page 790. The correctness of that abstract is not affirmed by the undersigned, nor does he believe that it is a correct statement of the English law. He relies, rather, upon Hindmarch, an English author of high repute, before cited, for a correct statement of the English law on this point and its construction by the English courts of justice.

The said Bain assigns as his fourth reason why the decision of the undersigned should be reversed "that the commissioner erred in allowing Morse to go into proof of his invention prior to his caveat and application, and at the same time refusing to allow Bain to make proof of his discovery before the date of the English patent of 1846." The correctness of the decision of the undersigned to which this exception is taken depends upon the question whether or not our law makes a distinction between the rights of an American applicant and a foreign applicant, as affected by a question of priority or originality. And on this point the undersigned can add but little, if anything, to the force of the cogent and luminous opinion of the attorney-general, to whom the question was submitted; which opinion accompanies the appeal, and to which your honor is respectfully referred. On reference to the seventh section of the act of 1836, it will be seen that there are two grounds on which the commissioner is bound to refuse a patent to the applicant, viz.: First, if the thing sought to be patented has first been "invented or discovered by any other person in this country;" and second, if it has been "patented or described in any printed publication in this or any foreign country." If the thing has been invented by any other person in this country, but not described, the commissioner is bound to refuse a patent. But he is not bound to refuse a patent if it has been invented in some foreign country, but not "patented or described in some printed publication in this or some foreign country." The principle that seems to be plainly laid down by our law with regard to the matter is, that in a contest for priority between two persons claiming to have invented the same thing in this country priority as well as originality must be proven. But in a contest between a person who has made the invention in this country and one who has invented the same thing in another country, originality in the American inventor is sufficient ground for awarding the patent to him, although the invention of the other may have in fact been prior in point of time in a foreign country. This distinction is obvious and palpable, and is intended to protect the person who invents a thing in this country from being defeated in his rights by proof of the invention of the same thing in a foreign country, if such invention has not been patented or described as our law requires. The fifteenth section of the act of [July 4,] 1836, [5 Stat. 123,] recognizes this distinction in defining the ground and mode of defense in suits for infringement.

When there is no foreign claimant of the same invention, there can be no doubt as to the right of the American inventor, whether on an application for a patent or in a suit for infringement. In the one case the American commissioner would be bound to grant the patent to the American inventor, the latter conforming to the provisions of the law with regard to the mode of making the

application, notwithstanding the thing claimed as new had been "invented and discovered" in a foreign country, but had not been "patented or described in some printed publication in this or some foreign country." And in an action of infringement, the defense that the thing in dispute had been "invented" in some foreign country, but not "patented or described," &c., would have to be ruled out for the same reason. In both instances originality, and not priority, is a sufficient ground to sustain the claim of the American inventor. To make the case more obvious, suppose Morse had made his application for a patent for his improvement in the telegraph before Bain had applied and before he had actually had his invention patented in England. If Bain's invention had not been "described," &c., the American commissioner would be bound to grant a patent to Morse, although Bain had in fact invented his telegraph before Morse had invented his. And suppose, further, that some person had infringed Morse's patent before Bain had patented his invention in this country, and an action had been brought by Morse for the recovery of damages for such infringement; would it be pretended for a moment that the fact that Bain's invention was prior in point of time to Morse's would be a bar to the recovery of damages by Morse? The provisions of the fifteenth section of the act of 1836, precludes such defense in express terms. And if the doctrine of the learned counsel for Bain is correct, would it not operate as a virtual repeal of the fifteenth section, so far as it relates to this subject? In all cases where a discovery has been kept a secret in a foreign country, and should afterwards be discovered and patented by some person in this country, all that the infringer of the American patent have to do would be to hunt up the foreign inventor, procure a patent in his name in this country, and plead it in bar to the further prosecution of the action, or produce it in evidence, and clearly show that the plaintiff had no cause of action. The American congress intended no such absurdity when it enacted the provisions of the fifteenth section of the act of 1836. Now the attorney-general, after taking a similar view of the question which the undersigned has submitted, very pertinently remarks that the American commissioner cannot be required to grant a patent which the courts of justice in this country would be bound to set aside.

The learned counsel for Mr. Bain has, while arguing his fourth point, much to say with regard to natural right and the rights of foreigners. It is not proposed by the undersigned to go into any metaphysical disquisition upon natural rights, nor how much all rights of property depend upon positive law. He would simply remark, in reply to the learned counsel, that foreigners have no rights in other sovereignties than that in which they are born, except what has been expressly conceded to them by the sovereign power of the countries to which they may go. They cannot even enter the limits of a foreign jurisdiction except by permission, express or implied, of the sovereign power. They have no legal privileges in the country to which they go except what are expressly granted to them. And all privileges which they are permitted to enjoy are granted as matters of favor and not of right. See Vatt. Law Nat. c. 7, § 94, and following sections; and Id. c. 8. But the right of the American inventor is recognized by the constitution. See article 1, § 8. The right may be extended to the foreigner, and it may be granted to him conditionally or in a qualified manner, or it may be absolutely refused; and this upon the general principles of national law which regulates the comity and courtesies of nations in their intercourse with each other. And the legislation of congress has been in accordance with this view of the subject. By the act of December [February] 21, 1793, [1 Stat. 318, c. 11,] only citizens of the United States were permitted to take out patents. By the act of April 17, 1800, [2 Stat. 37, c. 25,] the privilege was extended to aliens having resided two years in the United States. By the act of July 13, 1832, [4 Stat. 577, c. 203,] the privilege was extended to aliens resident who had declared their intention to become citizens. The privilege was further modified with regard to aliens by the act of July 4, 1836, [5 Stat. 119.] The right of the foreigner to take out a patent in this country for an invention or discovery made by him is precisely what our law defines it to be, and no more. Our statutes are construed according to their true intent and meaning so far as they affect the rights of foreigners, but they are to have no forced construction for the benefit of aliens, because the latter have no constitutional rights here further than has been expressly conceded to them by the sovereign power of the Union. Without following the learned counsel of Mr. Bain through the various steps of his elaborate argument on this point, much of which is inappropriate and irrelevant, and based upon a false assumption of facts, the undersigned again respectfully refers your honor to the able and conclusive opinion of the attorney-general herewith submitted, which in his view covers the whole of the question. That the commissioner would be obliged to issue a patent to "the inventor," (as is so earnestly insisted upon,) if a foreigner, to the exclusion of the American inventor, whose invention was subsequent, might be true if the foreigner had made his invention "in this country." Bain having made his abroad, does not come within the purview of our statute, even if his invention in point of fact was prior to Morse's. * * *

The learned counsel contends that the undersigned should have refused a patent to Morse on the ground that his invention was

not of "practical utility." The "practical utility" of an invention is seldom determined at the patent office. The term "utility" has received from the courts a legal interpretation. According to that interpretation, it means any degree of utility; not that it shall be more useful than others. By the term "useful inventions" in the patent act of the United States is meant an invention that may be applied to a beneficial use in society, in contradistinction to an invention which is injurious to public morals, the health, or the good order of society. Bedford v. Hunt, [Case No. 1,217;] Kneass v. Schuylkill Bank, [Id. 7,875.] It is not necessary that the invention should be of such general utility as to supersede all other inventions previously in practice to accomplish the same purpose; nor is it important that its practical utility should even be limited, for the law does not look to the degree of utility. [Bedford v. Hunt, supra.] Acting in conformity to the spirit of the authorities above cited, the question of utility, any further than it concerns the public morals, the health, and good order of society, is not one which is particularly inquired into by the commissioner of patents in determining the patentability of an invention. Indeed in some cases it would be impossible for him to decide whether or not a machine was practically useful. That, generally, must be ascertained by actual experiment, which it would be impossible for the commissioner of patents in most cases to make. Therefore the general rule adopted by the patent office with regard to inventions is to decide upon the novelty, priority, and originality, and leave the question of utility to the public and the courts of justice to settle. But, as before remarked, (in answer to Bain's first reason,) this question of utility was not raised by the interference. It was a point settled by the undersigned before he ascertained that the claims of the respective parties did interfere. He decided that the inventions of both were useful and patentable before he declared the interference. In deciding that both claims were substantially the same, he decided that both inventions were useful, and he decided upon similar testimony, viz., the models, drawings, and descriptions of the two parties. He did not, as is alleged, decide expressly that Bain's invention was useful. The question was never raised. And with regard to Morse's, he had decided that it was useful before Bain had contended that it was not. But it is respectfully submitted that the question of utility cannot be raised by any second party on the issue of a patent. The law points out no mode for testing in the patent office the practicability of an invention, except by the examination of the specifications, drawings, and model. It has provided no way to take testimony touching that question. In short, prior to the issue of a patent, it is a question reserved for the commissioner alone, to be determined on the case before him. If he doubts, he may require experiments to satisfy him. If he does not doubt, nobody else has a right to raise the question nor to contest the issue of the patent on that ground, and he is bound to grant it. With these views, hastily put together, the undersigned submits the various questions raised by the learned counsel of Bain to the enlightened consideration and decision of your honor. All which is respectfully submitted.

Edmund Burke, Commissioner of Patents.

For convenience of reference, the opinion of the attorney-general upon the question of law presented in this case is given in full:

Sir: I have the honor to reply to your letter submitting an inquiry propounded by the commissioner of patents, whether a foreign patentee can go behind the date of his foreign patent and prove the actual date of his invention, in order to defeat the right of an American inventor, there having been no previous description of the invention in any printed publication; or, in other words, whether the fact of an invention or discovery abroad, which had not been patented nor described in any printed publication, will defeat a patent to an original inventor, who has invented or discovered the same thing in this country. The answer to be given to this inquiry depends upon the act of congress of July 4, 1836, [5 Stat. 119,] when the patent laws of the United States underwent a revision, and several important provisions were for the first time introduced. By the sixth section it is enacted "that any person or persons having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter not known or used by others before his or their discovery or invention thereof, and not, at the time of his application for a patent, in public use or on sale with his consent or allowance as the inventor or discoverer, and shall desire to obtain an exclusive property therein, may make application in writing to the commissioner of patents, expressing such desire, and the commissioner, on due proceedings had, may grant a patent therefor." The same section provides that "the applicant shall also make oath or affirmation that he does verily believe that he is the original and first inventor or discoverer of the art, machine, composition, or improvement for which he solicits a patent, and that he does not know or believe that the same was ever before known or used, and also of what country he is a citizen."

Thus far the law is left substantially as it stood before, and, if not accompanied by any new provisions, would be controlled by previous adjudications, founded in a considerable degree upon enactments now become obsolete. But the seventh section introduces a new rule, which seems to be decisive of the

question under consideration. It declares "that on the filing of any such application, description, and specification, and the payment of the duty hereinafter provided, the commissioner shall make, or cause to be made, an examination of the alleged new invention or discovery; and if, on any such examination, it shall not appear to the commissioner that the same had been invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant, or that it had been patented or described in any printed publication in this or any foreign country, or had been in public use or on sale, with the applicant's consent or allowance, prior to the application, if the commissioner shall deem it to be sufficiently useful and important, it shall be his duty to issue a patent therefor." The rule here prescribed to the commissioner is afterwards reaffirmed and carried out in the form of a proviso in the fifteenth section, prescribing a rule of adjudication, namely: "That whenever it shall satisfactorily appear that the patentee, at the time of making his application, believed himself to be the first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof, having been before known or used in any foreign country, it not appearing that the same, or any substantial part thereof, had been before patented or described in any printed publication." While, therefore, the seventh section declares that a patent shall issue to the inventor (all other conditions being complied with) if the thing proposed to be secured had not "been invented or discovered by any other person in this country," the proviso of the fifteenth section enacts that the patent shall not be held void (all other conditions being complied with) "on account of the invention or discovery, or any part thereof, having been before known or used in any foreign country."

These provisions introduce an important modification of the law of patents, designed to protect the American inventor against the injustice of being thrown out of the fruits of his ingenuity by the existence of a secret invention or discovery abroad—that is to say, one not patented, and not described in any printed publication. It is well known that such secrets of trade exist in great numbers, and are designedly withheld from the public; and when, therefore, the American inventor has been so fortunate as to invent or discover the same thing, he is as great a public benefactor as if the secret did not exist in any foreign country. And it was the intention of congress to secure to him his rightful property in the result, and not permit it to be defeated by the foreign inventor coming forward afterwards either for a patent or without a patent. There is no more reasonable or just foundation or title of property than that which has been so imperfectly secured by law in the products of mind; and it is to be regarded as the presumed intention of the legislature effectually to secure it in every case where the reason of the law will apply and the language used will admit of a favorable interpretation. In the present case the intention is clear, and the language explicit and unequivocal, leaving no room for construction. The proviso, without the aid of the sixth section, furnishes a clear rule of adjudication, by which the rights of parties are ascertained; and it is impossible that an executive officer should regard that as an objection to the grant of a patent which the courts of law are bound to overrule as unavailable. The objection, therefore, which is now presented—that an original bona fide inventor in this country, who verily believed himself the original and first inventor or discoverer at the time of his application, and did not know or believe that his invention or discovery was ever before known or used; and when, in fact, it had not been before invented or discovered by any other person in this country, and had not itself, or any substantial part of it, been before patented or described in any printed publication in any country; that the American inventor, in such a case, is not entitled to a patent for his discovery, because it had been before known or used in a foreign country,—is directly opposed to the intent, the policy, and express words of the act of congress, and is without any legal foundation.

In such a case the American inventor is, in contemplation of law under the provisions of the act of congress, the original and first inventor. The fact that an invention not patented, and not described in any printed publication, has been before known or used in any foreign country, is rendered immaterial, except so far as it may have come to the knowledge of the applicant, and may thus conflict with the oath or affirmation which he is required to take, or with his claims as an original inventor. If he is an original inventor, and is in a condition to take the oath or affirmation prescribed, then the act removes the supposed objection out of the way, requires the commissioner to issue the patent, the courts to declare it valid, and establishes the American right, to the exclusion of the foreign discovery, which has not, in either mode indicated by the act of congress, been communicated to the public.

I have the honor to be, very respectfully, sir, your obedient servant,

Isaac Toucey.

Hon. James Buchanan, Secretary of State.

CRANCH, Chief Judge. The commissioner, upon hearing, decided that Mr. Bain's claim interfered with Mr. Morse's, and that Mr. Morse was the first inventor, and rejected the claim of Mr. Bain. From this decision Mr. Bain has appealed. It is contended by the counsel of Mr. Morse that the judge, upon appeal, has no jurisdiction of the question of interference; that an appeal is

given solely upon the question of priority of invention; that upon the question of interference the decision of the commissioner is conclusive. Whether it be thus conclusive, then, is the first question to be decided. By the act of [July 4,] 1836, [5 Stat. 120,] c. 357, § 7, it is enacted that "if the specification and claim shall not have been so modified as, in the opinion of the commissioner shall entitle the applicant to a patent, he may, on an appeal and upon request in writing, have the decision of a board of examiners, to be composed of three, &c.; and on examination and consideration of the matter by such board, it shall be in their power, or of a majority of them, to revise the decision of the commissioner, either in whole or in part; and their opinion being certified to the commissioner, he shall be governed thereby in the further proceedings to be had on such application." This section is applicable to cases where there is no conflicting applicant, and shows that the legislature, by saying "if in the opinion of the commissioner," &c., did not intend to make that opinion conclusive. On the contrary, it provides "that the board shall be furnished with a certificate in writing of the opinion and decision of the commissioner, stating the particular grounds of his objection, and the part or parts of the invention which he considers as not entitled to be patented; and that the said board shall give reasonable notice to the applicant, as well as to the counsel, of the time and place of their meeting," &c. All these provisions were evidently intended to enable the board of examiners to revise the opinion and decision of the commissioner, and show that his opinion was not to be conclusive. By the eighth section of the same act (1836) it is enacted "That whenever an application shall be made for a patent which, in the opinion of the commissioner, might interfere with any other patent for which an application may be pending, or with any unexpired patent which shall have been granted, it shall be the duty of the commissioner to give notice thereof to such applicants or patentees, as the case may be; and if either shall be dissatisfied with the decision of the commissioner on the question of priority of right or invention on a hearing thereof, he may appeal from such decision on the like terms and conditions as are provided in the preceding section of this act; and the like proceedings shall be had to determine which, or whether either, of the applicants is entitled to receive a patent as prayed for."

The question of priority of right or invention necessarily implies interference. The commissioner, before he could decide the question of priority, must have decided that of interference, for without interference there can be no question of priority. Before I can have jurisdiction of the question of priority, I must be satisfied that there is an interference; and I must decide the question of jurisdiction, as well as any other question which arises in the cause. The opinion of the commissioner (mentioned in the eighth section, that interference exists) only justifies him in giving notice thereof to the other applicant and appointing a day to hear the parties upon that question. He decides it only pro hac vice, and for that purpose only. Upon the hearing, he is to decide; and from that decision, if either shall be dissatisfied with it on the question of priority, including that of interference, he may appeal; and upon such appeal, as I understand the law, the judge, in case of real interference, may "determine which, or whether either, of the applicants is entitled to receive a patent as prayed for." The scope thus given to the judge is broad enough to include the question of interference, as well as that of priority, if it should arise. By the act of [March 3,] 1839, [5 Stat. 354,] c. 88, § 11, it is enacted "That in all cases where an appeal is now allowed by law from the decision of the commissioner of patents to a board of examiners, provided for in the seventh section of the act to which this is additional, the party, instead thereof, shall have a right to appeal to the chief justice of the district court of the United States for the District of Columbia by giving notice thereof to the commissioner and filing in the patent office, within such time as the commissioner shall appoint, his reasons of appeal specifically set forth in writing, and also paying into the patent office, to the credit of the patent funds, the sum of twenty-five dollars. And it shall be the duty of the said chief justice, on petition, to hear and determine all such appeals, and to revise such decisions, in a summary way, upon the evidence adduced before the commissioner, at such early and convenient time as he may appoint, first notifying the commissioner of the time and place of hearing, whose duty it shall be to give notice thereof to all parties who appear to be interested therein in such manner as the said judge shall prescribe. The commissioner shall also lay before the said judge all the original papers and evidence in the case, together with the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal; to which the decision shall be confined."

One of the reasons of appeal in this case is that there is no real and substantial interference between the two applications. The question of interference, therefore, is involved by the reasons of appeal, and must be decided by the judge. By limiting the jurisdiction of the judge to the points involved by the reasons of appeals, the legislature has affirmed it to that extent. The interference mentioned in the eighth section of the act of 1836 must be an interference in respect to patentable matters; and the claims of the applicants must be limited to the matters specifically set forth as their respective inventions; and what is not thus claimed may, for the purpose of this prelim-

inary inquiry, be considered as disclaimed. The question, then, is, Does Mr. Bain claim a patent for any matter now patentable for which Mr. Morse claims a patent? To answer this question it is necessary to ascertain for what patentable matter Mr. Morse now claims a patent. In his specification filed January 20th, 1848, he says: "What I claim as my own invention and improvement is the use of a single circuit of conductors for the marking of my telegraphic signs, already patented, for numerals, letters, words, and sentences, by means of the decomposing, coloring, or bleaching effects of electricity acting upon any known salts that leave a mark, as the result of the said decomposition, upon paper, cloth, metal, or other convenient and known markable material. I also claim the invention of the machinery, as herein described, for the purpose of applying the decomposing, coloring, or bleaching effects of electricity acting upon known salts, as hereinbefore described." The commissioner in his written decision in this case says: "Such use of a single circuit" (i. e., to produce marks upon chemically-prepared paper) "is not the point at issue; nor is this claimed by either party. Said Morse claims using a single circuit of conductors for a certain purpose or in a certain way, viz., to mark his telegraphic signs, and also claims the machinery by which he accomplishes this purpose. Said Bain does not specifically mention in his claim using a single circuit, though this must be considered as an essential part of his invention and claim, and is necessarily involved in the final clause of his claim, to wit: 'So that in either case these form the received communication, substantially in the manner and with the effects described and shown.'" The commissioner proceeds: "The third clause of the claim of said Bain, with which the two claims of said Morse interfere, is as follows, to wit: 'Third. The application of any suitable chemically-prepared paper, without regard to the chemical ingredients used for such a purpose, to receive and record signs forming such communications, such signs being made by the pulsations of an electric current or currents transmitted from a distant station, said current operating directly and without the intervention of any secondary current or mechanical contrivance, through a suitable metal-marking style that is in continuous contact with the receiving paper, thereby making marks thereon, which marks correspond with groups of perforations in the paper composing the transmitted communication, or may be given by the pulsations from the spring 45 and the block 46; so that in either case these form the received communication, substantially in the manner and with the effects described and shown, including any merely practical variations, analogies, and equivalents in the means employed and the effects produced thereby.'" The commissioner in his written decision says: "The invention, it will be seen by the reference to the specifications of the parties respectively, does not consist in the use of the electric current to make marks upon chemically-prepared paper, nor making marks through a single line of conductors; nor could a claim to either of these devices have been entertained as patentable, as they have been long known." Again, it is said by the counsel of Mr. Morse: "It is admitted that neither could patent the battery, the circuit, the prepared paper, or the marking by the electro-chemical process. It was only a new combination of the several parts, so as to produce a new result, or an old result in a better manner, that either could patent. Again, the commissioner in his "reasons of decision" says: "It is true, as Mr. Bain asserts, that no one can monopolize the use of air, fire, or water, but it is equally true that any one can monopolize the use of air, fire, or water upon certain principles of operation which he may have invented or discovered; and this is precisely what the respective claimants in this case demanded as their right, and which gave rise to the interference, viz., each claimed the right to use, and exclude others from using, galvanic power to mark certain signs (which signs have already been patented by said Morse) upon chemically-prepared paper through a single circuit of conductors. A single circuit of conductors consisting either wholly of wire, or in part of wire and part of earth, for telegraphic purposes was not new. The signs or signals to be marked were not new, the same having been before patented by said Morse; and chemically-prepared paper for receiving telegraphic signs by galvanism was not new, the same having been patented in England in 1836 by Mr. E. Davy (7719 of 1836). Moreover, the use of a single telegraphic circuit for making the aforesaid signs upon paper was not new, the same having been before patented by said Morse. Neither party claimed any one or any two of the above elemental features. The invention of each was made up of the three combined, and the advantages claimed to have been discovered by each in these combined operations were identical."

There is nothing, then, now patentable in the Morse claim, left to be interfered with, except his claim of a patent for his invention of the machinery described in his specification or for his combination of machinery and materials as described therein. The claim of each applicant, therefore, is reduced to the claim for the combination of machinery and materials which he has invented, and does not include any of the matters claimed in his specification which are not now patentable. These combinations seem to me to be far from identical. Mr. Bain includes in his combination the use of the perforated paper for composing the communication and of the style which passes the electric current through the perforator and the machinery for transmitting the same communication to

several different places at the same time. It is said that the style is not new; but he makes it an ingredient in his combination—and in that respect his combination differs from that of Mr. Morse, and it is a very important item—in connection with the perforated paper. He includes in his combination new patentable matter with old matter not patentable, and thereby makes a new patentable combination. This new matter thus introduced into the combination is admitted to be patentable in itself without combination with the old unpatentable matter, and, indeed, it seems to be a great improvement in the transmission of telegraphic information. But it is said that Mr. Bain is only authorized to obtain a separate patent for these inventions, and cannot claim a patent for his new combination of the old and new together. If, however, his new combination of old materials be patentable, which must be admitted, or it would not interfere with Mr. Morse's claim, it seems to be not the less patentable because it includes the new matter in connection with the old. The old matter may not in itself be patentable, but joined to the new matter a combination may be formed which may be patented. He is not obliged to take separate patents for each new patentable matter. He does not now ask for them. He may be willing to ask only for a limited use of those new matters, to wit, in combination, and not for an exclusive use of them for every purpose to which they may be applicable. Mr. Godson (Gods. Pat. p. 63) says: "A combination of old materials, when in consequence thereof a new effect is produced, may be the subject of a patent. This effect may consist either in the production of a new article, or in making an old one in a better manner or at a cheaper rate. This manufacture may be made of different substances mingled together, or of different machines formed into one, or of the arrangement of many old combinations. Each distinct part of the manufacture may have been in common use, and every principle upon which it is founded may have been long known, and yet the manufacture may be the proper subject for a patent. It is not for those parts and principles, but for the new and useful compound or thing thus produced by combination, that the grant is made. It is for combining and using things before known with something then invented, so as to produce an effect which was never before attained."

The counsel for Mr. Morse in argument said: "It is obvious, and is admitted by our adversaries, that Morse's instrument is a very different thing in form and structure from Bain's." But form and structure are very important matters in machinery; and if they enable the operator to do the work in a better manner, or with more ease, or less expense, or in less time, it is no interference, but it is an improvement for which the inventor may have a patent. When the application is for a patent for a combination of machinery and materials, form and structure become substance. They are the essence of the invention; and an admission that Morse's instrument is a very different thing in its form and structure from Bain's, is an admission of a fact which is prima-facie evidence, at least, that there is no interference between the two, and throws the burden of proof upon the other side. There was no evidence laid before the commissioner of patents upon the question of interference; so that he must have adjudged the interference upon a comparison of the two specifications, possibly without considering that the only patent either could obtain would be a patent for his own combination—all the materials of which Mr. Morse's combination consists being old and not now patentable. The question is not now whether the claims of Mr. Bain and Mr. Morse interfere as to matter not now patentable, but whether they interfere as to matter now patentable; and the only matter now patentable in Mr. Morse's specification is his own combination of machinery and materials. That combination constitutes his machine, and his machine is admitted to be a very different thing in its form and structure from Mr. Bain's. Form and structure constitute the identity of machinery. The combination consists in form and structure, and the patent, if issued, will, I presume, be issued for the form and structure of the instrument. It being admitted that the form and structure of Mr. Bain's instrument is very different from Morse's, there can be no interference in that respect. And if form and structure constitute the identity of machinery, there is no interference in the two instruments; and if the instruments are the combinations, or the result of the combinations, for which patents are now claimed, there is no interference in the two instruments in regard to any matter now patentable. But it is not necessary to rely alone upon the admission of Mr. Morse's counsel to show that there is a great difference between the machines used by the contending applicants to effect the objects, i. e., the rapid transmission of intelligence by the power of the electric current. Any one who will compare the two specifications and drawings and models will at once perceive that difference.

A patentable improvement is not an interference. The commissioner in his written decision says: "It appears from the records of the office that the application by said Alexander Bain, subject of Great Britain, was made April 18th, 1848; and upon examination of his claim it was found that the before-mentioned claim could be admitted to patent, no invention of a like character appearing in the public records of the office nor in any printed publication. Prior, however, to the final issue of the case, the secret archives were consulted, and it was found that an application filed by Samuel F. B. Morse

January 20th, 1848, had been there deposited, in compliance with provisions of the law, which presented claims conflicting with those before mentioned set up by said Bain." This shows that but for the supposed interfering claim of Morse Mr. Bain was entitled to his patent; and if there be no interference in respect to patentable matter, he is still entitled to a patent for his own combination. But the counsel for Mr. Morse say: "There is an interference in that Bain's third claim palpably covers the whole of Mr. Morse's first claim, and, if granted, Bain could do all that Morse claims an exclusive right to do. He could write Morse's characters precisely as Morse does; and that therein consists the interference." But the only matter now patentable and claimed in Mr. Morse's specification is his peculiar combination of materials and machinery as therein described. All the materials used in the combination are old, and he will not under his patent be entitled to the exclusive use of any of them separately, or in any other combination than that which he has described in his specification. There cannot be a patent for a principle, nor for the application of a principle, nor for an effect. Two persons may use the same principle, and produce the same effect by different means, without interference or infringement, and each would be entitled to a patent for his own invention. Gods. Pat. pp. 63, 68, 74. So in the present case, although the power used by both applicants is the same, and the subject the same, yet, as the effect is produced by means which appear to me so different as to prevent an interference, the question of priority of invention does not arise. It is not, therefore, a case under the eighth section of the act of [July 4,] 1836, but under the seventh section of the same act, [5 Stat. 120;] so that each of the applicants may have a patent for the combination which he has invented and claimed and described in his specification, provided he shall have complied with all the requisites of the law to entitle him to a patent. If this were a doubtful question I should think it my duty to render the same judgment, so as to give Mr. Bain the same right to have the validity of his patent tested by the ordinary tribunals of the country which Mr. Morse would enjoy as to his patent, and finally, to obtain the judgment of the supreme court of the United States upon it. For if the commissioner and the judges should reject Mr. Bain's application for a patent, the decision would be final and conclusive against him unless he could obtain relief by a bill in equity under the tenth section of the act of 1836, [5 Stat. 121,] and the tenth section of the act of 1839, [Id. 354,] which it is said is doubtful.

I am therefore of opinion, and so decide, that there is no interference in relation to any matter (contained in their respective specifications) now patentable, and therefore that Samuel F. B. Morse is entitled to a patent for the combination which he has invented, claimed, and described in his specification, drawings, and model, and that Alexander Bain is entitled to a patent for the combination which he has invented, claimed, and described in his specification, drawing, and model, provided they shall respectively have complied with all the requisites of the law to entitle them to their respective patents. I deem it unnecessary, therefore, to decide upon any other points involved by the reasons of appeal.

[NOTE. Patent No. 6,420 was granted to S. F. B. Morse, May 1, 1849. For other cases involving this patent, see Morse v. O'Reilly, Case No. 9,858, Id. 9,859; O'Reilly v. Morse, 15 How. [56 U. S.] 62; Morse and Bain, Telegraph Case, Case No. 9,861.]

BAIN, (UNITED STATES v.) See Case No. 14,496.

BAINBRIDGE, (UNITED STATES v.) See Case No. 14,497.

Case No. 755.

BAINBRIDGE et al. v. WILCOCKS.

[Baldw. 536.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1832.

BILLS AND NOTES — LEX LOCI — INTEREST — COMMENCEMENT—COMPOUND INTEREST BY CONTRACT —EFFECT OF WAR UPON INTEREST.

1. Where bills are accepted payable in London on a promise to provide funds to meet them, the contract is governed by the law of England.

[Cited in Grant v. Healey, Case No. 5,696; Cook v. Moffat, 5 How. (46 U. S.) 315.]

2. An account current received and not objected to in a reasonable time becomes a settled account, bearing interest from the time it is stated, and the balance is payable on demand.

[See Baker v. Biddle, Case No. 764; White v. Macon, Id. 17,553; Hopkirk v. Page, Id. 6,697.]

3. An account made up of principal and interest becomes one principal debt when settled, the aggregate balance bearing interest.

4. Compound interest is not illegal, and may be recovered on an express promise, or one implied by law, as a part of the contract.

[Cited in Hollinsworth v. City of Detroit, Case No. 6,613.]

5. If an account contains a charge of interest during a war, it is recoverable if there is a promise to pay the account after peace, or the account is in fact or law a settled account, from which the promise results by operation of law.

[6. Cited in Marye v. Strouse, 5 Fed. 491, to the point that an account stated cannot be opened because an item of interest which went into it could not have been recovered by suit, provided such item is not illegal.]

[At law. Action by Bainbridge & Co. against Wilcocks.]

The plaintiffs were bankers and commission merchants residing in London, the defendant a merchant residing in Philadelphia;

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

this suit was brought to recover a balance of an account, principally for bills accepted by plaintiffs at the request of defendant, or drawn by him, on his promise to make provision for them at maturity. The money was paid before and in 1810, and charged in account; the defendant left the United States in June 1811, and did not return till 1825. On the 25th of June 1811, he wrote to the plaintiffs that he appointed William Waln of Philadelphia his agent in his commercial transactions, and desired them to take his directions, the defendant being about to go to South America and Canton. In September 1811 the plaintiffs sent to Mr. Waln their account current with the defendant, exhibiting a balance due by him of 300 pounds. In March 1813 they sent another account to him, balance 1500 pounds, in March 1815 another, balance 1660 pounds, in March 1817 another, balance 1830 pounds, which were received by Mr. Waln in due time; a copy of the last account was also delivered to the defendant in Canton in the same year.

These accounts were made up of the items of charge and credit, beginning with the old balance, on which interest was charged till the making up of the new account; a balance was then struck and carried to the new account. The three last accounts were made up of the balances of the former accounts, with interest added; the effect of which was, that the aggregate balance of principal and interest in the last account, became principal in the next, with interest computed upon it. In the last accounts, interest was charged during the late war with England, letters from the plaintiffs to the defendant at Canton, complaining of the non payment of the balance were sent in 1817, 1819, 1823, which were received, but were not replied to till 1824, when defendant refused payment, alleging that he had paid Mr. Waln, to whom the plaintiffs had charged the account on his guarantee made in 1810. Mr. Waln continued to be the agent of defendant till 1819, and appears to have kept up a regular correspondence with him, in which reference was made by both, to the accounts of the plaintiffs; there were large accounts between them and Mr. Waln, and Mr. Waln and the defendants, which were given in evidence at the trial, together with a great mass of correspondence. It was alleged by the defendant, that he had objected to the account in Canton when it was presented to him in the winters of 1817, 1818, but the evidence was contradictory. Much time of the trial was occupied on the allegation of payment to Mr. Waln by defendant, of the balance claimed by plaintiffs, who had at one time charged it to him, but no satisfactory defence was made out on that ground; there was also some controversy as to some of the items of the account, and some additional credits claimed. No questions of law arose at the trial except on the charge of compound interest, and interest during the late war, which were objected to by the defendant's counsel; these were the principal questions in the cause. The trial occupied eight days, principally on matters of fact. [Verdict and judgment for plaintiffs.]

Chauncey and Binney, for plaintiffs.
C. J. and J. R. Ingersoll, for defendants.

Before BALDWIN, Circuit Justice, and HOPKINSON, District judge.

BALDWIN, Circuit Justice, (charging the jury.) The account between the parties consists of advances made in London by the plaintiffs, who resided there, to the defendant residing here, and payments made on account by the latter in London. The whole course of the transactions and correspondence between them shows, that the contract was to be performed in London; the rights and obligations of the parties, the rate of interest, and the rules for its computation, must therefore be governed by the law of England; the remedies on the contract depend on the law of the forum. The relation between the parties is that of agent, factor and depository on the part of the plaintiffs, and the defendant as their principal; their obligation is to account for the effects which came to their hands, his is to reimburse them for advances made, and responsibilities incurred at his request by a letter or a bill drawn on them. The contract between them is not one implied by a loan, but a special contract of indemnity, arising from the relation between them, governed by the law and usage of merchants, which makes it the duty of a person who draws bills on another without funds, to place them in the hands of the acceptor before the bill is due. Though the acceptor becomes the principal debtor to the holder of the bill, yet he is considered as the surety of the drawer, entitled to full indemnity, if funds are not provided in time: the factor or agent who has accepted on the faith of such contract, must be put in the same situation as if it had been complied with punctually. Interest is deemed to be a compensation for not paying money when due; the law of England as to the payment of interest is well settled.

On a note payable at a particular day, with interest, it is payable from the date, (5 Ves. 803; Coop. 29; 2 Mass. 568; 8 Mass. 221;) if interest is not mentioned, then it runs only after the day of payment, (2 Burrows, 1081;) if goods are sold payable at a certain day by a note or bill, if not given, the account bears interest, as if the note or bill had been given, for the obligation to pay is equal, (13 East, 98; 3 Taunt. 157; 2 Camp. 272, 280; 17 Ves. 278.) Any instrument of writing by which money is to be paid on a day certain, bears interest thereafter; not as damages, but as part of the contract. 3 Brown, Ch. 439; 3 Ves. 133, 134. The balance of an account properly stated, bears interest from the

time of liquidation till the principal is paid, though the debt, from its nature, did not bear interest. 2 Ves. Sr. 365; 2 W. Bl. 761; 3 Wils. 206; 2 Atk. 211. It will be computed on all notes, bills, contracts or debts, which on their face, or the nature of the contract, carry interest, (2 Ves. Jr. 300,) from the day when payable, on money lent, (Dickens, 307, 308; Bunb. 119;) if there is no time of payment, or if payable on demand, then after demand made, (1 Ves. Jr. 63;) on an overdraft on a banker, though a note is taken for it payable on demand, the interest is due from the usage and course of dealing between banker and customer, and the contract implied therefrom, (2 Ves. Jr. 302;) so on an advance of money by an agent in transacting the mercantile concerns of his principal, (3 Camp. 466, 467.) It will be allowed on an account current between merchants, where one has laid out a gross sum for another. Ridgway's Case, Cas. t. Hardw. 285; 1 H. Bl. 305. So on an award to pay the sum due on a balance of accounts on a certain day, (3 Camp. 467;) or on award of damages assessed pursuant to a statute, (1 Maule & S. 173, 174;) on an account stated by a master in chancery, (1 P. Wms. 480, 653; 1 Atk. 244.) These are the rules which prevail at law, as well as in equity, except in cases of bankruptcy; in such cases as the commissioners cannot award damages, the interest is allowed only in cases where it is due by contract, not where it is given by way of damages merely. 1 Atk. 75, 80, 151, 244; 3 Brown, Ch. 436, 439, 504, 508; 2 Ves. Jr. 295; 1 Rose, 317, 400. Where the course of trade between two countries has been settled to allow interest in certain cases, it is evidence of a contract to pay it according to such usage, (Doug. 361,) as the tacit law of the contract presumed to be agreed on by the parties, (3 Caines, 234, 243.)

Though an account does not bear interest a priori, yet the party receiving the account with interest charged according to usage or custom, it is evidence of an original agreement to pay it; so if the parties have settled an account according to such usage. 3 Brown, Ch. 439, 508; 3 Wash. 352, 402, [Barclay v. Kennedy, Case No. 976, and Denniston v. Imbrie, Id. 3,802.] In all such cases, the interest accruing from the time when an account is liquidated by the parties, when it is settled or liquidated by presumption of law from the conduct of the parties, or their implied agreement, by an award, a report of auditors or a master, an inquest or a jury, becomes as much a part of the debt due by the contract, as the original sum out of which it arose. 2 Burrows, 1088.

To make an account a stated, settled, or liquidated one, it need not be signed by the parties, it is enough that it shows a balance, or that there is none. 2 Atk. 251, 399. If one merchant sends an account to another in a foreign country, and he keeps it by him any length of time, as two years, without objection, the rule of courts and merchants is, that it is understood as a stated account. 2 Ves. Sr. 239; 2 Atk. 251; S. P., 15 Johns. 409, 424. Where the parties live in England, it has been held that not objecting to the account by the second or third post is an allowance of it. 2 Vern. 276; S. P., 1 P. Wms. 653.

The time within which an account shall be taken as a stated one, unless objected to, cannot be definitely fixed; it depends on the circumstances of the case, whether an acquiescence or a presumed agreement to the correctness of the account exists. If it does, and the party does not account for his silence, the account is considered as settled to his satisfaction, and the party claiming the balance is not bound to prove the items of his account. The party charged may show errors and omissions apparent in the account, but the burthen of showing them is on him who receives and keeps the account without objection, and the errors must be specified; they will not be corrected on doubtful or only probable testimony, but must be palpable, and not to be misunderstood, the party complaining can only surcharge and falsify, but cannot open the account generally, unless there has been fraud practiced upon him. 2 Atk. 119; 9 Ves. 266; 1 Ch. Cas. 299; 1 Vern. 180; 2 Brown, Ch. 62. It is the law of this country. [Freeland v. Heron,] 7 Cranch, [11 U. S.] 151. And a settled account is not opened, by being introduced into a second one. [Chappedelaine v. Dechenaux,] 4 Cranch, [8 U. S.] 309. These rules apply to all stated or settled accounts which bear interest from the time of settlement, unless some time for payment is stated, although part of the balance is for interest. Where regular accounts are settled from time to time, interest on interest is allowed. 3 Brown, Ch. 440. Where an account of moneys paid for insurances, and on other transactions between agent and principal, had been rendered annually, and interest charged at the close of every year on the balance, and the interest of each preceding year added to the principal, and no objection was made when the accounts had been rendered, until the expiration of ten years from the first account, the interest so charged was allowed. 3 Camp. 466, 467. Where bankers furnish an annual account without objection, an agreement shall be presumed that the balance of principal and interest shall bear interest. 1 Ball & B. 428. Accounts between merchants may be settled every half year, on the principle of compound interest. 9 Ves. 223, 224. It may be allowed where there is a contract implied, or it is the usage of trade, (2 Ves. Jr. 16, 17, 20, 21; vide a very able opinion of the late Judge T. Smith, 4 Yeates, 224,) or accounts transmitted annually, (2 Ves. Jr. 20, semb.) It is not illegal. 1 Ves. Jr. 99. Compound interest cannot be a priori, but is just after the debt is due. 9 Ves. 224. When it is the custom of a place and the

practice of the parties, to strike a balance every quarter, and render the account, it brings it to the case of a fresh agreement, at the beginning of every quarter, to lend the sum then due, which is not illegal. 2 Anstr. 496. Acquiescence in an account rendered, is not, per se, an agreement to it, but it is evidence from which it may be inferred, that the party who receives the account, without objection, thereby agrees to continue this course of dealing, and to retain the balance in his hands rather than to pay it. It is a tacit assent to the terms demanded by the creditor on the face of the account rendered, which is direct notice of his understanding of their agreement; if the debtor is not content, he is bound by every principle of good faith to give notice of his dissent. The balance due is the capital of the creditor, which he leaves in the debtor's hands on paying interest; if it is not recoverable, his capital consists in a dry, barren balance, while his debtor uses it to a profit. The law does not impose such hardship on an ordinary merchant who makes a profit by his dealing, still less on a factor who receives only commissions and interest on his advances; especially in a case like the present. No contract can be more obligatory in justice or mercantile faith, than one by letter promising to provide funds to meet an acceptance by a friend and agent; or an implied one more sacred, than what the law infers from drawing a bill without funds, and its acceptance for the accommodation of the drawer. Nor can there be a case where there can be less ground for complaint, than one where, after such a contract has been violated, the creditor strikes a balance of principal and interest only once in two years, as in the one before you; and if the law will presume an agreement from silence in any cases, it is in this, where accounts had been rendered at intervals of two years without an objection, till the expiration of thirteen years from striking the first balance.

It has been objected that the defendant was in Canton when the accounts were rendered. But it is a conclusive answer to this objection, that Mr. Waln was his agent, so notified to the plaintiffs, who were directed to correspond with him as such; the accounts were received by Mr. Waln, between whom and the defendant a constant correspondence was kept up. Notice to the agent was notice to the principal, it was the agent's duty to communicate the accounts, and from the evidence there can be no doubt of the fact that they were so communicated and received, but if they were not received in fact by the defendant the law will presume it in this case. We instruct you therefore, as matter of law, that the accounts which have been rendered by the plaintiffs, and received by Mr. Waln or the defendant, are to be considered as stated or settled accounts, and as liquidated by the parties; as fully so as if they had been signed by both. The balance struck is a debt bearing interest, as a matter of contract implied by the law, and the balance is considered as one debt, without regard to the items which compose it; the aggregate of principal and interest, due on the old account, is carried to the new, imparting a promise to pay on demand, with interest from its date.

A promise or agreement implied by law, is as binding as if made by the party, the legal presumption is in the place of proof by witnesses; if the evidence is in writing, or the facts are admitted, the law declares what is the contract which results from them; so if a jury find the facts specially, the legal conclusion is a matter of law. If the facts are contested and the evidence doubtful, the jury will decide whether there was a promise express or implied to pay interest; but if they are satisfied that there was such promise in fact, or that such facts existed as are the foundation for the legal presumption of a promise or agreement to pay it; then interest follows as a matter of law. But though not so satisfied that there was an express or implied contract for the payment of interest, the jury may find it as damages for the non payment of the principal. In this case there is no fact in controversy which can affect the question of interest, the account being a settled one, the law raises the promise to pay interest on the balance stated in the last account rendered, as a matter of contract, which you will find accordingly. This implied agreement, applies as well to the interest on the account during the late war, as to what accrued before or after; the promise which the law raises to pay the whole account, carries with it the war interest, though it may not have been recoverable had it been objected to in time, there is no law which makes such promise illegal, or which can prevent the plaintiff from recovering it on an express or implied promise after peace. Our opinion therefore is, that in point of law the plaintiffs are entitled to interest as stated in their account.

The jury found for the plaintiffs with only simple interest, and as no motion was made for a new trial, judgment was rendered on the verdict. Vide York and Sheepshanks v. Wistar, [Case No. 18,141.]

Case No. 756.

BAINS v. The JAMES AND CATHERINE.

[Baldw. 544.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1832.[2]

ADMIRALTY JURISDICTION — SEAMEN'S WAGES — SET-OFF—PRESENTING ACCOUNT.

1. An account for provisions furnished to the owner or commander of a vessel, or for articles

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

[2] [Affirming an unreported decree of the district court.]

for her use when not on a voyage or in a foreign port, is not within the admiralty jurisdiction of the district court, either as a substantive distinct claim or as an off-set to a libel for seamen's wages. [The General Smith, 4 Wheat. (17 U. S.) 443, distinguished.]

[See Peyroux v. Howard, 7 Pet. (32 U. S.) 324; The St. Lawrence, 1 Black, (66 U. S.) 522; The Lottawanna, 20 Wall. (87 U. S.) 201.]

2. Admiralty jurisdiction is referred to in the constitution as it was restrained by the statutes and common law in England before the revolution, and as it was exercised by the state courts before the adoption of the constitution.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; Marsh v. The Minnie, Id. 9,117; U. S. v. Block, Id. 14,609; and in the dissenting opinion of Mr. Justice Woodbury, in Waring v. Clarke, 5 How. (46 U. S.) 473. Contra, see Waring v. Clarke, 5 How. (46 U. S.) 441; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 344.]

3. The rules which regulated it and the cases where it can be exercised, considered libels for seamen's wages, as held in England not to be within the statutes which restrain the jurisdiction of the admiralty, either as being excepted cases or as coming within the rule of communis error facit jus.

4. Contracts of seamen for maritime service are in effect maritime contracts, governed by the maritime law, which prescribes the rights and obligations of the parties differently from the common law.

[Cited in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 421.]

5. In the United States they are regulated by the act of 1790, [1 Stat. 133,] which gives seamen a right to proceed in the admiralty for the recovery of their wages.

6. The seventh amendment to the constitution excludes the jurisdiction of admiralty over contracts regulated by the common law; suits upon such contracts are appropriately "suits at common law" within the terms of the amendment, and are cognizable only in courts of common law.

[Cited in U. S. v. The New Bedford Bridge, Case No. 15,867; Cox v. Murray, Id. 3,304; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 409; Grant v. Poillon, 20 How. (61 U. S.) 169; U. S. v. Shepard, Case No. 16,273; and in a dissenting opinion in Jackson v. The Magnolia, 20 How. (61 U. S.) 322.]

7. No off-set is allowable on a libel for seamen's wages, unless a payment on account thereof.

[Cited in The Two Brothers, 4 Fed. 159.]

8. No account against the vessel is chargeable to the master, unless it is presented in a reasonable time, so that the master may charge it to the owners before settling with them.

[9. Cited in Re Barry, 42 Fed. 121, to the point that the jurisdiction of the federal courts is not derived from the common law. See Ex parte Burrus, 136 U. S. 586, 10 Sup. Ct. 850.]

[10. Cited in U. S. v. The New Bedford Bridge, Case No. 15,867, to the point that the admiralty jurisdiction does not extend to acts "arising within the body of a county." See The Ann Arbor, Case No. 407, and note.]

[11. Cited in Waring v. Clarke, 5 How. (46 U. S.) 488, to the point that the locality of torts must be on "the sea" to confer jurisdiction on the admiralty.]

[Appeal from the district court of the United States for the eastern district of Pennsylvania. Affirmed.]

The case was a libel in the admiralty [by Bains against the schooner James and Catherine] for seamen's wages, to which the claimant offered to set off an account against the libellant, composed in part of provisions furnished him for the use of vessels which he had commanded, and a pump for one of them.

Mr. Hubbell opposed the allowance of the credit, 1. Because the account offered was not cognizable in the admiralty, it being merely for goods and provisions sold, and not on a contract in its nature maritime, or made at sea. Le Caux v. Eden, 2 Doug. 594; 3 Bl. Comm. 106; 3 Mason, 161, [Willard v. Dorr, Case No. 17,680;] [The General Smith,] 4 Wheat. [17 U. S.] 438. The claimant can make no offset against a claim for seamen's wages, otherwise than by showing advances made on account, or some matter which would tend to affect or diminish the amount of compensation due. 3 Mason, 171, [Willard v. Dorr, Case No. 17,680.]

Mr. J. M. Scott, for the claimant.

The libellant might sue at common law, and by changing the forum cannot put the other party in a worse situation than he would be at law. But though he sues in the admiralty, it is a court of equity, and will not permit a recovery against equity and good conscience, though the case may not come within any statute of set-off. 2 Burrows, 826; 2 Gall. 526, 551, [The Brutus, Case No. 2,060.] A court of law will set off one judgment against another. 4 Durn & E. [Term R.] 123. An obligor may set off against the assignee a debt due him by the obligee. 1 Rawle, 227, 291. And courts of admiralty have the same power of allowing set-off, as the courts of Pennsylvania. The debt claimed to be set-off is of admiralty jurisdiction, it being founded on a maritime contract for provisioning and repairing vessels. 2 Gall. 475, [De Lovio v. Boit, Case No. 3,776;] 4 Wash. 454, [Zane v. President, Case No. 18,201;] [The General Smith,] 4 Wheat. [17 U. S.] 438; [The Aurora,] 1 Wheat. [14 U. S.] 96; 2 Gall. 345, [The Jerusalem, Case No. 7,294;] 1 Pet. Adm. 226, 233, [Gardner v. The New Jersey, Case No. 5,233.] And though the contract was made on land, it is incident to matters arising at sea. 2 Pet. Adm. 309, [Moxon v. The Fanny, Case No. 9,895.]

Before BALDWIN, Circuit Justice, and HOPKINSON, District Judge.

BALDWIN, Circuit Justice. The object of the libel was to obtain the payment of the balance of wages due the libellant as mate of the schooner James and Catherine, by shipping articles on a voyage from Philadelphia to Kingston and back. The contract and its faithful performance by the libellant is admitted by the answer, and the difference between the amount claimed, and

that admitted to be earned, is but trifling. The controversy arises on an account set up by the respondent in bar of the claim for wages, by way of set-off, or payment, to which the libellant has demurred; because the contract on which the account is founded, was made and to be performed in the county of Philadelphia, and therefore not cognizable in the admiralty, as also because the admiralty cannot entertain pleas of set-off.

As the first ground of demurrer goes to the jurisdiction of the court, it must be first considered. The first item of the account of the respondent is a balance of account of 31 dollars, due in 1822, the items composing it not being stated, but averred generally in the answer to have been for provisions furnished by the respondent for different vessels, owned or commanded by the libellant, and a pump for the sloop Polly, so owned and commanded. The judicial power of the United States extends to all the cases enumerated in the third article of the constitution, but to none other; as this account is between two citizens of Pennsylvania, it is not cognizable by the courts of the United States; unless it presents a case arising under the constitution, laws or treaties of the union, or is a subject of equity, of admiralty or maritime jurisdiction. The first is not pretended, and it is therefore incumbent on the respondent to bring his case within the other provisions of the constitution. To do this it is necessary to show that at the time of its adoption, cases of this description were cognizable in the admiralty in any shape, whether by original libel, counter claim, or set-off, arising from either the nature of the contracts, its subject matter, or application; for as a mere balance of account, there can be no pretence that it is any other than a contract at common law, cognizable only in courts of law.

There is nothing in the nature or subject matter of the account which can vary its character, it is to be performed on land within the jurisdiction of this state; it is subject to none of the casualties, conditions, terms, or peculiar obligation of marine contracts. The credit is not given or accepted on any express or implied pledge of ship, cargo or freight, or on the faith of either. The answer contains no such allegation. Neither does it specify the kind of provisions furnished, their quantity or use, whether in port or on a voyage; or whether they were purchased by libellant as owner or commander of the respective vessels, or set forth any circumstances which vary it from a case of mere personal credit. Taking the account then as it is stated, and the application of the items to have been as alleged, it presents no one feature of a marine contract, or any maritime attribute or quality to which any part of admiralty or maritime law can apply. It is, in the words of the constitution, "a case in law," not a controversy "between citizens of different states," but of the same state, cognizable only in the federal courts, by the principles of the common law, if the plaintiff was competent to sue therein.

The counsel for the respondent has ably and ingeniously endeavoured to establish the position, that the admiralty has jurisdiction in personam over all contracts for materials and provisions furnished, and labour performed in building, repairing, equipping and provisioning ships; in doing which he has entered into a very extensive range of investigation of the jurisdiction of courts of admiralty, a subject on which great contrariety of opinion has existed and yet exists among the most learned judges and jurists of this country. It was once a very vexed question in England, between the courts of Westminster Hall, which were governed by the common law, and the admiralty courts, which acted under the orders of the king in council, and proceeded according to the principles of the civil law; but after a long struggle the latter yielded, and their proceedings have for more than two hundred years, been constantly controlled and held in restraint by the courts and rules of the common law. The decisions on this subject have often been reviewed and commented on in our courts, but without any satisfactory results, and there has been no decision of the supreme court settling the question.

There is a dictum in the case of The General Smith, 4 Wheat. [17 U. S.] 443, stating the opinion of the court, in affirmance of the admission of counsel of the claimant, previously made in argument, that the admiralty had a general jurisdiction in cases of material men, both in personam and rem; but this point formed no part of the judgment of the court, was not before them, and could not be settled by this declaration of an abstract opinion in a case, where a ship was libelled on a claim which was adjudged by the court to be no lien in the case before them. [Satterlee v. Matthewson,] 2 Pet. [27 U. S.] 413. The court did not take the point to be settled eight years afterwards, when it came up in the case of Ramsay v. Allegre; they did not consider the general question of jurisdiction, but decided the case on other grounds. 12 Wheat. [25 U. S.] 611. Mr. Justice Johnson, who was one of the court when the opinion in the case of The General Smith was delivered, considers the remarks on this subject as mere dicta, and dissents from them in a very able, learned opinion, in which he utterly denies the jurisdiction of the admiralty in personam, in the cases referred to. Not being then bound to take the law as settled by the opinion of the judges as declared in 4 Wheat. [17 U. S. 438] and finding that the decisions of the different circuit courts are in direct contradiction on the subject of this branch of admiralty jurisdiction, I am at liberty to consider it, as not so firmly established as to make it improper for me to

be guided by my own judgment of the law as it was settled before the adoption of the constitution. The jurisdiction of the courts of admiralty in England, is a part of the royal prerogative conferred on the lord high admiral by the king's commission, (4 Co. Inst. 124,) and exercised by his deputies and inferior officers forming courts of different grades, from the highest of which an appeal lies to the king in council; but not being courts of record, their proceedings cannot be reviewed according to the course of the common law, and no act of parliament has provided for an appeal to the house of lords, as from the high court of chancery. Vide 3 Bl. Comm. 69.

The jurisdiction of the admiralty was deemed a jewel of great lustre and value in the diadem or crown of the king, and was carried to great extent by the lord high admiral and his officers; but however it might be cherished and enlarged by them, in order to extend the king's and their power, and promote their interest, it was odious to the commons of England, who became alarmed at the encroachments upon the jurisdiction of the courts of common law, and called loudly for the redress of the grievance. Similar complaints were made against the encroachments of the court of chivalry, which was composed of the lord constable and earl marshal, which had conusance of deeds of arms, and of things touching arms, which could not be determined by the common law, and remedies were provided for both cases. The statute 13 Rich. II. c. 2, (1 Ruffh. St. 385; Keb. 173,) prohibited the court of chivalry from entertaining any plea "that might be tried by the law of the land," and provided a remedy by a writ compelling them to surcease proceedings. Chapter 5 prohibited the admiral and his deputies from meddling with any thing done in the realm, and on the sea only as it had been used in the time of Edw. III. (1 Ruffh. St. 385;) this statute proving insufficient, another was passed, on the grievous complaint of all the commons, in 15 Rich. II. c. 3, (1 Ruffh. St. 400; Keb. 180,) the prohibition of the admiral's jurisdiction was more explicit and extensive, excluding it from all things done in the body of a county, as well by land as by water, or wreck of the sea. The parliament, finding that laws merely prohibitory, did not prevent the encroachments of the admiralty, again interfered in 2 Hen. IV. c. 11, on the prayer of all the commons, and passed an act authorizing the party aggrieved by any usurpation and exercise of admiralty jurisdiction, to sue the plaintiff, and directed that he should recover double damages, declaring that the statute and common law should be holden against the admiral and his deputies. 1 Ruffh. St. 438; Keb. 193. As this statute empowered the courts of common law to vindicate its principles, and secure the right of trial by jury by amercing plaintiff in the courts of admiralty in heavy and double damages; and as the court of king's bench, in the exercise of its high prerogative and supervisory powers over all inferior courts and tribunals, issued writs of prohibition which neither the admiral or his deputies dared to disobey, they were compelled to submit to the statute and common law of the kingdom, in civil and criminal cases. But they yielded with a bad grace. In the 8 Jac. I., more than two hundred years after the statute of 2 Hen. IV., the lord high admiral made a formal complaint on the subject to the king, against the judges, concerning prohibitions granted to the court of admiralty.

The fifth grievance complained of by the admiral is worthy of special attention. "That the clause of non obstante statuto, which hath foundation in his majesty's prerogative, &c., is current in other grants; yet in the lord admiral's patent, is said to be of no force to warrant the determination of the causes committed to him in his lordship's patent, and is rejected by the judges of the common law."

Such was the audacity of the pretensions of the admiralty, that it claimed to exercise jurisdiction in virtue of the king's patent, in defiance of the acts of parliament; and the complaint against the judges was, that they enforced the supreme law of the kingdom. On a reference of the complaint by the king to the judges, they met it by acts of parliament, judicial proceedings, and adjudged cases, which exposed and put an end to the audacious claims asserted by the admiralty, 4 Co. Inst. 134, 142. This occurred in the reign of Jac. I., from which time the statutes in restraint of admiralty jurisdiction have been observed and enforced by the courts of common law, so as to prevent any encroachment by prerogative courts, in contravention of the established laws. It is not necessary for me to examine in detail the adjudged cases in the English courts. It would be useless, after the able review of them by Judge Johnson in Ramsay v. Allegre, 12 Wheat. [25 U. S.] 614, &c., as to the claims of material men to proceed in personam in the admiralty, and by a very distinguished jurist and statesman who presided in the state court of admiralty in this state, during and after the revolution, as to the same claim to proceed in rem. The conclusion to which both arrived was, that such claim was inconsistent with the law as it existed in England before, and in the United States after the separation. It is also needless to combat the proposition, that the civil jurisdiction of the admiralty was more expanded in the colonies than in the mother country; or that it could be exercised in opposition to the established course of the law of England, without an act of parliament to authorize it. As appeals lay from the colonial courts of admiralty, the line of their jurisdiction was necessarily that which was the rule for the appellate court. The courts of both the colonies and mother country, were organized on similar principles; each with its

appropriate jurisdiction, as prescribed by statutes or regulated by usage, the evidence of which is in the adjudications of the courts in England, and those of the colonies and the states, which acted on the rules established by early statutes, and their uniform construction down to the revolution. The civil jurisdiction of courts of admiralty was confined to matters arising on the sea, out of the body of any county, and to subject matters in their nature maritime, or done in the prosecution of a voyage. Courts looked to the nature of the act done, as well as its locality, and though the act was done on shore, as the pawning a ship for the emergencies of a voyage, yet being of a maritime nature, and the cause rising on the sea, it was cognizable in the admiralty. 6 C. Rob. Adm. 40; Bee, 420, 435, [Clinton v. The Hannah, Case No. 2,898; and Shrewsbury v. The Two Friends, Id. 12,819;] Hob. 11; 1 Salk. 35. If a vessel is taken as prize, the legality of the capture must be tried in the admiralty, (1 C. Rob. Adm. 238; Bee, 371, [Dean v. Angus, Case No. 3,702;] Doug. 591, 597;) so of a cause of action growing out of a capture as prize, (Bee, 372, [Dean v. Angus, supra,]) or if goods are taken piratically at sea, they may be followed in the admiralty on land, because the original cause arose at sea, (3 Bulst. 29; Cro. Eliz. 685.) But if a mere trespass is committed at sea, or the original cause arises on land, or on the sea, in the body of a county, or is not of a maritime nature, though arising on the sea, the cognizance thereof belongs to courts of common law, who will prohibit the admiralty from proceeding therein. Bee, 435, [Shrewsbury v. The Two Friends, Case No. 12,819;] 4 Co. Inst. 134; Hob. 212; 2 L. R. 805.

Such is the admitted course of proceeding by the statute and common law of England. But it is alleged, that the jurisdiction of courts of admiralty in the United States is more extensive, and that the constitution has re-established it, as it was claimed by the admiralty before the restraining statutes of Rich. II. and Hen. IV., and that it may now be exercised in all cases, where it is authorized by the civil law, or had been exercised under the king's commission to the admiral. Should this construction be given to the constitution, it will present, in striking contrast, the opinion of the people of the states who adopted it, and the opinion of the people of England, during the four hundred preceding years, on the right of trial by jury, and the preference of the common to the civil law. It will also present in as striking a view, the great difference between the opinions of those who composed the first congress of the revolution, and the members of the convention, who framed the constitution, in relation to admiralty jurisdiction, in all its branches.

In the preamble to the declaration of the rights of the colonies in October, 1774, one of the grievances complained of was, that parliament had, by late acts, "extended the jurisdiction of courts of admiralty not only for collecting the said duties, but for the trial of causes merely arising within the body of a county." In the fifth resolution it is declared, "that the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." It was also "resolved, that the following acts of parliament are infringements and violations of the rights of the colonists, and that the repeal of them is essentially necessary in order to restore harmony between Great Britain and the American colonies, viz.: the several acts of (naming them) which impose duties for the purpose of raising a revenue in America, extend the power of the admiralty courts beyond their ancient limits, deprive the American subject of trial by jury, &c., are subversive of American rights." Vide Journals of Congress 27, 29, 14th of October, 1774. Among the grievances enumerated in the declaration of independence, is the following: "for depriving us in many cases of the benefit of trial by jury." These declarations show that the same spirit which actuated their ancestors in England, descended to the colonists with equal zeal, in favour of the common law, the right of trial by jury, the restriction of admiralty jurisdiction to its ancient limits, and against its exercise "over causes merely arising within the body of a county." It is not credible that principles, thus consecrated, would be abandoned by the people of the colonies, when they made themselves states, by their declaration of independence, or that they solemnly reversed them when they adopted the constitution. No state ever passed any law in accordance with the acts of parliament which led to the revolution, which in any way abridged the right of trial by jury, even in civil cases, or abrogated any principles of the common law, by substituting in their place the rules of the civil law, which had not been adopted in the mother country. Nor is there any pretence that the admiralty courts, in any of the states, between the declaration of independence and the adoption of the constitution, had ever assumed the jurisdiction of civil causes not cognizable by the courts of admiralty in England. On the contrary, all such courts whose decisions are known, have asserted and acted on the principle that their admiralty jurisdiction was confined to the cases, and must be exercised by the rules which had defined it in England. The able and learned opinions of Judge Francis Hopkinson, in the admiralty court of Pennsylvania, in Dean v. Angus, in 1785, [supra,] and in Clinton v. The Hannah, in 1781, [Case No. 2,898,] are full and conclusive on the subject. His character as a jurist and statesman is well known to all of us. We cannot presume him to have been ignorant of the law of courts of admiralty, or withhold from his opinions the high respect

to which they are justly entitled. Another distinguished civilian, Judge Bee, of South Carolina, also examined the subject most ably in Shrewsbury v. The Two Friends, in 1786, [Id. 12,819,] and laid down the law in the same way. Judge Peters uniformly adopted the principles on which Judge Hopkinson acted. 1 Pet. Adm. preface, V., [Append. Fed. Cas.] He held that the people of the states had adopted the common law, and the maritime law as a part of it, existing at the revolution,—1 Pet. Adm. 112, [Thompson v. The Catharina, Case No. 13,949,]—and laid down the broad proposition that "the maritime laws of England existing before our revolution, and consistent with our situation are yet our laws. It is but recently that admiralty cases have been published. We have therefore unavoidably recourse to their common law books for authority." 1 Pet. Adm. 229, [Gardner v. The New Jersey, Case No. 5,233.]

Few men were more familiar with the jurisprudence of the states, or the political history of the country, than Judge Peters, from before the revolution till the adoption of the constitution; the high authority of his opinions, concurring with Judges Hopkinson and Bee, is the highest judicial evidence which we can have, of the nature and extent of admiralty jurisdiction as it existed, when the states granted it by the constitution to the courts of the United States. It was a jurisdiction limited and defined by the statute and common law, its boundaries had been declared by adjudications in the courts of the states, so recently before the framing of the constitution in convention, that they must have been familiar to the members. To the states in which courts of admiralty had been long held, its jurisdiction was well known, and in the absence of any judicial authority under the governments of the states, in opposition to what has been referred to, we must consider this jurisdiction to have been granted, precisely as it had been previously exercised.

As the obnoxious acts of parliament ceased to have any force after the declaration of independence, the jurisdiction of courts of admiralty which those acts conferred, necessarily ceased with them, and could not be exercised without the authority of a state law. All matters relating to revenue, the regulation of commerce and navigation, were therefore cognizable only in the courts of common law in the several states, as they were in England from time immemorial; for the most strenuous advocates of the admiralty never pretended that it had jurisdiction over these subjects prior to the statutes of Richard II. The criminal jurisdiction of offences committed on the sea, within the body of a county, was made cognizable by a special court organized by the statute 28 Hen. VIII. c. 15, (2 Ruffh. St. 258,) which was directed to proceed according to the course of the common law. 3 Co. Inst. 111. When the offence was committed on the main sea or the coasts of the sea, being no part of the body of any county, it was declared to be cognizable in the admiralty by the statute 27 Eliz. c. 11. 4 Co. Inst. 137.

From this time the line which separated the jurisdiction of admiralty in all its branches from that of the common law, remained firmly settled, and the jurisdiction of the common law over matters excluded from the admiralty was unquestioned. All causes arising in the body of a county, or arising on the sea, unless of a maritime nature, were cognizable by the courts of common law, and the principles on which they granted prohibitions to courts of admiralty, were as much a part of the common law as the rules of descent. It was a part of that great system of English jurisprudence which the colonists adopted in its largest sense,—1 Gall, 493, [U. S. v. Coolidge, Case No. 14,857,]—as a general and fundamental law, unless altered by acts of assembly, or was not adapted to their condition,—[Morris' Lessee v. Vanderen,] 1 Dall. (1 U. S.) 67; 9 Serg. & R. 330, 358; 11 Serg. & R. 273; [Town of Pawlet v. Clark,] 9 Cranch, [13 U. S.] 333,—which the people of each state claimed as their birthright, from the beginning of the revolution. As this system is the basis of the judicial institutions of all the states, it is incumbent on those who assert that any part of it is not in force, to prove it as an exception. 9 Serg. & R. 334. Especially is it incumbent on those who assert that the people of the American colonies or states were more in favour of the extension of admiralty jurisdiction beyond its ancient limits, so as to embrace the trial of causes merely arising within the body of a county, and less attached to the inestimable right of trial by jury than their English ancestors, to establish it by irrefragable proof. The unanimous declaration of rights by the congress of 1774, expressed the then sense of the people of the colonies, and there has never been a jurist or statesman who has controverted the principles of government and policy therein promulgated. On the contrary, these principles have been adopted as the foundation on which the state and federal constitutions have been built.

In the grant of judicial power over cases of admiralty and maritime jurisdiction to the courts of the United States, the right of trial by jury of all crimes (except in cases of impeachment) is carefully secured; "and such trial shall be had in the state where the said crimes shall have been committed; but when not committed within any state the trial shall be at such place or places as congress may by law have directed, article three, section two, clause three, of the constitution of the United States." The sixth amendment is still more explicit. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the

crime shall have been committed, which district shall have been previously ascertained by law."

These provisions go to the root of the criminal jurisdiction of the admiralty, over offences committed on the high sea; thus far the American people have solemnly affirmed their declaration of rights, and excluded from the admiralty a branch of jurisdiction which the statutes of England authorized them to exercise. It remains to inquire whether they have, by the same instrument, enlarged the civil jurisdiction of the admiralty, so as to extend it to causes arising within the body of a county, which were cognizable exclusively by the courts of common law in England.

In pursuing this inquiry, I am not at liberty to overlook the view of the constitution which has been taken by the supreme court; or if I was, I would not be so presumptuous as to attempt to make a better one than is to be found in their opinion in Parsons v. Bedford, 3 Pet. [28 U. S.] 446, 447: "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in every state constitution in the union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares, that 'in suits at common law, where the value in controversy shall exceed 20 dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law.' At this time there were no states in the union, the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no states were contemplated, in which it would not exist. The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The constitution had declared, in the third article, 'that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority,' &c. and to all cases of admiralty and maritime jurisdiction. It is well known, that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the constitution denominated in the third article 'law;' not merely suits, which the common law recognised among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognised, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. Probably there were few, if any, states in the union, in which some new legal remedies differing from the old common law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And congress seems to have acted with reference to this exposition in the judiciary act of 1789, [1 Stat. 77,] c. 20, [§ 9,] which was contemporaneous with the proposal of this amendment; for in the ninth section it is provided, that 'the trial of issues in fact in the district courts in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury;' and in the twelfth section it is provided, that 'the trial of issues in fact in the circuit courts shall in all suits, except those of equity, and of admiralty and maritime jurisdiction, be by jury;' and again, in the thirteenth section, it is provided, that 'the trial of issues in fact in the supreme court in all actions at law against citizens of the United States, shall be by jury.'" This view of the constitution and seventh amendment, is in perfect accordance with the spirit of the revolution, and perpetuates the principles of the congress of 1774, as settled constitutional law.

As the extension of admiralty jurisdiction beyond the line prescribed in England is necessarily a deprivation of the right of trial by jury, and a substitution of the civil for the common law in cases cognizable only by the latter in 1774; any construction which will give to the term admiralty and maritime jurisdiction, a more expanded meaning than the term had in England, must be rejected. In the emphatic language of the supreme court "the want of an express pro-

vision securing the right of trial by jury in civil causes, led to the adoption of the amendment;" it is therefore the bounden duty of every court, to so construe it as to effect that object. "In a just sense the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." In defining "suits at common law," in the amendment, the supreme court declare the term to be, what is denominated "cases in law" in the third article of the constitution; what then are such suits or cases? The court gives the answer, "not merely suits which the common law recognised among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognised, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit." Adhering to this definition, the constitution becomes intelligible, in its reference to the three classes of cases to which the judicial power extends:

1. Cases in law, or suits at common law, wherein legal rights are to be ascertained, and legal remedies administered according to the old and established proceedings at common law.

2. Cases or suits in equity where equitable rights only are recognised, and equitable remedies administered.

3. Cases or suits in the admiralty, where there is a mixture of public or maritime law and of equity in the same suit.

Whether there is not a fourth class of cases, those of maritime jurisdiction independently of those of admiralty, need not now be examined.

It is next to be inquired by what rule or standard we are to ascertain what is a case in law, equity or admiralty, as contradistinguished from each other? The only rule furnished by congress, is in the acts regulating process in the courts of the United States, which provide, that the forms of writs, executions and other process in suits at common law, shall be the same as used in the supreme courts of the respective states; "in those of equity and admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity, and to courts of admiralty respectively, as contradistinguished from courts of common law. 1 Story, 67, 257, [1 Stat. 93, 275. c. 36.] No act of congress has defined this line of contradistinction, no state laws had done it before the adoption of the constitution; the jurisdiction of the respective courts had been well settled, and was well understood previously, so that no new statutory definition was necessary. The existing judicial systems of the states had been founded on the principles of the English jurisprudence. The application of the principles of the common law was universal as the rule of jurisdiction, unless altered by local statutes or usage. Hence we find that in the judiciary act, congress refer to "the common law," "the principle and usages of law" as terms of definite import, referring to the common law, and as adopted in the states. [Bank of U. S. v. Halstead,] 10 Wheat. [23 U. S.] 56, 58. In the ninth section giving admiralty and maritime jurisdiction to the district court is this expression; "saving to suitors in all cases, the right of a common law remedy in all cases where the common law is competent to give it," "and shall have cognizance of all suits at common law," &c. The eleventh section gives the circuit court jurisdiction of "all suits of a civil nature at common law or in equity," &c. The thirteenth section authorizes the supreme court, "to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus in cases warranted by the principles and usages of law," &c. The fourteenth section gives the circuit courts power to issue writs not specially provided for agreeably "to the principles and usages of law." The fifteenth section gives them power to compel the production of papers "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." The sixteenth section provides that suits in equity shall not be sustained in any case where complete remedy can be had at law.

The seventeenth section authorizes new trials to be granted "for reasons for which new trials have been usually granted by courts of law. Vide 1 Story, 56, 58, [1 Stat. 83.] Indeed the whole legislation of congress in relation to the judicial system of the United States, shows their reference to a pre-existing system, to which the terms they use are to be applied. Neither the constitution, the amendments, or laws, give a definition of law, equity, admiralty, or trial by jury," but the terms are not consequently indeterminate, or open to any construction which may be put upon them; they must be taken in the sense in which they have been universally understood through all time, by the people, the conventions and governments of the states and union. The jurisprudence of England is the test and standard to which these terms are to be referred, and by which they are clearly defined. In Robinson v. Campbell the supreme court declare, "that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles." 3 Wheat. [16 U. S.] 222, 223. "And as the courts of the union have a chancery jurisdiction in every state, and the

judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states." [U. S. v. Howland,] 4 Wheat. [17 U. S.] 115.

So far then as relates to the respective jurisdiction of courts of law and equity, under the constitution, its amendments and the judiciary act, as construed by the supreme court; the jurisprudence of England is the test and standard of reference. The next question is to what period of time this reference is to be made; on this subject there is little or no difference of opinion. The people of the several states, delegated to the United States a judicial power over cases at law, equity and admiralty, according to the rules and principles established in England before the revolution, according to general opinion; and according to the opinion of some, at the adoption of the constitution and passage of the judiciary act. Certain it is, that all laws which extended to the colonies before the revolution, which were adopted by usage or acts of assembly, were enforced as a part of the jurisprudence of the states, as well as the common law. Statutes also which were "passed before the emigration of our ancestors, being applicable to our situation, and in amendment of the law, constitute a part of our common law." Patterson v. Winn, 5 Pet. [30 U. S.] 241. And the construction of such statutes which prevailed at the revolution is the rule for the courts of the United States. Cathcart v. Robinson, 5 Pet. [30 U. S.] 280, 281. It only remains to inquire, whether the framers of the constitution, its amendment, and the judiciary act, intended to make the English system the standard by which to test the respective jurisdiction of the courts of law and equity, and the civil law the standard of admiralty jurisdiction; or whether it was intended to refer to the English system, as it was settled at the revolution, the adoption of the constitution, or passage of the judiciary act, to ascertain what was a case in law or equity; but to go back four hundred years, and ascertain by the law of England as it was understood before the restraining statutes of Richard II., passed in 1389, (vide 1 Ruffh. St. 385,) what was a case in admiralty at that time. If the advocates of an admiralty jurisdiction, broader than consists with the statutes and common law of England, take the first position, the seventh amendment is necessarily annulled; for if a case arises which is by the English system a suit at common law, the amendment embraces it, and there must be a trial by jury. If a suit on such a case is sustained in the admiralty according to the civil law, there is no trial by jury, and the amendment does not apply; such a result makes the amendment contradict itself. If by the English law, a given case is one confessedly cognizable only by a court of common law, yet by the civil law it is as clearly cognizable in the admiralty; then if the amendment refers to the former for the definition of a suit at law, and the constitution refers to the latter for the definition of a suit in the admiralty, the amendment is a felo de se, as well as directly subversive of the object, which the supreme court declare it was passed to effectuate,—to supply the want of an express provision in the constitution, securing the right of trial by jury in civil cases. The defendant is excluded from a trial by jury in the very case provided for by the amendment. The constitution and amendment must of course be referred to the same system for the definition of the three classes of cases, or the constitution controls the amendment by the grant of a jurisdiction to the admiralty, over a "suit at common law," in which the trial by jury is secured. Such a doctrine would subvert the government, by making the constitution of paramount authority to the power which created, and can amend it in all its provisions, except the equal representation of each state in the senate.

If by assuming the other position the terms law, equity, admiralty are referred for their definition and contradistinction from each other to different periods, it will be attended with difficulties which cannot be surmounted. It must be taken to be the settled construction of the constitution by the supreme court, that the terms "cases in law and equity," refer to the line drawn between the respective courts in England, at some period. Assuming that to have been the 13 Rich. II. (1389), we go back to a time when there was neither a court, nor a system of equity jurisdiction, as contradistinguished from law; those who contend that the system of federal jurisprudence was intended to be organized on the model of that of England at that period, must be left to establish the proposition as they can. To reason upon it seriously, is difficult for those who oppose it. It is as difficult to reason on the proposition, that the framers of the constitution referred to the state of the law at that period, to ascertain what was a case of admiralty jurisdiction, while they referred to a period four hundred years later to ascertain what was a case of common law or equity jurisdiction. The same difficulty attends the discussion of the proposition, that when the common law was adopted in the colonies, the states, the constitution and judiciary act; that part of it should have been excluded, in virtue of which the courts of common law issued prohibitions to the admiralty, and all other prerogative courts. This is certainly not a time to contend, that it is congenial to the spirit of American institutions, to adopt the principles of courts proceeding according to the course of the civil law, under a patent of non obstante statuto, and without a trial by jury, in preference to the rules and principles of the common law. Nor can it be necessary to enter upon an argument to show that the statutes of England, though passed before

the settlement of the colonies, which restore the common law, secure the trial by jury, and confine all courts within the line which the law prescribes for their jurisdiction, are in accordance with all our institutions, suited to the condition of the colonists, and were adopted by them as part of the common law.

It has been shown that the jurisdiction of the admiralty, was asserted in virtue of the king's prerogative to dispense with acts of parliament; the assertion of such a right by James II., was deemed so subversive of a fundamental principle of the English constitution, that it was declared to be an abdication of the crown at the revolution of 1688. 4 Ruffh. St. 440.

Whether the people of the United States intended by their constitution of 1788, to reestablish the supremacy of prerogative over law, or to authorize the district court to exercise a jurisdiction commensurate with that claimed by the admiral in his appeal to James I., as more congenial to the spirit and principles of the revolution of 1776, than the principles of their ancestors, is not deemed worthy of further inquiry. Certain it is, that the fear of such an assumption of jurisdiction, led to the seventh amendment, which was intended to remove all doubt by placing the right of trial by jury in suits at common law, beyond the danger of violation by any power under the constitution, "and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people." [Parsons v. Bedford,] 3 Pet. [28 U. S.] 446. A fundamental guarantee of the rights and liberties of the people, by sanctioning an admiralty jurisdiction according to the civil law, which repudiates the trial by jury, or on the principles asserted by the admiralty in England, in virtue of royal prerogative! If this is the only security left for the right of trial by jury in civil cases, the amendment has been made in vain, for the admiralty is left open to every plaintiff, who can bring his case within the rules of the civil law, or the English admiralty, according to their pretensions, prior to the statutes of Rich. II., in which the defendant cannot have the benefit of this "fundamental guarantee;" wholly abjuring any construction of the amendment, which would make it a fundamental and solemn mockery, I feel bound to give it a practical meaning, consistently with the solemn, repeated and uniform decisions of the supreme court. An amendment to the constitution, annuls all jurisdiction which the constitution grants, whether past, present or future, which is contrary to the amendment; it arrests the action of even the supreme court, in cases depending before them prior to the adoption of the amendment, and operates as an absolute prohibition to the exercise of any other jurisdiction than dismissing the suit. [Hollingsworth v. Virginia,] 3 Dall. [3 U. S.] 378, 382; [Cohens v. Virginia,] 6 Wheat. [19 U. S.] 405, 409; [Osborn v. Bank of U. S.] 9 Wheat. [22 U. S.] 868. The supreme court has declared the object of the seventh amendment, and inferior courts must so construe and enforce it as to effectuate that object. This fundamental guarantee of the right of trial by jury, applies to all cases or suits which the common law recognises among its old and settled proceedings, in which legal rights are to be ascertained, and legal remedies administered, whatever may be the peculiar form which they may assume. [Parsons v. Bedford,] 3 Pet. [28 U. S.] 447. These are cases or suits at law; let the plaintiff resort to what court he may, it does not change their nature, they cannot be cases in equity or admiralty, as contradistinguished from courts of law; the term a case or suit at law, refers to the cause of action, the remedy, and the mode of enforcing it, not to the forum to which the plaintiff may choose to resort. This is the meaning of the term in the constitution and amendment as judicially settled. It is also the manifest meaning of the judiciary act, which was passed at the same session of congress in which the amendments to the constitution were recommended to the states.

By the ninth section, the district court has "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction;" by the eleventh section, the circuit courts have "original cognizance concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity," &c. From these two sections three propositions necessarily follow; 1. If the suit is one of admiralty jurisdiction, its cognizance is exclusively in the district court, and it cannot be sustained in a circuit or state court; 2. If it is a suit at common law or in equity, it can be sustained in a circuit or state court; and 3. Such cases cannot be sustained in a district court, as a case of admiralty jurisdiction. In thus distributing the judicial power among the inferior courts, and assigning to each the cognizance of particular cases, congress have evidently done it with a reference to some antecedent pre-existing rules, which distinguished the different classes of cases from each other; they have also intended to refer to some system which has defined them by such lines as will prevent a collision between the different courts, on the subject matters of their respective cognizance. Those rules cannot be found in the civil law, which does not distinguish cases at law from cases in equity; and as that code recognises neither suits at common law, courts of common law, or trial by jury, it is so utterly incompatible with the judiciary act, that their repugnance is apparent at first blush. It is therefore a self evident proposition, that the jurisprudence of the United States is not founded in the civil law, and that a reference must be had to some other system to define what is a case at law or in equity; it is equally evident that the definition of a case of admiralty jurisdiction, must

be sought in the same system which defines the other cases, otherwise the courts will be involved in perpetual conflicts of jurisdiction. Conclusive as this view of the ninth and eleventh sections is, from their language and the subject matter to which they refer; the provisions of the thirteenth and fourteenth sections are too positive to leave a doubt as to the system of jurisprudence on which the courts of the United States were organized. The supreme court "shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States." 1 Story, 59 [1 Stat. 80, § 13.]

The fourteenth section gives to all the courts power to issue "all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." In referring to which term, "agreeable," &c., the supreme court say, it doubtless embraces writs sanctioned by the principles and usages of the common law. [Bank of U. S. v. Halstead,] 10 Wheat. [23 U. S.] 56. It being the settled doctrine of the supreme court, that by the terms "principles and usages of law," congress refer to the common law, the conclusion follows, that the common law is the standard by which to ascertain what are proper cases for a pro[illegible]sition to a court of admiralty, and not the civil law; still less those principles on which the admiralty courts in the time of Jac. I., protested against the right of the king's bench to grant prohibitions. This section of the judiciary act, is therefore a decided and express repudiation of the past and present pretensions of the admiralty to the cognizance of any cases where prohibition would be granted in England; that it is constitutional cannot be doubted, as the supreme court in the case of the United States v. Richard Peters, district judge, affirmed their authority under this section by issuing a prohibition. [U. S. v. Peters,] 3 Dall. [3 U. S.] 121.

A reference to the act of congress for the regulation of process in the courts of the United States, will show that the rules of the civil law have been carefully excluded. By the process act of 1789, the forms and modes of proceeding in causes of equity and of admiralty and maritime jurisdiction, shall be according to the course of the civil law. 1 Story, 67, [1 Stat. 93.] But by the act of 1792, the form and modes of proceeding in such cases were directed to be, "according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law." 1 Story, 258, [1 Stat. 275, c. 36.] We must then resort to that system of jurisprudence, in which there are courts of common law, as contradistinguished from courts of equity and admiralty; to resort to the civil law for the rules which define the respective jurisdiction of these courts, when congress have excluded them as to the forms and modes of proceeding, would be manifestly opposed to the law. Such resort would also be useless, as the civil law recognises no courts of common law. Both of these acts have been deliberately examined by the supreme court, in Wayman v. Southard. They declare that "the forms of writs and executions and modes of proceeding in suits at common law, and the forms and modes of proceeding in causes of equity and admiralty and maritime jurisdiction, embrace the same subject, and both relate to the progress of a suit, from its commencement to its close." 10 Wheat. [23 U. S.] 29. The term, "forms and modes of proceedings, embraces the whole progress of the suit, and every transaction in it, from its commencement to its termination." Id. 32. "This section (second section of the act of 1792) then goes on to prescribe the rules and principles by which the courts of equity and of admiralty jurisdiction were to be governed." Bank of U. S. v. Halstead, Id. 58, governed from the commencement of the suit; jurisdiction of course is included, and trial by jury preserved. The whole system would be deranged, by adopting the civil law as the rule of jurisdiction, and regulating and governing the forms and modes of proceedings by rules, principles and usages which were unknown to that code, and known only in that system in which courts of common law are recognised, as contradistinguished from those of equity and admiralty jurisdiction.

There is another view of our system of federal jurisprudence, which leads to the same conclusions. The judicial power of the United States is confined to the cases enumerated in the third article of the constitution; all others remain under the exclusive cognizance of the states, as a part of their powers, reserved by the tenth amendment; the eleventh section of the judiciary act also leaves to state courts a jurisdiction over the cases therein enumerated, concurrent with the circuit courts. Any exercise of jurisdiction by the district court in admiralty, over cases at law or in equity, must therefore clash with that of the courts of the several states, as well as of the circuit courts. This will be avoided by adhering to the line of separation between the respective courts, as designated by the statute and common law of England, at the revolution or adoption of the constitution, and the system will be harmonious and consistent in all its parts, both federal and state. On the other hand, by attempting to introduce the admiralty jurisdiction of the civil law, or those principles which were asserted in early times in its favour, a foundation is laid for interminable conflicts of jurisdiction between the courts of the state and the

union. Conceding, ex gratia, that the constitution admits of two constructions, that the seventh amendment does not remove the doubt, that the judiciary act does not exclude cases at law and equity, as defined by the common law, from the cognizance of courts of admiralty, and that the provisions of neither will be violated by the exercise of admiralty jurisdiction as claimed before the statutes which restrained it; it cannot be denied that they admit of a different and more obvious construction, more conducive to the harmonious movements of the two systems of state and federal jurisprudence; and which ought to be adopted, if it can be done consistently with the words, or spirit of the constitution and laws. The decisions of the supreme court have conclusively established the principle that the terms cases in law and equity in the constitution, and suits at common law, in the seventh amendment, are therein used as they are defined by the common law; some powerful reasons ought therefore to be given why the term "cases of admiralty and maritime jurisdiction" have not been used according to their common law definition, but in reference to its definition in a system, in all respects in collision with the common law. No such reasons have been given in argument, or appear in any of the cases referred to.

If there was any middle ground between the audacious pretensions of the admiralty in virtue of prerogative, and the limits prescribed by the statutes and common law of England, on which to place the admiralty jurisdiction of the district courts, there would be more reason for entertaining a doubt as to the meaning of the constitution, its amendments, and the judiciary act. But there is no middle ground on which to place such jurisdiction; when we once break over the line which restrained it by acts of parliament and prohibitions, we are necessarily thrown back on the civil law and the royal prerogative, for the rules and principles on which the right of trial by jury depends. It is in vain to contend that the seventh amendment will be any efficient guarantee for this right, in suits at common law, if an admiralty jurisdiction exists in the United States, commensurate with what is claimed by the claimant in this case. Its assertion is, in my opinion, a renewal of the contest between legislative power and royal prerogative, the common and the civil law, striving for mastery; the one to secure, the other to take away the trial by jury; and until the authoritative judgment of a higher court shall make it my duty to surrender my judgment to their decree, it will never be sanctioned by me. Judicial power must first annul the seventh amendment, or judicial subtlety transform "a suit at common law, into a case of admiralty and maritime jurisdiction," before I take cognizance of such a case as this without a jury. Both parties are citizens of Pennsylvania, the cause of action arose in the body of a county, the contract is governed by the common law, its subject matter is not of a maritime nature, or regulated by public or maritime law; but in all its aspects, a suit upon it from its commencement to its close, is cognizable only in a state court.

Viewing the question on which this case must turn, as involving most important consequences, I have given it a consideration not called for by the small amount in controversy, but called for on account of the principles it involves, as well as my duty to the profession and suitors, in cases which may come to this court by appeal. If it should be thought that any of the foregoing principles would shake the jurisdiction of the admiralty over contracts for seamen's wages, it must be admitted that the objection would have great, if not conclusive force, if the question was a new one; but in deciding on this, and other great questions of power, whether of courts or legislatures, the proper inquiry for a judge, is not merely into the original principle on which it depends, but also the practical, undisturbed, unquestioned exercise of jurisdiction for a long course of time. It is not only a powerful reason in favour of its legitimate existence, but to question it after it became recognised by all departments of the government, might tend more to shake foundations, than an adherence to a principle at first erroneous.

In England, the statutes of Richard II., or Hen. IV., have never been applied to suits for seamen's wages. Courts of common law have not issued prohibitions to the admiralty, against the exercise of this part of their jurisdiction; the judges have considered it as not embraced in the statutes, but as an exception to them, or sanctioned by the maxim of communis error facit jus. The reason is immaterial, the matter is at rest by common consent, the jurisdiction of the admiralty is unquestioned there, as a practical undisturbed construction of ancient statutes. So it is here. It has been exercised in the states before the confederation, from its adoption till the adoption of the constitution, and since then by the federal courts. In Sheppard v. Taylor, [5 Pet. (30 U. S.) 710,] the supreme court unanimously declared, "that over the subject of seamen's wages, the admiralty has an undoubted jurisdiction in rem, as well as in personam." Thus definitively settled, this matter is certainly not open to argument here. Though a contract for seamen's wages is made on land, and is cognizable by courts of common law, yet they must adjudicate upon it by the rules and principles of the maritime law. The rights it creates, the duties and obligations it imposes, the penalties it inflicts, the conditions and casualties to which it is subject, are mostly unknown to the principles of the common law, and a suit upon it partakes of few of the attributes of a "suit at

common law." They are prescribed and regulated by the public or maritime law, so that though the suit to enforce the payment of wages, or the performance of the service, may be at common law, yet the controversy concerning them is not necessarily a case in law. The rights to be ascertained are not legal, as contradistinguished from cases in equity and admiralty in the third article, and the remedy by libel in the admiralty is not the suit at common law, but that peculiar proceeding, by the mixture of public, maritime and equity law, in the same suit, which, according to not only the opinion of the supreme court, but the correct legal construction of the seventh amendment to the constitution, is not forbidden by its provisions. So it was considered by the first congress which assembled after the adoption of the constitution, in the session succeeding that in which the same body recommended the amendments to the constitution. In the sixth section of the act of 1790, [1 Stat. 133,] for the regulation of seamen in the merchant service, they have a right to proceed in the district court for their wages, "and the suit shall be proceeded on in the said court, and final judgment be given, according to the course of admiralty courts in such cases used;" provided that nothing shall prevent any seaman or mariner from having or maintaining his action at common law, &c. 1 Story, 105, [1 Stat. 133, § 6.] In the previous sections of this law, there are various other provisions relative to seamen, which make the contract of service a statutory contract, peculiarly appropriate to admiralty and maritime jurisdiction, as regulations of commerce and navigation, and the service is in its nature maritime. But the law has made no provision for the exercise of admiralty jurisdiction over contracts for materials, labour or provisions, in building, equipping, furnishing or provisioning a ship when in our ports. Such contracts have no maritime attributes, but as to the rights and obligations imposed and arising, are regulated exclusively by the statute and common law of the states; and all controversies concerning them must be cases in law, in which legal rights are to be ascertained according to the old and settled proceedings of such courts, according to the law which regulates right and remedy, in as marked contradistinction to those in courts of admiralty, as the latter are to the former. Such cases therefore come directly within the seventh amendment, and agreeably to its solemn and authoritative exposition, are not cognizable in the admiralty.

The next aspect in which this account is presented for consideration, is as an off-set to the demand of the libellant, for which the respondent produces no authority from any writer of authority on maritime law, or any adjudication in the admiralty, but rests on general principles of law and equity. The contract for wages is a marine one, and from its nature, and the principles which govern it, seems to me not to come within the provisions of any statutes of set-off, their equity, or any analogous principle adopted by courts of law or equity. There are cases where each party having a judgment or decree for money, in the suits in which they are respectively plaintiffs, and entitled to the process of the court for collection; and the parties and the causes of action being within its jurisdiction, the court can do justice between them, by deducting the amount of the one judgment from the other, and order process only for the balance, or where a claim, over the subject matter of which the court have jurisdiction is pending before the same court in which a defendant has obtained a judgment; a court of law as well as equity may, in certain cases, direct proceedings to be stayed, till the other party can have an opportunity of a trial or hearing. And as courts of admiralty undoubtedly possess equity powers, the same rule may prevail there; but it is not necessary to the decision of this case to enter on the inquiry, or to attempt to specify the cases in which it could be done. As the admiralty has not jurisdiction of this account, as an original claim, they cannot take cognizance of it in shape of a set-off, as they have no power over the subject matter of the respondent's claim.

To subject the wages of a mariner to a defalcation on account of debts due to the owner of the ship, on matters unconnected with the particular contract, would be to deprive the former of all inducement to enter the service, which is to get bread for himself and family and secure a subsistence for them in his absence. It would be not only hard, but oppressive on him, at his return from a long voyage, to find his wages attached by a debt due the owner, or purchased by him from another, and neither stipulated or contemplated at the time of the contract to be charged upon his wages, and without any previous notice that an attempt would be made to do so. That the owner has no such right by the marine law is very evident from the following rule. "If a mariner takes up money or clothes, and the same is entered on the purser's books; by the marine custom it is a discount or receipt of so much of their wages as the same amounts to, and in an action brought by them for their wages the same shall be allowed, and is not accounted mutual, the one to bring his action for his clothes, and the other for his wages." Molloy, bk. 2, c. 3, rule 11, p. 249.

This is certainly a direct negation of the general right of set-off, or no provision would have been deemed necessary for such case; suggestio unius est exclusio alterius, is an old and safe maxim of the law. This subject has been taken up by the learned judge of the first circuit, and very ably considered; concurring fully with him in his views, and the conclusions, to which he arrived as to set-off in the admiralty, it is unnecessary to do more

than to refer to his opinion, as reported in Willard v. Dart, [Case No. 17,680.] As it is not averred in the answer, that any of the supplies of provisions were made on the faith of, or with reference to the contract for wages, it cannot be pretended that they can be considered as payment. There are also other strong, if not conclusive objections, to this account, all the items preceding that of January 1831, are barred by the act of limitations, which might have been conclusive if it had been pleaded, and whether pleaded or not, the libellant could, at the hearing, have availed himself of the staleness of the claim and the lapse of time, on equitable principles, as settled in this court in Baker v. Biddle, [Case No. 764,] in suits in equity, and in the circuit court in the first circuit in the case of Willard v. Dart, [supra.] &c. This case affords a very powerful reason for the application of the rule. The answer does not state whether the provisions were furnished to the libellant for the supply of vessels on his own account, or of the owners thereof. If he was merely the master, the accounts ought to be furnished seasonably before he settles with the owner, and if not done before such settlement or in a seasonable time, according to marine usage, are proper charges only against the owner.

The decree [unreported] of the district court is affirmed with six per cent. interest and costs.

Case No. 757.

BAIRD v. BYRNE.

[3 Wall. Jr. 1.][1]

Circuit Court, D. Pennsylvania. Oct. Sessions, 1854.

JURISDICTION—NATURALIZATION — FOREIGN ALLEGIANCE.

A mere "declaration of intention" by an alien, under the naturalization laws of the United States, to become a citizen, &c., and to renounce all allegiance to a foreign, his natural sovereign, in a judicial point of view, is not sufficient of itself, and without being perfected by an actual renunciation, to prevent such alien from being regarded as a "foreign citizen or subject," within the meaning of that clause of the constitution which gives jurisdiction to the courts of the United States over controversies between the citizens of a state and "foreign citizens or subjects." This point ruled at nisi prius, in a special case, and with the expression of a readiness on the part of the court to hear it more solemnly argued.

[Cited in Betzoldt v. American Ins. Co., 47 Fed. 706.]

[See Lanz v. Randall, Case No. 8,080.]

By the act of congress, on the subject of naturalization, (Act April 14, 1802, c. 28, § 1; 2 Stat. 153,) any alien, being a free white person, may become a citizen of the United States by declaring before certain courts prescribed by the act, his bona fide intention to become such citizen, "and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly by name the prince, potenate, state or sovereignty whereof such alien may at the time be a citizen or subject;" and then at the expiration of three years, under certain provisos, making oath to support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure such allegiance, &c.

With this law in force, Byrne, the defendant, a native of Ireland, came to this country in the spring of 1849, and immediately, on the 7th of April of that same year, made in the proper court the required declaration of his intention, and particularly of his intention to renounce his allegiance to the queen of Great Britain and Ireland. Soon afterwards he took up his abode in Philadelphia, where, with his father, he continued to reside. In 1853 he was elected captain of a volunteer company of Philadelphia troops, and as such was commissioned by the governor of Pennsylvania, and he frequently and uniformly declared, and this with emphasis and warmth, that he had thrown off his allegiance and ceased to be a subject to the queen of Great Britain and Ireland. He was thus residing here when, in April, 1853, this suit was brought by Baird, a citizen of Pennsylvania, before the expiration of the term of residence required by law as precedent to the final act of naturalization.[2]

"The judicial power" of the United States courts extending by the constitution (article 3, § 2, par. 1) to controversies between the citizens of a state, and foreign states, citizens or subjects, the question in this case, which arose on a plea to the jurisdiction, was whether the defendant was, when the suit was brought, a foreign subject, and as such within the jurisdiction of the United States courts; or, in other words, whether a person born in a foreign country, and owing allegiance to its sovereign, who emigrates to this country with the intention of becoming a citizen, can by his voluntary act, without the concurrence of his native government, throw off his allegiance, so as to cease to be a foreign subject, after he has made his declaration on oath of his intention to renounce that allegiance, and before the final act of naturalization.

Mr. Penrose, for the defendant, Byrne.

I. The circuit court is of limited jurisdiction, having cognizance only in a few cases. So strictly have the United States courts been confined within the limits prescribed, that it has been held, under the provision

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

[2] On the expiration of the proper term, Byrne actually became a citizen; but on the breaking out of the war between Great Britain and Russia he went abroad, without any intention of returning to the United States, and entered into the military service of the emperor of Russia.

that the court shall have jurisdiction in controversies between citizens of different states, that neither the District of Columbia, nor a territory, is a state within the meaning of the constitution. Seton v. Hanham, Charlt. R. M. 374; Hepburn v. Ellzey, 2 Cranch, [6 U. S.] 445; New Orleans v. Winter, 1 Wheat. [14 U. S.] 91; Wescott v. Fairfield Tp. [Case No. 17,418.] Assuming, then, that if Byrne was, at the time of the commencement of this suit, not a subject of the queen of Great Britain, this court had no jurisdiction, let us inquire:

II. Was he at this time such a subject? It is not necessary to show affirmatively that he was a citizen, or even a subject of the United States. Whatever might be said in favor of that position, this case requires us only to show that he was not a subject of the queen of Great Britain and Ireland. We can expect no assistance from English authorities or decisions. A country which executed as a traitor a person born of French parents who were temporarily in England on a visit, because he was found in the army of his own country fighting against England; which maintains even now, that a child born in the United States, of an American mother, is a British subject, because its father, though a naturalized citizen, happened to have been born in England—such a country cannot be expected to aid much in discussing here a question of American citizenship. We have uniformly, and in the most decisive manner, repudiated as unjust and antiquated, the dogmas of England on the subject of allegiance. We have a code of our own upon that subject, and with a federal court interpreting the federal constitution, the only question will be, what is the American view? We have sent as an American minister, one Frenchman, Mr. Galatin, to the court of France; and another Frenchman, Mr. Soule, to the court of Spain; and by the law of allegiance, as laid down in England, our present minister in London is a subject of the British queen. The English courts, whose decisions ever run in parallelism with English interests, may decide what they please. We settle the law on some subjects for ourselves.

The case of Martin Koszta, though a diplomatic and not a judicial case, is in point. See The Washington Union, Extra, Sept. 29, 1853. Koszta, by birth an Austrian subject, had been engaged in an unsuccessful attempt at revolution against the emperor of Austria; and fleeing from the Austrian dominions to Turkey, had, in 1851 or thereabouts, come by agreement of the emperor to the United States, on condition that he should not again set foot on Ottoman soil. In July, 1852, he made the usual and proper declaration here of his intention to become a citizen of the United States, and to renounce all allegiance to any other state or sovereign, and particularly to the emperor of Austria. After remaining here about two years, he returned to Turkey for purposes of private business of a temporary kind, where he placed himself under the protection of the American consul, who gave to him a tezkera, or kind of passport or letter of safe conduct. Soon after this he was seized by agents of the emperor of Austria, and against his will, put on board an Austrian ship of war, to be taken into the Austrian dominions. Captain Ingraham, commanding an United States sloop of war, demanded his release under threat of a resort to force if the demand was not complied with by a certain hour. The prisoner was surrendered by the Austrian sloop to an agent satisfactory to Captain Ingraham, and he came afterwards to America. This interference was complained of by Austria, which declared that it "could not consider the individual in question as belonging to a foreign jurisdiction so long as the ties which bound him to his country were not legally dissolved." And that even if Koszta "could, without violating the laws of his own country, of his own accord, and without any other formality, have broken asunder the ties which bind him to his native soil," yet in this case he had "done nothing more than declare his intention of becoming a citizen of the United States, and with that object in view, of renouncing his rights of nationality in the states of the emperor." But how was this doctrine answered by our government? It declared, on the subject of allegiance generally, that the sounder and more prevalent doctrine is "that the citizen or subject having faithfully performed the past and present duties resulting from his relation to the sovereign power, may, at any time, release himself from the obligation of allegiance, freely quit the land of his birth or adoption, seek through all countries a home, and select anywhere that which offers him the fairest prospect of happiness for himself and his posterity." And while it was not contended that the "initiatory step in the process of naturalization invested him with all the civil rights of an American citizen," such step was declared to "be sufficient, for all the purposes of this case, to show that he was clothed with an American nationality, and that in virtue thereof the government of the United States is authorized to extend to him its protection at home and abroad." The government accordingly defended the acts of all its agents; not only of Captain Ingraham, who claimed possession of a man having an American tezkera or passport (which was enough to justify him), but of the American consul, who, on learning of Koszta's mere "declaration of intention," had so far regarded him as an American citizen as to give him a document usually given to citizens alone. Indeed, the secretary of state afterwards went further than he need have done for this case, in saying that mere domicile, animo manendi, or without any present intention of removing herefrom, gave such nationality.

Now, if Koszta was an Austrian, and "a foreign subject," what right had our government to prevent Austria's final control of him? By interfering as it did, completely and thoroughly, our government declared in an emphatic manner that he was not an Austrian subject; that whatever new character he might or might not have as yet acquired, he had lost his old one. No doubt, as a legal view, this, merely on our principles of allegiance, was right. We can well conceive, under our laws, of inchoate or initiate citizenship; and inchoate American citizenship is inconsistent with the completeness of any foreign subjection; perhaps with its existence at all. A man, it is true, must have a domicile somewhere; and he must have perhaps a national character. But it has not been decided that he must necessarily be a citizen totus, teres atque rotundus; invested with all political and civil rights of citizenship of the most favored class. Citizenship, under the American view, may be in a state of transition, which is enough for our purpose; though the more true view, in respect of legal analogies, is the one above mentioned, st. that of citizenship initiate. The alien has undoubtedly certain political rights by the mere declaration of intention; for he has a right, at the end of three years thereafter, on complying with certain terms, to become a citizen complete. His case finds a legal analogy in that of a tenant by the curtesy; who has no rights till the birth of issue; and no perfect rights till the death of the wife.

But a man may be a subject within the terms of the constitution, and yet not be a citizen within the naturalization or any other laws. Koszta, though not a citizen within these or any other laws, was so far a subject that he claimed and received the most ample protection of our government; a protection which certainly we do not extend to the subjects of foreign powers. We justified an act of war for this man. Our government "in discharging" what it called "its duties of protection," regarded him as its subject, bound by its laws, and bound to act as it directed. Great Britain and the United States have millions of subjects who are not citizens at all. Many of the people of the East, and some, probably, of the West India isles, are British subjects, but not British citizens.

It must be recollected, that the delay after thus making the declaration, before the alien becomes a citizen, is not of his own seeking. He does not say, "I don't intend to become a citizen now, but will consider the subject a little and see whether I will give up my allegiance to my native country." He is willing and anxious to become a citizen at any time; but the United States, for their own protection, and to prevent persons inexperienced in our institutions and mode of carrying on our government from interfering in a matter they don't understand, requires a term of probation, during which they may learn more of our affairs, and thus become better fitted for taking part in them. No foreigner who has declared his intention of becoming a citizen, would be unwilling to have the process completed at that same time. The simple act of swearing to an intention to renounce all allegiance to the queen of Great Britain and Ireland, is an act inconsistent with the idea of any further continuance of that allegiance.

It has been held, that after making the declaration of intention, there must be a continued and uninterrupted residence of five years in this country; and that any absence, however short, is sufficient to prevent subsequent naturalization. Now it would be unjust thus to require a man to remain here, and yet to assert at the same time that he was a foreigner, and not entitled to protection as a citizen of the United States. Is this requiring him to remain here consistent with the idea that our law considers him as remaining a foreign subject? This government, we have seen, has avowed its intention not to be guilty of this injustice; and further, that it will protect such persons and redress their injuries, even should those injuries be inflicted by the country claiming the allegiance. It can scarcely be that we would avow a doctrine in our intercourse with foreign nations, which we reject when applied to ourselves. That we should say to England "Mr. Byrne is entitled to our protection even against you, because he has ceased to be your subject," and yet, when he, himself, here asserts that he is not a subject of England, that we should deny it and say that he was.

If we look at the light in which a person, thus making a declaration of intention to become a citizen, is viewed by the statutes of the United States, we shall find that he is in no place considered as remaining a foreign subject, but that he is vested with certain rights which are entirely inconsistent with such an idea. The act of 26 March, 1804, [2 Stat. 293,] § 2, says: "When any alien who shall have complied with the first condition specified in the first section of the said original act" (that is, who has declared his intention, &c.), "and who shall have pursued the directions prescribed in the second section of the said act, may die before he is actually naturalized, the widow and children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such upon taking the oaths prescribed by law."

Such a right as that given by the statute would scarcely have been given to the wife and children of a person owing allegiance to a foreign government: and it seems from this that it was thought that he ceased to be a foreign subject from the moment of making his declaration. This shows, too, that it is merely to prevent his voting that he is not naturalized at once, and that it was thought that from the time he makes the declaration he ceases to be a subject of the foreign gov-

ernment, and begins to become an American citizen, clothed with all the civil rights of the citizen, but from his inexperience not yet intrusted with the political rights. The expression "actually naturalized," is significant. It admits a naturalization short of actual or complete naturalization, a naturalization in law, or a naturalization for many purposes.

So, also, the patent act of July 4, 1836, § 12, [5 Stat. 121,] provides, "that any citizen of the United States, or alien who shall have been a resident of the United States one year next preceding, and who shall have made oath of his intention to become a citizen thereof, and who shall have invented any new art, &c., and shall desire further time to mature the same, may, on payment of the sum of $20, file in the patent office a caveat, setting forth the design," &c. Here there is a right given equally to aliens who have declared their intention, &c. and to citizens of the United States, from which right all other aliens are excluded. This seems to favor the view we have taken; but the 9th section of the act is still stronger. It is as follows: "That before any application for a patent shall be considered by the commissioner, the applicant shall pay into the treasury of the United States, or into any of the deposit banks to the credit of the treasury, if he be a citizen of the United States, or an alien, and shall have been resident in the United States for one year next preceding, and shall have made oath of his intention to become a citizen thereof, the sum of $30; if a subject of the king of Great Britain, the sum of $500, and all other persons the sum of $300." This act speaks of three classes of persons, viz.: Citizens and aliens who have been a year resident within the United States, and have declared their intention of becoming citizens thereof. 2d. All other aliens, except subjects of the king of Great Britain. 3d. Subjects of the king of Great Britain. Now Byrne must belong to one of these classes, and to one only. And being one of the persons described in the first class, no one will say that the act considers him as belonging to the third class also. If he be not of the third class, then has the plaintiff failed to prove the facts alleged in the record, and to repel the presumption of the want of jurisdiction.

Mr. Ingraham, on the other side, contended that the declaration of an intention to renounce, &c., was not a renunciation. It was, indeed, a thing of the least possible significance. The party might perfectly well change his intention. This locus penitentiae was given to him designedly; that he might see whether he knew his own mind. The omission of the party to carry out his intention involved no penalty from our government; nor would the existence of the declaration itself infer any penalty from his own. An intention to renounce at the end of five years is consistent with a continuing allegiance during the five years. Nay, it is inconsistent with any renunciation before the expiration of five years. Even the party himself, therefore, did not renounce his allegiance. If he had, it would be a nullity. He can make no renunciation not acknowledged by the law, and the law will not allow him to renounce it before the end of five years. The country could not accept it. If, then, the party does not renounce his old allegiance, and the country does not accept any new allegiance, in what way does his old allegiance cease? There is a fundamental error on the other side in supposing that a declaration of an intention to renounce is identical with an actual renunciation. The declared intention may not exist. A real intention may change, as we have said. This very case proves the truth of our argument. Byrne declared his intention to become a citizen of the United States, but abandoned the country soon after, and is a soldier in the army of the emperor of Russia, without the least intention of ever coming back here.

The case of Koszta was not a precedent. It was a political, not a judicial case. The fact that Koszta was on a neutral territory, Turkey, with an American passport, was enough to justify our government in saying to Austria, who had arrested him by main force, against the complaint of Turkey, "You have treated our 'protection' with indignity;" and in justifying in the eyes of the world, at least, a gallant officer of our navy who, with patriotic motives, had compelled a surrender of the man to the government with whose sign of protection he was invested.

The acts of congress which have given some privileges to persons declaring intention are of no significance, either as facts or arguments. Congress may favor such persons, as it has in special cases favored aliens who had made no declaration at all. An act by congress can't amount to an act by an individual no way connected with congress: nor can acts of congress, having nothing to do with the naturalizing of aliens, cause the transfer of allegiance from one sovereign to another. The very sections of both the acts relied on speak of persons who have done no more than "declare intention" as "aliens." They favor our view more than they do that of the other side.

GRIER, Circuit Justice, admitted that the question, as a judicial one, was new, and of some difficulty; but it being, as he stated, his opinion that a man could not throw off his natural allegiance except in assuming some new citizenship, he refused to dismiss the case in a summary way, for want of jurisdiction. And there being no disputed facts in the case, he directed a verdict for the plaintiff, giving leave, however, to the defendant to move to set it aside if he desired. The motion was made; but Byrne having actually abandoned this country soon after the suit was brought, and there not being any like-

lihood whatever of his return, the case was not heard of further.

NOTE, [from original report.] The conclusion thus adopted by the court in this case is sustained by the view subsequently taken by the court of appeals in Kentucky, in White v. White, A. D. 1859, 2 Metc. (Ky.) 189, where it was decided that an alien who had taken the preparatory oath to become a citizen of the United States, is not thereby rendered capable to take lands by descent; and that his subsequent naturalization does not operate to invest him with the title which in the meantime has vested in the commonwealth. It was supported, also, in the view taken by the federal government at an interesting crisis of American history; as appears by the following letter of the secretary of state to the then British charge at Washington: Department of State, Washington, July 20, 1861. Sir:—Having informally understood from you that British subjects who had merely declared their intention to become citizens of the United States, had expressed apprehensions that they might be drafted into the militia under the late requisition of the war department, I have the honor to acquaint you, for their information, that none but citizens are liable for duty in this country, and that this department has never regarded an alien, who may have merely declared his intention to become a citizen, as entitled to a passport, and consequently have always withheld from persons of that character any such certificate. I have the honor to be, with high consideration, your obedient servant, Wm. H. Seward. To the Hon. Wm. Stewart, etc.

BAIRD, (DUNHAM v.) See Case No. 4,147.
BAIRD, (LEWIS v.) See Case No. 8,316.

Case No. 758.

BAIRD v. SHORE LINE RY. CO.

[6 Blatchf. 276.] [1]

Circuit Court, D. Connecticut. Dec. 19, 1868.

EQUITY—JURISDICTION—TO RESTRAIN THE ERECTION OF A BRIDGE.

This court has jurisdiction of a suit in equity brought to restrain the building of a bridge across the Connecticut river, between Saybrook and Lyme, to be used for a railroad, although the construction of such bridge is claimed to be authorized by the legislature of the state of Connecticut. The construction of such a bridge was enjoined until the final hearing of the cause.

[See Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. (54 U. S.) 518; Devoe v. Penrose Ferry-Bridge Co., Case No. 3,845; Silliman v. Hudson River Bridge Co., Cases Nos. 12,851, 12,852; Hatch v. Wallamet Iron Bridge Co., 6 Fed. 326, 780. Contra, Milnor v. New Jersey R. Co., Case No. 9,620; Pennsylvania R. Co. v. New York & L. B. R. Co., Id. 10,953.]

[In equity. Bill for injunction by William M. Baird against the Shore Line Railway Company. Injunction granted. At a subsequent hearing this provisional injunction was dissolved. See Baird v. Shore Line Ry. Co., Case No. 759.]

The plaintiff, a resident of Philadelphia and a citizen of the state of Pennsylvania, filed this bill in equity, praying for a perpetual injunction against the defendants, to restrain them from building a bridge across the Connecticut river, connecting their railroad track, between Saybrook and Lyme. He alleged that they were proceeding to erect the bridge, and that the same would very seriously obstruct the navigation of the river. The defendants, by their answer, set up that they were proceeding to erect such bridge under and by virtue of authority conferred on them by a statute of the state of Connecticut, and that the structure which they were erecting was not intended to obstruct, and would not in fact obstruct, to any considerable extent, the free navigation of the river. The plaintiff, who alleged that he was an owner of vessels enrolled and licensed under the act of congress, and engaged in running on said river, and interested in the navigation thereof, now moved that the defendants be temporarily enjoined against the further erection of the bridge, until the final hearing on the bill, answer, and proofs. This motion was founded on the bill and accompanying affidavits in support of its allegations. The defendants opposed it on their answer and on affidavits.

Richard D. Hubbard and William Hammersley, for plaintiff.

Henry B. Harrison and Tilton E. Doolittle, for defendants.

Before NELSON, Circuit Justice, and SHIPMAN, District Judge.

SHIPMAN, District Judge. We do not propose, at this stage of the controversy, to enter into a lengthy discussion of the important questions involved. As we intimated to the counsel on the hearing, we have no doubt on the question of jurisdiction raised by the defendants. The Connecticut river, at least at the point where this bridge is being erected, is a public river, free to all for the purposes of navigation. We regard the right of this plaintiff, as well as that of every other citizen, to its free navigation, as secured by the constitution and the laws of the United States. Any material obstruction to the exercise of this right is a wrong which this court has power to redress. As the injury complained of is of that peculiar character for which the remedy at law is not adequate, resort must be had to equity, and the plaintiff has, therefore, filed his bill on the equity side of the court. Over the questions thus presented, as we have stated, we think this court has ample jurisdiction. This jurisdiction is not impaired by the law of the state authorizing the erection of the bridge, for the constitution and laws of the United States, by which the free navigation of the river is secured, are paramount to the authority assumed to be exercised by the state.

After elaborate arguments, and upon due consideration of the proofs as they now stand, we think that the defendants should be enjoined until the case can be brought

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

to a final hearing. The Connecticut river is an important river, emptying into a great arm of the sea, and over its waters a considerable commerce is carried on by citizens of other states as well as by those of Connecticut. It is navigable for large vessels for some fifty miles from its mouth, and it is very near its mouth that the defendants are engaged in erecting the bridge. In this particular, the case is without parallel in the history of this country, so far as we are informed. We are not aware that the attempt has ever before been made to throw a permanent bridge across a large navigable river, at or very near its entrance into the sea. Of course, to whatever extent the navigation may be endangered or obstructed, the danger and inconvenience will be felt by the whole commerce of the river. We are satisfied, upon the proofs, as they now stand, that the free navigation of this river will be materially abridged, and the commerce over it be seriously incommoded and burdened, by the erection of the structure on which the defendants are now engaged. We are now treating the case in its present aspect, leaving, of course, a final judgment upon this and other questions involved, to a later stage in the suit, when the proofs shall be fully presented. We, therefore, purposely abstain from dwelling at length on the points in issue between the parties, and content ourselves with the announcement that, on the facts now before us, we deem it our duty to temporarily arrest the construction of this bridge.

It is proper to add, that we regard this as the best course for all concerned, for, while it leaves all the important questions open for examination on final hearing, it will effectually prevent the introduction into the case of that element of embarrassment, arising out of large expenditures, which has been felt in the later stages of cases of a similar character. Though the defendants are thus subjected to delay, they are at the same time relieved from any hazards. The enjoyment of their railway franchise, as they have used it for many years, is not interfered with. On the contrary, their rights, as they have existed and been enjoyed down to the present time, and the immemorial rights of all to the free and unobstructed navigation of the river, are preserved until the final determination of the grave questions involved in the case.

Let an injunction issue.

Case No. 759.

BAIRD v. SHORE LINE RY. CO.

[6 Blatchf. 461.] [1]

Circuit Court, D. Connecticut. June 17, 1869.

BRIDGES—ERECTION—DRAWBRIDGE—ACT FEB. 19, 1869.

By the act of February 19th, 1869, (15 Stat. 273,) authority was given to the Shore Line Railway Company to erect a drawbridge over the Connecticut river, although this court had held [Baird v. Shore Line Ry. Co., Case No. 758] that such bridge would be an obstruction to navigation, and had enjoined its erection. The injunction was dissolved by the court, because of the passage of such act.

[Cited in Hatch v. Wallamit Iron Bridge Co., 27 Fed. 674.]

[In equity. Bill for injunction by William M. Baird against the Shore Line Railway Company. Heard on motion to dissolve the provisional injunction heretofore issued in this cause. Baird v. Shore Line Ry. Co., Case No. 758. Injunction dissolved.]

Richard D. Hubbard, for plaintiff.

Tilton E. Doolittle and Henry B. Harrison, for defendants.

NELSON, Circuit Justice. This motion is founded upon the act of congress passed February 19th, 1869, (15 Stat. 273.) The legislature of the state of Connecticut passed an act authorizing the defendants to erect and maintain a railroad bridge across the mouth of the Connecticut river. The second section provided that the bridge should be constructed and used so as not to be a substantial obstruction to the free navigation of the river, and should be provided with two draws, each of which should be of the width of at least one hundred and twenty feet; and that, during the season of navigation, the draws should be kept open, except when closed for the passage of engines and cars. Various other regulations were prescribed, to be observed by the defendants, which do not require to be particularly noticed. The third section provided, that the bridge and draws should be located and constructed in such manner, at such places, and upon such plan, as a board of engineers, to be appointed by the superior court of the state, should approve. The defendants, having procured the approval of such board, commenced the erection of the bridge, but were soon thereafter restrained from further proceedings, until the cause should be heard on pleadings and proofs, by a preliminary injunction issued by the court, on the ground that the bridge would substantially obstruct the navigation of the river. In this posture of the case, an application was made to congress on the subject, in pursuance of which the act in question was passed.

It is claimed, on the part of the defendants, that this act removes the objection taken by the court to the erection of the bridge, and authorizes its construction according to the plan prescribed by the legislature of the state, and approved by the board of engineers, while it is insisted, on the part of the plaintiff, that, according to the true construction of the act, the question still remains for the court to decide, whether or not the bridge, as thus built, will present a substantial obstruction to the navigation.

This first section of the act provides, that the consent of congress is given to the erec-

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

tion of a drawbridge over the Connecticut river, &c., by the Shore Line Railway Company, in accordance with the terms of a resolution passed by the general assembly, &c. The second section provides, that the bridge, when completed in the manner specified in said resolution, and in the place, and in accordance with the plans of the board of engineers, &c., and in accordance with the requirements of the second section of the resolution of the general assembly, &c., shall be deemed to be a legal structure, &c. The argument, on the part of the plaintiff, is, that, inasmuch as the first and second sections of the act, which are relied on as legalizing the bridge, refer to one built in conformity with the requirements of the legislature of the state, and one of those requirements is, that it shall be so built as not to be a substantial obstruction to the navigation, if it can be shown, to the satisfaction of the court, that it would be, if erected, the preliminary injunction should be continued—that the requirement referred to must be shown to have been complied with, in order to bring the case within the authority conferred by the act of congress. The argument is plausible. But I am not satisfied that it is sound, or can afford sufficient ground for disregarding the general intent of the act, and the fair import of particular provisions of the same. The clause in the resolution of the legislature of the state is but declaratory of a principle of law, and added nothing to the legal effect of that resolution. If it had been omitted, the construction of the state act would have been the same. Therefore, I am not satisfied that the act of congress, when it refers to the mode and manner of the construction of the bridge, and to the duties and obligations of the defendants, as prescribed in the state law, and, especially, in the second section of that law, has any reference to the principle of law there declared. It refers to the mode and manner of the construction of the bridge, and to the duties and obligations of the defendants as thus prescribed, that is, to the construction and use of the bridge.

The fourth section of the act, I think, confirms this view. Congress there reserves the right to withdraw its consent to the erection of the bridge, in case free navigation of the river shall at any time be substantially obstructed. It should be remembered that, at the time of the passage of this act, the court had enjoined the erection of the bridge, on the ground, that, in its judgment, the bridge would, if erected, be a substantial obstruction. The question, whether it will be so or not, is not left to the courts, but congress seem to have taken it under their own charge, and to have admonished the defendants that, if the bridge shall, when built, turn out to be an obstruction, they will withdraw their assent to its erection, and leave the courts to deal with it.

Another consideration worthy of note is, that, according to the construction claimed by the plaintiff, the act would be without any force or effect, and utterly nugatory. The power to confer upon the defendants authority to build a bridge over this river, belonged to the sovereign state of Connecticut, and was not at all dependent upon congress. This power, however, is subject to the qualification, that the bridge must be built so as not materially to obstruct the navigation of the river. So far as any impediment to the navigation is concerned, the power of congress is paramount; but not beyond this. Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. [59 U. S.] 421. Unless this act, therefore, was intended to confer authority to erect the bridge, notwithstanding this court had held it to be an obstruction to navigation, it was, legally speaking, an act without an object, and without any effect. I do not inquire what opinions individual members of congress may have held or expressed on this subject. I can look only to the act itself, and ascertain the intent and meaning of the law-making power from its terms and provisions.

Upon the best consideration I have been able to give to the case, I think that it was the intention of congress, by the act in question, to legalize the bridge, constructed in the mode and manner prescribed by the legislature of the state; and, as a consequence, the preliminary injunction, heretofore issued, must be dissolved.

Case No. 760.

BAIRD v. WOLFE.

[4 McLean, 549.] [1]

Circuit Court, D. Indiana. May Term, 1849.

EJECTMENT—INTERESTED PARTY—WITNESS—LIMITATION OF ACTIONS—EQUITABLE TITLE—PRESUMPTION OF TITLE FROM POSSESSION.

1. A witness, at whose instance an ejectment is brought, and who is the assignee of a part of the consideration, for which the land was sold, and the suit being brought, on a failure to pay the consideration, is not a competent witness.

2. The statute of limitations does not run against an equitable title, nor in favor of one.

3. A presumption of a title may arise from long possession, and under such circumstances as are favorable to such a presumption.

4. But, it may be rebutted by circumstances or positive proof. In many cases the court will refer the presumption to the jury for their consideration and decision.

[5. Cited in Mezes v. Greer, Case No. 9,520, to the point that a certificate issued under authority of an act of congress authorizing a person to locate 400 acres of land within the time and place limited does not convey the legal title until the segregation of the land is completed.]

[6. Cited in Mezes v. Greer, Case No. 9,520, to the point that an equitable claim, how-

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

ever strong, cannot be set up at law to defeat the legal title. See Willink v. Miles, Case No. 17,768; Larriviere v. Madegan, Id. 8,096.]

[At law. Action of ejectment by the lessee of James Baird, and Peter Bartmoss, against Benjamin Wolfe. Verdict and judgment for plaintiffs.]

Smith & Sullivan, for plaintiffs.
Mr. Judah, for defendant.

THE COURT, (charging the jury.) Patent for the land in controversy, was given in evidence, to James Baird or to his legal representatives, for four hundred acres, dated 21st September, 1847. Peter Bartmoss and Eli Adams being sworn, proved the heirship of the lessors of the plaintiffs. Mr. Ewing being offered as a witness, was objected to, on the ground of interest. It appears that he commenced the suit and procured Mr. Browning to become security for costs, and it was alleged, promised to indemnify him. Mr. Browning on being examined, said Ewing informed him, when he applied to him to indorse for costs, that the party was good, but did not specially promise to indemnify him. But the witness expected Ewing would not permit him to be injured. It appeared that Ewing was the assignee of a small part of the consideration agreed to be paid for the land. The witness was admitted to give evidence, by the court, subject, at any future stage of the case to be overruled. A deposition was offered which was taken under a rule of court, which authorized depositions to be taken under the laws of the state. Those laws specify certain cases in which depositions of witnesses may be taken, which do not require the reasons for taking them to be stated. The plaintiff claims a right to take them because they live more than one hundred miles from the place of holding the court. The deposition can not be received as having been taken under the act of congress, as the requisites of that act have not been complied with. Is the deposition admissible as having been taken under the laws of the state? The rule of court may be so construed, as to embrace merely the mode of taking depositions, where the right exists under the act of congress. The deposition was admitted on parol proof that the witness lives more than one hundred miles from the place of holding the court.

The land in controversy was not acquired in the ordinary mode of entry and payment, in the register's and receiver's offices, under the act of congress. On the 21st of April, 1806, [2 Stat. 395,] an act was passed, authorizing the registers and receivers of public moneys of the district of Vincennes and Kaskaskias, under the direction of the secretary of the treasury, to lay out one or more tracts of land in their respective districts, for the purpose of locating therein, tracts of land granted by virtue of any legal French or British grants, or of any resolution, or act of congress, etc. The claims of the character above stated, under various subsequent acts of congress, and the action and reports of the land officers were examined, and confirmed by congress, and certificates were issued which authorized the person to whom issued, to locate the tract within the time and place limited. This tract of four hundred acres was acquired in this mode. It was located by Baird, who sold the land to Duncan, and who, it is alleged, never paid the full amount of the consideration. Ewing was the assignee of the consideration to be paid, two hundred and fifty dollars with interest, and suit is commenced to recover the possession, by reason of the failure to pay the consideration in full.

The agreement for the sale of the land to Duncan, was proved, and that an imperfect deed was made out by Baird, which, together with the agreement, was placed in the hands of Ewing in June, 1824. In 1825, the witness's house was burnt, and these papers were burnt with it. It seems two hundred and fifty dollars of the purchase money remained unpaid, and of which Ewing was the assignee. And Ewing states, that from year to year, from 1819, at the time of the sale, to 1824, Duncan promised payment. One witness, who was one of Duncan's executors, and who examined his papers, never saw a receipt for the balance of the purchase money. He never saw a deed from Baird for the land. In 1835–6 believes Wolfe claimed the whole tract. He claimed the whole of it prior to the sheriff's sale. Wolfe took possession of the land in 1840 or '41. He purchased from Sloan, and one of the witnesses stated that he had seen a deed from him to Wolfe. The above is the ground on which the plaintiffs rest to recover the possession of the land. The legal title being in them under the patent, and a part of the consideration money not being paid.

The defense, gentlemen of the jury, is, first, that the purchase money has been paid. A receipt is produced, which, it is alleged, was given for the balance of the purchase money. The genuineness of the receipt, and the circumstances under which it was procured, are for your determination. If you shall find that the consideration money has been fully paid, it will take away from the plaintiffs all equitable considerations, and leave them only the claim to the legal title. On the part of the defendants, it is insisted, that the act of congress confirming the right to this tract to the original claimant, under the report of the register and receiver, vested in the claimant the legal title. This was not the effect of the confirmation. It was the right to four hundred acres of land which was confirmed, and not any particular tract of land. The certificate which the claimant received, as evidence of his right, authorized the location of four hundred acres of land, but, until such location was made, the claim was without locality, except within the district des-

ignated, for the satisfaction of such claims. A legislative act confirming a title, which was in its terms final, and required no further action of the government, would be considered a grant. But the right before us was not of this character.

The statute of limitations of twenty years is relied on, as a bar to the plaintiffs' recovery. To maintain this defense an adverse title must be shown. Since 1814, this claim appears to have been under Duncan, and there would seem to be no claim of an adverse character, unless it can be set up under the sheriff's deed. An equitable claim, however strong it may be, can not be set up at law to defeat the legal title. Nor can the statute of limitations be pleaded as a bar to a legal title, where the defendant has only an equity. Until the emanation of the patent in 1847, the legal title to the land in dispute, it is contended, remained in the United States. The statute does not run against the government, nor against an individual who holds only an equitable title. By Rev. St. [Ind.] 1843, p. 455, [§ 9,] an individual who holds a final certificate for lands purchased from the United States is vested with the legal title, so as to subject it to the lien of a judgment, and to execution, as where the patent has issued. But this law was not passed until after the above transaction. As the law then stood, the equitable title could not be sold on execution, and a sheriff's deed, it is supposed, on a sale of the equity merely, could not convey a title which could be set up under the statute. A title may be set up under the statute, which is fair upon its face, but inoperative, as it was adopted to protect a bona fide holder under such a title. But a sheriff's title must be considered as essentially connected with the judgment; and when the sheriff attempts to sell that which is not subject to execution, he can convey no title, and a void title is not one which the statute will protect. The purchaser, at most, in such a case, could take only the right held by the defendant in the judgment; and that right being only an equitable one, could not avail the defendant against the legal title. Ewing is an interested witness, as the recovery is for his benefit; and it appears by a contract with Bartmoss he is responsible for the costs, and what he has said is withdrawn from the jury. But waiving a reliance upon the statute of limitations, the counsel for the defendant relies on the presumption of a deed to Duncan.

This presumption is founded, 1. On a possession of thirty-five years. 2. No contract respecting the title was known for a long time. 3. That Duncan had the ability to pay the amount. 4. The receipt of the balance by Sullivan to be paid on the execution of the deed. 5. Acquiescence of the claimants in the sheriff's sale to defendant. 6. The loss of the recorder's office in Knox county, by fire. 7. The recital in the deed from Duncan to McCall. 8. The controversy between Duncan and Tuckers, in which Duncan said he had left his title at home. The presumption of title arises from lapse of time and circumstances, which may, however, be rebutted. When an individual has been a long time in the possession of the property, and there are no facts proved which go to rebut such presumption, the court will leave the question to the jury whether a title may not be presumed. But in this case, although the possession has been in the defendant and those who preceded him in the claim of purchase many years, yet there are facts which conduce to show that the whole of the consideration money has not been paid; and the deed to Duncan was not to be executed until the whole of the purchase money should be paid. It is true there is an acknowledgment of the receipt of the consideration on the deed, but this is not conclusive and may be explained. Indeed in all conveyances the consideration is acknowledged.

The receipt to Sullivan, if genuine, shows an intention by Duncan to pay the balance, but it does not appear that Sullivan was acting as the agent of Baird, or that he had a right to receive the money. In receiving it he acted as the agent of Duncan, and unless it was paid over, to the proper persons, Duncan could not claim a credit for it. The money it seems, was to be paid when the deed was executed. The deed that was made out by Sullivan for Baird was defective in not describing the boundaries of the tract, and it seems that this deed was never delivered. There is no controversy as to the whole of the consideration being paid, except the two hundred and fifty or fifty-four dollars. Now, this will explain why the possession of the land was taken and improvements made, by the acquiescence of those who obtained the patent. Until the patent was obtained, Baird could not make a deed that would be operative from its date. The patent, it seems, was not issued until 1847. A deed made before that time to Duncan, would have been made good by the patent, but the date of the patent is of some importance, as it may, in some degree account for the reason why a deed was not made to Duncan. And also the recognition or admission, at different periods by Duncan, that the above small balance was due.

Upon the whole the facts are left with the jury, whether from a deliberate consideration of them, the jury can presume a deed from the lessors of the plaintiffs, or from their ancestor. If there be anything in the case to make the presumption doubtful, as to a deed having been executed to Duncan, it will not be presumed. Jury found for plaintiff. Judgment.

Case No. 761.

BAJORQUES v. UNITED STATES.

[Hoff. Op. 53; Hoff. Dec. 1.]

District Court, D. California. June 10, 1859.

PUBLIC LANDS—SURVEYS—CONFIRMATION—RIGHTS OF GRANTEES PENDENTE LITE.

[Where the original grantee of lands has parted with his entire interest, parties who have obtained derivative titles pendente lite from such original grantee are entitled to contest a survey, though the original grantee as plaintiff, the United States, and vendees of two-thirds of the interest of the original grantee consent to its approval.]

[Land claim by Bartolome Bajorques and another against the United States. Confirmed. Motion for approval of the survey of the lands. Denied.]

HOFFMAN, District Judge. A final decree of confirmation having been made in this case, the survey of the lands, the claim to which was confirmed, has been brought into court for its approval. To the location and survey by the surveyor general the United States makes no objection. The counsel who has hitherto conducted the case on the part of the claimant, who was the original grantee, appears and also assents to the survey. But objections to it are made by other counsel, who represent parties to whom the original claimant has conveyed a portion of the land claimed by him. It is admitted that Bajorques, the original grantee, has parted with his whole interest in the land. The parties represented, therefore, by the counsel who has hitherto conducted the case, are assignees, or vendees, of a part of the land; as also are the parties represented by the counsel who object to the survey. It is claimed that these last are the owners of the greater portion of the premises; but this allegation is denied: I understand it, however, to be admitted that the survey is opposed by gentlemen who represent at least one-third of the lands, and that those who assent to the survey are not the owners of more than two-thirds of the interest of the original grantee.

The question then is, can the court confirm and approve the survey on the consent of the United States and the counsel representing two-thirds of the interest of the claimant, or are the parties holding the remaining third entitled to be heard in opposition to the survey? The importance of the question arises from the fact that if these latter have a standing in the court, they must be allowed to take testimony to bring the cause to a hearing, and probably appeal, if dissatisfied, from the decision of the court, thus retarding indefinitely the issuance of the patent, to the great damage of their co-owners, who are content with the survey as made by the surveyor general.

It was not questioned on the argument that the duty of reviewing and confirming or modifying the surveys of the surveyor general of lands confirmed to the claimants by the decree of this court, imposed upon it by the recent decision of the supreme court in the case of U. S. v. Fossatt, [21 How. (62 U. S.) 445,] involved the necessity of permitting parties to make objections to such survey, and to take testimony and to be heard in support of them. The United States are heard through the district attorney. The question presented in this case is—can the court refuse to hear all or any of the parties deriving title from the original grantee in whose name the claim has been prosecuted—when it appears that the original grantee has parted with his entire interest in the suit? If this were a regular suit in chancery, the answer would seem obvious. The decree confirming or correcting the survey which the court is now to make is declared by the supreme court to be the final decree in the suit. It is certainly a decree which must naturally affect the rights of all parties interested in it.

In equity proceedings, if pendente lite the complainant disposes of all his interest, the suit must abate. "It is very clear," says Mr. Justice Story, "that no party can stand before the court for a decree who has no farther interest in this, either formal or real." Hoxie v. Carr, [Case No. 6,802;] 3 P. Wms. 348; 9 Ves. 75. "And where the interests of new parties intervene pendente lite, having derivative titles under the plaintiff, there the suit may abate or become defective." Id., and cases cited. But this abatement is a mere interruption or suspension of the suit until the proper parties, who have derived their interests by purchase or transfer pendente lite, can be brought before the court by a supplemental bill. 1 Sumn. 179, [Hoxie v. Carr, supra;] Story, Eq. Pl. § 156.

In the case at bar no application is made for leave to bring in new parties to the suit. But it is admitted, as has already been stated, that the original claimant has parted with all interest in the lands. It appears to me that the parties who have acquired an interest and who have obtained derivative titles under the plaintiff pendente lite have a right to be heard in this proceeding, at all events as against other parties who have acquired precisely similar title to, it may be, the larger portion of the land. To say that grantees of the original claimant, who have acquired the greater portion of his portion, shall, for that reason, be exclusively entitled to appear, would be to apply or establish a rule anomalous and impracticable; for those who have acquired the greater portion of the land in extent may have the lesser portion in value, or the various grantees of the claimant may have equal interests, in both of which cases the rule suggested could not be applied. Nor can the fact that the counsel who now appear for the owners of two-thirds of the lands formerly represented the original Mexican grantee affect the decision of the question; for that gentleman now represents, not the original grantee, who has no

further interest, but a portion, said to be the majority, of those who have derived title from him. Though I feel very reluctant to subject this or any other cause to delays which may possibly be unnecessary or vexatious, yet I have been unable to perceive any ground on which, under the circumstances of this case, I can refuse to hear and to pass upon the objections to the survey which may be made by either of the parties who have appeared. Those objections must be stated in writing, and filed in court. The court, on being informed of their nature, can make such further order as to the taking of testimony in support of them as the nature of the objections and the circumstances of the case may require.

BAKER, Ex parte. See Case No. 8,558.

Case No. 762.

In re BAKER.

[1 Hask. 593; 13 N. B. R. 241.][1]

District Court, D. Maine. Dec., 1875.

BANKRUPTCY ACT OF 1841 — ENDORSEMENT ON MORTGAGE IN FRAUD OF THE ACT — ATTACHING CREDITOR—LIEN.

1. An endorsement by the mortgagor upon a chattel mortgage, subjecting chattels acquired after the date of the mortgage to its operation, made in fraud of the bankrupt act, does not invalidate the mortgage otherwise valid, but simply fails of its purpose.

2. A creditor having attached the chattels of his debtor within four months of his bankruptcy, and meantime having paid the debt and assumed liabilities secured by an existing mortgage thereon to save the attachment, thereby acquires a valid lien upon the chattels attached, although the attachment becomes void upon the debtor's bankruptcy, and should be repaid the same by the assignee upon the sale of the chattels to which the lien attached.

3. An attachment by a creditor of the property of his insolvent debtor is not a fraud upon the bankrupt act.

In bankruptcy. Petition by attaching creditors to be reimbursed, from the proceeds of the sale of certain chattels of the bankrupt [Harrison Baker] by the assignee, for sums paid and liabilities incurred in raising a mortgage from the same, to preserve their attachment thereof that was dissolved by the debtor's bankruptcy. [Decree for petitioners.]

William P. Whitehouse, for petitioners.

Eben F. Pillsbury and Samuel Titcomb, for assignees.

FOX, District Judge. Baker was adjudged bankrupt in this court, upon his petition filed Sept. 20, 1875, and the respondents were duly appointed his assignees. The bankrupt was the keeper of the Augusta House, under a lease to him from Cushman & als., for three years from October 15, 1874, at a rent of $3,200 per year, payable in monthly installments, together with the taxes and insurance. The performance of the covenants of this lease were secured by a chattel mortgage to the lessors from Baker, of all the household furniture in the house, "together with all property of a similar description which he may hereafter add thereto, so that the said property should at all times be suitable and proper for carrying on said Augusta House;" the mortgage also provided "that said Baker should indemnify and save harmless the lessors from all liabilities they had already or may hereafter incur, by reason of advances made by them, or as signers or endorsers of any notes which they should make or endorse for the accommodation of said Baker." This lease and mortgage were duly recorded, and the bankrupt went into possession of the house and remained there until the filing of his petition in bankruptcy. He added to the furniture his purchases amounting to about $4,000, a portion of which was attached on a writ in favor of the Gas Company, July 31, 1875. This attachment was discharged, and on August 5th Baker executed on the back of the original mortgage an agreement reciting "that in consideration of the depreciation in value, by use past and future, of the property within described, I hereby agree that the within mortgage with this endorsement thereon shall hold and cover any and all additions that have been or may be made to the same; also including two billiard and one pool table put into the Augusta House by me together with all the fixtures thereto belonging."

This instrument was recorded in the city records on the same day.

Under the laws of this state, an attachment of chattels subject to a mortgage may be made on mesne process. Rev. St. [Me.] c. 81, §§ 41–44, provide that such mortgaged property may be attached, held and sold, as if it was unincumbered, if the attaching creditor first tenders or pays the full amount unpaid on the demand so secured. The mortgagee shall not bring his action against the attaching officer until he has given him forty-eight hours' written notice of his claim and the true amount thereof; and the officer or creditor may, within that time, discharge the claim by paying or tendering the amount due thereon, or restore the property. "If the creditor redeems such property and it is subsequently sold by the officer, he shall from the proceeds first pay to the creditor the amount, with interest, paid by him to redeem, and apply the balance to the debt on which it was attached."

The petitioners being creditors of the bankrupt, on the 18th of August sued out their writs against him, and caused the mortgaged furniture to be attached thereon by the sheriff of Kennebec county, and on the same day due notice of the attachment was given by the officer to the mortgagees, to which, on the 27th of the same month, they made

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

written reply, setting forth in detail the several sums claimed by them to be secured by said mortgage, amounting in the aggregate to $5,903.72 on that day; and they further claimed to hold the same as security for the accruing rent during the continuance of the lease.

On the 27th of August, the mortgagees served upon Baker a notice of foreclosure, under the statute, for breach of condition of the mortgage, and on the 28th the attaching creditors paid to the mortgagees the amount claimed by them to be secured by the mortgage—i. e. $5,903.72, and also gave to them their obligation, binding themselves to assume and keep in the future all the other stipulations and covenants of said lease, "provided said lessors shall, promptly and without delay, enforce compliance with all the terms and conditions of the lease not already performed by us, and avail themselves of all needed legal measures, or allow us to do so, to expel said lessee for nonpayment of rent hereafter becoming due, and give us the privileges and benefit of said lease, according to the terms thereof."

On the sixth of September, a process of forcible entry and detainer, to recover from Baker the possession of the premises, was commenced against him by the lessors, returnable before the municipal court of Augusta, September 13th.

An appraisal was duly made of the attached property, and the appraisers having certified that it could not be kept without great expense and deteriorating in value, the officer, in accordance with law, advertised to sell the same at public auction on the 23d day of September, but was prevented from so doing by an injunction from this court, on the 22d of that month, in the bankruptcy proceedings; and the property was therefore held by the sheriff under his attachment until the respondents were appointed assignees, when the same was turned over to them by the sheriff. The process of forcible entry and detainer was also stayed by an injunction from this court, on the 24th of September, until the further order of the court.

The assignees having obtained the possession of the mortgaged property, Whithed proposed to purchase the same, together with any interest acquired by the assignees in and by virtue of the lease, for the sum of ten thousand dollars. They petitioned this court for leave to accept the offer of Whithed. Notice of the petition was given to the mortgagees and all others interested, and no one appearing to object, the court authorized the sale to be made under Rev. St. U. S. § 5063, which has been done.

Upon a careful revision of the accounts, it appeared that the bankrupt had paid to one of the lessors, Milliken, by board $786.67, which should have been allowed in part discharge of the rent; and that there had been an over-payment of rent, by the attaching creditors to that amount, on the 27th day of August. A settlement was accordingly made between the lessors and the attaching creditors, the sum of $4,919.11 being claimed as due on the 27th of August, and a further sum of $213.33 for additional rent of the premises from August 27th to September 20th, the day of the filing the petition in bankruptcy; these two amounts, in the aggregate $5,132.44, were retained by the lessors, and the balance of the amount received by them was repaid to the attaching creditors. The petitioners in their present petition now ask that the assignees may be ordered to refund to them, from the proceeds of sale, the $5,132.44 and interest, they having relinquished to the assignees and discharged all claim, under the endorsement on the mortgage of August 5th, to any proceeds of sale of the furniture acquired by Baker after the 14th of October.

The respondents, in behalf of the creditors, deny the validity of the original mortgage of Oct. 14th, and claim that it was rendered null and void by the proceedings of August 5th; and they called at the hearing the bankrupt as a witness, who testified "that soon after the attachment made by the Gas Co., Cushman, one of the mortgagees, called upon him, he being then unwell and confined to his room, with the mortgage and endorsement thereon, as it now appears, and requested him to execute the same, at the same time assigning as a reason therefor, that there were several parties in Augusta who were disposed to put him to trouble and expense, and subject them to a good deal of cost and inconvenience; that it would be no harm to me, but on the contrary a benefit to me if I signed the paper; and I then executed it."

It is claimed upon this statement, that one purpose of the mortgagees in thus procuring the endorsement and having the mortgage cover the subsequent acquired property of the mortgageor, was to delay other creditors and prevent their attachment of this property. The original mortgage provided "that all property of a similar description to that then on the premises, which the mortgageor should thereafter add thereto, should pass under the mortgage." A stipulation of this nature was held valid and effectual as against an assignee in bankruptcy under the former bankrupt law. Mitchell v. Winslow, [Case No. 9,673.] So that all of the subsequent acquired property of a similar description to the old, the mortgagees could have retained as against an assignee in bankruptcy. Cushman has not been called to contradict this statement of the bankrupt, and I am therefore for this hearing to consider it as established, that one motive and purpose of the mortgagees in procuring this endorsement was to delay creditors of the bankrupt, and that this transfer of the subsequent acquired property was fraudulent, and could not prevail as against attaching creditors.

No rights, therefore, were acquired to the new property, and this endorsement was a

nullity, so far as creditors were concerned; but that I hold is the extent of its operation. It did not deprive the creditors of any rights whatever which they before had. The newly acquired property was still open to attachment for Baker's debts, but the property, which belonged to Baker at the time the original mortgage was executed, did not become subject to such liability. That mortgage was originally valid and effectual, and so continued notwithstanding the parties at a day long subsequently might have contemplated a fraudulent purpose relative to the other property of the bankrupt, and to subject it to liability for the security of the same claims embraced in the original mortgage. The rights of all parties are the same as they would have been, if instead of making this endorsement on the back of the original mortgage, a separate, independent mortgage had been given, on August 5th, upon the subsequent acquired property, as security for the claims covered by the original mortgage, and the parties at the time had designed thereby to defeat or delay the other creditors. It is quite clear that the latter mortgage would be fraudulent and void as against creditors and assignees in bankruptcy; but it is equally clear to my mind that it could not in any manner affect the prior mortgage untainted by any fraud in its inception.

In the present case the petitioners have filed a written waiver and release of all interest in and to any property not included in the original mortgage, the proceeds realized from the sale of that property being in excess of the amount paid by them to the mortgagees, so that no claim is made under the fraudulent endorsement.

It is further contended by the assignees, that there has been collusion between the petitioners and the owners of the Augusta House, to turn over all the personal property of the bankrupt to the petitioners, that they might acquire a title thereto for a sum far below its real value, and in fraud of the other creditors. The history of the case certainly manifests that the owners of the property were quite willing to be rid of Baker as their tenant, and that the petitioners, or Whithed, might take possession in his stead and occupy the house, and acquire all their rights to Baker's property, on complying with his obligations under the lease and mortgage.

To accomplish these ends there can be no question that the landlords resorted to a foreclosure of the mortgage and to their process of forcible entry and detainer, and the attaching creditors to the appraisal and contemplated sale by the sheriff of the property attached; but every step in these proceedings was in accordance with the laws of this state, while to counteract their force and effect, the bankrupt and his creditors applied to this court, and availed themselves of its restraining process to prevent their opponents obtaining any advantage by their movements under the various provisions of the state laws. Each side, in my view, stood on their legal rights, endeavoring to obtain all the advantages that the law would afford them; and as it would now seem, the whole rather resulted in a drawn game, neither party having obtained any very great success over the other, the property of the bankrupt having vested in his assignees in substantially the same condition it would have done if this warfare had never existed. But nothing is shown which would justify this court in declaring that there was such collusion between the parties as should deprive the petitioners of any rights to which they would otherwise be entitled.

Having disposed of these objections, there remains to be determined what are the petitioners' rights in this fund, the proceeds of the mortgaged property sold by order of the court, and now in the custody of the court, as against the assignees in bankruptcy.

The petitioners made an attachment of this property to secure a just debt; this attachment was valid under the laws of this state, but liable to be defeated by proceedings in bankruptcy instituted within four months. The property thus attached was subject to a valid mortgage; and the laws of this state empowered the attaching creditors to pay the amount of this incumbrance and discharge the claim thereon, and if the creditor redeem the property, and it is subsequently sold by the officer, he shall from the proceeds first pay to the creditor the amount, with interest paid by him to redeem the property. The officer, in strict compliance with the law, was about to sell this property and pay to the creditors the amount they had paid to redeem, when he was enjoined by this court from so doing, and was compelled to retain the property until assignees were appointed, and then to surrender it to them, and they have since, by order of this court, sold it for a sum in excess of the amount paid by the creditors to redeem it.

Under these circumstances, which party has the better equity, the creditors who have paid this amount to discharge this valid claim, an incumbrance upon the property, and for which at present they are just so much the poorer, or the assignees, who by reason and on account of this very payment by these creditors, have received the property relieved and discharged from this incumbrance, and thereby the estate in bankruptcy is just so much the larger for distribution than it would have been if the creditors had not paid this sum?

The simple statement of the proposition presents most conclusively its own solution. Conceding that the payment of the amount "discharged" the incumbrance, or "redeemed" the property, it is equally certain that the law itself, the instant the payment was made, the property being in the possession of the officer, imposed upon the property a new lien or incumbrance for the security of

the creditors for the amount paid by them to redeem. The officer constantly retained the property charged with this trust and statutory lien, until sold by him, and the proceeds he was required to pay over to the creditor to the extent he had paid out in redemption of the property. The lien, therefore, upon this property for the security of the redemption creditor, was thus created by statute, and was as effectual and binding upon the property as could be had by the most formal contract. The statute provided its own method for its enforcement, and this would have proved effectual and sufficient if the court in bankruptcy had not interposed and prevented the officer from completing the steps in that behalf, which the state law contemplated as sufficient.

In Savings Bank v. Stuyvesant Bank, [Case No. 12,919,] Mr. Justice Hunt of the supreme court of the United States, says:

"The soundness of the position that liens are preserved under the bankrupt act, and that the holders of them are to be protected, cannot be well doubted.

"The bankrupt act of 1841, [5 Stat. 440; repealed March 3, 1843, 5 Stat. 614,] in its second section, was very explicit on this subject, and it was repeatedly held that liens or rights of property created by the laws of the state could not be disturbed while enforcing the provisions of the act. The rule is the same under the present bankrupt law, and although not stated in terms so precise and specific as are found in the act of 1841, the provisions of sections 14 and 20 establish the same rule."

In Re Wynn, [Case No. 18,117,] Chase, C. J., says: "We do not doubt that the assignee takes the property in the same plight in which it was held by the bankrupt when his petition was filed, subject to such liens or incumbrances as would affect it if no adjudication in bankruptcy had taken place. * * * Liens are of various descriptions, and may be enforced in different ways; but we think it sufficient to say here, what seems to us well warranted in principle and authority, that whenever the law gives a creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt." In that case a statute of Virginia required an officer who took goods on certain premises under legal process, to pay out of the proceeds the rent in arrear, and the chief justice remarks: "We cannot doubt that this statute creates a lien in favor of the landlord, and a lien of high and peculiar character." While that language is peculiarly applicable to the present case, the lien in the present case is of a higher nature, as the party claiming it has discharged a prior lien upon the same property, for the exact amount which he now claims to be allowed, and all parties interested in the property have been benefited to the exact amount claimed, as no one could have in any way recovered a dollar from the property without first discharging the incumbrance.

In Parker v. Muggridge, [Case No. 10,743,] Mr. Justice Story says, "The plaintiffs have an equitable lien and a superior title to the property over the assignee and the general creditors, and the assignee must take the property of the bankrupts for the general creditors, subject to this lien and superior title, * * * and the property will be followed and affected with the trust in the hands of the assignees, in the same manner and to the same extent as it would be in the hands of the bankrupt. * * * We all know that in bankruptcy the assignee takes only such rights as the bankrupt himself had, and is subject to like equities."

This last proposition, with a modification repeatedly recognized by Judge Story himself, that in cases of fraud the assignee may acquire and enforce rights which the bankrupt could not, has been affirmed scores of times, by every tribunal in the United States administering the bankrupt law. If bankruptcy had not intervened, the bankrupt could not have prevented the creditors receiving the payment which they now claim from the proceeds of the sale of the goods upon which they had a valid statute lien; charged with this lien those goods passed to the assignee, and the bankrupt court, administering principles of equity, is not restricted to the course provided by the statute for affording redress to these claimants. Having taken this property burdened with this incumbrance it is bound on every principle of equity law, first to see that this lien is paid off and fully discharged before it will allow any portion of the proceeds of the property to be distributed among the general creditors.

It is said that this principle will not justify the payment of the $213.33 being for the rent from the 27th of August to the day of the filing the petition in bankruptcy; it is claimed that this sum was paid by force of the petitioners' obligation of August 27th, by which they, on certain conditions, became personally accountable to the lessors for the subsequent rent. These conditions appear to have been complied with by the lessors, and I am of the opinion that the petitioners had rendered themselves personally accountable for the future rent; but I also hold that this remedy was merely cumulative, and that the lessors still held the security under their mortgage for its payment. They had done nothing at that time to discharge this security, or to estop them from availing themselves of it, in case it became necessary for their protection. They had received payment for rent up to the 27th of August, and had at the same time asserted, distinctly, their claim under the mortgage as security for future rent.

Between these dates, Aug. 27th and Sept.

20th, Baker was in possession of the premises, resisting the process of forcible entry and detainer instituted to oust him therefrom; his furniture was also there, subject to attachments for the benefit of the petitioners, who had at that time a much larger interest at stake in the same property, by reason of their lien on the same, for the amount paid by them to the lessors. They were therefore, as it were, compelled to discharge the claim for the subsequent rent, which was secured on the property, subject to their liens and attachment, as the claim for rent most certainly would have priority over the claim by attachment. The payment of the subsequently accruing rent was not strictly by force of the provisions of the law before cited, and it did not, therefore, strictly acquire for its security a lien as provided by statute, which would require the payment by the officer from the proceeds of sale; but its payment from these proceeds may, in my view, be justified under the circumstances, as against the assignees of the bankrupt by the principle of subrogation, which is frequently adopted by courts of equity. If the mortgage is to be deemed as now outstanding for the security of the payment of the rent, which under the circumstances may well admit of doubt, as the mortgagees upon notice have not objected to the sale of the mortgaged property, or to the granting of the prayer of the present petition, it is possible that the mortgagees might interpose and object, and that as against them and their future claims under this mortgage, the petitioners could not insist on being subrogated to their rights, qua the payment made by them for this subsequent rent; but I do not think the assignees in bankruptcy are at liberty to insist on this objection in behalf of general creditors: "It is a well settled and familiar principle that he, who acquires an interest in an estate that is subject to a mortgage or other charge, acquires at the same time the right to pay off such mortgage, or to exonerate the estate in the same manner that he would have been entitled, who created the incumbrance; and that in so doing he becomes substituted in the place of him to whom he has paid the money, in all cases in which it is necessary for his protection that the incumbrance should be kept alive; and he will in all cases of making such payment be deemed the assignee, if an assignment will better subserve the ends of justice than payment and extinction would do." Fletcher v. Chase, 16 N. H. 42.

"Where a party, advancing money to pay the debt of a third person, is compelled to pay it to protect his own rights, a court of equity substitutes him in the place of a creditor as a matter of course, without any agreement to that effect." Sandford v. McLean, 3 Paige, 122.

For these reasons, I hold that as against the assignees these petitioners have a right to demand the payment of the $213.33 from the sales of the mortgaged property, equally with the larger sum.

Finally, it is objected that these proceedings of the petitioners were in furtherance of an attachment, which was an attempt to obtain a preference fraudulent under the bankrupt law. This objection at first appeared of some force, but on reflection I am satisfied it should not prevail. The bankrupt act in terms declares what are prohibited and fraudulent transfers and preferences, and denounces them under certain penalties; but an attachment, on mesne process, is nowhere enumerated among them. It does declare, that the assignment to the assignee shall vest in him the property of the bankrupt, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachments made within four months next preceding the commencement of bankruptcy proceedings.

The attachment is nowhere declared to be a fraud upon the act; on the contrary, if permitted by the state law, it may be made and will continue in full force until the assignment, and only fails and dissolves away in case the assignment is made in proceedings commenced within the four months; in that case, the result will be, the party obtains no benefit from his attachment; he has incurred expenses incidental to it, for which he has no claim against the bankrupt or his estate; but any other rights, by virtue of the state law, which he has acquired in the property, still continue to him and are not affected by the bankruptcy proceedings. An express provision should be had to defeat these rights, and none such is anywhere found in the act.

It results that the petitioners are entitled to payment of the full amount claimed by them with interest from the date of such payments.

Case No. 763.

In re BAKER.

[14 N. B. R. 433; 14 Alb. Law J. 294.]

District Court, N. D. New York. Aug., 1876.

BANKRUPTCY—PREFERENCES—KNOWLEDGE OF CREDITOR.

[The value of the stock in trade of a debtor, who had little other property, was about equal to his indebtedness to his brother, and he owed other debts nearly double in amount. This brother with knowledge of the value of the stock, without inquiry into the debtor's circumstances, intimation of summary measures, or effort to obtain payment, began suit for the whole amount. The debtor, pending the suit, made no attempt to get an accommodation, but remained on friendly terms with his brother, bought on credit, and made payments to certain creditors from the proceeds of sales. The brother delayed 10 days in entering judgment and issuing execution. *Held*, that the parties intended to secure a preference, the debtor cooperated thereto, the creditor relied on such co-

operation, and the judgment obtained by him was therefore void.]

[Cited in Parsons v. Caswell, 1 Fed. 78; In re Keller, Case No. 7,654.]

[In bankruptcy. Petition by a creditor of Jerome E. Baker, a bankrupt debtor, that a judgment recovered by him against the debtor and execution levied upon his property be declared a lien upon the proceeds of his estate in bankruptcy. Denied.]

WALLACE, District Judge. I cannot concur in the conclusion of the register, that the proofs herein fail to show that the bankrupt procured his property to be seized on the execution obtained in favor of his brother. The nature of transactions like the one involved almost uniformly precludes the production of any but circumstantial evidence. Parties who collude to evade the law shield their actions from the cognizance of witnesses, and generally fortify their case by suppressing the truth, or misrepresenting the facts when called upon to testify. But it generally happens that the usual indicia of fraud will be detected, and when these are found, if they suffice to convince the judicial mind of the illegal character of the transactions involved, the testimony of the parties will receive but little credence. In order to determine that the judgment and execution in this case are invalid, it is necessary to find upon the proofs that when his property was seized, the debtor was insolvent or in contemplation of insolvency; that he procured his property to be seized with an intent to give his brother a preference; and that the brother had reasonable cause to believe the debtor to be insolvent, and knew that the seizure was made in fraud of the provisions of the bankrupt act. That the debtor was insolvent when the action was commenced in which the judgment was obtained; that he intended his brother should obtain a preference over his other creditors, by means of the judgment and execution, and that the brother was cognizant of these facts, I cannot entertain any doubt; and if, in addition, it can be found that the debtor facilitated this end by any affirmative action on his part, and the creditor was aware of it, the case is made out. At the time the action was commenced in which the judgment was obtained, the property of the debtor consisted only of his stock and accounts in trade; and, according to his own testimony, the stock was about equal in value to the amount of his brother's debt, while his other debts were nearly double in amount, and his accounts were of trifling value. The debt of the brother was for borrowed money, and constituted almost the entire capital with which the debtor commenced business, and no part of the principal had ever been paid. The brother and the bankrupt were on friendly and intimate terms. Apparently without any inquiry into the debtor's circumstances, and without any effort to obtain payment of any part of the loan, and without any intimation of summary measures, the brother, who was personally conversant with the ostensible value of the debtor's stock in trade, commenced suit for an amount which would necessarily absorb the whole of it. It would seem that not only was no effort made by the debtor for an accommodation or extension, but that no word of expostulation or of intercession was uttered by him, while no expression of sympathy or regret escaped from the lips of the creditor during the pendency of the action; an impressive silence fell upon the parties, and the Sunday visits, when the creditor remained from Saturday until Monday with his debtor, were characterized by an utter negation of all unpleasant topics. While these circumstances justify the conclusion that both parties intended that the creditor should get his debt, to the exclusion of other creditors, and excite a violent suspicion of collusion, they fail, probably, to show anything more than a passive acquiescence on the part of the debtor in the creditor's proceedings.

As the law now stands, a failing debtor may undoubtedly suffer a brother or any friendly creditor to obtain a preference, by means of legal process; he may resign himself to the purpose of the creditor with perfect tranquillity, and enjoy heartfull pleasure in the experience. More than this the wisdom of the law does not permit, and if, by any active participation with the creditor, he facilitates the seizure of his property, the law is transgressed, and the preference is illegal. That the debtor co-operated actively here is clear. After the action was commenced, knowing his hopeless insolvency, and knowing that his brother's execution would ultimately absorb his entire available assets, he continued buying goods on credit, and carrying on his business ostensibly in the same manner as before he was sued. He was justified in selling from his stock in trade until judgment should be obtained and execution issued; but he had no right to contract debts which he knew he could not pay legitimately, or to acquire additional property, in order to increase the fund available for favored creditors. It is true he continued making payments to divers of his creditors from the proceeds of his sales after he was sued, but each of these payments, in his then condition, was a preference, so far as he was concerned. It is not unfair to assume, under such circumstances, that his intention was to pay off favored creditors, or conciliate those whose hostility he might fear. However this may be, the certain result of his course was to augment a fund for his brother's benefit, and subject such goods as he might not sell, to seizure in appropriate time upon the execution. It is to be presumed that he intended the natural and ordinary consequences to follow from his acts, but the proofs disclose

further evidence of a dishonest purpose, established by his own testimony. He admits that after he was sued, and after the time when judgment could have been entered against him, he was interviewed by an agent of one of his creditors, and led the latter to suppose that no change had occurred in his circumstances. The agent was fairly entitled to the information he requested, and the evasion of the debtor was such conduct as might be expected from one who was not disposed to deal fairly and impartially with his creditors.

That the brother knew that the debtor was so acting as to facilitate the former's purpose is evidenced by the signincant circumstance that the former delayed the entry of judgment and issuing execution for ten days after these steps might have been taken. He knew the debtor was carrying on his business apparently as usual, and selling from his stock in trade. He knew that the collection of his debt was daily becoming more precarious. Why was he so indifferent as to his security? If he was the diligent and unrelenting creditor that is to be believed, if his version of the whole transaction is true, why is it that for ten days after he could have seized the stock on the execution he neglected to do so? No explanation of this strange indifference to his interests is vouchsafed. His conduct is inconsistent with his whole theory of the transaction, and, in view of the other facts, is quite convincing evidence of the utter falsity of the narrative of the parties. In short, I cannot resist the conclusion that the parties had a brotherly understanding of the situation; that they were, in fact, acting in harmony and concert, and that the delay in seizing the property was because the ripe moment had not come. That the parties intended the creditor should get his pay, while the other creditors generally should not, and that the form of a hostile legal proceeding was adopted to secure this result, is obvious beyond a doubt. That the parties intended that the debtor should preserve a nice equilibrium between acquiescence and co-operation is probably true, but under such circumstances the role is so difficult that slight indicia suffice to show that it has failed. In such cases courts are justified in being critical to detect these indicia, and should accord them ample weight when discovered. Upon the evidence here I am satisfied not only that the parties intended a preference should be secured, under color of legal process, and that the debtor co-operated to secure this result, but also that the creditor anticipated and relied upon such co-operation. A decree is ordered denying the prayer of the petitioner, and the validity of his lien upon the fund, with costs of the proceeding.

BAKER, (BANK OF COLUMBIA v.) See Case No. 862.

Case No. 764.

BAKER v. BIDDLE.

[Baldw. 394.][1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1831.

EQUITY — JURISDICTION — ADEQUATE REMEDY AT LAW—ANCILLARY RELIEF—PLEADING—BILL FOR DISCOVERY—DEMURRER TO JURISDICTION — BILL FOR ACCOUNT—STALE CLAIM—TRUSTS.

1. The sixteenth section of the judiciary act [1 Stat. 82] is a declaratory act, settling the law as to cases of equity jurisdiction, in the nature of a proviso, limitation, or exception to its exercise.

2. If the plaintiff has a plain, adequate, and complete remedy at law, the case is not a suit in equity under the constitution or the judiciary act.

[Cited in Carpenter v. Providence Wash. Ins. Co., 4 How. (45 U. S.) 223; Pierpont v. Fowle, Case No. 11,152; Foster v. Swasy, Id. 4,984; Clark v. Sohier, Id. 2,835; Waring v. Clarke, 5 How. (46 U. S.) 472; Bunce v. Gallagher, Case No. 2,133; Curry v. McCauley, 11 Fed. 370; Spring v. Domestic Sewing Mach. Co., 13 Fed. 448; Yeatman v. Bradford, 44 Fed. 538.]

[See Brown v. Pacific Mail S. S. Co., Case No. 2,025; Crane v. McCoy, Id. 3,354; Sullivan v. Portland & K. R. Co., 94 U. S. 806; Boyce v. Grundy, 3 Pet. (28 U. S.) 210; Morgan v. Beloit, 7 Wall. (74 U. S.) 618.]

3. There cannot be concurrent jurisdiction at law and in equity, where the right and remedy are the same, but equity may proceed in aid of the remedy at law by incidental or auxiliary relief, though not by final relief, if the remedy at law is complete. Its jurisdiction is special, limited, and defined, not as in England, where it depends on usage.

[Cited in Pierpont v. Fowle, Case No. 11,152.]

4. A bill for discovery does not lie for matter of which plaintiff has knowledge and means of proof, or of matter whereof he has the same means of information as the defendant (as public records). If such bill is sustained, it does not give power to make a final decree, if relief is not incidental to the discovery, where nothing is disclosed by the answer, or the whole equity of the bill is denied.

5. Though the rules and principles established in the English chancery at the revolution, are adopted in the federal courts, the changes since introduced there are not followed here, especially on matters of jurisdiction, as to which the sixteenth section is imperative.

[Cited in Pierpont v. Fowle, Case No. 11,152.]

6. An objection to jurisdiction for the want of parties, of equity in the bill, or of there being a remedy at law, need not be made by demurrer, plea, or in the answer; it may be made at the hearing, or on appeal.

[Cited in Pierpont v. Fowle, Case No. 11,152; Yeatman v. Bradford, 44 Fed. 538.]

7. A bill for an account does not lie, where an account has been rendered and received.

8. If an account is retained an unreasonable time without objection, it becomes in law and equity a stated or settled account, and a bar to an action or bill to account.

[Cited in Duryee v. Elkins, Case No. 4,197.]

[See Hopkirk v. Page, Case No. 6,697; White v. Macon, Id. 17,553; Bainbridge v. Wilcocks, Id. 755.]

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

9. A bill to account lies only when an action to account lies at law, and when the case comes under some appropriate head of equity jurisdiction.

10. It does not lie on an agreement to procure an assignment of judgments for the use of the plaintiff, when he has evidence of the agreement, and compensation for the breach can be had in damages, nor where there has been a great lapse of time in asking it.

11. The staleness of a demand may be relied on at the hearing, though there is no plea, or demurrer, or the answer does not insist on it; equity acts by analogy, or rather in obedience to the statute of limitations on stale demands.

12. Equity has cognizance only of executory trusts, not of those executed, or where a trust can be enforced at law; there must be some act to be done by the trustee.

13. A trust once executed cannot be revived by the non execution of a trust resulting from a subsequent agreement relative to the same subject.

14. An agency closed wholly or on any distinct matter, as to which no act remains to be done by the agent, is not cognisable in equity, under the head of account or trust.

In equity. The substance of the case stated in the bill was the following. Valentine Eckert was the owner of a valuable farm in Berks county, on which there were heavy incumbrances by judgment; his son-in-law, Isaac Baker, who resided in Virginia, on the 27th of April 1819, caused 2800 dollars to be put into the hands of the defendant, to be so applied as to prevent a forced sale of the property, and to protect Baker from loss; that the trust was accepted by the defendant, who agreed to procure assignments of the judgments, which he was directed to pay out of the money he received. By the letters of the defendant from time to time received by Baker, he was informed of the proceedings of the defendant, which resulted in a sheriff's sale of the farm to him in 1821, for 10,200 dollars, of which he gave Baker notice, who confided in the assurances of the defendant, that the agreement to assign the judgments had been complied with until March 1823, when he found that he would lose the money advanced on the judgments, by their not having been assigned to him. On the 30th of April 1819, the defendant rendered an account, charging himself with the 2800 dollars, claiming credit for money paid on certain judgments therein specified, leaving a balance of 191 dollars to be applied to a debt due the Bank of Pennsylvania. Another account was furnished by the defendant after the sheriff's sale, by either of which he was indebted to Baker in a large balance. Baker made his will in 1829, appointing the plaintiff his executor, who demanded a settlement and payment of the balance, the defendant paid 1000 dollars on account, and offered to pay 695 dollars, the balance admitted to be due on receiving an indemnity against any claim on him by the creditors of Eckert, and exhibited a statement showing such balance. But this statement is inaccurate and unjust, as it gives Baker no credit for the judgments which were to have been transferred to him, and ought to have been paid to him out of the proceeds of the sale, leaving in the defendant's hands a large balance, the precise amount of which cannot be ascertained, inasmuch as the plaintiff has not a detailed account of costs and expenses and payments made by the defendant, for which balance he is accountable, but has refused to account though repeatedly applied to to do so, and denies that he ever agreed to procure assignments of the judgments he paid with Baker's money. The bill prays for a full answer to all the matters charged, whether the defendant did receive the 2800 dollars, and by means thereof procure the control of the sale of the farm, whether he assured Baker that he should have the benefit of the judgments he had paid, whether he did not cause the sale of the farm by execution, and by his silence confirm Baker's belief, that he was to be first paid his advances. That he may set forth the dates and amounts of the judgments which were liens on the farm, the amount he paid thereon, the time of payment, whether the balance in his hands was mixed with his other money, that he be decreed to account for all moneys or liabilities for which he is accountable to the estate of Baker, and pay the balance with interest, and for such further and other relief as the case requires.

The answer admits that Eckert owned the farm, states the judgments against him to be 13,900 dollars, admits the receipt on the 27th of April 1819 of the 2800 dollars, and a deed for the farm from Eckert to Baker dated 10th September 1818, for the consideration of 20,000 dollars acknowledged 23d of January 1819, which he had recorded at the request of the person who gave it to him. He also received a bond of J. G. to Baker on which there was then due 894 dollars; at the time of receipt of the money, defendant was directed to pay certain judgments against Eckert, and to apply the balance with the proceeds of the bond to other judgments, so as to induce the creditors not to press a sale, till Baker would have time to pay all judgments entered before the acknowledgement of the deed, and he applied the money accordingly. He avers that in receiving or paying the money, he did not conceive he was agent, attorney or trustee of Baker, or acting for him in any capacity whatever, that he was not and is not bound to account to him or his representatives therefor, but that he acted solely to serve Eckert and family, so as to enable them to profit by the sale to Baker. He denies that when the 2800 dollars was put into his hands, he was directed or requested to procure an assignment of the judgments he was directed to pay, or that he agreed or undertook to have it done, or that any intimation was given to him that such was the wish of Mr. Baker, the

defendant believed that Baker rested on the security of the deed, and would pay the residue of the judgments. The bond of J. G. was due in July 1819 and defendant was directed to pay it to the judgment in which one Eesenbrier was plaintiff. The first communication received from Baker after April was a letter dated 24th of September 1819, directing the 2800 dollars to be entered on the judgments which had been paid, for the benefit of Baker, it being necessary then, as he was unable to pay all the judgments as he wished, and at the time agreed on for their payment, owing to the scarcity of money; that a sale of the farm was unavoidable, and had better be made by the sheriff. On the receipt of this letter defendant procured several of the judgments to be marked on the docket for the use of Baker, took out execution on one of them, levied on the farm and informed Baker by letter, who approved of what had been done, and desired the defendant to let him know the time of sale, this was done but Baker did not attend. The farm was sold and purchased by defendant in November 1821, he gave notice thereof to plaintiff and offered to convey it to him, but he declined, he also stated to him the appropriation of the purchase money to which no objections were made. He never received the money due by J. G., and delivered up the bond to the order of plaintiff, he never refused to settle with plaintiff or to pay him any balance in his hands, but on ascertaining the balance, authorized plaintiff to draw on him for 1000 dollars, paid that amount, forwarded him an account with such explanations as gave him a full account of what had been done. He afterwards offered to the plaintiff's counsel to correct any errors in the account, and put into his hands 695 dollars the balance of the account as stated by defendant to be paid plaintiff on his indemnifying defendant. He avers this account to be correct except an error of 131 dollars, which he is willing to pay on being indemnified; that he never undertook to have the judgments assigned, or assured Baker that they had been assigned so as to give him the benefit of them. The two accounts together with the usual affidavit were annexed to the answer. A great number of letters between the defendant and Isaac Baker were read, at the hearing several witnesses were examined, but there was nothing which varied the case as it appeared in the bill and answer, so far as affected the questions on which it was argued and decided. [Bill dismissed.]

Mr. Joseph R. Ingersoll, for complainant.

By the deed from V. Eckert to Isaac Baker, the testator had become the owner of the Moslem farm, either in his own right or as trustee for Eckert; the 2800 dollars was placed in defendant's hands for the purpose of paying such judgments as were liens before the date of the deed, and having been accepted by him he became a trustee for some one. Though he denies that it was for Baker, he admits the money was received from Baker to save the property, he was not bound or authorized to pay any judgment against Eckert after the deed took effect, as it not only would not tend to save, but would expose the property to be sacrificed on process by the elder creditors. Notwithstanding his denial, he has accounted to Baker and him only, has paid his executor 1000 dollars out of the money received from him, has paid judgments and marked them on the docket for his use, and paid for recording the deed out of his money; which acts estop defendant from denying the agency created between him and Baker. The relation of trustee and cestui que trust results by legal operation against his will. 1 Johns. Ch. 205; 2 P. Wms. 414. The result of this trust is, that he can do no act to the injury of Baker, or make any unauthorized application of his money, without liability to account to him, for all acts in which he did not acquiesce after being fully informed. 3 Swanst. 81. The money was advanced for a special purpose, and with special directions how to appropriate it, it was applied to other purposes inconsistent with those directions, besides which, the defendant acted as agent for others, whose interests were opposed to Mr. Baker, when it was his duty to have acted entirely for him, or to have renounced the agency, when he found it incompatible with his relations to others. His agency was limited, so as not to justify him in making any agreement to give a preference to any judgment, over those which were for the use of Baker, or to bind him to give any indemnity; he might use the money in his hands to effect the object, but when that could not be done, was bound to refund it. In October, 1819, on the faith of the money received on Gardiner's bond, he promised to procure an assignment of certain judgments to Baker, and wrote him he had done it, whereas it appears that it was not done and the money applied to other purposes, by which Baker has lost land and money: this is a breach of trust for which he is answerable to the amount misapplied, with interest.

Mr. Dunlap and Mr. J. C. Biddle, for respondent.

The answer denies any agreement to procure an assignment of the judgments, and being responsive to the bill is evidence, unless disproved by two witnesses; it is not pretended to have been made when the 2800 dollars was given to the defendant in April, 1819, nor was such pretence made till long afterwards. The receipt given for the money contained no such promise. the account rendered within four days afterwards and immediately received by Mr. Baker, stated the amount paid on those judgments, and no objections made to it. In directing defendant to pay these judgments, he was not requested

to procure assignments; this was an afterthought in October following; having once paid the money on them, they could not be revived, or be held for the use of Mr. Baker so as to affect strangers; unless an assignment or entry for his use was made at the time of payment, they were satisfied and extinguished pro tanto. 1 Serg. & R. 399; 12 Serg. & R. 37, 41; 2 Rawle, 128. After the payment in April, Mr. Baker had no remedy under them by any subsequent act of defendant or the creditors, any undertaking of defendant in October, therefore, if made, was made under a mistake of the law, it was impossible to be performed so as to benefit Mr. Baker, and its non performance was no injury to him; but if there was a breach of an agreement, and damages have been sustained, the court has no jurisdiction. No fraud is alleged in the bill, the plaintiff had a full account before it was filed, nothing new is disclosed by the answer or evidence, the agency was special, its execution was stated twelve years before suit brought, so that if the plaintiff has any cause of action, it is at law where his remedy is complete, it is therefore not a case for equity. 1 Pet. C. C. 356, [Andrews v. Solomon, Case No. 378.] The sale of the property appears of record, the sheriff is accountable for the purchase money, so that without any resort to equity, the plaintiff has ample means of information, and can have full justice done him at law; besides he has disavowed the acts of defendant, which is a denial of any trust existing between them, and if there is any money due plaintiff from the proceeds of the sale, he must look to the sheriff. This court cannot decide on the rights of the judgment creditors in state courts, the court which issues the process for sale, makes the appropriation of the proceeds, according to their judgment on the priority of the respective judgments. A purchaser at sheriff's sale, is not accountable to the judgment creditor for the purchase money, it is paid to the sheriff, who brings it into court or appropriates it according to their order, and the priority of the liens on record. 14 Serg. & R. 257. The object of the plaintiff's bill, is to raise a trust by the purchase at sheriff's sale so as to make defendant accountable for a supposed balance, this is incompatible with any trust resulting from the receipt of the 2800 dollars, which was advanced for the purpose of preventing a sheriff's sale; they cannot, therefore, make out a trust for which defendant must account in equity. Being distinct transactions with distinct objects, they present separate causes of action at law, for acting either negligently in the execution of the agreement, or in violation of it, but neither transaction presents a case for equity. The defendant had accounted for the 2800 dollars before the alleged agreement to procure assignments; after the sheriff's sale, the priority of the judgment was no matter for account, or executory trusts, such as are alone cognizable in equity, there remained no act for defendant to do of which equity could compel the performance, it follows that the plaintiff's claim must rest in damages by a suit at law. But were this a case for equity, the staleness of the demand after an account had been rendered twelve years, would be a sufficient reason for its rejection. Jeremy, 548. This objection may be taken advantage of at any stage of the case. By the rules of chancery, and the twenty-third rule of the supreme court, we may set up any special matter in the answer, without demurrer or plea. On the case made out by the plaintiff, his remedy is complete at law, which, by the sixteenth section of the judiciary act, bars the jurisdiction of a court of equity; here is no case for a discovery, as the plaintiff had full knowledge before filing the bill, so that no discovery was necessary. 4 Wash. C. C. 349. [Mayer v. Foulkrod, Case No. 9,341.] If there was any mistake, it could be corrected at law. 2 Wash. C. C. 129. [Hurst v. Hurst, Case No. 6,932.] Where the legal remedy is fully adequate to the object, the sixteenth section applies, unless there are some special circumstances to take the case out of it,—2 Mason 270, [Bean v. Smith, Case No. 1,174;] [Russell v. Clark,] 7 Cranch, [11 U. S.] 89,—as in some cases of dower,—[Herbert v. Wren,] 7 Cranch, [11 U. S.] 370, 376,—the reforming a mistake in a contract,—[U. S. v. Howland,] 4 Wheat. [17 U. S.] 115,—or some defect in the remedy at law,—[Smith v. M'Iver,] 9 Wheat. [22 U. S.] 532. The want of jurisdiction is always open; a bill will be dismissed on this ground, after answer. [Fowle v. Lawrason,] 5 Pet. [30 U. S.] 503. It does not attach to a case of trust founded on mere allegation in the bill that there was a trust, or the receipt of money by one for the use of another, as a case for account. There must be some appropriate head of equity under which the obligation to account arises, (Jeremy, 504; 6 Ves. 140; 13 Ves. 131; 8 Ves. 193; 1 Brown, Ch. 194; 3 Brown, Ch. 137,) and some defect in the law, (1 Schoales & L. 205; 1 Ves. Jr. 416; 1 Ves. Sr. 161; 4 Brown, Parl. Cas. 436.) If assumpsit will lie, it is a case for law. Cary, 135, 139.

Mr. J. R. Ingersoll, in reply.

As the defendant has not pleaded, demurred, or set up in his answer the objection that the plaintiff has a remedy at law, it is now too late; the old practice was to plead it, then demur, or in the answer state that it would be relied on. Gilb. Ch. 220; Bunb. 29. It is too late to reserve it till the hearing,—2 Johns. Cas. 339,—because it is an acquiescence in the jurisdiction of equity, and prevents plaintiff from proceeding at law, having the same effect as an agreement to go on and settle the account,—2 Caines, Cas. 40, 52; 1 Wash. C. C. 320, [Gallagher v. Roberts, Case No. 5,194.] If there is no equity in the bill, defendant must demur. If the court has not jurisdiction, it must be pleaded. 1

Atk. 544; 13 Ves. 276. The objection cannot be taken at the hearing. 2 Vern. 483; 1 P. Wms. 477; 1 Ves. Sr. 446. The sixteenth section of the judiciary act, [1 Stat. 82] is only declaratory of the common law, affirming and adopting the rules of the English chancery, so it has been held by the supreme and circuit courts. 2 Mason, 270, [Bean v. Smith, Case No. 1,174;] 4 Wash. C. C. 204, 205, [Harrison v. Rowan, Id. 6,143;] [Robinson v. Campbell,] 3 Wheat. [16 U. S.] 221; [U. S. v. Howland,] 4 Wheat. [17 U. S.] 115; [Boyce v. Grundy,] 3 Pet. [28 U. S.] 215. The twenty-third rule only waives a plea or demurrer, and gives leave to set up special matter in the answer. Equity has jurisdiction of all cases of account, though courts of law may have a concurrent jurisdiction, (13 Ves. 278; 13 Price, 721; 2 Caines, Cas. 54; 10 Johns. 587; 1 Eq. Cas. Abr. 131, pl. 12,) as on a devise to pay debts and make distribution, (4 Johns. Ch. 651, 659,) cases of agency, as a supercargo, (Paley, Ag. 58.) So wherever the relation of principal and agent exists, a bill lies for an account, though the agency is gratuitously undertaken. 4 Madd. 198, (374,) 220, (417.) It lies whenever an action may be brought at law to account,—[Fowle v. Lawrason,] 5 Pet. [30 U. S.] 503,—where there are mutual accounts,—Paley, Ag. 55; 1 Petersd. Abr. 98; 2 Show. 301; 1 Holt, N. P. 500, 3 E. C. L. 172. So in all cases of money received for the use of another concurrently with assumpsit, (Kirby, 163, 164,) to have an account allowed, (3 Johns. Ch. 351,) and between landlord and tenant, (1 Schoales & L. 309.) Equity has jurisdiction of all trusts which are variable and flexible, for the execution of which no action lies at law, or where the accounts growing out of it are complicated. 2 Atk. 612; 1 Atk. 128. It is concurrent with law where the trust is executed, but exclusive when it is executory, or there is an open subsisting relation of trust between the parties. A plaintiff must show that the trust is executed, and a balance due, before he can sue at law for money had and received. 1 Holt, N. P. 500; 3 E. C. L. 172, note. So wherever the transaction partakes more of confidence than contract. 5 East, 449. Any person for whose benefit a trust is created, may come into equity. [Russell v. Clark,] 7 Cranch, [11 U. S.] 89. It gives relief on legal titles where deeds are suppressed. Hob. 109. It will continue to exercise its jurisdiction, though courts of law have recently given a remedy. 2 Swanst. 546, 580. Equity will sustain a bill against an attorney who acts for all parties, if he abuses his trust, (1 Schoales & L. 165,) so to compel a solicitor to deliver papers, (1 Russ. 519.) All trusts, though gratuitous and honorary, come within the cognizance of equity, whether they arise from agencies, or in cases of dower, partition, partnership, executors or administrators. 4 Johns. Ch. 651; 17 Johns. 384; 1 Fonbl. 23, note f; 2 Atk. 60; 3 P. Wms. 249; 5 Madd. 9; 3 Mason, 347, [Powell v. Monson & B. Manuf'g Co., Case No. 11,356;] 4 Wash. C. C. 349, [Mayer v. Foulkrod, Case No. 9,341.] In this case the receipt of the money made defendant a trustee to whoever owned it, liable to an account as between principal and agent, the account was demanded and refused, the uncertainty of the arrangements made by defendant, the inaccuracy of defendant's statements, which required correction, the remedy at law being doubtful, attended with great delay if pursued, all which circumstances make it a proper case for equity. In sustaining this bill the rights of no third person will be affected, between the parties equity will consider that as done which defendant undertook to do by an assignment of the judgments; had this been done the plaintiff would have been in the situation of a surety, entitled to the benefit of such judgments, (1 Atk. 133,) or of bail who pays money for his principal, (2 Vern. 608,) though the suretyship was voluntary, as by indorsement, (2 Bin. 382; 2 Madd. 570.) A judgment creditor who pays prior judgment with the intention of becoming the assignee, shall have the benefit of it, as such payment is no extinguishment when equity requires it to be kept alive. 10 Serg. & R. 404; 2 Rawle, 128. As a surety Mr. Baker had all the rights of these judgment creditors against the principal. 1 Johns. Ch. 412; 2 Johns. Ch. 554; 4 Johns. Ch. 121; 1 Gall. 32, [Hunt v. U. S., Case No. 6,900;] 10 Ves. 412; 11 Ves. 22; 14 Ves. 162. It therefore cannot be relied on by defendant that Mr. Baker shall have no benefit from the judgments of which he agreed to procure the assignments; that he was mistaken in point of law is no defence. [Hunt v. Rhodes,] 1 Pet. [26 U. S.] 1, &c. Hence arises the trust, the money paid in April 1819 was to be refunded to Mr. Baker out of the proceeds of the sheriff's sale, this was prevented by the conduct of the defendant, in consequence of which the original trust was revived, and not having been executed according to the agreement, we may enforce it in equity by claiming an account, and payment of the balance. The objection founded on the lapse of time must be pleaded or insisted on in the answer, (2 Madd. Ch. Pr.; 1 Atk. 494; [Prevost v. Gratz,] 6 Wheat. [19 U. S.] 497,) as where the statute of limitations is relied on; its application by analogy is in the discretion of the court, here is no pretence of limitation as defendant has paid 1000 dollars within two years.

Before BALDWIN, Circuit Justice, and HOPKINSON, District Judge.

BALDWIN, Circuit Justice. The first question made in this cause is jurisdiction, which is an important one that ought to be settled to prevent its recurrence in other cases. By the second section of the third article of the constitution, the judicial power of the United States is extended to all cases

in equity[2] between persons therein described; it also authorizes congress to establish inferior courts. In execution of this power circuit courts have been established by the judiciary act of 1798, [1 Stat. 73,] with jurisdiction over all cases in equity, by the eleventh section, but it must be exercised within the limits prescribed by the organic law creating this power, and confined to the cases and subjects defined. [Marbury v. Madison,] 1 Cranch, [5 U. S.] 173; [U. S. v. More,] 3 Cranch, [7 U. S.] 172; [U. S. v. Hudson,] 7 Cranch, [11 U. S.] 32; [Shirras v. Caig,] Id. 44; [U. S. v. Goodwin,] Id. 108; [U. S. v. Gordon,] Id. 287; [Martin v. Hunter,] 1 Wheat. [14 U. S.] 337; [Cohens v. Virginia,] 6 Wheat. [19 U. S.] 395; [M'Clung v. Silliman,] Id. 604; [Osborn v. Bank of U. S.,] 9 Wheat. [22 U. S.] 820; [Williams v. Norris,] 12 Wheat. [25 U. S.] 117; [Montgomery v. Hernandez,] Id. 131; [Connor v. Featherstone,] Id. 203. By the sixteenth section of this act it is declared, that "suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." 1 Story, Const. 59. It has been decided by the supreme court that this section introduced no rule, but was declaratory of the common law. [Boyce v. Grundy,] 3 Pet. [28 U. S.] 215. So this court must take it; but we must give it the effect of a declaratory law, which is to declare it for the past and settle it for the future. Vide 4 Co. Inst. 87; Keb. St. 807; 2 Ruffh. St. 539. "Whereas some question hath of late risen, whether &c; for declaration whereof, and in avoiding such question hereafter, be it enacted and declared, that the common law of this realm is, and always was, and ought to be taken." Such is the form and effect of a statute declaratory of the common law, so taking the sixteenth section it is a proviso, a limitation and exception to the jurisdiction of the court, declaring that the case defined is not a suit in equity, cognizable under the eleventh section.

There can be no doubt of the power of congress to define what should be a case in equity, by declaring what the common law was, which drew the line between the courts of law and equity, nor that when declared, it was obligatory upon all the federal courts, by super-adding the authority of the legislature to that of the common law, so as not to leave the line of separation discretionary with the judges. To give any other effect to a declaratory law than settling a rule and standard for all cases coming within it, would annul it, for if it leaves the common law as it was before, doubtful or discretionary in any way with the court, it is to all intents and purposes a dead letter.

In looking to the seventh amendment to the constitution, proposed by congress at the same session as the judiciary act, their intention is most manifest to connect the sixteenth section with this amendment, which declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." By the adoption of this amendment, the people of the states and congress have declared, that the right of jury trial shall depend neither on legislative or judicial discretion. There were two modes in which this right might be impaired: 1. by an organization of courts in such a manner as not to secure it to suitors; 2. by authorizing courts to exercise, or their assumption of equity or admiralty jurisdiction over cases at law; this amendment preserves the right of jury trial, against any infringement by any department of the government, and the sixteenth section prohibits all courts from sustaining a suit in equity where the remedy is complete at law. Connecting this with the ninth section, directing the trial of all issues in fact in the district court to be by jury, with the twelfth, giving the same directions in cases in the circuit court, and the thirteenth in the supreme court, the judiciary act was intended to preserve a right deemed too invaluable and sacred to be left to any other guardianship than the supreme law of the land.

When congress intended to make an exception, it was declared, in the ninth section, "except civil causes of admiralty and maritime jurisdiction;" in the twelfth, "except those of equity, and of admiralty and maritime jurisdiction;" in the thirteenth, the provision extended only to "actions at law." It thus became necessary to define what were "suits in equity so excepted;" this was done by the sixteenth section, so that to bring a case within the exception, it must be, 1. a suit of equity jurisdiction; 2. a suit in which a complete remedy cannot be had at law, for if such remedy could be had, then it was a "suit at common law," within the seventh amendment.

This view of the constitution and law is the same as taken by the supreme court. "It is well known that in civil cases in courts of equity and admiralty juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases, to inform the conscience of the court; when, therefore, we find the amendment requires that the right of trial by jury shall be preserved 'in suits at common law,' the natural conclusion is, that the distinction was present in the minds of the framers of the amendment. By common law they meant what the constitution denominated in the third article, 'law,' not merely suits which the common law recognises among its old and settled proceedings, but suits in which legal rights were to be determined and ascertained, in contradistinction to those where equitable rights alone were recognised, and equitable remedies were ad-

[2] [See, also, Lorman v. Clarke, Case No. 8,516; Hubbard v. Northern R. Co., Id. 6,818; In re Meador, Id. 9,375.]

ministered, or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit." Parsons v. Bedford, 3 Pet. [28 U. S.] 446, 447. Taking the amendment, the law, and their construction as the one law, it follows, that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a final judgment, which affords a remedy, plain, adequate and complete, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right of trial by jury. If the right is only an equitable one, or, if legal, the remedy is only equitable, or both legal and equitable, partaking of the character of both, and a court of law is unable to afford a remedy according to its old and settled proceedings, commensurate with the right, the suit for its assertion may be in equity. This distinction is strongly illustrated in a case on the occupying claimant law of Ohio, directing compensation to be made for improvements on land recovered by ejectment, to be ascertained by commissioners appointed by the court which tried the cause. The supreme court held the law valid so far as respected the right of compensation, but unconstitutional as respected the mode of ascertainment, inasmuch as the circuit courts of the United States, in a suit at law, must submit every question of fact to a jury. Bank of Hamilton v. Dudley, 2 Pet. [27 U. S.] 492, 525.

The tests of the relative jurisdiction over suits at law and equity are, 1. the subject matter, 2. the relief, 3. its application, 4. the competency of a court of law to afford it; their application is not to be regulated by the decision of state or foreign courts, where their judicial system is organized on principles wholly inconsistent with a federal government of limited jurisdiction in all its departments. All the courts of the United States are of limited jurisdiction, which, whether appellate or original, must be exercised in the mode pointed out by the constitution, an act of congress directing a different mode is void. [Marbury v. Madison,] 1 Cranch, [5 U. S.] 175. Their jurisdiction is special, limited to certain cases, the facts necessary to its exercise must appear on the record, or their judgment is erroneous, as in inferior courts in England,—1 Saund. 174; 1 Ves. Sr. 204,—though their proceedings are not nullities, because their jurisdiction does not appear,—[Kempe v. Kennedy,] 5 Cranch, [9 U. S.] 184, 185. An enumeration of cases on which the federal courts may act, is an exclusion of all others. [Marbury v. Madison,] 1 Cranch, [5 U. S.] 174; [U. S. v. More,] 3 Cranch, [7 U. S.] 172; [Durousseau v. U. S.,] 6 Cranch, [10 U. S.] 313; [U. S. v. Hudson,] 7 Cranch, [11 U. S.] 32; [M'Clung v. Silliman,] 6 Wheat. [19 U. S.] 603; [Osborn v. Bank of U. S.,] 9 Wheat. [22 U. S.] 820; [Montgomery v. Hernandez,] 12 Wheat. [25 U. S.] 132. A legislative exception from its appellate constitutional power is implied from a legislative affirmative description of the powers of the court. [Durousseau v. U. S.,] 6 Cranch, [10 U. S.] 314. If the law describes the power in general terms, embracing the case, without making any exception, it will be liberally construed and acted on. [Wilson v. Mason,] 1 Cranch, [5 U. S.] 91; [Cohens v. Virginia,] 6 Wheat. [19 U. S.] 400. But a strict construction is adopted in other cases. [Wiscart v. Dauchy,] 3 Dall. [3 U. S.] 324; [U. S. v. Goodwin,] 7 Cranch, [11 U. S.] 110. These are the rules on which the supreme court acts, whether on an appeal, writ of error, or a certificate of division. [Cohens v. Virginia,] 6 Wheat. [19 U. S.] 363; [U. S. v. Daniel,] Id. 547; [Wayman v. Southard,] 10 Wheat. [23 U. S.] 20; [Montgomery v. Hernandez,] 12 Wheat. [25 U. S.] 132. So as to the appellate jurisdiction of the circuit court, the time, the manner of its exercise, and its process must be subject to the absolute legislative control of congress. [Martin v. Hunter,] 1 Wheat. [14 U. S.] 349; S. P., [The Caroline v. U. S.,] 7 Cranch, [11 U. S.] 500; [Patterson v. U. S.,] 2 Wheat. [15 U. S.] 225. It cannot have been intended to leave the original equity jurisdiction, subject to different rules, or capable of being exercised in opposition to them.

State courts are organized on contrary principles; the supreme court of this state has all the powers of the court of exchequer, common pleas and king's bench. 1 Dall. Laws, 180. So has the supreme court of New York. 6 Johns. 280. In England the "king hath delegated his whole judicial power to the judges," "all matters of judicature according to his laws." 4 Co. Inst. 70, 74; St. 20 Edw. III. c. 1; 1 Ruffh. St. 246. Hence the jurisdiction of the courts was general and supreme over all matters subject to their respective cognizances. That of the court of chancery proceeding secundum equum et bonum, was original, not delegated. 4 Co. Inst. 73, 74. It is difficult to discover its origin. Mitf. Eq. Pl. 1. It can be traced to no act of parliament, but had existed time out of mind, it had become very extensive, and being extraordinary, was governed by no certain rules. 4 Co. Inst. 89. It extends to all cases not taken from it, and transferred to some other court of equity. Professing to act only in aid of the law in curing its defects, chancery adopted a general rule, not to interfere where the remedy at law was complete, but have not always adhered to it; the only test of jurisdiction being usage, they would not suffer it to be arrested because courts of common law gave the same relief. 3 Brown, Ch. 73, 224; 2 Caines, Cas. 40; 5 Ves. 784. Repeated attempts were made by the commons of England, to define and limit this jurisdiction "to such cases as have no remedy by the common law," but were defeated by the king's answer, "the usages heretofore shall stand so as the king's

royalty be saved." 4 Co. Inst. 82, 83. Chancery has thus been left to define its own jurisdiction, by its own usages and precedents, never giving up what it had once exercised, and struggling for its extension over cases cognisable at law; courts of law too, judging likewise of their own jurisdiction, have in modern times assumed the powers of equity, so that from their respective decisions it has become difficult to draw the line between them. 2 Schoales & L. 630; 6 Ves. 86; 7 Ves. 18; 2 Eq. Cas. Abr. 382; Prec. Ch. 111, 244; 4 Brown, Ch. 296; 2 Ves. Jr. 122; 7 Mod. 43; 2 Ld. Raym. 785; 3 Durn. & E. [Term R.] 53, 151.

To avoid the confusion arising from this conflicting struggle for jurisdiction, between the different courts of common law and equity, congress vested the powers of both courts in the circuit courts, and did what the commons of England could not effect, prohibited their exercise of equity powers, in cases where the legal remedy was complete. Usage therefore is no test of jurisdiction in the federal courts, they cannot act (in the language of Buller, Justice,) as the lord chancellor does "in the plentitude of his power," (3 Durn. & E. [Term R.] 161,) but must proceed by the line drawn by the constitution, the law and the supreme court. It is no excuse for disregarding it, because courts of equity elsewhere act on another rule; as a matter of constitutional right, a defendant is entitled to a jury trial on an issue of fact in a suit at common law, and to his oath in his answer to a bill in equity, of which he cannot be deprived at the option of a plaintiff. 6 Ves. 184. It is enough for the purposes of justice, that one tribunal is open to every party, competent to give a remedy for every wrong; he ought to be compelled to resort to that which is appropriate to his case, and ask his remedy with the incidents attached to it. This court has been organised on this principle, with limited powers, it cannot sustain a suit at law on an equitable right only, adjudge a remedy appropriate only to equity, or sustain a suit in equity on a mere legal right, for which the law affords a complete remedy. [Graves v. Boston Marine Ins. Co.,] 2 Cranch, [6 U. S.] 444. This has been made our duty by a more imperative and safe rule than the usage or discretion of a chancellor.

A case however may be sustained in equity on a legal right, if the object and nature of the remedy sought are equitable. 10 Ves. 14. The rights and rules of property are the same at law as in equity, the remedy for their violation is different; if damages are sought for a breach of contract, it must be by a suit at law, if a specific execution is asked, it must be in equity, so to annul and set it aside for fraud. [Hepburn v. Dunlop,] 1 Wheat. [14 U. S.] 197. The right may be clear at law, but as a court of law cannot by assuming cognizance of the conscience act on the person of a party,—1 Ves. Sr. 446, —if the remedy is doubtful, difficult, not adequate to the object, not so complete as in equity,—[Osborn v. Bank of U. S.,] 9 Wheat. [22 U. S.] 842,—not so efficient and practicable to the ends of justice and its prompt administration, the sixteenth section does not preclude the jurisdiction of equity,—[Boyce v. Grundy,] 3 Pet. [28 U. S.] 215. Nor where it is necessary to bring before the court, persons who are interested or actors in the case, though not parties to the suit, and cannot be made parties to a suit at law,—[Osborn v. Bank of U. S.,] 9 Wheat. [22 U. S.] 843, 844;—where the competency of law falls short of the equum et bonum of the case,—4 Wash. C. C. 352; [Mayer v. Foulkrod, Case No. 9,341;]—where there is some difference in the remedy, and some equitable circumstances calling for its application, [Smith v. M'Iver,] 9 Wheat. [22 U. S.] 534, 535. But there must be some head or branch of equity jurisdiction under which the case comes, independently of the remedy being more complete. 4 Wash. C. C. 206; [Harrison v. Rowan, Case No. 6,143;] [Herbert v. Wren,] 7 Cranch, [11 U. S.] 376; [Osborn v. Bank of U. S.,] 9 Wheat. [22 U. S.] 842; 1 Ves. Jr. 423. In such cases equity acts to supply the defects of the law as to the remedy to which the party is entitled, and will administer its own appropriate relief by a final decree on the whole merits because cognizance cannot be effectually taken at law. 1 Schoales & L. 205.

When the jurisdiction of equity attaches, the extent of its exercise depends on the nature and object of the suit, if required only as preliminary, or auxiliary to a legal remedy, its power ceases when that is effected by the aid of equity; a subpoena in equity does not operate like a capias from the king's bench with a clause of ac etiam, or a quo minus in the exchequer, to draw from law, the cognizance of legal rights or legal remedies, when an auxiliary relief was alone called for,—3 Conn. 140, 170,—or be abused as a pretext for bringing causes proper for a court of law into equity, —[Russell v. Clark,] 7 Cranch, [11 U. S.] 89. A bill for discovery, for instance, must present a case of defect of proof,—1 Wash. C. C. 129, [Carson v. Jennings, Case No. 2,464,]—and relief must be an incident or consequence of the discovery, or the party after obtaining it will be sent to law for his final remedy,—3 P. Wms. 150; 2 Brown, Ch. 61; 1 Brown, Ch. 194; 6 Ves. 689; 3 Conn. 140, 170. Equity will not render a final decree in a case of fraud, unless the object of the bill is to obtain something besides mere compensation,—[Boyce v. Grundy,] 3 Pet. [28 U. S.] 221,—nor on an injunction, unless the object is to arrest the injury and prevent the wrong,—[Osborn v. Bank of U. S.,] 9 Wheat. [22 U. S.] 845,—or on a bill for an account, unless the justice of the case appears on the account,—1 Schoales & L. 308, 309. If the question of discovery, fraud, injunction, or account, in-

volves the essence and merits of the whole case, as to right and remedy, and the court is competent to decide on the one and administer the other, it will, when put in possession of the materials to enable it to make a final decree, proceed to make it, to avoid multiplicity of suits. 3 Atk. 263; Amb. 541; 10 Johns. 596. So where a contract is made by fraud and imposition or the like, equity gives relief, which the law cannot, and having thus possession of the principal question, makes a final decree on the question and equity of the whole case. [Hepburn v. Dunlop,] 1 Wheat. [14 U. S.] 197. The court being once rightly in possession of the whole cause, will determine the controversy, although in its progress it may decree on a matter which was cognizable at law. [Cathcart v. Robinson,] 5 Pet. [30 U. S.] 278; [Wilson v. Mason,] 1 Cranch, [5 U. S.] 89. But if the answer to a bill of discovery confesses nothing, furnishes no evidence in favour of a plaintiff's claim, and denies the whole equity of the bill, this ground of jurisdiction is totally withdrawn from the case. [Russell v. Clark,] 7 Cranch, [11 U. S.] 89, 90. The rule resulting from these cases is plain and intelligible, the principal question in a cause is the cause itself; a court of equity once having cognizance of it, would not send the party back to law to settle its incidents; nor if the incidents only are before them, would they take the substance of the controversy from law.

It was a well established rule of chancery before the American revolution, to sustain a bill for discovery where they could not give the relief prayed for; if the plaintiff was entitled to a discovery, and not to relief, the defendant must answer the former, and might demur to the latter, but a general demurrer was uniformly overruled, if the plaintiff was entitled to an answer to either. Mitf. Eq. Pl. 148; 1 Ves. Sr. 248; 2 Caines, Cas. 176; 10 Ves. 553; 2 Brown, Ch. 281; 8 Ves. 2; 2 Atk. 44, 157, 284, 289; 2 Ves. Sr. 357. This rule was adopted in the United States and yet prevails. 2 Caines, Cas. 177; 1 Johns. Cas. 434, 435. It was changed in England in 1787, 1788, by Lord Thurlow, and a new one introduced which has been followed since. That a demurrer if good to the relief, is good to the discovery, if the discovery is sought for the purpose of the relief, (1 Madd. Ch. Pr. 216; 10 Ves. 553; 2 Brown, Ch. 280, 319;) a plaintiff is not entitled to discovery, if he goes on to pray relief to which he is not entitled, and a general demurrer is good to both, (4 Brown, Ch. 480; 2 Ves. Jr. 517; 3 Ves. 7; 6 Ves. 63; 11 Ves. 510.) The only reason given for so important a change in chancery proceedings is, that it was a hardship on a defendant to pay the expense of a long copy, when there was only a right to a discovery, and not be able to avoid it by a general demurrer. 2 Brown, Ch. 281.

Trivial as the reasons are, the rule affects the jurisdiction of the court most materially; if a general demurrer is allowed they cannot proceed, if overruled they can act on the whole case, thus doing away the distinction between incidental and final relief, and the cases where the principal question is before them, the essence and substance of the case, or only its incidents or an incidental question. A similar reason has led to an assumption of equity jurisdiction in account, wherever the relation of principal and agent exists, in the case cited by the plaintiff's counsel, because a "plaintiff can only learn from the discovery of the defendant how they have acted in the execution of their agency; and it would be most unreasonable that he should pay them for that discovery if it turned out that they had abused his confidence: yet such must be the case if a bill for relief did not lie." 4 Madd. 199, (Amer. Ed.) 220; Id. (Eng. Ed.) 376, 416; 1 Madd. Ch. Pr. 217. It is an old rule of chancery that plaintiff pays the costs of a bill for discovery though defendant resists it, (Bunb. 124; 1 Atk. 286; 4 Ves. 746,) though Justice Buller ruled otherwise, (1 Ves. Jr. 423;) yet it was never made a pretext for extending its jurisdiction till 1819. As costs are discretionary in equity, (1 Ch. Cas. 106; 1 Eq. Cas. Abr. 125; 2 Atk. 111; 1 Madd. 190,) the justice of the case could have been better answered by altering the rule as to the costs, than to make jurisdiction and final relief a mere incident to costs. In the rule of Lord Thurlow there is still less reason, for though the defendant pays the costs of a copy in the first instance, he charges it in his bill against the plaintiff. Ch. Cas. 106. Such are the pretexts for the assumption of jurisdiction when its extent and exercise depend on mere discretion, than which there can be no better reason for a statutory definition. Be the rule however as it may in England, or founded on solid or trivial reasons, it cannot be adopted by the courts of the United States; a check has wisely been provided against the assumption of equity jurisdiction by any new rule in English courts since the Revolution, (vide [Cathcart v. Robinson,] 5 Pet. [30 U. S.] 280,) especially those which depend on the discretionary power of the court over costs. No such principle has been sanctioned by the supreme court in the cases cited by plaintiff's counsel, they have decided that the acts of congress distinguishing cases at law from those in equity, refer to the principles settled in England before their passage, and not to the practice in the state courts. [Robinson v. Campbell,] 3 Wheat. [16 U. S.] 221; 4 Wheat. [17 U. S.] 115; [Fullerton v. Bank of U. S.,] 1 Pet. [26 U. S.] 613. In the words of Judge Washington, the judiciary act adopts the long established principles of the court of chancery on the subject of equity jurisdiction. 4 Wash. C. C. 205, [Harrison v. Rowan, Case No. 6,143;] 4 Wash. C. C. 354, [Mayer v. Foulkrod, Id. 9,341.] It follows that new

rules subversive of established principles and practice are excluded. Vide [Vattier v. Hinde,] 7 Pet. [32 U. S.] 274.

It is contended by plaintiff's counsel, that the want of jurisdiction on the ground of there being a remedy at law ought to be by demurrer or plea, and comes too late after an answer. As a demurrer admits the facts of the bill, and can introduce no new ones, it presents only the question whether defendant shall answer it. Mitf. Eq. Pl. 86, 87. It denies the equity of the bill, as a demurrer to a declaration denies the cause of action, but at law the defendant may move in arrest of judgment, or assign error for the same cause, as the defect is not cured by verdict or judgment. [Tiernan v. Jackson,] 5 Pet. [30 U. S.] 585. There is no reason why a demurrer should be necessary in equity more than at law. It would be a hardship to compel the defendant in this case to admit the fact stated in the bill, that he undertook to procure an assignment of certain judgments to the plaintiffs, as the jurisdiction and relief might be consequent upon it; whereas, by denying it in his answer, the plaintiff would be out of court if he did not prove that fact. The difference between a demurrer at law and in equity is this, a judgment on a demurrer at law, if against a defendant, is final and peremptory, he puts it in at his risk, and the judgment is a perpetual bar; if a demurrer is overruled in equity, the defendant must answer over, but may insist on the same matter in his answer, (2 Atk. 284; 3 P. Wms. 94; 2 Ves. Sr. 492,) being the same as a respondeas ouster at law, (1 Caines, Cas. 7.) If the demurrer is allowed in equity, it is a bar and goes to the merits. 1 Atk. 544. In general if a demurrer would hold to a bill, the court will not grant relief though the defendant answers. 6 Ves. 686; 2 Jac. & W. 151. It will be done in some cases, but they are rare. Mitf. Eq. Pl. 87, (New York Ed.) The ground of a demurrer is, that the bill does not disclose a case which entitles the plaintiff to the relief prayed for; if the bill does not state or the plaintiff does not make out such case at the hearing, or on an issue, or by the answer, he cannot have a decree; the want of equity in the bill is fatal to the plaintiff's relief; although a demurrer or plea might have availed the defendant, he is not precluded by answering, and the precedents to this point are numerous. 3 P. Wms. 256, 257; 1 Ch. Cas. 144, 147; 2 Brown, Ch. 338, 340, 519; 4 Brown, Ch. 180, 198; 2 Ves. Jr. 56, 60; Comyn. 612; 1 Brown, Ch. 29, 201; 1 Atk. 451; 3 P. Wms. 94; 2 Ves. Sr. 493. After plea overruled he may answer to the same matter, or set it up in a second answer after the first has been overruled. 2 Ves. Sr. 492. The rare cases referred to in Mitford are North v. Earl & Countess of Stafford, 3 P. Wms. 148, 150, where the lord chancellor allowed a demurrer, but said he would have relieved on the hearing if there had been no demurrer; this dictum applied to the particular case, the defendant had demurred to the relief and not to the discovery, and the plaintiff was at liberty to except, to amend his bill, and force defendant to discover. The others were the Rector of Sherrington's Case, and the Case of Pickering, referred to in a note of the reporter in Brewster v. Kidgell, 12 Mod. 171, in which it is said, that the difference between granting and refusing relief in the exchequer depended on there being a demurrer. As the case of Brewster v. Kidgell is reported in Holt, 669; Carth. 438; Comb. 424, 466; 5 Mod. 369, 374; 1 Salk. 198; 2 Salk. 615; 3 Salk. 340; 1 Ld. Raym. 317, 322,—without noticing this point, little if any weight is due to this note of the reporter as evidence of a general rule, and his statement of the cases is too imperfect to ascertain their circumstances.

The counsel of the plaintiff relies upon a rule laid down by Lord Chief Baron Gilbert, that after answering, a defendant cannot object that the plaintiff's remedy is at law; this rule however appears by the text and cases cited, to be applied to the cases of bills filed for relief on deeds, bonds, or other papers, which have been lost or destroyed. Gilb. Ch. 50, 51, 52; 2 Mod. 173; 1 Ch. Cas. 11, 231; 1 Vern. 59, 180, 247. These bills are of two descriptions. 1. Such as pray only for relief, auxiliary to a final remedy at law, by a decree for a discovery and re-execution of the deed. 2. Such as, in addition, pray for payment of the money due; in the former an affidavit of the loss or destruction is necessary, in the latter not. Mitf. Eq. Pl. 42, 43. The reason of the difference is this, that if the matter of the bill is within the jurisdiction of the court, the plaintiff need not make affidavit that he hath not the writings, but if it be to give the court jurisdiction then he must. 2 Eq. Cas. Abr. 13, pl. 1; 2 Freem. 71, pl. 83. As a plaintiff cannot recover on a lost deed at law, it is a clear case for equity to supply the defect in aid of the law; when this is done by a decree for discovery and re-execution, the power of equity is functus officio, for then the remedy is complete at law to enforce payment, and a demurrer admitting the loss admits the jurisdiction to supply the defect. But as a decree for payment takes the final remedy from law to equity, there must be an affidavit to give jurisdiction for payment; if not made and the defendant denies the deed, he may demur, because he has a right to have it tried by a jury. If the deed is confessed in the answer, he cannot demur to the relief, as it is iniquitous to afterwards litigate it on an issue at law of non est factum, and he has nothing to do but to pay the money; so if he denies the deed without demurring, and it is proved by two witnesses. Gilb. Ch. 50, 51, 52, 219, 220; Mitf. Eq. Pl. 42. These principles are supported by the adjudged cases cited by Gilbert and

2 P. Wms. 541; 3 Atk. 17, 132; 3 Anstr. 859, 861; they apply however only to this class of cases, which are governed by appropriate rules, not interfering with those adopted in ordinary cases. The nature of a bill on a lost deed necessarily makes it an exception to the general rule, of which this case is an illustration; for here it is admitted and cannot be controverted, that a demurrer would be good if the plaintiff has a complete remedy at law, (3 Brown, Parl. Cas. 525,) whereas it would be overruled, if this was a bill on a lost bond with an affidavit annexed. In this case, as the answer admits or discloses nothing, which gives any jurisdiction independently of the allegations of the bill, the defendant is not put to his demurrer; nor is the case in the bill one in which the plaintiff was bound to make affidavit, in order to give jurisdiction to equity, or where any affidavit if made to any fact set forth, would authorize a transfer of the final remedy from a court of law, if it was a case for law without such affidavit. It has been thought proper to notice the rule in Gilbert the more particularly, as it was much pressed in the argument, and was the basis of the opinion of the judges in Ludlow v. Simonds, referred to hereafter. Admitting this rule as an exception in peculiar cases, we cannot hesitate in giving our opinion, that the established general rule of chancery is as laid down by Lord Eldon; "if you could have demurred to the bill, the court will not make a decree at the hearing;" the exception is, "if the defendant has the vouchers, so that the plaintiff cannot go on at law, and then the observation applies, that wanting discovery, the court gives relief particularly in matters of account." 6 Ves. 686. Here the plaintiff asks for final relief, which must be denied him unless at the hearing he has made out a case of equity jurisdiction. It is next contended that this objection must be made by a plea to the jurisdiction of the court.

A plea differs from a demurrer in this, the latter is on the ground that the case is not cognizable in any court of equity, and can set up no new matter; a plea must set up matter not in the bill, some new fact as a reason why the bill should be delayed, dismissed, or not answered, or it will be overruled. Mitf. Eq. Pl. 177, 179; Beames, 2, 7; 2 Madd. (Amer. Ed.) 346. A plea to the jurisdiction does not deny the plaintiff's right, or that it is not a matter proper for the cognizance of equity, but that the court of chancery is not the proper one to decide it. Mitf. Eq. Pl. 180; Beames, 57. It admits the case to be of equity jurisdiction, but asserts that some other court of equity can afford the remedy. This must be shown by matter set up in the plea, because the court of chancery being one of general jurisdiction in equity, an exception must be made out by the party who claims an exemption in order to arrest it. Mitf. Eq. Pl. 183; Beames, 57, 91; 1 Vern. 59; 2 Vern. 433; 1 Ves. Sr. 264. But if no circumstance can give jurisdiction to the court of chancery, no plea is necessary, a demurrer is good. The objection that the case belongs to another court of equity cannot be taken by demurrer. It must be by plea, (1 Atk. 544; Mitf. Eq. Pl. 123, 124; Beames, 100, 101; 1 Saund. 74,) showing what court has cognizance of the case, that it is a court of equity and can give the plaintiff a remedy, (1 Vern. 59; 1 Dickens, 129; 3 Brown, Ch. 301; 1 Ves. Sr. 203; 2 Ves. Sr. 357.) It is in the nature of a plea in abatement at law which cannot be put in after general imparlance, or received when it does not give the plaintiff a better writ. 1 Com. Dig. 151, (146, 147;) 1 P. Wms. 477; Beames, 92, 93; 1 Ves. Sr. 203, 204. The analogy however does not run throughout. Lord Hardwicke says, in Penn v. Baltimore, "First the point of jurisdiction ought in order to be considered: and though it comes late I am not unwilling to consider it. To be sure a plea to the jurisdiction must be offered in the first instance, and put in primo die; and answering submits to the jurisdiction; much more when there is a proceeding to a hearing on the merits, which would be conclusive at common law: yet a court of equity which can exercise a more liberal discretion than common law courts, if a plain defect of jurisdiction appears at the hearing will no more make a decree than where a plain want of equity appears." 1 Ves. Sr. 446, S. P., 3 Atk. 589; Beames, 56.

We have been much pressed with a contrary principle laid down by high authority, in Ludlow v. Simond, 2 Caines, Cas. 40, 51, 56; 2 Johns. Ch. 369; 4 Johns. Ch. 290. But it is not supported by the cases referred to, and is much shaken by subsequent opinions of the same judges who asserted it. Vide 9 Johns. 493, by Mr. Justice Thompson, who remarked, "This objection ought not to be very favourably received in this stage of the cause," by Chief Justice Kent, who does not notice this point in his opinion, (9 Johns. 505,) and by Judge Spencer, who had previously given his opinion, that the bill ought to be dismissed, (9 Johns. 504.) In 2 Johns. Ch. 369, Chancellor Kent rests his opinion solely on 2 Caines, Cas. 40, 56, in 4 Johns. Ch. 290, he repeats the rule as a general one, referring to 1 Johns. Cas. 434; 2 Johns. Cas. 431; 10 Johns. 595, 596,—in neither of which cases is the rule referred to laid down by any of the judges. In Ludlow v. Simond, Kent, J., quoted 1 Atk. 128; 1 Ves. Sr. 331; 3 Brown, Parl. Cas. 525; Mitford passim; Gilb. Ch. 51, 53, 219, 221; 1 Ves. Sr. 446,[3] neither of which support the position; hence he omits any reference to these cases in his two subsequent opinions in

[3] [See note at end of case.]

chancery, relying on the rule as one established in New York, by the case of Ludlow v. Simond which was decided in 1805.

In LeRoy v. Servis, Judge Benson, in delivering the opinion of the court of errors in 1801, laid down the rule of chancery to be, "For it is to be remarked that a defendant does not waive or forego a single advantage as to the merits, or the point whether the plaintiff has equity, by not demurring. He may equally insist on the same matter by the answer, which he may have done by the demurrer; and if he should omit them in the answer, he may still avail himself in argument on the final hearing of the case. 1 Caines, Cas. 1, 7; 2 Caines, Cas. 176, 182. Decisive as are the terms of this opinion, it was overlooked in 1805, and a local rule to the contrary laid down, which we cannot follow when it is in opposition to the established course of equity.

The true rule as laid down by Judge Benson is analogous to proceedings at law, where an objection is made that the plaintiff's remedy is in equity. In Pasley v. Freeman, 3 Durn. & E. [Term R.] 53, the question whether an action founded on a fraud, could be sustained at law, was decided on a motion for a new trial; so in Read v. Brookman, whether a plaintiff could recover on a lost deed, was decided on a demurrer to the declaration for want of a profert. 3 Durn. & E. [Term R.] 152, 157. Surely then a court of equity, which exercises a more liberal discretion in pleading than courts of law, will not hold a defendant to stricter rules on the question, whether the plaintiff has a remedy at law. In the courts of the United States, an objection to the jurisdiction of the court, or to the want of equity in the bill, has never been overruled for the want of a demurrer or plea, but has been sustained wherever the defect appears by the bill, the answer, or the proofs in the cause; it may be made on a motion to dismiss the bill,—1 Pet. C. C. 363, 383, [Andrews v. Solomon, Case No. 378; Thompson v. Tod, Id. 13,978;] [Duncan v. Walker,] 2 Dall. [2 U. S.] 205,—though the defendant answer the merits without taking this objection,—[Graves v. Boston Marine Ins. Co.,] 2 Cranch, [6 U. S.] 419, 444. So after a decree pro confesso, a reference and report of a master. [Fowle v. Lawrason,] 5 Pet. [30 U. S.] 496, 504, S. P.; [Massie v. Watts,] 6 Cranch, [10 U. S.] 158; [Russell v. Clark,] 7 Cranch, [11 U. S.] 75, 89; [Herbert v. Wren,] Id. 376; [Hepburn v. Dunlop,] 1 Wheat. [14 U. S.] 197; [Cameron v. M'Roberts,] 3 Wheat. [16 U. S.] 591; [U. S. v. Howland,] 4 Wheat. [17 U. S.] 115; [Osborn v. Bank of U. S.,] 9 Wheat. [22 U. S.] 739, 842; [Boyce v. Grundy,] 3 Pet. [28 U. S.] 211, 215. When urged in argument, the objection "is considered in the nature of a demurrer to the bill for want of equity. 1 Mason, 270; [Bullard v. Bell, Case No. 2,121.] So a decree will be reversed for the want of proper parties, after a hearing on the merits in the circuit court. [Wilcox v. Plummer,] 4 Pet. [29 U. S.] 180; [Caldwell v. Taggart,] Id. 202. We must therefore take the law of equity to be settled, that a defendant may, at any stage of the cause, rely on the want of equity in the bill, on the ground that the plaintiff has a complete remedy at law. The nature of this case, which is one very near the dividing line between law and equity, required us to examine this question thoroughly, in order to come to a satisfactory conclusion on which side of the line it comes, as well as to settle the general rules of equity jurisdiction, so far as it could be done by this court. The labour of making up a detailed opinion is our own, the tax upon the time of the bar in listening to its delivery, is voluntary and comparatively small. It is enough for us, that the course we take is from the impulse of duty, of this we must be the judges.

The objects of the bill are threefold, first, discovery, second, account, third, the execution of a trust. They will be considered distinctly.

1. Discovery. From the bill it appears, that the plaintiff's testator had received from the defendant, two accounts of the receipt and disbursement of the 2800 dollars put into his hands, also of the amount of the judgments against Eckert, the sum bid at sheriff's sale, the purchase by defendant, the application of the purchase money, and that defendant had communicated his proceedings by letters received by the testator, which were read at the hearing. Thus far plaintiff having previous knowledge of all material facts had no need of a discovery. The only matters disclosed in the answer, of which the plaintiff by his bill did not appear to have both knowledge and proof, were mostly of detail of what was in the accounts rendered, or would appear on the records referred to therein, in no way affecting the substance of the plaintiff's case in his bill. As the plaintiff had equal means of resorting to public records for information as the defendant, their contents are not a proper subject for a bill of discovery, as we decided in Ross v. Gibson [Case No. 12,074] at the last term. The merits of the plaintiff's claim were not changed by the answer, unless on matters merely auxiliary, or collateral to the principal question of relief, the answer has removed no legal impediment, or brought out any matters peculiarly within the knowledge of the defendant, so as to present a case of equity cognizance of any matter not cognizable at law; admitting the contrary, still equity can go no further than to supply the defects of law under this head. The discovery sought and made does not carry relief in equity as an incident, so as to give the court power to decree on the whole case, and take the controversy from law to equity, but leaves all questions as to a final remedy as open as before the answer. Vide [Fowle v. Lawrason,] 5 Pet. [30 U. S.] 503; [Russell v.

Clark,] 7 Cranch, [11 U. S.] 89; Mitf. Eq. Pl. 27, 42.

2. Account. The bill does not aver any refusal to account till 1829. On the contrary it admits that one was rendered in April 1819 and another two years before the death of the testator, exhibiting a balance due by defendant of 191 dollars and its appropriation, to which no objections were made as to the items, or the application of the money before the filing of the bill, nor is any fraud suggested. It is a good plea to an action at law for an account, that the defendant had accounted before suit brought, to the person from whom money had been received, or to the person to whom he was bound to account or directed to pay it, (Bull. N. P. 127,) or that the money had been received for an object which had been accomplished, (1 Vern. 95, 136, 208,) or that he never was the plaintiff's bailiff or receiver to render an account, (1 Com. Dig. 189, E. 3, 4, 5.) The object of the suit being to compel the settlement of the account, the plea of fully accounted is good at law,—4 Serg. & R. 44; 3 Wils. 113,—and a stated account is a good plea in equity,—[Chappedelaine v. Dechenaux,] 4 Cranch, [8 U. S.] 309; 4 Desaus. Eq. 175; 1 Atk. 1; 2 Atk. 1; Mitf. Eq. Pl. 210, 211. If plaintiff has agreed to the account his only remedy is at law for the balance; unless there is some legal impediment, equity will not interfere when the sum is certain. 1 Ves. Sr. 160, 163; 6 Ves. 141. In this case the account must be considered as settled by its long retention, without objection made in a reasonable time. 2 Vern. 276; 2 Ves. Sr. 239. Though not signed by the party it is a stated account, if it is in writing and shows a balance or that there is none. Mitf. Eq. Pl. 21; 2 Atk. 251, 399. The burthen of showing errors in such an account, is on the person who receives it without objections. [Freeland v. Heron,] 7 Cranch, [11 U. S.] 151. A settled account can be opened only for fraud or errors specified, and which are palpable or clearly proved. 2 Atk. 189; [Chappedelaine v. Dechenaux.] 4 Cranch, [8 U. S.] 309; 1 Ch. Cas. 299; 1 Vern. 180; 2 Atk. 119; 9 Ves. 265; 2 Johns. Ch. 216. It can only be surcharged or falsified by the plaintiff,—[Perkins v. Hart,] 11 Wheat. [24 U. S.] 256,—and is not affected by being introduced into a subsequent account,—[Chappedelaine v. Dechenaux,] 4 Cranch, [8 U. S.] 316. Long acquiescence in an account makes it a settled one. Stale demands are not favoured in equity when the party acquiesces for a length of time and sleeps on his rights. 1 Jac. & W. 59, 62; 2 Jac. & W. 152; 2 Schoales & L. 627. Conscience, good faith and reasonable diligence are required to call the powers of equity into action. 6 Johns. Ch. 369; Amb. 645; 3 Brown, Ch. 640; 2 Ves. Jr. 583. A trustee's account with an infant cannot be opened after eleven years' acquiescence in a settlement, unless by falsifying an item. 2 Brown, Ch. 62. An account is barred in eleven years. 2 Johns. Ch. 437; 3 Johns. Ch. 586. The bar from lapse of time is a conclusion from acquiescence, an inference from facts, which need not be set up by demurrer, answer or plea, but may be suggested at the hearing. 3 Brown, Ch. 646; 4 Brown, Ch. 268; 2 Ves. Jr. 87, 572, 582; 2 Schoales & L. 637. There is no fixed time when it operates in equity. It is applied by analogy to the statute of limitation,—[Thomas v. Brockenbrough,] 10 Wheat. [23 U. S.] 149; [Elmendorf v. Taylor,] Id. 168; [Willison v. Watkins,] 3 Pet. [28 U. S.] 52, 53,—or rather in obedience to them as Lord Redesdale, expresses it,—2 Schoales & L. 629, 636; 2 Jac. & W. 191. The effect however is the same as at law. 7 Johns. Ch. 122. In this state six years bars an action of account. 1 Dall. Laws, 95, 96. An infant is barred from an account of rents and profits, unless brought in six years after he comes of age. Prec. Ch. 518; 7 Johns. Ch. 113, 114. And the same rule applies to an account of all trusts, which are not the peculiar creatures of a court of equity. 7 Johns. Ch. 114; [Willison v. Watkins,] 3 Pet. [28 U. S.] 52; 2 Jac. & W. 147, 152, 191; [Peyton v. Stith,] 5 Pet. [30 U. S.] 491. We think this case comes within the spirit of all these decisions. The act of limitations has twice run over the plaintiff's claim, and being barred at law, we can see no equitable circumstance to take it out of the rule; the account must therefore be considered both at law and in equity as closed, so far as respects the receipt of the 2800 dollars.

The next ground for an account is an allegation in the bill, that the defendant undertook to procure an assignment of certain judgments against Eckert, to be made to plaintiff's testator; this is explicitly denied by the answer, and in our opinion the plaintiff has failed in doing away this denial (which is directly responsive to this part of the bill), though the answer was unsupported. Vide [Union Bank v. Geary,] 5 Pet. [30 U. S.] 110, 111. The defendant also avers in his answer, that he acted not as the agent, attorney or trustee of the testator, in any capacity whatever; that what he did, was purely and solely to serve Eckert and family. It is then incumbent on the plaintiff, to make out the defendant to have become his bailiff or receiver, by something independent of the receipt of the 2800 dollars; if he has succeeded in this, another difficulty occurs. Admitting that the alleged agreement was made, its obligation was a legal one, and the remedy at law upon it, so far as we can perceive, complete. The evidence of this agreement was in writing in possession of the plaintiff, and connected with the answer, presents the whole case; no evidence has been given at the hearing which gives any new turn to it, or presents any matter for equitable relief on the ground that defendant was the bailiff or receiver of the plaintiff, in any thing but the receipt of the money for which he had

accounted, and the account was settled by acquiescence. No change of circumstances could open this account for revision. All future accountability rested on the subsequent agreement, which related to the performance of certain acts, and cannot be carried back into the original account, so as to make the performance or non performance of the agreement, a matter of account. As a settled account cannot be opened directly, it cannot be done collaterally; the only pretext for it is, that defendant acted in both transactions as plaintiff's agent, consequently they make but one account, which cannot be closed without embracing the whole conduct of the defendant. The answer denying the agency not having been disproved, excludes the jurisdiction of equity,—[Russell v. Clark,] 7 Cranch, [11 U. S.] 89; 3 Ves. 446,—and the defendant has rendered a full account of both transactions, it was not to open the old account, or to attach any responsibility not existing when it was rendered, nor can the court give it that effect, for though a defendant does not demur but answers, it does not give the plaintiff a right to any relief, to which he is not entitled by his bill. 1 Pet. C. C. 363, 383; [Andrews v. Solomon, Case No. 378; Thompson v. Tod, Id. 13,978;] Mitf. Eq. Pl. 87. That part of the plaintiff's claim which grows out of the agreement in October 1819, is for damages for its non performance, not for money pretended to be actually in the hands of the defendant; the sole question is whether the money was applied according to the agreement. If it was, the plaintiff has no case on his own showing. If not, the amount misapplied is a mere matter of calculation, as easy for a jury as a master. To sustain a bill for an account, there must be a series of demands and payments,—2 Caines, Cas. 51,—mutual dealings,—2 Johns. Ch. 171; 6 Ves. 139, 141; 9 Ves. 473,—great complexity in the accounts, some doubt or difficulty in proceeding at law, or some discovery required,—[Fowle v. Lawrason,] 5 Pet. [30 U. S.] 503; 6 Ves. 89; 10 Johns. 595; 2 Strange, 733; 1 Ves. Jr. 424; 13 Ves. 278, 279,—so that a court of law would not be competent to try it at nisi prius, and where the justice of the case depended on the account,—1 Schoales & L. 308, 309. The case must be one proper for an action of account at law, and involve an account. [Fowle v. Lawrason,] 5 Pet. [30 U. S.] 503; 2 Caines, Cas. 54. If the bill show a liquidated sum incapable of being entangled, it will be dismissed, as all difficulty of proceeding at law will be removed. 6 Ves. 688; 2 Rand. 450; [Graves v. Boston Marine Ins. Co.,] 2 Cranch, [6 U. S.] 444; 2 Mason, 270, [Bean v. Smith, Case No. 1,174;] 4 Wash. C. C. 352, [Mayer v. Foulkrod, Case No. 9,341.] So where the facts are within the knowledge of plaintiff, and the answer confesses nothing, or furnishes no evidence to support the bill. [Russell v. Clark,] 7 Cranch, [11 U. S.] 89. So where the object of the bill is to recover damages for the breach of an agreement, and not its specific performance,—Mitf. Eq. Pl. 95; [Hepburn v. Dunlop,] 1 Wheat. [14 U. S.] 197; [Boyce v. Grundy,] 3 Pet. [28 U. S.] 214, etc.,—or the plaintiff has a remedy by statute,—3 Atk. 740. Different reasons are assigned for the jurisdiction of equity in account, by Lord Redesdale, the difficulty of proceeding to the full extent of justice in courts of common law, (Mitf. Eq. Pl. 96,) by Lord Eldon, to avoid multiplicity of suits, (5 Ves. 687,) by Chancellor Kent, that it originated in discovery, (2 Caines, Cas. 52.) Assuming either as the ground, neither exists in this case. There must be some appropriate head of equity jurisdiction under which an account must be decreed. 1 Madd. Ch. Pr. 89; 1 Ves. Jr. 424; 3 Conn. 141; 1 Brown, Ch. 194. It is not enough to charge it in the bill, to change the jurisdiction, it must be distinctly made out. (3 Brown, Parl. Cas. 525; 2 Brown, Cas. 340, 519; 1 Ves. Sr. 172; 1 Atk. 598; 1 Vern. 359; 2 Vern. 382, 386; 1 Ch. Cas. 144, 147, 184,) or some ground of equity exist, growing out of the conduct of the defendant, (1 Brown, Ch. 40, 201; 2 Cox, 362; 2 Mason, 417, 418, [U. S. v. La Jeune Eugenie, Case No. 15,551.]

There are cases affirming the broad principle that courts of law and equity have a concurrent jurisdiction in account. 13 Ves. 279. It has been carried so far as to embrace all cases of principal and agent. 4 Madd. 199, 220. So it has been held in late cases of dower, though they seem to be considered as exceptions, rather than as falling within the principle of concurrent jurisdiction, as the interference of equity is on the ground of discovery, the removal of legal impediments, or some equitable circumstance to regulate its exercise. 3 Brown, Ch. 630; 5 Johns. Ch. 488; Prec. Ch. 244, 248; [Herbert v. Wren,] 7 Cranch, [11 U. S.] 376; 3 Atk. 130. The law had been explicitly laid down, that the chancellor had nothing to do in assigning dower, but in case of lands held in chivalry, (2 Ld. Raym. 785; 7 Mod. 43; Prec. Ch. 111;) yet in 1793 Lord Thurlow sustained a bill for dower, solely on the ground that the title was admitted by the answer, (4 Brown, Ch. 296; 2 Ves. Jr. 122.) This was the establishment of a new rule abrogating an established one, and forcibly illustrating the gradual assumption of jurisdiction by the court of chancery, in cases which by the ancient land marks of the law were cognizable only at law. We cannot adopt these or other innovations as guides, but must consider them as beacons, in the administration of the equity jurisprudence of this court. We cannot adopt any rules or principles of the law, which are in contradiction to those which were settled and established before the Revolution, [Cathcart v. Robinson,] 5 Pet. [30 U. S.] 280,—nor extend our jurisdiction in account beyond the rules prescribed by the supreme court in [Fowle v. Lawrason,] 5 Pet. [30 U. S.] 503. They re-

sult from the provisions of the constitution and judiciary act, which cannot be affected by any subsequent adjudications of any courts in England, or in those states which adopt them. In the present case there is nothing in the nature of the agreement, or in the conduct of the defendant, which can give any equitable jurisdiction over it; nor does the defendant stand in that relation to the plaintiff, as to make him liable to a bill or action to account. He is neither bailiff, or guardian, and as the account is not between merchant and merchant, the plaintiff must make him out to be receiver before there can be a case for account. Co. Litt. 172a; 2 Co. Inst. 379; Bull. N. P. 127. A receiver is one who receiveth the money of another to render an account. Co. Litt. 172. But a party cannot have account of money in which he has no property, as if A directs B to borrow money from C to pay D, the account lies not by A, but D. Hob. 36. If defendant has paid over the money as a trustee, the trust is executed and an account does not lie. 3 Wils. 114. There must be a privity between the parties, continuing till suit brought; account lies not by an executor or administrator at common law for want of privity, it is given by statute. Co. Litt. 89, 90, 96; 1 Com. Dig. 192. Here all privity arising from the receipt of the money, ceased on its payment to the persons directed, and rendering an account not objected to; there remained no subject matter to which the relation of receiver could apply at the time of the agreement, and as the money had passed from the testator for certain purposes, the property in it could only revest on their non performance. 1 Dyer, 22b. For these reasons we cannot sustain the bill under the head of account.

3. Trust. Where the legal right of property real or personal, is in one person for the use of another, there is a trust resting in confidence and conscience, on which a court of law cannot act, as it looks only to the legal right; hence a trustee is accountable only in equity, which acts on the conscience according to the justice of the case. 2 Jac. & W. 147 to 191. If a trustee gives a covenant to perform the trust, he is suable at law. [Duvall v. Craig,] 2 Wheat. [15 U. S.] 56. If A assigns goods to B to sell and pay the proceeds to C, and B receive them without a promise to pay C, his remedy is in equity. If B promises to pay C, the remedy is at law; so if A consigns goods to B to deliver to C, and B accepts the consignment, or any agreement is made to perform the trust, [Tiernan v. Jackson,] 5 Pet. [30 U. S.] 594, 602,—or the trust is executed,—3 Wils. 114,—the right to the property is then a legal one. To give jurisdiction to equity, some part of the trust must remain unexecuted, some act remain to be done which rests in confidence; the mere relation between the parties of trustee and cestui que trust, is not enough, there must be that trust which is a creature of a court of equity, not cognizable at law, (7 Johns. Ch. 114,) on which no action lies, but is only for the consideration of equity, (2 Atk. 612,) which acts to carry into effect the principles of law where it provides no adequate remedy, and supplies its defects, (1 Madd. Ch. 450; 2 Schoales & L. 630; 4 Johns. Cas. 654.) For the breach of all other trusts, an action lies at law. 1 Salk. 9; Wils. 204. It is a simple contract for which the remedy is personal. 2 Ves. Sr. 19; 2 W. Bl. 1269, 1272. Wherever the money or property of another is held on a legal trust, the right being legal, the legal remedy is adequate. 1 Bos. & P. 286, 288; 2 Bos. & P. 279, 281; 1 Maule & S. 714, 720; 7 Taunt. 403; 2 E. C. L. 156; 9 East, 378; 14 East, 590. So where there is a special agency, and the contract is closed wholly or as to any particular object, if the agreement, or its further execution has been ended by the death or act of the other party, it is a subject for law if the matters are distinct and can be separately executed. [Perkins v. Hart,] 11 Wheat. [24 U. S.] 250, &c.

In considering the transactions between the parties, we can discern no right in the plaintiff resting in confidence; if there was any trust it was a legal one. The answer discloses nothing of an equitable nature, the case is one where any discovery would be merely auxiliary to law, to enable the plaintiff to recover damages for the breach of the agreement alleged to have been made. As matter of mere trust, any which has ever existed has been executed, so far as confidence was reposed in the discretion of the defendant; if we sustain this suit on the deposit in April 1819, it will be on the principle that every bailment is a trust involving an account in equity. If it is sustained on the alleged agreement in October, we assume equity jurisdiction in all cases of principal and agent, where one agrees to do an act or receives money or property for another, though there is a complete remedy at law to recover damages for the breach of the undertaking. Being satisfied that the plaintiff has not made out a case for the relief prayed for in his bill under the head of discovery, account, trust, or other appropriate branch of equity jurisdiction, the bill must be dismissed.

NOTE, [from original report.] The remark of Lord Hardwicke, that "answering submits to the jurisdiction," has been misapprehended as appears by the case as reported. "The bill was for a specific performance and execution of the articles, what else was in the cause came by way of argument to support, or objection to impeach this relief prayed. The first objection for defendant was, that this court (of chancery) had not jurisdiction nor ought to take recognizance of it; for that the jurisdiction is in the king and council." 1 Ves. Sr. 444, 445. This objection, with others, which went to the jurisdiction, were considered elaborately, though they were not set up by the answer; the authority of this case is therefore in direct opposition to the position for which it is cited. The remark is consistent with the course taken, it is correct as a general rule, when applied to an

objection to the jurisdiction of the high court of chancery, on the ground that an inferior court of equity has cognizance of the case; but it is not applicable to a case which is not cognizable in any court of equity, on account of the subject matter. With this distinction in view, this remark taken in connection with the whole sentence, the case before the court, and its course in its decision, is not only in perfect conformity with the cases which establish the principle laid down in Baker v. Biddle, but a direct affirmance thereof.

BAKER, (BRONSON v.) See Case No. 1,605.

BAKER v. BROWNING. See Case No. 2,041.

BAKER, (CARTER v.) See Case No. 2,472.

BAKER, (CHEW v.) See Case No. 2,663.

BAKER, (CHRIST v.) See Case No. 2,697.

Case No. 765.

BAKER et al. v. The CITY OF NEW YORK.

[1 Cliff. 75.][1]

Circuit Court, D. Massachusetts. May Term, 1858.[2]

COLLISION—BETWEEN STEAM AND SAIL—FAULT—LIGHTS.

1. Steamers having more power and speed than sailing vessels, and being more immediately subject to control, greater caution and vigilance are expected of those in charge of them to avoid collisions.

[Cited in The Free State, Case No. 5,090.]

2. When a steamer and sailing vessel are approaching each other, the sailing vessel has, in general, a right to hold her course, and it is the duty of the steamer under such circumstances to adopt the necessary precautions to avoid a collision.

[Cited in The Free State, Case No. 5,090.]

[See The Carroll, 8 Wall. (75 U. S.) 302.]

3. The steamer is prima facie chargeable if she fails in this, and a collision occurs.

[Cited in The Sunnyside, Case No. 13,620.]

4. If the sailing vessel fails to keep her course, the fault will in general be attributable to her, provided it appears that under the unexpected change of course by the sailing vessel the steamer used all reasonable exertions to avoid the danger.

[Cited in The Sunnyside, Case No. 13,620; The Colorado v. The H. P. Bridge, 91 U. S. 699. The Coe F. Young, 1 C. C. A. 219, 49 Fed. 168.]

[See St. John v. Paine, 10 How. (51 U. S.) 557; The R. B. Forbes, Case No. 11,598; Haney v. The Louisiana, Id. 6,021; The Kentucky, Id. 7,716; Hall v. The Buffalo, Id. 5,927.]

5. These rules, however, cannot have any controlling application before the two vessels have approached to a point of danger, which renders their observance reasonably necessary.

6. No maritime usage requires merchant vessels constantly to carry lights.

7. Semble. If the absence of a light contributed to a collision in a harbor, or crowded thoroughfare, on a dark night, and one vessel showed a light and the other did not, it might well be held that the dark vessel, other things being equal, was in fault.

[See The Adriatic, Case No. 91.]

[8. Cited in The City of Savannah, 41 Fed. 894, in support of the statement that on moonlight nights sailing vessels without lights can be seen two or three miles distant.]

In admiralty. Appeal from the district court, in a cause of maritime collision; Ware, District Judge, presiding. [Nowhere reported. Reversed.]

The allegations of the libel [by Judah Baker and others against the steamship City of New York] were in substance as follows: On the 15th of December, 1855, the schooner George Engs, having on board a cargo of corn, flour, and iron, sailed from Philadelphia on a voyage to Boston. At half past three o'clock on the morning of the 19th of the same month, when steering about east-southeast, she made a light off her weather bow, which proved to be on board the steamer City of New York, bound from Boston to Philadelphia. The weather was perfectly clear when the steamer was first discovered, being at a distance of about five miles from the schooner, coming out between Block island and Montauk point, and steering about southwest by south. The schooner kept off east, on her course for Block island, to give the steamer a wide berth. A short time afterward, when the steamer was nearly abreast the schooner, the mate of the schooner, who was at the helm, observing that the steamer was winding off towards him, immediately called all hands, and the master and mate both shouted to the steamer, which was four or five times her length to windward, to luff or hold her course so as to keep clear, which could then have been done. Immediately before the collision, the mate put up the helm of the schooner for the purpose of saving the lives of those on board. The schooner was struck by the steamer's bow, on her starboard and windward quarter, about ten feet from her taffrail, and sunk, with everything on board except the crew, in about fifteen minutes afterward. It was set up as matter of defence, that, after having made the steamer, the schooner changed her course and kept off more and more, until the collision occurred; also that the schooner showed no lights, and was not therefore discovered so soon by several minutes as she would have been had she conformed to the usual custom; that as soon as she was seen, the helm of the steamer was put to the starboard, to keep her off and give the schooner room, presuming she would keep her course; but shortly after, the schooner put off more from the wind, in consequence of which the danger of collision became apparent, upon which the engine was stopped and reversed, though too late to prevent the accident. The bows of the steamer struck the schooner near her main rigging.

C. W. Story, J. W. May, and B. R. Curtis, for libellants.

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Reversing an unreported decree of the district court.]

Thaxter and Bartlett, for respondents.

CLIFFORD, Circuit Justice, (after reciting the substance of the pleadings). Many of the circumstances attending the collision are admitted, and others are so fully proved, that they cannot properly be regarded as the subjects of dispute. A collision occurred between the two vessels, and the schooner was sunk and totally lost, with all her cargo, consisting of corn, corn-meal, flour, and iron. She was a vessel of about one hundred and thirty tons burden, engaged in the coasting trade, and sailed from Philadelphia on the 15th of December, 1855, on a voyage to Boston, fully manned and equipped, and with a full cargo. On the 19th of the same month, at about half past three o'clock in the morning, when off the coast of Long island, in the usual track of vessels sailing between those ports, and about three or four miles south to southwest from Montauk point, she met the steamer City of New York, bound on a trip from Boston to Philadelphia, and the collision took place. Damages are claimed on the part of the schooner, on the ground, that the collision is chargeable to the fault of the steamer, and the answer admits the collision and the loss, but denies that it was the fault of the steamer, and the respondents, as a matter of fact, insist that it was the fault of the schooner. It was a clear starlight night, but the moon had been down from a half-hour to an hour before the collision occurred. No light was shown on the schooner, but the steamer carried her usual lights, one forward and one on each quarter, and both the vessels had lookouts. It was the second mate's watch on board the schooner, from twelve o'clock at night to four in the morning, and he was at the wheel when the steamer was first discovered. At that time the steamer was about five miles distant, and the mate says the schooner was heading east by north, and that shortly afterward he put her off east for Block island. The wind was then not far from north, and about a six-knot breeze. When the master went below, at twelve o'clock, he says the wind was about north and was not quite steady, and that the schooner was then heading east-northeast. Reardon, the second mate of the steamer, says that the wind, at the time he first discovered the schooner, which was not until the vessels had approached within half a mile of each other, was north-northwest. These statements respecting the course of the wind are not conflicting, and lead to the conclusion that its bearing at the time of the collision was at least one point west of north. At the time the mate of the schooner first discovered the steamer, and when he changed her course from east by north to east, the course of the steamer was about southwest by south, and it is believed, from the evidence, that if she had kept that course a collision would not have occurred.

Allowing that the schooner was sailing five or six knots and the steamer about ten miles an hour, it is a reasonable calculation that they were approaching each other say at the rate of fifteen miles an hour, or one mile in four minutes. They were, therefore, about twenty minutes' sailing time apart when the schooner changed her course from east to north by east, and that change must have been made from fifteen to eighteen minutes before the schooner was discovered by any one on board the steamer. After that change was made, and before the schooner had been seen by the second mate of the steamer, the two vessels had advanced toward each other four and a half miles, which could not have been accomplished in much less than eighteen minutes at the rate of speed they were sailing. Assuming that the two vessels were approaching each other at the rate of a mile in four minutes, then the second mate of the steamer is mistaken in supposing that two minutes elapsed, after the engine was stopped, before the steamer struck the schooner, and his own testimony shows satisfactorily the error in his calculation. He admits that he gave the order to stop the engine, because he saw that the two vessels were coming together; and it was not until after he had noticed that the schooner had changed her course that he gave that order. When he first saw the schooner she was only about half a mile off, and that was before he had ordered the helm to be put hard a-starboard. What time elapsed after he ordered the helm to be put hard a-starboard, and before he gave the order to stop the engine, will appear most satisfactorily by a comparison of his testimony with what transpired on board the schooner at that precise time. She was approaching the steamer on a course of east by north, and the mate says he continued that course until the steamer was nearly abreast of the schooner, when the lights of the steamer suddenly changed, and he saw that she was coming down on to the schooner. Seeing that, he called all hands, and while the master was coming up from below he hove the wheel up. He says, however, at the same time, what it is important to notice, that the steamer struck the schooner before she could alter her course but very little, showing conclusively that the collision was inevitable irrespective of any change of course that was or could have been made. Before the master left the deck he directed the mate, or arriving near Montauk point, to steer east for Block island; and it is clearly proved that the change was made shortly after the steamer was first discovered, and that it was an order proper to be executed to carry the vessel on the usual route south of that island to Boston. In respect to the second change of course, it satisfactorily appears, both from the testimony of the second mate of the steamer and from the testimony of the mate of the schooner, who were in charge of their respective vessels,

that it was not made until all chance of preventing the collision was gone. It is admitted in the answer that this last change was made after the helm of the steamer had been put to the starboard, and so is the testimony of the second mate of the steamer, by whom the order to starboard the helm was given. Two seamen, also, who were on board the steamer, testify to the same effect. They say, in substance, that after the wheel of the steamer was put hard a-starboard, and she had begun to pay off, they noticed that the schooner had her wheel hard a-port, and that she also had begun to pay off. It is true, that the mate of the schooner, after he discovered that the collision was inevitable, hove the wheel up, and it may be that she had begun to pay off when the collision occurred; but it is fully proved that her course had not been altered enough to affect the result, except, perhaps, to shift the blow from one part of the schooner to another. When the mate called all hands, the master says he jumped on deck, and that the situation of the vessels at that time was such that it could have made no difference whether the schooner had luffed, wound off, or kept a straight course. Shockley, the engineer of the steamer, says that he received the order from the second mate to stop the engine just before the steamer actually came in collision with the schooner. He estimates the time that elapsed after the order and before the collision at about a minute, but says he had just time to close the throttle-valve, and that it was the only order he received, although, from the quick way in which it was given, he expected that the order to reverse would immediately follow, and accordingly unhooked the engine and threw her into the back motion. It was to the change of course last made on the part of the schooner that the second mate of the steamer referred in his testimony, when he said that, after he ordered the helm to be put hard a-starboard, he noticed the schooner had altered her course more to the eastward, and not to the change from east by north to east, which had been made twenty minutes before, when the two vessels were five miles apart. He was referring to a change of course which he himself had seen, and not to one made at least fifteen minutes before the schooner had been discovered by any one on board the steamer. After the mate of the schooner first discovered the steamer, two changes were made in the course of the schooner, and only two, as conclusively appears by a careful comparison of all the testimony in the case. One was made when the two vessels were about five miles apart, and at least fifteen minutes before any one on board the steamer had discovered the schooner, and the other not until the vessels were in such close proximity that a collision was inevitable; and throughout all the intermediate period the schooner held her course without any change of the wheel whatever. Some change also was made in the course of the steamer after the second mate was informed by the lookout that a sail had been discovered on the starboard bow. How much change was made in the first instance does not appear; and the man at the wheel says that the first he knew of the matter was, that the second mate ordered the helm hard a-starboard, and that he executed the order as soon as it was received, leaving it to be inferred either that no previous order had been given, or, if given, that it had not been understood or obeyed. He had not seen the schooner when he executed that order, and when he did see her he says that she was heading towards the steamer, but omits to state what time had elapsed after the order was given before he saw her and the distance between the two vessels. His estimate that three minutes elapsed after the order was executed before the collision occurred is contrary to all the other evidence in the case, and therefore cannot be admitted to be correct. Howlett first discovered the schooner, and he says that he sang out twice to the second mate that there was a sail ahead, and he heard that officer singing out to the man in the wheel-house to put the helm a-starboard, and this was before the witness had ascertained the bearing of the schooner; and the second mate admits that he could not tell at that time which way the schooner was going, whether east-northeast or west-northwest, and yet he says he gave the order, and it was promptly executed, and it does not appear that it was countermanded before the collision. All these facts are so clearly proved, that it is difficult to see how they can be misunderstood. On this state of the evidence the respondents insist, in the first place, that the schooner was in fault, because she changed her course shortly after the mate of the schooner first discovered the steamer, and at the time when the two vessels were about five miles apart. That change did not exceed two points in any view of the evidence, and, according to the testimony of the mate, who had charge of the deck and made the change, it was but one point from east by north to east, and was one proper to be made to carry the vessel on her intended route south of Block island.

I. Steam vessels, having more power and speed than sailing vessels, and being more immediately subject to control, greater caution and vigilance are exacted of those in charge of them to avoid collisions. Consequently a sailing vessel, whether close-hauled or with a free wind, when a steamer is approaching, has in general a right to keep her course; and it is the duty of the steamer under such circumstances to adopt such precautions as to avoid a collision; and if she does not, and a collision occurs, the steamer is prima facie chargeable; and in order that the steamer may not be baffled in her pur-

pose to adopt such precautions, it is the duty of the sailing vessel to keep her course as though there was no danger; and if she fails to do so, the fault will, in general, be attributable to her, provided it also appears that the steamer used all reasonable exertions to avoid the danger under the unexpected change of course on the part of the sailing vessel. The St. John v. Paine, 10 How. [51 U. S.] 583; The Oregon v. Rocca, 18 How. [59 U. S.] 571; The Clement, [Case No. 2,879.] These rules of navigation ought to be strictly adhered to in all cases where they are applicable. They were prescribed to prevent collisions and for the ascertainment of the rights of parties, after they have occurred, in cases to which they apply. They cannot, however, have any controlling application before the two vessels have approached to a point of danger which brings them into exercise, and makes their observance reasonably necessary in order to fulfil the purpose which they were designed to accomplish. Accordingly it was held by the supreme court, in the case of The Monticello v. Mollison, 17 How. [58 U. S.] 154, that they did not apply in a case where the approaching vessels were seven miles apart, it appearing, as in this case, that the change of course on the part of the sailing vessel was made before she had been seen by the steamer; and in Newton v. Stebbins, 10 How. [51 U. S.] 606, the same court held that the sailing vessel was not in fault, although the distance between her and the steamer when she changed her course was only three or four miles, and the change of course had been made by her after she had been seen by the steamer. A change of course under such circumstances, if made into the pathway of the approaching steamer, could not be justified, unless it also appeared that the steamer was guilty of negligence in not avoiding the danger. The change made in this case, however, was not of that character; and there is no evidence having the least tendency to show that it had the effect to baffle any precaution which those on board the steamer adopted or intended to adopt. Both these suggestions are disproved, as fully appears from the evidence already stated. When that change was made, there was no danger of collision, and if the steamer had kept her course it would not have occurred; and inasmuch as it did not in any manner contribute to the disaster, it was not a fault on the part of the schooner. The Genesee Chief, 12 How. [53 U. S.] 461.

II. It is contended, in the second place, by the respondents, that the schooner was in fault because she changed her course after she was seen by those on board the steamer. When the schooner was first seen by the second mate of the steamer, the latter was sailing about ten miles an hour, and he says the schooner was about a half-mile off, and he admits that he ordered her helm put hard a-starboard just as quick as he could, and that about two minutes elapsed before he gave the order to stop the engine; thus fully confirming the engineer, who says he received the order just before the steamer actually came in collision with the schooner. They were approaching each other at the rate of a mile in four minutes; and it appearing that they were but a half-mile apart when the order to starboard the helm was given, it shows to a demonstration that the speed of the steamer was not reduced until the instant of collision; and this confirms the testimony of the mate of the schooner, that she had not time after he hove up her wheel to make any considerable change in her course, and strongly corroborates the testimony of the master, that it would not have made any difference whether she had luffed, wound off, or kept a straight course, as the collision was then inevitable. Rules of navigation were designed to afford security to life and property on the high seas and other navigable waters, by preventing collisions, and cannot be invoked by those who have rendered their observance impracticable or imminently dangerous to human life. A change of course under such circumstances is not a fault, and certainly not when, as in this case, it appears that it did not contribute to the collision. The Birkenhead, 3 W. Rob. Adm. 76; The Rose, 2 W. Rob. Adm. 1; The James Watt, 2 W. Rob. Adm. 271.

III. It is insisted, lastly, by the respondents, that the schooner was in fault because she did not show any light prior to, and at the time of, the collision, and reference is made to a case decided in the third circuit to support that proposition. In that case the court expressed the opinion that sailing vessels navigating in harbors and thoroughfares in a dark night, where they are constantly liable to meet steamers, ought to show a light; and signified in strong terms, that between a vessel under such circumstances, with a light, and another without a light, other things being equal, they would hold the dark vessel to be in fault; admitting, however, at the same time, that there is no law requiring vessels navigating the high seas to carry signal-lights, and that courts of justice cannot establish any such rule, and make it obligatory on such vessels. Bark Delaware v. Steamer Osprey, [Case No. 3,763.]

No maritime usage requires merchant vessels constantly to carry lights, and it is understood there is some difference of opinion among navigators as to its expediency, especially when navigating along the coast, where the lights on board vessels are liable to be mistaken for land lights, and thus by deceiving other vessels as to their own true position, bring them into danger. In harbors and crowded thoroughfares the balance of safety would seem to be in favor of showing a light. Such were the views of the district judge, and they are believed to be correct; and where that precaution is omitted

in such thoroughfares, on a dark night, and it appears that the absence of a light contributed to the collision, and that the colliding vessel showed a light and used all reasonable exertions to prevent the collision, it might well be held that the dark vessel, other things being equal, was in fault. That principle, however, cannot have any application to this case for several reasons apparent on an examination of the facts. Here the collision occurred on a clear starlight night, when several of the witnesses, who are experienced navigators, say that the schooner could have been seen two or three miles. Others say that a schooner in such a night might be seen a mile and a half or two miles, and some enlarge the distance three or four miles. Not a doubt is entertained that she might and ought to have been seen much earlier, if the lookouts on the steamer had been vigilant in the performance of their duty.

IV. Lookouts are valueless unless they are vigilantly employed on their duty; and whenever it appears that they are not so employed on board steamers, it must be considered as the fault of the steamer. Vessels propelled by steam have command of their own course and their own speed, and it is their duty, where there is room, to pass an approaching sailing vessel at such a distance as to avoid all danger; and if in consequence of the omission of duty on the part of lookouts, or their negligence, the approaching sailing vessel is not seen in season to prevent a collision, the fault is properly chargeable to the steamer, unless the sailing vessel was also guilty of a violation of the rules of navigation. The Genesee Chief, 12 How. [53 U. S.] 463. These reasons, together with those already mentioned responsive to the preceding propositions, lead necessarily to the conclusion that the collision was the fault of the steamer. Some evidence is exhibited in the case tending to show a local usage for sailing vessels to carry lights in the harbor of Boston. The effect of such a usage, if proved, it is not necessary now to consider, as the evidence introduced is not sufficient to show its existence. The decree of the district court [unreported] is therefore reversed, and a decree must be entered for the libellants.

Case No. 766.

BAKER et al. v. DRAPER et al.

[1 Cliff. 420.] [1]

Circuit Court, D. Massachusetts. May Term, 1860.[2]

PAYMENT—BY NOTE—SIMPLE CONTRACT DEBT—MASSACHUSETTS RULE.

1. At common law a promissory note given for a simple contract debt does not operate as a discharge of the original obligation, or constitute a payment of the original debt, unless it affirmatively appears from the evidence that such was the intention of the parties at the time it was so given.

[Cited in Re Hurst, Case No. 6,925; The Helen M. Pierce, Id. 6,332.]

2. In this case the transaction must be governed by the rules of law which prevail where it took place; and in Massachusetts, where a party, bound to a simple contract debt, gives his own negotiable security for it, it is presumed as a matter of fact, in the absence of any circumstances to indicate a contrary intention, that the bill or note was given and received in satisfaction and discharge of the pre-existing debt.

[Cited in Re Hurst, Case No. 6,925; Kimball v. The Anna Kimball, Id. 7,772; The Helen M. Pierce, Id. 6,332.]

3. Such rule should be cautiously applied in all cases where the remedy upon the new security is not as good and effectual as upon the one for which it was substituted.

4. If there is any deception or fraud in the giving the new security, or if it was accepted without full knowledge of the facts, the plaintiff is not bound by the acceptance, but may tender it back or produce it in court to be cancelled, and seek his remedy on the original contract.

[Cited in The Eclipse, Case No. 4,268.]

5. Where the libellants, in Massachusetts, took a note for the amount of certain supplies furnished to a vessel, from a person whom they supposed to be one of the owners, but which person had previously given a bill of sale of his share in the vessel to certain third parties, to secure them for liabilities they had incurred for him, which was not at the time known to the libellants, *held*, that the libellants did not take the note in satisfaction and in discharge of the original liability of those to whom the credit was given, or with full knowledge of all the material facts.

This was an appeal in admiralty in a suit in personam, brought [by Baker and others] against the respondents [Draper and others] as owners of the bark Fernandina, to recover for certain supplies alleged to have been furnished by the libellants to the bark on the credit of the vessel and owners. Respondents admitted the ownership of one half of the vessel, and that they held the other half as security for certain advances made to, and liabilities contracted for, one Adolphus Davis, but denied that the credit was given on their account or that of the bark. They alleged that the supplies were furnished on the credit of the said Adolphus Davis, who was the ship's husband, and that he had subsequently paid for the same as follows, viz. by his promissory note for six hundred and eighty-six dollars and eighty-three cents, dated August 17, 1858, and payable in seven months from date. The libellants in a supplemental bill denied that the credit was given to Davis otherwise than as he was supposed to be one of the owners in the vessel. They also denied receiving the note as payment, and averred that, if such was the intent of the maker, then the transaction was fraudulent, because it was founded on a fraudulent concealment of material facts touching the ownership of the vessel, and that it had the

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirming an unreported decree of the district court.]

effect to deceive and mislead the libellants. The note was brought into court and tendered to the respondents. Certain interrogatories were propounded in the supplemental libel, which were answered by respondents. A decree was entered in the district court [unreported] in favor of the libellants. [Affirmed.]

H. A. Scudder, for libellants, cited Story, Partn. § 455; Pars. Mar. Law, 91; The Chusan, [Case No. 2,717.] As to the law in Massachusetts, French v. Price, 24 Pick. 21; Butts v. Dean, 2 Metc. [Mass.] 76–79.

G. D. Guild, for respondents, cited Maneely v. McGee, 6 Mass. 144; Chapman v. Durant, 10 Mass. 47; French v. Price, 24 Pick. 20; Bangor v. Warren, 34 Me. 324; Hutchins v. Olcutt, 4 Vt. 549; Wright v. Crockery-Ware Co., 1 N. H. 281; Reed v. White, 5 Esp. 122; Sheehy v. Mandeville, 6 Cran. [10 U. S.] 253; The Chusan, [supra.]

CLIFFORD, Circuit Justice. It is insisted by the respondents on this state of the case that the note was accepted by the libellants in payment of the bills for the supplies in question, and therefore that the suit cannot be maintained. On the part of the libellants it is denied that they ever received the note in payment, and they insist that the whole case shows that it was not so agreed or intended by the parties. At common law a promissory note given for a simple contract debt does not operate as a discharge of the original obligation, or constitute a payment of the original debt, unless it affirmatively appears from the evidence that such was the intention of the parties at the time it was given. Holt, Ch. J., said in Clark v. Mundal, 1 Salk. 124, that a bill shall never go in discharge of a precedent debt, except it be a part of the contract that it should be so. Such bill or note of the debtor himself or of a third party, say the supreme court, in Downey v. Hicks, 14 How. [55 U. S.] 249, is never considered payment of a precedent debt, unless there is a special agreement to that effect. Where persons were indebted to a bank, and gave their promissory notes for the amount of the debt, it was held by the same court that the mere acceptance of the notes by the bank did not necessarily operate as a satisfaction; and whether or not there was an agreement at the time to receive them as payment, or whether the circumstances attending the transaction warranted such an inference, was a question of fact for the jury. Lyman v. Bank of U. S., 12 How. [53 U. S.] 225. Satisfaction of the pre-existing debt as distinguished from an actual payment must always arise from the agreement of the parties, and not from the new security given for that purpose, which only operates as the consideration for the agreement. Hence the agreement must always be proved, and cannot be implied by law in a case where there are no facts or circumstances from which it may reasonably be inferred. James v. Hackley, 16 Johns. 277; Peter v. Beverly, 10 Pet. [35 U. S.] 567; Whitbeck v. Van Ness, 11 Johns. 414; Gallagher v. Roberts, [Case No. 5,195.] But the courts of this state have adopted a different rule, and the question in this case must be governed by the rules of law which prevail in the jurisdiction where the transaction took place. Whenever a party bound to a simple contract debt in this state gives his own negotiable security for it, whether it be a bill of exchange or promissory note, it is presumed as a matter of fact, in the absence of any circumstances to indicate a contrary intention of the parties, that the bill or note was given and received in satisfaction and discharge of the pre-existing debt. That rule was adopted at a very early period in the history of the state, and has been followed by such repeated decisions that it must be regarded here as the settled law upon the subject. Very little embarrassment results from the practice, as was remarked by this court in another case, so long as the application of the principle is kept within the bounds which the rule itself announces. Properly understood, most or all of the cases admit that it is a presumption of fact, and not of law, and that it may be controlled by any circumstances which show that such was not the intention of the parties to the contract. When the rule was first adopted, it was placed upon the ground that, if an action could be maintained for the original debt, the debtor might also be sued by an innocent indorsee of the bill or note, and thus be compelled to pay the debt twice; and that is the principal reason assigned for the rule at the present time. Wherever the doctrine prevails, the new security is regarded in all respects as a substitute for the first promise, and the reasons assigned for its adoption show that it ought to be very cautiously applied in all cases where the remedy upon the new security is not as effectual and comprehensive as upon the one for which it was substituted. Mr. Greenleaf says, where the debtor's own negotiable bill or note is given for a pre-existing debt, it is prima facie evidence of payment, but is still open to inquiry by the jury. To the same effect also are the remarks of Shaw, Ch. J., in the case of Fowler v. Bush, 21 Pick. 230. He says the rule here differs from that of the common law, only in determining what shall be presumed to be the intent of the parties, from the fact of giving and accepting a negotiable note for a simple contract debt. Without further evidence of intent, we construe it, says the learned judge, to be payment, but the common law deems it to be collateral security. But this presumption may be controlled by other evidence, and when ascertained such intent shall govern. All of the cases upon the subject, in point of fact, agree that the giving and accepting of such a security is only presumptive evidence of the intent to

extinguish the prior simple contract-debt, which, like other presumptions of fact, is liable to be repelled by the circumstances.

Courts of justice in this state and in Maine, where alone this rule prevails, have often had occasion to inquire and determine what circumstances are, and what are not, sufficient to repel this presumption. In the course of the numerous decisions upon the subject they have established certain general principles, to which it may be useful to refer. If there is any deception or fraud in the giving of the new security, or if it was accepted without a full knowledge of the facts, or under a misapprehension of the rights of the parties, the plaintiff or libellant, as the case may be, is not bound by the acceptance of the note, but may tender it back or produce it at the trial, to be cancelled, and seek his remedy on the original contract. So also, if, when the note was taken he supposed the maker was the only person bound for the goods, and that he was not changing the parties, but only taking a new security from the same party, then it is clear, say the supreme court of this state, in French v. Price, 24 Pick. 22, that the original contract is not so far extinguished as to prevent a resort to it after new parties are discovered. Where negotiable paper had been taken for a pre-existing debt, Shepley, Ch. J., in Fowler v. Ludwig, 34 Me. 461, held, that if the paper was not binding on all the parties previously liable, or, if the paper of a third party was received not expressly in payment, the presumption that it was so accepted might be considered as repelled. Similar views were also expressed in the case of Melledge v. Boston Iron Co., 5 Cush. 170, where it was held, that when the promissory note given is not the obligation of all the parties who are liable for the simple contract debt, and a fortiori when the note is that of a third person, and if regarded as in satisfaction, would wholly discharge the liability of the party previously liable, the presumption, if it exists at all, is of much less weight. Applying these principles to the present case, there can be no doubt what the result must be on the state of facts disclosed in the evidence. Testimony was introduced by the libellants tending to show, as matter of fact, that the note was not accepted as payment, but was received only as a convenient mode of adjusting the accounts; and the book-keeper testifies expressly that it was not so accepted, and that he made the transfers on the books without the authority or knowledge of the libellants. Whether so or not, and wholly irrespective of that evidence, I am of the opinion, from the circumstances of the case, that the libellants did not understandingly and with a full knowledge of all the material facts accept the note in satisfaction and discharge of the parties to whom the original credit was given; and there is much reason to conclude, from the evidence, that there was a want of good faith on the part of the maker of the note in negotiating the transaction. His clerk went to the counting-room of the libellants with the note already prepared; and when the maker of it sent the clerk, he must have known that the libellants supposed him to be the owner of one-half part of the bark, else he could not have expected that the proposition would have been accepted; and he well knew at the same time that he had conveyed his interest to another person. Another bill for repairs against the bark was settled on the same day in the same manner, and a conveyance was also made by him of certain real estate. Whether he owned any other property does not appear, but it does appear that he suspended payment shortly afterwards, and that he was insolvent. Taking all of the circumstances together, it is clear that the defence set up in the answer cannot prevail. The decree of the district court [unreported] is, therefore, affirmed, with costs.

BAKER, (FIELD v.) See Case No. 4,762.

BAKER, (FREEMAN v.) See Case No. 5,084.

Case No. 767.

BAKER v. FRENCH et al.

[2 Cranch, C. C. 539.][1]

Circuit Court, District of Columbia. May 26, 1825.

SCIRE FACIAS TO REVIVE JUDGMENT — RETURN—ALIAS WRIT—DISCONTINUANCE.

1. If some of the terre-tenants named in the scire facias are returned "nihil," an alias scire facias must be issued against them, or the cause will be discontinued.

2. Semble, that the scire facias, or its return, must describe the land held by each tenant.

Scire facias [by John H. Baker, administrator of Bayly] against [George French and others] the terre-tenants of Ariana French, executrix of George French, deceased.

The writ stated that William Bayly, in June, 1812, recovered judgment against Ariana French, executrix of George French, for $501.87; and at the time of the rendition of the judgment against her, she was seized in fee of divers lands and tenements, and that execution remains to be made of the judgment; and that she has since departed this life; therefore the marshal was commanded to give notice to George French, Robert French, Virginia French, Elizabeth Weems, and Marianne C. French, widow of Charles French, terre-tenants of the lands and tenements in his bailiwick being, whereof the said Ariana French, executrix, as aforesaid, was seized on the 6th of June, 1812, on which

[1] [Reported by Hon. William Cranch, Chief Judge.]

day the said judgment was rendered, or ever afterwards, that they appear before the court, &c., on the 1st Monday of October, 1823, to show cause, &c., why the said William Bayly should not have his execution to be levied on those lands and tenements, &c. The marshal returned, "scire feci George French; and nihil as to the others."

Mr. J. Dunlop, for George French, the only terre-tenant summoned, moved the court to quash the scire facias, or to order it to be stricken off the docket as discontinued.

1. Because the original judgment did not bind the lands of the executrix.

2. Because only one of the tenants was summoned, and no alias scire facias against the others.

3. Because the lands are not described in the scire facias, nor in the return. 2 Tidd, Pr. 1038.

Mr. Ashton, contra.

Under the testamentary law of Maryland of 1798, c. 101, the judgment against an executor or administrator is de bonis propriis, in the first instance, being for the plaintiff's proportion of assets only, and is an original judgment, binding the person and property of the executrix in the same manner as if she had not been sued in that character. The return of the marshal is good. He has no authority to ascertain and describe the lands holden by the tenants, nor whether they were tenants of the freehold. It is not necessary that the judgment should be against all who are named terre-tenants in the scire facias. The defendant may plead in abatement, that there are other terre-tenants not summoned. If the return is defective, it is no reason for quashing the writ of scire facias.

Mr. Dunlop, in reply.

It is impossible for the court to render judgment, unless the land, held by the terre-tenants summoned, be described either in the writ of scire facias, or in the return. The judgment is not against the tenant, personally, but against the land. The forms of returns show that the sheriff always describes the land held by the tenant summoned. 2 Har. Ent. 174. But the action is discontinued by the omission to sue out an alias writ of scire facias against the terre-tenants not summoned upon the first writ. Tidd, Pr. 1042; U. S. v. Parker, [Case No. 15,992;] and Nicholls v. Fearson, at this term, [Id. 10,226.]

May 26, 1825. THE COURT, having taken time for consideration during the vacation, was of opinion that the cause was discontinued by the plaintiff's neglect to take out an alias writ of scire facias against the terre-tenants not summoned upon the first writ.

NOTE, [from original report.] In Adams v. Terre-Tenants of Savage, 3 Salk. 321, it was held by Holt, C. J., that where a scire facias against terre-tenants is general, it is not proper for the defendant to plead in abatement, that there are other terre-tenants not named, and so pray judgment of the writ et quod breve cassetur; but to pray judgment, whether without them, respondere debet; but where the scire facias is particular, (i. e., naming the particular tenants,) in such case the defendant may pray judgment of the writ. See, also, Michel v. Croft, Cro. Jac. 506; S. P. on Demurrer. In Coke's Entries, 619a, is a form of scire facias and return against terre-tenants of W. H. After reciting the judgment, and dying, seized, &c., the sheriff is commanded to make known to "the tenants of the lands and tenements which were of the said W. H., on the octave of St. Hilary, 33 Eliz., on which day the judgment aforesaid was rendered, that they be here at this day, viz., &c., to show cause, &c., why the debt and damages aforesaid ought not to be made of those lands and tenements," &c.; and the sheriff returned that he had made known to Thomas Hunt, knight, tenant of the manor of Baconsthorpe Weodal, with the appurtenances in Baconsthorpe, in his county, and of the manor of Bodham Hall, with the appurtenances in his county, &c. &c. And to Thomas Armiger, gentleman, tenant of 80 acres of land in Bodham, &c. &c., as to the other terre-tenants, being eleven in all. "And thereupon the plaintiff prays execution against the said Thomas Hunt," and the other tenants named in the return "of the debt and damages aforesaid, of those lands and tenements to be adjudged to him," &c.

Case No. 768.

BAKER v. GALLAGHER.

[1 Wash. C. C. 461.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

NEGOTIABLE INSTRUMENTS—DEMAND, NOTICE, AND PROTEST — NO FUNDS IN HANDS OF DRAWEE — SPECIAL DEMURRER—SUIT BEFORE DUE.

1. When the drawer of a bill of exchange has no funds in the hands of the drawee, neither protest nor notice of non-acceptance or non-payment to the drawer, is necessary to enable the payee to recover.

[See Volk v. Simmons, Case No. 16,815; Cox v. Simms, Id. 3,306; Fenwick v. Sears, 1 Cranch, (5 U. S.) 259. For distinguishable case, see Mackall v. Gossler, Case No. 8,835.]

2. The payee must either state that the bill was protested, or show that it was not incumbent on him to protest it, because the drawer had no funds in his hands to pay the bill; but this omission can only be taken advantage of by special demurrer.

3. Where the drawer had no funds in the hands of the drawee, an action may be brought by the holder, upon the bill, before the time it would be payable, if it had been accepted. It may be brought immediately on non-acceptance.

At law. This action was instituted, [by Baker against Gallagher] to recover the amount of a bill of exchange for £224 sterling, drawn by the defendant on a merchant in Liverpool, in favour of the plaintiff, with interest from the date of it. The drawer having no funds in the hands of the drawee, ac-

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

ceptance of the bill was refused; and, to avoid the legal consequence of a protest, to fix upon the drawer payment of damages, which, by an agreement between drawer and payee, were not to be demanded, the bill was returned without being protested, this agreement having been communicated by the defendant to the drawee. This action was brought before the time for payment by the drawee would have arrived, had he accepted the bill.

Ewing, for the plaintiff, stated, first, that where the drawer has no funds in the hands of the drawee, neither protest, nor notice to the drawer, is necessary to enable the payee to recover. 1 Term R. 714, 410; 2 Term R. 717; 5 Term R. 239. Plaintiff must either state that the bill was protested, or show that it was not incumbent on him to protest; as, that the drawer had no effects in the hands of the drawee; but, the omission can only be taken advantage of by special demurrer. 1 Salk. 131; 1 Show. 125; 2 Doug. 684, note 144. Not even necessary to present it for acceptance. Chit. Bills, 68; 2 H. Bl. 336, and post. 2d. That the action was not brought prematurely. It may be commenced immediately on non-acceptance. 3 Burrows, 1687. 1 Doug. 55; 3 East, 481; Chit. Bills, 64, 100.

These points were admitted by Mr. Dallas for the defendant, who stated the case to be, that the defendant was indebted to one Niblie, of New Orleans, who again was indebted to the plaintiff: that, by the correspondence between Niblie and the plaintiff, it appeared, that the defendant was to pay to the plaintiff, what he owed to Niblie. In August, 1804, Niblie drew an order on the defendant for 500 dollars, in favour of one Vertner, at sixty days, which was accepted. This bill was drawn in December, afterwards. He contended, that the plaintiff was to be considered as the agent of Niblie; and, as the bill was drawn for the whole sum, which had been due from defendant to Niblie, without crediting the above 500 dollars, the defendant was entitled to a credit for that sum, the suit being between the original parties to the bill. [Verdict and judgment for plaintiff.]

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

WASHINGTON, Circuit Justice, charged the jury. The argument, founded on the idea of the plaintiff being the agent of Niblie, is ingenious, and would be sound, if the case would bear it out. If the plaintiff had not been the creditor of Niblie, we might have considered him as his agent. But, as the case is, it is nothing more than a promise by the defendant, to pay to the plaintiff, a creditor of Niblie, a debt due to him by Niblie, and the bill is evidence of this promise. It is of no consequence, if the defendant, instead of having paid a part, had previously discharged the whole of his debt to Niblie; he is still bound to fulfil his engagement to the plaintiff. Verdict for plaintiff, for his whole demand.

Case No. 769.

BAKER et al. v. GLOVER.

[2 Cranch, C. C. 682.][1]

Circuit Court, District of Columbia. May Term, 1826.

EQUITY—INJUNCTION TO STAY EXECUTION—SURPRISE.

A court of equity will grant an injunction to stay execution upon a judgment obtained against a garnishee by surprise and will continue it till final hearing.

In equity. This was a bill [by Baker and others against Charles Glover] for an injunction to stay proceedings upon a judgment against the complainants as garnishees of Edward Smith by default, and for general relief. [Decree for complainants.]

The bill stated, that in February, 1818, the defendant Charles Glover, issued an attachment against Edward Smith, under the Maryland act of 1795, (chapter 56,) which was returned, "Laid in the hands of Elizabeth Baker, John R. Dyer, Edward Dyer, and Thomas Munroe, and summoned them as garnishees." That at the time of the service of the attachment, neither of the garnishees had any goods or chattels of Smith in their possession, and that neither of them was indebted to him. That relying on that fact, and being ignorant of the law and the proceedings of courts, they failed to appear at the return of the attachment, whereby they are informed that judgment of condemnation by default was entered against them as garnishees for $260 and costs, at June term, 1818, and that execution thereupon is in the hands of the marshal, who is about to levy on the property of the complainants. That the proceedings at law were illegal and void, inasmuch as the judgment was rendered against one of the complainants by the name of Elizabeth, when her name was Catharine; that there is no return on the capias against Smith, and no short copy of the cause of action set up at the court-house door. The bill then prays an injunction, and for general relief.

An injunction was granted in vacation by Thruston, Circuit Judge. The answer denies that the complainant Baker was not indebted to Smith. It avers that the defendant believes that the proceedings at law upon the attachment were correct and proper, and that a short note of the cause of action was set up at the court-house door, which the defendant himself saw. As to that part of the bill which complains that no return was made on the capias against Smith, the defendant answers, that before the capias was

[1] [Reported by Hon. William Cranch, Chief Judge.]

issued Smith had absconded and has not returned.

Mr. Morfit, for the defendant Glover, contended that by the rules of equity an injunction cannot be granted to stay execution upon a judgment by default. Graves v. Houlditch, 2 Price, 147; Ham. Eq. Dig. 503. That the complainant had a complete remedy at law, under the Maryland act of 1787, (chapter 9, § 6,) by a motion to set aside the judgment for surprise or irregularity, and to quash the execution. Cheetham v. Tillotson, 4 Johns. 500; 1 Johns. Cas. 429. That therefore there was no equity in the bill.

Mr. Key then moved the court to quash the execution, and to set aside the judgment at law against the garnishees rendered at June term, 1818, for irregularity. 1. Because there was no return of the capias against Smith. 2. Because there was no short note set up at the court-house door. 3. Because there was no evidence by which "to make appear to the court" what "goods, or chattels, or credits of the defendant were in each respective garnishee's hands," according to the provisions of the 4th section of the act of Maryland, 1715, (chapter 40.)

THE COURT ordered the injunction, and the motion to set aside the judgment and quash the execution, to be continued till the final hearing upon the cause in equity.

NOTE. Glover died, and the cause was abated.

BAKER, (GOLDSBOROUGH v.) See Case No. 5,516.

Case No. 770.

BAKER v. HEMENWAY.

The CITY OF VALPARAISO.

[2 Lowell, 501.][1]

District Court, D. Massachusetts. Nov., 1876.

SALVAGE—TOWAGE AND SALVAGE—AMOUNT DECREED.

1. A steamship, worth, with her cargo, $500,000, took the ground in the harbor of Boston, and was pulled off, at about high water, by a large tug, assisted by the engines of the steamship, and by two small tugs, the principal power being furnished by the ship and the large tug, and the small tugs being occupied less than an hour. *Held*, that the small tugs had rendered a salvage service.

[Cited in The Athenian, 3 Fed. 250.]

2. That they were to be paid a liberal compensation, much more than their hire for an hour, but not one into which the value saved would enter as a very important element: Sums decreed, $800 and $400.

[Cited in The Athenian, 3 Fed. 250.]

[In admiralty. Libel by Baker and others against the steamship City of Valparaiso (Hemenway, claimant) for salvage.] The City of Valparaiso was a new steamship, built in England, and intended for the trade between Boston and Chili. In going down the harbor of Boston on her first voyage she grounded on Lovell's island in the daytime, about an hour and a half or two hours before high water. The wind was strong from the north-west, and tended to set her further on the shoal. She had a large and powerful tug, called the C. S. Winch, in attendance, to bring back some passengers; and, while lying aground and backing her own engines with all their power, she accepted the services of the two comparatively small tugs, the Macy and the Woolley, whose owners and crews bring this libel. The Macy assisted the Winch in pushing against the steamer's quarter, to keep her up to the wind; the Woolley assisted in drawing her off. The steamer was aground a little more than an hour. The facts were not seriously disputed; but the opinions of the witnesses were opposed upon the question how far the services of the tugs were important to the safety of the ship, her own witnesses testifying that she had ample means to haul off by anchors, &c., in addition to her engines, in case those alone had failed. The after-part of the ship was lightened by pumping out the water ballast. The vessel pursued her voyage to Valparaiso and back, and on her return was found to have been considerably injured by taking the ground, though the leak caused by it was not large. The ship and cargo were worth nearly half a million dollars. [Decree for libellants.]

J. C. Dodge, for libellants.

E. R. Hoar & S. Hoar, for respondent.

LOWELL, District Judge. That a vessel in distress accepting services without a special contract, and in the absence of a usage of the port, accepts a salvage assistance, is abundantly established. It will be enough to cite some of the decisions in this circuit, though the law is the same in all: The Versailles, [Case No. 6,365;] The Independence, [Id. 7,014;] The Island City, [Id. 55;] The Susan, [Id. 13,630;] The James T. Abbott, [Id. 7,202;] M. B. Stetson, [Id. 9,363;] The Coringa, [Id. 1,736.]

The important and difficult part of the case is not the name by which it is called, but the amount which shall be decreed. A very large value was saved, but under circumstances which do not contain other elements which should require the quantum to be large. The service resembled towage. I do not mean that there is any generic difference between towage and salvage. In the absence of a contract, the towing of a vessel in peril or disabled is salvage; but as a convenient word to distinguish an ordinary case of contract from one of salvage, "towage" is often used.

The increased use of tugs, and their rival-

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

ry, have operated to reduce the value of a salvage service in most of the ports to something not very much beyond the price of a towage contract contingent upon success. Competition has established what might almost be called a quantum meruit for cases of this kind. A striking illustration of this is found in the history of two cases which were tried in the southern district of New York. It had been held by the courts there that a corporation organized for saving vessels, and paying its men wages which did not vary with the service performed, could not be salvors. The decision was overruled by the supreme court: see The Morning Star, [Case No. 9,818;] The Camanche, 8 Wall. [75 U. S.] 448. In the mean time, two more cases of the kind had arisen in that district, and Judge Blatchford, refusing salvage, had allowed to the corporations what he called a liberal allowance for work and labor: The J. F. Farlan, [Case No. 7,313;] The Stratton Audley, [Id. 13,529] When these cases were reviewed in the circuit court, the decision of the supreme court had reversed the rule on which they were avowedly decided; but Judge Woodruff, nevertheless, affirmed the decrees, as having awarded a sufficient salvage: The J. F. Farlan, [Id. 7,314;] The Stratton Audley, [Id. 13,530.] That affirmance was wrong, unless Judge Blatchford had in fact, though not in name, given salvage. And such I suppose to be the case. He spoke of a liberal compensation; but liberality is salvage: there is no place for liberality in an action of contract. The circuit court in effect decided in those cases that salvage performed by means of towage in the harbor of New York should be compensated without any close attention to the amount saved, but rather as a liberal and enlarged compensation for work and labor. We are told by the privy council that value is never wholly lost sight of in these cases: The Amerique, L. R. 6 P. C. 468; and this is true; for the salvage for a small vessel might be much less than the worth of the time and labor employed; and, in a case precisely like this in other respects, if only $500 had been saved, no one would expect my decree to be what it will be in this case. The essential difference in assessing damages in contract and in salvage is, that in the former nothing can be considered but the means employed; in salvage, even when the value saved is left out of account, or nearly so, the general results are quite as important as the means used to accomplish them.

That the City of Valparaiso was in need of assistance, and that it was highly desirable that she should not lie on that shore beyond high water, was and is clear; more so, perhaps, since the amount of injury which she suffered has been found out than it was at the time. I should consider that her master and her owner, who was on board and was insured, had incurred a grave responsibility if they had not accepted assistance. If she had lain there twelve hours, no one will venture to say what the damage would have been.

When, therefore, some of the witnesses say that they do not think she was in peril, all they can mean is, that they believe she would have come off without assistance, not that her position, in itself considered, was not perilous. The weight of the evidence is, that by carrying out anchors and hauling on them with her winches, which were worked by steam, she could have applied as much and even more power in the general direction in which the tugs furnished it. But I have heard no witness say that this operation could have been successfully performed before high water; and I very much doubt it. High water was so near, that the witnesses dispute whether it had been actually reached or not when she came off; and that carrying out anchors would have been a slower work than hitching on a tug needs no testimony.

Most of the work was done by the steamer's engine, and by the large tug which makes no claim here. That which the libellants did appears to have been useful, and, I am inclined to think essential to the rescue at that time.

I have looked at many of the cases besides those already cited, to see how much has been given under various circumstances more or less like these. As well as I can estimate the intent of the courts, it has been to give to tugs what will be a handsome gratuity, enough to induce prompt and even eager assistance; and this would be enhanced slightly by a great value at risk, though in no important or definite proportion to value.

Taking all these circumstances into view, and intending to be liberal, I award to the Macy $800, to the Woolley $400, and costs.

NOTE, [from original report.] For the sense in which contract and salvage are contrasted with each other, see The Louisa Jane, [Case No. 8,532.]

Case No. 771.

BAKER v. HERTY.

[1 Cranch, C. C. 249.][1]

Circuit Court, District of Columbia. July Term, 1805.

ASSUMPSIT — QUANTUM MERUIT — AGREEMENT FOR EXTRA WORK.

Although there be an agreement that the value of extra work should be ascertained by persons mutually chosen, yet if such valuation has not been actually made, the plaintiff, in an action upon a quantum meruit, may give other evidence of the value of the work.

[See, contra, Fox v. Hempfield R. Co., Case No. 5,011.]

At law. Indebitatus assumpsit and quantum meruit, [by Samuel Baker against Thomas Herty,] for work and labor done as ex-

[1] [Reported by Hon. William Cranch, Chief Judge.]

tra work; a special contract under seal having been made for building a house of a certain plan and description, which contained the following clause: "And it is mutually agreed upon that in case any misunderstanding shall take place in relation to the bill of particulars or any other misconception or want of appropriate words to convey the true intent and meaning of said parties, or in case any material alteration shall take place therein, so as to incur an extra expense to the contractor than that hereby contemplated, then and in either of said cases, a competent judge in the premises shall be chosen by each party, whose decision or extra valuation shall be conclusive and binding; and nothing herein contained shall be so construed as to enable either of the said parties to throw up or vary from this contract, and take another mode of valuation, either by the common mode of measure and value, or otherwise, instead thereof, but that such addition or reduction as shall or may be made in said work only, and valued as aforesaid, shall be binding on said respective parties."

Mr. Key, for the plaintiff, offered evidence of the value of digging an area, not contained in the original plan.

Mr. Hewitt, for the defendant, objected, and relied upon the above clause, as an agreement for another mode of ascertaining the value.

THE COURT overruled the objection and admitted the testimony.

Mr. Key offered evidence of a third story extra, and of other alterations made in the plan in the two lower stories.

Mr. Hewitt, having offered the agreement in evidence, objected to all the evidence given by the plaintiff, of extra work, alleging that it was provided for by the aforesaid clause in the agreement, and prayed the court to instruct the jury that they ought not to regard such evidence, it not being legal.

THE COURT refused. KILTY, Chief Judge, doubting as to the evidence respecting alterations in the two first stories, the original agreement being for a two-story house.

CRANCH, Circuit Judge. The whole extra work, whether it consist in alterations or additions to the original plan, or bill of particulars, is within the covenant; but as no persons have been chosen to ascertain the value of the extra work under that covenant, the plaintiff is not deprived of his original cause of action on a quantum meruit, and can only resort to the covenant for damages against the defendant for not appointing a person on his part to ascertain the value of the extra work. The defendant, in not paying for such work, has not committed any breach of that covenant.

BAKER, (HYDE v.) See Case No. 6,965.

BAKER, (JACKSON v.) See Cases Nos. 7,129 and 7,130.

Case No. 772.

BAKER v. JEFFERS et al.

[4 Cranch, C. C. 707.][1]

Circuit Court, District of Columbia. March Term, 1836.

LANDLORD AND TENANT—DISTRESS FOR RENT—APPORTIONMENT.

If the landlord evict the tenant from part of the premises, he cannot distrain for the rent. If he is entitled to an apportionment of the rent he may maintain an action for use and occupation; but if he is not entitled to an apportionment of the rent, he has no remedy.

Replevin [by Thomas Baker against Jeffers and Gideon.] Cognizance as bailiffs of Mrs. McGunnigle for rent-arrear; plea, an eviction by the landlady of a ten pin alley.

R. J. Brent, for the plaintiff, prayed the court to instruct the jury, in effect, that an eviction from a part of the premises suspends the payment of the rent. 1 Tuck. Bl. Comm. 27; 1 Saund. 204, note 7.

THE COURT (THRUSTON, Circuit Judge, absent) instructed the jury that if they should be satisfied by the evidence that the landlady, Mrs. McGunnigle, evicted the plaintiff from a part of the demised premises, she cannot recover in this action; because, if, at the time of the distress she was only entitled to an apportionment of the rent, and not to the whole rent, she had no right to distrain, but must resort to her action for use and occupation; and if it was not a case in which she was entitled to an apportionment, she cannot recover in any form of action.

Verdict for the plaintiff, and $50 damages.

Case No. 773.

BAKER v. KANSAS CITY TIMES CO.

[18 Amer. Law Reg. (N. S.) 101.]

Circuit Court, W. D. Missouri. 1879.

LIBEL—CHARGING MURDER—JUSTIFICATION.

[1. A party under reasonable apprehension of danger of life or great bodily harm has a right in self-defence to take the life of the aggressor, but he must have had no agency in bringing about the danger upon which he relies to justify the taking of life.]

[See note at end of case.]

[2. Where the deceased had published in his newspapers articles reflecting on the person accused of having committed the murder, and the latter, seeing the deceased on the street, crossed it, and addressed him, when the fatal quarrel took place, the jury must, in determining whether the accused person was guilty of murder, and in considering the intent of the accused in crossing the street and addressing the deceased, take into consideration the existing feeling and apprehension of the parties; and if they find that the accused calculated thereon to bring about a personal difficulty, he being prepared, and intending to make use of it if it occurred, the killing is not justified as self-defence, and is murder.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

[3. In an action for the publication of a libel charging plaintiff with being an accessory to a murder, an answer pleading the truth of the charge in justification, which charges the plaintiff with encouraging, countenancing, and supporting the person who did the killing, will be construed as pleading a legal justification, viz. the advising or commanding to kill.]

[See note at end of case.]

[4. In such action, the jury must, on a plea of the truth of the libel, consider the plaintiff as innocent of the crime until his guilt is established by evidence sufficient to produce an abiding conviction of his guilt.]

[See note at end of case.]

At law. This was an action for libel. [By F. P. Baker against the Kansas City Times Company.] Plea justification. The facts sufficiently appear in the charge.

M. J. Leaming, A. B. Jetmore, and H. B. Johnson, for plaintiff.

John K. Cravens and John W. Wofford, for defendant.

KREKEL, District Judge, charged the jury as follows: During the year 1877, there were published in Topeka, in the state of Kansas, two newspapers, one called the Commonwealth, owned and controlled by Floyd P. Baker, the plaintiff in this suit, the other called the Blade, controlled by J. Clark Swayze. During the same year, 1877, two other newspapers were published, one in Leavenworth, in the state of Kansas, known as the Leavenworth Times, the other in Kansas City, in the state of Missouri, known as the Kansas City Times, published by the defendant in this suit. The paper issued by this corporation is under the management and control of Morrison Mumford, who has testified in the case. In the Sunday's issue of the Kansas City Times, of April 1st, 1877, a communication appeared, dated Topeka, Kansas, March 29th, 1877, signed M. C. M., in which reference is made to Baker, plaintiff in this action, as follows: "The cloud of sorrow, caused by the felonious killing of J. Clark Swayze, has not yet passed away in this city; on the contrary, it thickens every hour, and the funeral of Mr. Swayze to-day, places a condemnation upon the villainous part which F. P. Baker took in the sacrifice of his life, seldom visited upon the acts of any man. * * * It was undoubtedly the object of those who conspired against the life of Mr. Swayze—Baker in particular—to murder the Blade by killing its editor; but in this they have signally failed, as the numerous assurances on part of the business men of Topeka, that the paper should have their undivided support, will show. I am reliably informed that ten new names were handed into the office last evening as subscribers to the Blade, all of whom had previously taken the murderer's organ." Of these two extracts, taken from and a part of the correspondence, Baker, the plaintiff, complains and brings his action against the Kansas City Times for damages.

To this complaint the defendant, the Kansas City Times, answers by setting up, first, the fact and circumstances under which the publication was made; next, a justification, alleging, "that said letter is true, for that the said F. P. Baker did, on the 28th day of March, 1877, and for some considerable time prior thereto, encourage and countenance the said John W. Wilson, in hostile acts toward the said Swayze, and in assaults upon the said Swayze, by the said Wilson, and so encouraged and supported by plaintiff said Wilson, did, on the 28th day of March, 1877, kill the said Swayze."

It becomes unnecessary to examine whether these pleas are technically and formally correct, for they have been replied to and treated as substantially sufficient. As this plea of justification disposes of the case in favor of the defendant, if found to be true, it is proper that it should be taken up first.

You will have to ascertain, in the first place, whether the correspondence charges that Swayze was murdered—that is, killed by Wilson, deliberately and with malice aforethought, for it would not be murder if Wilson had killed Swayze in self-defence. Should you come to the conclusion that the correspondence does charge that Wilson murdered Swayze, it will become your duty, in the second place to ascertain whether the charge is true. The defendant, the Kansas City Times, makes this allegation and is bound to prove it to your entire satisfaction. Now, for the purpose of ascertaining whether Wilson murdered Swayze, or acted in self-defence when he killed him, you will bring before your mind all the facts and circumstances testified to, existing prior to the killing, in order to arrive at the motives and intent with which Wilson went across the street and sought Swayze, as well as to ascertain the motives of Swayze in acting as he did. Wilson had a right to cross the street and remonstrate with Swayze against the publications in the Blade, and if that was the sole purpose with which he addressed Swayze, Wilson was in the right. But in trying to arrive at the intent of Wilson crossing the street and addressing Swayze, it will be proper for you to take into consideration the existing feeling and apprehensions of the parties, and if you shall find that Wilson calculated thereon as probably bringing about a personal difficulty—seeking rather than avoiding such—he, Wilson, being prepared, and intending, if such difficulty occurred, to make use of it for the purpose of killing Swayze, in such a case, Wilson cannot be said to have acted in self-defence, and the killing of Swayze would be murder. A party under reasonable apprehension of danger of life or great bodily harm, has a right in self-defence to take the life of the aggressor, but he must have had no agency in bringing about the danger upon which he relies to justify the taking of life. Should you, after a careful examination and consideration of the facts

and circumstances testified to and connected with the case, come to the conclusion that Wilson, when he killed Swayze, acted in self-defence, then the defendant fails in making out his plea of justification, and you should find that issue for plaintiff. But if you shall find that Wilson did not act in self-defence in the killing of Swayze, then it becomes necessary for you to consider whether in the language of the plea of justification the plaintiff, Baker, encouraged, countenanced and supported Wilson in the murder of Swayze, so as to make him, Baker, accessory thereto.

In law, one becomes an accessory who is guilty of an act of felony, not by committing the offence in person, or as principal, but by advising or commanding another to commit the crime. You are therefore to determine from the testimony in the case whether Baker advised or commanded the murder of Swayze. The part of the answer setting up justification charges Baker with encouraging, countenancing, and supporting Wilson, terms of no well-defined legal signification when applied to a case such as the one before the court. I construe them to mean a legal justification, namely, the advising or commanding Wilson to murder Swayze. In trying to arrive at a conclusion as to whether Baker advised or commanded Wilson to murder Swayze, Baker is to be treated and considered by you as innocent of the crime of being accessory to the murder of Swayze by Wilson. The guilt of Baker must be shown by the defendant to your entire satisfaction, by which I here and elsewhere mean that the evidence in the case must produce an abiding conviction in your mind of the guilt of Baker. You should with care go over all the testimony in the case, and if you find expressions used or acts done by plaintiff, Baker, fairly admitting of two meanings, you are authorized to apply the meaning leading to innocence rather than guilt. In passing from this plea of justification I sum up as follows: First, ascertain from the correspondence complained of whether it intends to charge that Wilson murdered Swayze, and that Baker was accessory to the murder, and if you find that this is the case, you will next find whether Wilson did murder Swayze, or did the killing in self-defence. If you find that Wilson acted in self-defence, that ends the plea of justification, for there could be no murder when the killing was done in self-defence.

If you shall find that Wilson did not kill Swayze in self-defence, but committed a murder, you will next find whether Baker was accessory thereto, by advising or commanding the same. If you shall find that Baker was not accessory to the murder, such finding will end the plea of justification in favor of plaintiff. If you shall find that Wilson murdered Swayze, and you shall further find that Baker was accessory to the murder of Swayze, such finding establishes the plea of justification, ends the case, and you should find for defendant.

Turning from the plea of justification to the plea in mitigation pleaded by the defendant, I proceed to present the law regarding it, so that you may have the whole case before you. The law, proceeding upon the presumption of innocence, assumes when a crime is charged upon any one that he is innocent thereof, and presumes the charge to have been maliciously made. The author or publisher is permitted, as already explained, to show that the charge made is really true, and that the person charged is or has been guilty of the crime imputed to him. Upon sustaining the charge, the one making it is acquitted and stands justified, that is if he sustain his plea of justification. But if he fails to sustain his plea of justification, the author or publisher may show, in mitigation of damages, anything tending to establish that he acted without malice and bad intent, but from proper motives.

In cases such as the one under consideration the law will not allow the author or publisher to go free if he fails to establish his plea of justification, though he satisfy you of the purity of his motives and the greatest prudence and care in making the publication. The law requires a publisher not only to be satisfied of the truth of the charges he publishes, but he must also be able to establish them to the satisfaction of a jury, in case he is sued. If the plea of justification pleaded in this case has not been made out by the defendant, it will then be necessary for you to examine into the mitigating circumstances in evidence, so as to enable you to determine the good faith, prudence and caution exercised by the defendant in making the publication, as upon this, in a large measure, must depend the amount of damages which you may assess against the defendant. You will call to mind the undisputed fact that the correspondent, Morris, was not connected with the Kansas City Times, and determine whether more or less care should be required at their hands when receiving a correspondence from a stranger. The manner in which the correspondence was received, the gravity of the charge and the action of the conductor of the Times, in refusing or neglecting to retract the charges made in the communication, when his attention was called to it by the plaintiff, are proper for your consideration, as is also the duty which the conductor of a newspaper such as the Times owes to the public, as well as the legal obligation which he is under to the plaintiff. You are to guard, on the one hand, the right of plaintiff, and on the other the freedom of the press, which is measurably involved in cases of this kind. There is no claim for special damages made by plaintiff, and none has been proven. While it is your duty, in case the plea of justification has not been made out, to find damages against this defendant, the amount thereof is left to your discretion, which you will exercise with due regard to the parties.

[NOTE.

[DEGREE OF PROOF REQUIRED IN CIVIL ACTIONS WHERE THE COMMISSION OF A CRIMINAL OFFENSE IS IN ISSUE.

[In the note to this case, published in 18 Amer. Law Reg. (N. S.) at page 108, the annotator, after setting forth the instruction, states that the court "declined to instruct that the offense charged must be proved beyond a reasonable doubt, or with the certainty required to sustain an indictment;" but it has since been held that the direction that the evidence must be such as to produce in the minds of the jury an abiding conviction as to plaintiff's guilt as to the crime charged is in effect a direction that the proof must be beyond a reasonable doubt. Battles v. Tallman, (Ala.) 11 South. 247; Griffith v. State, 90 Ala. 588, 8 South. 812; Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 618.

[There has been much discussion of the early rule as to the degree of proof required, not only in cases of libel and slander where a charge of crime is sought to be justified, but generally as to the degree of proof in other civil actions where the fact of a crime is in issue,—as on fire insurance policies where the defense relies on proof that the insured caused the loss, quasi criminal actions to recover penalties, actions to recover for selling liquor to minors in violation of state statutes, and the like; and in consequence thereof the rule, as originally laid down, has been the subject of much change and modification.

[The rule was originally established and laid down in Thurtell v. Beaumont, 1 Bing. 339, 8 E. C. L. 538, and in Chalmers v. Shackell, 6 Car. & P. 475, and is to the effect that in civil actions to recover damages for a criminal act, or where the defense seeks to prove a criminal offense, to defeat the action the same degree of proof will be required as would be necessary to convict upon an indictment for the crime; is still recognized in a number of the states, although unsupported in the English courts, except in cases of libel and slander, (Kane v. Hibernia Ins. Co., 39 N. J. Law, 704;) followed in other states with evident reluctance, and expressly repudiated in the majority. This rule, as is said in Continental Ins. Co. v. Jachnichen, 110 Ind. 59, 10 N. E. 637, "has its foundation in the tender regard in which the law holds the life and liberty of the subject. It had its origin, and was molded into form and consistency, when the penal code of England visited upon offenses of a comparatively trivial character the most harsh and cruel punishment. To mitigate the rigor of a code sometimes administered with severity, humane judges ingrafted upon the common law the rule that no one should be convicted of a crime which affected life or liberty until his guilt was established with such a degree of certainty as to exclude every reasonable doubt. Having grown up out of the humanity of the law, the rule is very properly retained in criminal cases, even after the reasons for it have in a good measure ceased to exist. The consequences of a mistake where life and liberty are involved are so overwhelming and irreparable that the integrity of the rule which requires a greater degree of certainty and caution in such a case, before coming to a conclusion, than in a case which affects property merely, should be steadily maintained and intelligently applied. This can only be done by limiting it to the class of cases which called it into being. To extend it is to render it obscure, and dissipate its benign effect in the cases where its benefits should be fully realized. In some exceptional cases the doctrine that, where a criminal act is charged in a civil action, the crime imputed must be established beyond a reasonable doubt, has gained recognition; notably in cases of libel and slander, when the defendant undertook to justify the uttering or publishing of that which amounted to a felony, and in cases where the action involved the burning of property under circumstances which amounted to arson. The rule was first extended to cases of libel and slander in England. The reason for the extension of the rule there was that if, upon the trial of a plea of justification of a charge which imputed a felony, the defendant proved the plea, the plaintiff was subject to be put upon trial for the felony proved, without the intervention of a grand jury. The verdict in such a case was equivalent to an indictment of the plaintiff. No such reason ever existed in this country for the application of the rule, and it may therefore be said it has been applied without any adequate reason." See, also, Ellis v. Buzzell, 60 Me. 209; Fowler v. Wallace, 131 Ind. 347, 31 N. E. 56.

[In Alabama, a mere preponderance of proof is sufficient in civil actions where the fact of the commission of a crime is put in issue. Adams v. Thornton, 78 Ala. 489, overruling Steele v. Kinkle, 3 Ala. 352; Tompkins v. Nichols, 53 Ala. 197. In California, proof beyond a reasonable doubt is required. Merk v. Gelzhaeuser, 50 Cal. 631. In Connecticut, in an action to recover treble damages, given by statute, for property feloniously taken, the court held that neither the fact that the issue involved the felonious taking, nor the fact that the action was for treble damages, altered the rule as to the degree of proof in civil cases. Munson v. Atwood, 30 Conn. 102. Hinman, J., concurring, denied that there was any distinction in law between civil and criminal cases as to the amount of evidence which ought to be required by a court or jury in order to find a fact; that the evidence must be such as to satisfy the mind of the truth of a fact; and that, when the mind was thus satisfied, there could be, of course, no reasonable doubt. See, also, Mead v. Husted, 52 Conn. 53. In Delaware, a mere preponderance of proof is necessary. State v. Gouldsborough, 1 Houst. Crim. Cas. 316. But otherwise in Florida. Schultz v. Pacific Ins. Co., 14 Fla. 73; Williams v. Dickenson, 28 Fla. 90, 9 South. 847. In the latter case the supreme court followed Schultz v. Pacific Ins. Co. with evident reluctance, and intimated that, if the question had been presented as an original proposition, it would have enunciated a contrary doctrine. In Georgia, preponderance of proof is sufficient. Schnell v. Toomer, 56 Ga. 168. In Illinois, proof of such an issue must be beyond a reasonable doubt. Germania Fire Ins. Co. v. Klewer, 129 Ill. 599, 22 N. E. 489; Sprague v. Dodge, 48 Ill. 142; McConnel v. Delaware M. S. Ins. Co., 18 Ill. 228; Webster v. People, 14 Ill. 365. But see Howell v. Hartford Fire Ins. Co., (U. S. Cir. Ct. N. D. Ill.) Case No. 6,780. A wife in a suit under the civil damage act is not required to make out her case beyond a reasonable doubt, but only by a preponderance of the evidence. Robinson v. Randall, 82 Ill. 521. And so in an action brought under the dramshop act to recover damages for selling liquors to a minor. Proctor v. People, 24 Ill. App. 599. In Indiana, the rule requiring proof beyond a reasonable doubt still exists. Byrket v. Monohon, 7 Blackf. 83; Lanter v. McEwen, 8 Blackf. 495; Gants v. Vinard, 1 Ind. 476; Swails v. Butcher, 2 Ind. 84; Wonderly v. Nokes, 8 Blackf. 589; Landis v. Shanklin, 1 Ind. 92; Shoulty v. Miller, Id. 544. Tull v. David, 27 Ind. 377; Bissell v. Wert, 35 Ind. 60; Tucker v. Call, 45 Ind. 31; Wilson v. Barnett, Id. 163; Hutts v. Hutts, 62 Ind. 214. To bring the case within the rule, there must be a specific charge of the crime, and not a charge by implication. Bissell v. Wert, 35 Ind. 60. Nor will it be sufficient that the facts charged involve the party in the moral turpitude of a crime. Id. Also, see Reynolds v. State, 117 Ind. 421, 17 N. E. 909. In Continental Ins. Co. v. Jachnichen, 110 Ind. 59, 10 N. E. 636, it is said that a civil action is subject to the rules of evidence belonging to actions of that class, without regard to the fact that the mat-

ter in issue may involve the commission of a crime. In Hale v. Matthews, 118 Ind. 531, 21 N. E. 43, the rule is recognized as applying to cases of libel and slander only, and as not extending to other civil actions. And in a very late case (Fowler v. Wallace, 131 Ind. 347, 31 N. E. 53) the majority of the supreme court, while adhering to the rule, say: "We are satisfied that the rule grew out of a misconception of principle, and we should be glad to escape from it; and, if we were not compelled by duty, we should decline to give it our adherence." The rule in this state never had application in bastardy proceedings. State v. Evans, 19 Ind. 92; Byers v. State, 20 Ind. 47; State v. Brown, 44 Ind. 329; Glenn v. State, 46 Ind. 368. In Iowa, the rule of the English cases cited prevailed for a considerable time, see Ellis v. Lindley, 38 Iowa, 461; Woodward v. Squires, 39 Iowa, 435; and Barton v. Thompson, 46 Iowa, 30; Mott v. Dawson, 46 Iowa, 533; but now a mere preponderance of proof is sufficient, Barton v. Thompson, 56 Iowa, 571, 9 N. W. 899; Welch v. Jugenheimer, 56 Iowa, 11, 8 N. W. 673; Behrens v. Germania Ins. Co., 58 Iowa, 26, 11 N. W. 719; Kendig v. Overhulser, 58 Iowa, 195, 12 N. W. 264; Coit v. Churchill, 61 Iowa, 296, 16 N. W. 147; and Riley v. Norton, 65 Iowa, 306, 21 N. W. 649, overruling Forshee v. Abrams, 2 Iowa, 571; Fountain v. West, 23 Iowa, 9; Ellis v. Buzzell, supra. Likewise in Kentucky. Aetna Ins. Co. v. Johnson, 11 Bush. 587. In Louisiana, a preponderance only is required. Hoffman v. Western M. & F. Ins. Co., 1 La. Ann. 216; Wightman v. Insurance Co., 8 Rob. 442. In Maine, in the leading case, (Ellis v. Buzzell, 60 Me. 209,) the court says: "We think it time to limit the application of a rule which was originally adopted in favorem vitae, in the days of a sanguinary penal code, to cases arising on the criminal docket, and no longer to suffer it to obstruct or incumber the action of juries in civil suits sounding only in damages." See, also, Knowles v. Scribner, 57 Me. 495; Decker v. Somerset Ins. Co., 66 Me. 406. Prior to Ellis v. Buzzell, the contrary doctrine had prevailed. See Thayer v. Boyle, 30 Me. 475; Butman v. Hobbs, 35 Me. 228. The rule requiring a preponderance of proof only is in force in Maryland. See McBee v. Fulton, 47 Md. 429, in which it is said that the rule requiring proof beyond a reasonable doubt in civil cases is appropriate only to the trial of issues between the state and a person charged with crime, and exposed to penal consequences if the verdict is against him. In Massachusetts, the court, in a case before it after the passage of the new practice act, said: "If there be any class of civil cases in which the instruction usually given in criminal cases might be required, it would be that class where the defendant has in a special plea fully and directly charged upon the plaintiff a crime, and where the same evidence must be adduced to support the plea as would be required upon an indictment for the like offense. But this principle would not apply to an action on contract where no special plea is required, as in the present system of pleading." Schmidt v. New York Union Mut. F. Ins. Co., 1 Gray, 529. And the court, in a later case, holding an instruction in a civil case requiring proof beyond a reasonable doubt to be erroneous, said: "It is better that the rule be uniform in all cases, leaving the instruction that the jury must be satisfied of the guilt of a party beyond a reasonable doubt to apply solely to criminal cases. Gordon v. Parmelee, 15 Gray, 413. In Michigan, in the case of Elliott v. Van Buren, 33 Mich. 49, Campbell, J., delivering the opinion, says: "There is no rule of evidence which requires a greater preponderance of proof to authorize a verdict in one civil action than in another, by reason of the peculiar questions involved. * * * There is no rule of law which adopts any sliding scale of belief in civil controversies." See, also, Semon v. People, 42 Mich. 141, 3 N. W. 304; Peoples v. Evening News, 51 Mich. 11, 16 N. W. 185; Hough v. Dickinson, 58 Mich. 89, 24 N. W. 809; People v. Hillhouse, 80 Mich. 580, 45 N. W. 484. In Minnesota, proof of fraudulent representations in an action for fraud need only be proved by a preponderance of evidence, where the averments of the complaint do not amount to a statutory charge of the crime. Burr v. Willson, 22 Minn. 206. And see Thoreson v. Northwestern Nat. Ins. Co., 29 Minn. 107, 12 N. W. 154. And now in Missouri, a preponderance of proof is sufficient. Smith v. Burrus, 106 Mo. 94, 16 S. W. 881; Edwards v. George Knapp & Co., 97 Mo. 432, 10 S. W. 54, following Marshall v. Thames Fire Ins. Co., 43 Mo. 586, and overruling Polston v. See, 54 Mo. 291. See, also, Rothschild v. American Cent. Ins. Co., 62 Mo. 356. But see Elder v. Oliver, 30 Mo. App. 575. And so in Nebraska, at least as far as bastardy proceedings are concerned. Strickler v. Grass, 32 Neb. 811, 49 N. W. 804, following Altschuler v. Algaza, 16 Neb. 631, 21 N. W. 407. In New Hampshire, the rule of Thurtell v. Beaumont, supra, never prevailed, one reason given being that, whatever the verdict might be, no punishment or disability was incurred. Matthews v. Huntley, 9 N. H. 150; Folsom v. Brawn, 5 Fost. (25 N. H.) 114. In New Jersey, it was held that the defense of usury must be proved beyond a reasonable doubt, Conover v. Van Mater, 3 C. E. Green, (18 N. J. Eq.) 481; Taylor v. Morris, 7 C. E. Green, (22 N. J. Eq.) 606; also a charge of adultery in an action for divorce, Berckmans v. Berckmans, 17 N. J. Eq. 453. But now it seems that a similar doctrine to that of Indiana prevails. Kane v. Hibernia Ins. Co., 39 N. J. Law, 704, reversing 38 N. J. Law, 449. The latter case states that Thurtell v. Beaumont stands alone and unsupported in the English courts, except in actions of libel and slander, and has but a slender support in this country; denies its application to actions on insurance policies; and confines it to actions for libel and slander. In New York, the English doctrine was followed in the early cases, Woodbeck v. Keller, 6 Cow. 118; Clark v. Dibble, 16 Wend. 601; Hopkins v. Smith, 3 Barb. 602; but is now repudiated, and the present rule seems to be that in all civil actions the party upon whom the burden of proof rests as to an issue is not bound to establish it beyond a reasonable doubt. It is sufficient if there is a fair preponderance of evidence in his favor. Johnson v. Agricultural Ins. Co., 25 Hun, 251; Freund v. Paten, 10 Abb. N. C. 311; Davis v. Rome, W. & O. R. Co., (Sup.) 10 N. Y. Supp. 334; People v. Briggs, 47 Hun, 266, affirmed 114 N. Y. 56, 20 N. E. 820; New York Guaranty & Indemnity Co. v. Gleason, 78 N. Y. 503; Stearns v. Field, 90 N. Y. 640; Seybolt v. New York, etc., R. Co., 95 N. Y. 562; Lewis v. Shull, 67 Hun, 543, 22 N. Y. Supp. 484. In Ferry Co. v. Moore, 102 N. Y. 667, 6 N. E. 293, it is laid down that, "there is no rule of law which requires the plaintiff in a civil action, when a judgment against the defendant may establish his guilt of a crime, to prove his guilt with the same certainty which is required in criminal prosecutions." And in People v. Briggs, 114 N. Y. 56, 20 N. E. 820, the court of appeals, citing the last case with approval, says: "There is no apparent reason for making any distinction * * * in behalf of a defendant in an action for a penalty in which the people are the party plaintiff. It is no less a civil action because so brought. The purpose of the action is not the 'punishment' of the defendant, in the sense legitimately applicable to the term, but such action is brought to recover the penalty as a fixed sum, by way of indemnity to the public for the injury suffered by reason of the violation of the statute. The effect of the recovery is merely to charge the defendant with pecuniary liability, while a criminal prosecu-

tion is had for the purpose of punishment of the accused." In North Carolina, the rule in criminal cases that the jury must be satisfied beyond a reasonable doubt has no application in civil cases. Kincade v. Bradshaw, 3 Hawks, 63; Rippey v. Miller, 1 Jones, 479, 62 Amer. Dec. 177, and note. Likewise in Ohio, Jones v. Greaves, 26 Ohio St. 2; though the contrary doctrine was formerly maintained, Lexington F. L. & M. Ins. Co. v. Paver, 16 Ohio, 324; Strader v. Mullane, 17 Ohio St. 624. In Jones v. Greaves, supra, it is said that the reason of the rule in criminal cases is that of humanity. See Lyon v. Fleahman, 34 Ohio St. 151; Bell v. McGinness, 40 Ohio St. 204. In Pennsylvania, the rule is declared to be that, where the cause of action is founded upon a crime imputed, something more than a preponderance of proof is necessary; the presumption of innocence must be overcome by evidence so preponderating as to lead to the conclusion that the act complained of was committed,—something more than is required in a civil action, and less than is required in a criminal case. Catasauqua Manuf'g Co. v. Hopkins, 141 Pa. St. 30, 21 Atl. 638. And see Woddrop v. Thacher, 117 Pa. St. 340, 11 Atl. 621; also, Young v. Edwards, 72 Pa. St. 257; Steinman v. McWilliams, 6 Barr. (6 Pa. St.) 170. In Tennessee, an issue in a civil action involving a charge of crime merely requires to be proved by a preponderance of evidence. McBee v. Bowman, 89 Tenn. 132, 14 S. W. 481; Gage v. Louisville, N. O. & T. R. Co., 88 Tenn. 726, 14 S. W. 73; Chapman v. McAdams, 1 Lea, 500; Hills v. Goodyear, 4 Lea, 236. Bradish v. Bliss, 35 Vt. 326, (11th Ann. Ed. 117,) holds that there is no middle class of cases, and that the rule of evidence as to civil actions applies to all civil actions, whether or not criminal in their nature. And see, also, Burnett v. Ward, 42 Vt. 80, (13th Ann. Ed. 31,) holding that the rule does not apply to an action upon a statute giving cumulative damages; and Weston v. Gravlin, 49 Vt. 507, (15th Ann. Ed. 186,) a case of trespass for malicious injury; and see Currier v. Richardson, 63 Vt. 617, 22 Atl. 625. In Virginia, the rule of Thurtell v. Beaumont is adhered to. Warner v. Com., 2 Va. Cas. 105. And so in West Virginia. State v. Ralphsnyder, 34 W. Va. 352, 12 S. E. 721. And likewise applied in contempt proceedings. State v. Cunningham, 33 W. Va. 607, 11 S. E. 76. But otherwise in Wisconsin. Washington Union Ins. Co. v. Wilson, 7 Wis. 169, followed in Wright v. Hardy, 22 Wis. 348, approved in Blaeser v. Milwaukee, etc., Ins. Co., 37 Wis. 31. Pryce v. Security Ins. Co., 29 Wis. 270, sometimes cited as overruling the principle of Washington Union Ins. Co. v. Wilson, supra, is said in Blaeser v. Milwaukee, etc., Ins. Co., supra, not to conflict with it. See Freeman v. Freeman, 31 Wis. 235, an action for divorce. And see the valuable note attributed to John H. May, sometime editor of Greenleaf's Evidence, in 10 Amer. Law Rev. 642.

[The decisions of the United States circuit courts are to the effect that a mere preponderance of proof is sufficient in actions to recover penalties. U. S. v. Brown, (Or. 1869,) Case No. 14,662, an action to recover a penalty for violation of the internal revenue act, (14 Stat. 144,) and Hawloetz v. Kass, (S. D. N. Y. 1885,) 25 Fed. 765, an action to recover the penalty prescribed by Rev. St. § 4901, for printing the word "patented" on an unpatented article; and also in actions on fire insurance policies, where a defense of willful burning of the insured property is interposed. Huchberger v. Merchants' Fire Ins. Co., (N. D. Ill. 1868,) Case No. 6,822; Scott v. Home Ins. Co., Id. 12,533. But in the supreme court of the United States the view is taken that proceedings for the purpose of declaring a forfeiture of a man's property by reason of offenses committed by him, though civil in form, are in their nature criminal, and that suits for penalties and forfeitures incurred by the commission of offenses against the law, of a quasi criminal nature, are within the reason of criminal proceedings. Boyd v. U. S., 116 U. S. 616, 16 Sup. Ct. 524. In U. S. v. The Burdett, 9 Pet. (34 U. S.) 682, a proceeding to forfeit a vessel because of foreign ownership, the court said that "no individual should be punished for a violation of law which inflicts a forfeiture of property, unless the offense is established beyond a reasonable doubt." And so in an action by the United States to recover a statutory penalty for violation of section 48 of the revenue act of June 30, 1864, the court held it incumbent on the government to prove the offense beyond a reasonable doubt. Chaffe v. U. S., 18 Wall. (85 U. S.) 516. And see Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370.

[In a well-considered case, recently decided,—U. S. v. Shapleigh, (Jan., 1893,) 4 C. C. A. 237, 54 Fed. 126,—it was decided, following the principles laid down in the supreme court decisions, that in an action under Rev. St. U. S. § 3490, to recover over $300,000, penalties from defendant for presenting a false and fraudulent claim against the United States, the government must prove its case beyond a reasonable doubt; but the reasons given by the learned judge in his opinion for the application of the rule of evidence were principally that the penalties sought to be inflicted were far heavier than any the court would probably have inflicted on a conviction for the crime, stating: "In each proceeding the same government, with its unlimited resources, proceeds against the same citizen to punish him for the same crimes, and in each the single question for the jury to determine is, was this defendant guilty of these felonies? Every consideration which induced the courts to establish the rule that the prosecutor must prove the crime charged beyond a reasonable doubt—the inequality of the parties in power, situation, and advantage; the purpose of the proceeding, which is the punishment of the defendant, not compensation for injury; the irreparable disgrace and injury that must result to the defendant from an unjust recovery; and the presumption of his innocence,—demands that this rule be applied to the latter to the same extent as it would be to the former proceeding. It is not the form, but the nature, of this proceeding, that must determine the rule to be applied to it." Notwithstanding, however, the decision in this particular case, the court recognized that "it is now settled by the great current of authorities in this country that, where a criminal act is alleged in a civil suit,—i. e. civil not in form merely, but in nature and purpose,—proof of the criminal act beyond a reasonable doubt is not required to warrant a verdict or decision in favor of the party who makes the allegation;" citing a number of cases.]

BAKER, (MACK v.) See Case No. 8,834.

BAKER, (McKENNEY v.) See Case No. 8,853.

BAKER, (MAYOR, ETC., OF GEORGETOWN v.) See Case No. 5,342.

Case No. 774.

BAKER v. MIX.

[2 Cranch, C. C. 525.][1]

Circuit Court, District of Columbia. Dec. Term, 1824.

GARNISHMENT—ISSUE JOINED BETWEEN PLAINTIFF AND GARNISHEE—ENTITLING DEPOSITIONS.

When the issue is joined between the plaintiff and the garnishee, in behalf of himself and his principal, the depositions must be entitled as of a suit between the plaintiff and the garnishee, and not between the plaintiff and the principal defendant.

Attachment, [by John W. Baker against Elijah Mix, garnishee of John Bulkley, surviving partner of John Bulkley & Co.,] under the Maryland act of 1795, c. 56. The garnishee appeared and pleaded, 1st. That the said John Bulkley & Co. had fully performed the covenant on their part; upon the replication to which plea issue was joined. 2d. That he, the garnishee, had no effects of the principal debtor in his hands; upon the replication to which, issue was also joined.

At the trial of these issues, Mr. Marbury, for the defendant, offered in evidence a deposition, taken under the act of congress, in a suit in which John W. Baker was plaintiff, and John Bulkley was defendant.

Mr. Redin, for the plaintiff, objected to the reading of the deposition, because it was not taken in this suit, which is between Baker and Mix and not between Baker and Bulkley. Smith v. Coleman, [Case No. 13,029,] in this court, at April term, 1821, in this county, and Peyton v. Veitch, [Id. 11,057,] at November term, 1816, in Alexandria.

Mr. Marbury, in reply. By the 4th section of the act of 1795, c. 56, "the garnishee may plead, in behalf of the defendant, such plea or pleas as the said defendant might or could do if he had been taken by the sheriff under the writ of capias ad respondendum issued as aforesaid, and had accordingly appeared to the same." When the garnishee thus pleads in behalf of the principal, it becomes substantially a suit between the plaintiff and the principal, and may truly be entitled as such. The suit was originally brought against the principal, and was so entitled until the garnishee appeared; and if perjury were committed upon the trial, it might be averred in the indictment, and proved to have been in an action between the plaintiff and the principal. Although the garnishee has pleaded for himself as well as for his principal, the issue upon the plea for the principal is, in effect, a suit between the plaintiff and the principal, and may be averred to be such. Dale v. Beer, 7 East, 333.

THE COURT (THRUSTON, Circuit Judge, absent) thought that Bulkley, not having appeared, could not be considered as a party in the cause, and rejected the deposition. [See Baker v. Mix, Case No. 775.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 775.

BAKER v. MIX.

[3 Cranch, C. C. 1.][1]

Circuit Court, District of Columbia. Dec. Term, 1826.

GARNISHMENT—PROCEDURE—NULLA BONA—ASSIGNMENT OF DEBT.

An assignment of the debt by the defendant to a third person, with notice to the garnishee, before service of the attachment, cannot be given in evidence upon trial of the issue of nulla bona, but must be pleaded specially.

[At law. Proceeding by John W. Baker against Elijah Mix, garnishee of Buckley & Co. See Baker v. Mix, Case No. 774.]

Under the plea of nulla bona by the garnishee, he offered in evidence a deed of assignment by Buckley, as surviving partner of Buckley & Co., to one Thomas Pryer, of all the effects of that firm, including the debt due to them by the garnishee, with notice thereof to the garnishee before the service of the plaintiff's attachment.

Mr. Reddin, for the plaintiff, objected to the evidence, and contended that the assignment could not be given in evidence upon the issue of nulla bona, but should have been specially pleaded, and cited 2 Har. Ent. 308, and Serg. Attachm. 91, 93, that a garnishee may plead an assignment.

Mr. Marbury, contra, contended that it was good evidence for the garnishee on the plea of nulla bona.

But the COURT, (CRANCH, Chief Judge, contra,) rejected the evidence on the issue of nulla bona.

Mr. Marbury moved for a new trial on the ground that the court erred in rejecting the evidence, and the motion came on to be argued at December term, 1826.

Mr. Marbury for the garnishee. Infancy may be given in evidence upon the general issue; so may coverture; yet in one case the plaintiff may reply, necessaries; and, in the other, special matter avoiding the marriage; so a parol release, or payment, and most matters in discharge of the action. 1 Chit. Pl. 471; Miller v. Aris, 3 Esp. 234; Sullivan v. Montague, 1 Doug. 106; Serg. Attachm. 93; Wood v. Roach, 2 Dall. [2 U. S.] 180; Steuart v. West, 1 Har. & J. 536; Harding v. Hull, 5 Har. & J. 478; U. S. v. Vaughan, 3 Bin. 400.

Mr. Reddin, contra. The plea of nulla bona goes only to the existence of the debt; an assignment does not show the debt is not due, and therefore should be pleaded specially. It admits the debt to be due at law, and is only a kind of equitable defence which the plaintiff, who had no notice of the assignment, did not come prepared to answer upon the issue of nulla bona. 1 Chit. Pl. 408. In the case from 3 Bin. 400, there was no question as to the form of the plea. In the case from 1 Har. & J. 536, the note

[1] [Reported by Hon. William Cranch, Chief Judge.]

was negotiable so that there was no debt to the defendant after his indorsement; and in the case from 5 Har. & J. 478, the assignment transferred the legal title, as well as the equitable. The plaintiff claims equal equity with that of the assignee, and has a legal remedy against a legal debtor of his debtor. A lien must be pleaded. Clarke v. Hougham, 9 Serg. & Lowb. 42, [9 E. C. L. 73;] 2 Esp. N. P. 536.

Mr. Marbury, in reply. In Pennsylvania a common promissory note, payable to order, is not negotiable. U. S. v. Vaughan, 3 Bin. 394. An assignment need not be a transfer of the legal right of action to enable the garnishee to plead nulla bona.

The COURT (CRANCH, Chief Judge, contra,) refused to grant a new trial.

BAKER, (NEW JERSEY MUT. LIFE INS. CO. v.) See Case No. 10,165.

BAKER, The OLIVE. See Case No. 10,489.

Case No. 776.

BAKER v. PETERSON.

[4 Dill. 562, note.][1]

Circuit Court, D. Iowa. 1877.

REMOVAL OF SUIT UNDER ACT OF MARCH 3, 1875—TIME IN WHICH APPLICATION MUST BE MADE TO REMOVE SUITS PENDING WHEN THAT ACT TOOK EFFECT—INFORMAL BOND HELD SUFFICIENT.

1. Where, in a suit pending in a state court at the time of the passage of the act of March 3, 1875, [18 Stat. 470,] the non-resident plaintiff applied to the state court, at the first term after that act went into effect, for its removal, and his petition showed a case proper for removal, and his bond, with sureties, was accepted by the state court, and the removal ordered to the circuit court, in which latter court a copy of the record in the suit was duly filed by the plaintiff and his appearance entered as required —on a motion by defendant to remand the cause to the state court: *Held*, that the petition for the removal was in time, being filed before the trial and at the first term after the passage of the act of March 3, 1875.

[Cited in Meyer v. Delaware, etc., R. Co., 100 U. S. 473.]

2. *Held*, that, although the condition of the bond for the removal was in conformity with the act of July 27, 1866, [14 Stat. 306,] and omitted the condition required by the act of March 3, 1875, as to paying costs that may be awarded by the circuit court for a wrongful or improper removal thereto, yet, as the case was one proper for removal, and the bond had been accepted by the state court, and the record was filed and the appearance of the plaintiff in the circuit court entered in time, the omitted clause in the condition of the bond was not sufficient ground for remanding the suit to the state court.

Charles A. Clarke, for the motion.
Wright, Gatch & Wright, opposed.

PER CURIAM. Heard before DILLON, Circuit Judge, and LOVE, District Judge.

[Note. Nowhere more fully reported. This case, as here reprinted, was originally published in 4 Dill. 562, as a note to Atlee v. Potter, Case No. 636.]

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

Case No. 777.

BAKER et al. v. PORTLAND.

[5 Sawy. 566;[1] 20 Alb. Law J. 206; 8 Reporter, 392; 4 Cin. Law Bul. 620; 11 Chi. Leg. News, 375; 25 Int. Rev. Rec. 321; 3 Pac. Coast Law J. 469.]

Circuit Court, D. Oregon. July 21, 1879.

CHINESE — RESIDENCE — TREATY — POWERS OF A STATE — LEGISLATIVE ACT IN CONFLICT WITH TREATY — MULTIFARIOUSNESS — CONTRACTORS—REMEDY AT LAW.

1. The right to reside in a foreign country implies the right to labor there for a living.

[Cited in Re Parrott, 1 Fed. 507.]

[See In re Ah Chong, 2 Fed. 733, and In re Quong Woo, 13 Fed. 229.]

2. A state has no power to interfere with or in any way limit the operation of a treaty of the United States.

[Cited in Re Parrott, 1 Fed. 517.]

[See Gibbons v. Ogden, 9 Wheat. (22 U. S.) 211; Henderson v. Mayor of New York, 92 U. S. 272.]

3. If it be admitted that a state has the general power to say who it will employ, or who its contractors shall employ, still the state being a member of the Union, and subordinate in the exercise of its general powers to the constitution of the United States and the laws and treaties made in pursuance thereof, it cannot exercise this power in any case where it conflicts with the operation of such constitution, laws or treaties.

4. A legislative act of the state of Oregon, which prohibits the employment by contractors of Chinese upon street improvements or public works, but permits all other aliens to be so employed, is in conflict with the treaty between the United States and the emperor of China, which secures to the Chinese, resident here, the same right to be employed and labor for a living as the subjects of any other nation, and is therefore void.

5. Parties having distinct claims against the same defendant cannot maintain a suit in equity thereon, jointly; and a bill containing two or more such claims is multifarious.

6. Any number of persons who may from time to time be engaged in making street improvements under several and distinct contracts with the city are not therefore a class of persons having a common interest in the subject of street improvements concerning which any one or more may sue for the whole.

7. A party threatened with proceedings under a void act has an adequate remedy at law.

[In equity. Suit by Perry Baker and others to enjoin the city of Portland from enforcing a state law prohibiting the employment of Chinese laborers for certain purposes. Defendant demurs. Demurrer sustained.]

James G. Chapman, for complainants.

F. O. McCown and Julius C. Moreland, for defendant.

DEADY, District Judge. This suit is brought to injoin the city of Portland from enforcing an act of the legislature, approved October 16, 1872, (Sess. Laws, p. 9,) entitled "An act to prohibit the employment

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 8 Reporter contains partial report only.]

of Chinese laborers on the improvement of streets and public works in this state." It provides, that "It shall be unlawful to employ any Chinese laborers on any street, or part of street, of any city or incorporated town of this state, or on any public works or public improvement of any character, except as a punishment for crime, and all contracts which any person or corporation may have for the improvement of any such street, or part of street, or public works or improvements of any character, shall be null and void from and after the date of any employment of any Chinese laborers thereon by the contractor."

The bill alleges that the complainants "are residents, citizens, property holders and taxpayers" of Portland, and now are and have been for many years engaged in the business of contracting for and making street improvements therein; that the defendant by its mayor and common council now require the complainants and other contractors to give bonds not to employ any Chinese labor upon such improvements, and threatens to refuse payment to any contractor and declare him delinquent who shall do so; that the said act of the legislature and the acts of the defendant thereunder are contrary to the constitution and laws of the United States and its treaty with the Ta-Tsing empire and contrary to the rights of "the complainants and other property holders, residents, citizens and taxpayers" of Portland and "the contractors and bidders upon the street improvements and other public works of the defendant; that the work upon the streets of the defendant is required by law to be let to the lowest responsible bidder, and that the defendant has contracted for and is about to contract for upwards of fifty thousand dollars worth of work upon its streets to be done this season, and has required, and declares that it will in all cases require contractors and bidders to give bond not to employ Chinese labor upon such work; that "said acts of the defendant done and threatened are and will be an irreparable injury to the complainants and other contractors and bidders" upon the street improvements of Portland and "to other residents, citizens, property holders and taxpayers" of the same, of many thousands of dollars; that "the injury to the complainants in the completion of their several contracts with defendant, already entered into for street improvements," by reason of being compelled to give bond as aforesaid, and "the threats and declarations of defendant to prohibit the employment of Chinese laborers upon its street improvements" by the means aforesaid "will amount to upwards of one thousand dollars."

Upon reading and filing the bill—July 7—an order was made that the defendant show cause why a provisional injunction should not issue as prayed for. The defendant showed cause by demurring to the bill which on July 14 was argued by counsel.

The demurrer sets up: 1. That this court has no jurisdiction to grant the relief prayed for; 2. That the bill is without equity; 3. That the complainants have no privity of interest, and are therefore improperly joined as parties; and, 4. That complainants have "a full and complete remedy at law."

As to the want of jurisdiction, it is claimed that it does not appear that the matter in dispute exceeds the sum of five hundred dollars, but on the hearing it was tacitly admitted that otherwise this was a case of federal cognizance, because arising under a treaty made by authority of the United States—namely, the treaty of June 18, 1858, [12 Stat. 1023,] and the additional articles thereto of July 28, 1868, [16 Stat. 739,] between the United States and the emperor of China.

Article 5 of said additional articles declares that the two high contracting parties "cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other, for the purpose of curiosity, of trade, or as permanent residents," while article 6 of the same declares that "Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may be then enjoyed by the citizens or subjects of the most favored nation," and that citizens of the United States visiting or residing in China shall enjoy there the same privileges, etc. Public Treaties U. S. 148.

This treaty, until it is abrogated or modified by the political department of the government, is the supreme law of the land, and the courts are bound to enforce it fully and fairly. An honorable man keeps his word under all circumstances, and an honorable nation abides by its treaty obligations, even to its own disadvantage.

The state cannot legislate so as to interfere with the operation of this treaty or limit or deny the privileges or immunities guaranteed by it to the Chinese residents in this country. As was said by Mr. Justice Field in the "queue ordinance case," lately decided in the circuit court for the district of California, [Ho Ah Kow v. Nunan, Case No. 6,546,] to the national government "belong exclusively the treaty-making power and the power to regulate commerce with foreign nations, which includes intercourse as well as traffic. * * * That government alone can determine what aliens shall be permitted to land within the United States and upon what conditions they shall be permitted to remain."

It will be observed that the treaty recognizes the right of the Chinese to change their home and allegiance and to visit this country and become permanent residents thereof, and as such residents it guarantees to them

all the privileges and immunities that may be enjoyed here by the citizens or subjects of any nation. Therefore, if the state can restrain and limit the Chinese in their labor and pursuits within its limits, it may do the same by the subjects of Great Britain, France, or Germany.

True, this act does not undertake to exclude the Chinese from all kinds and fields of employment. But if the state, notwithstanding the treaty, may prevent the Chinese or the subjects of Great Britain from working upon street improvements and public works, it is not apparent why it may not prevent them from engaging in any kind of employment or working at any kind of labor.

Nor can it be said with any show of reason or fairness that the treaty does not contemplate that the Chinese shall have the right to labor while in the United States. It impliedly recognizes their right to make this country their home, and expressly permits them to become permanent residents here; and this necessarily implies the right to live and to labor for a living. It is difficult to conceive a grosser case of keeping the word of promise to the ear and breaking it to the hope than to invite Chinese to become permanent residents of this country upon a direct pledge that they shall enjoy all the privileges here of the most favored nation, and then to deliberately prevent them from earning a living, and thus make the proffered right of residence a mere mockery and deceit. In Chapman v. Toy Long, [Case No. 2,610,] this court, in considering these provisions of this treaty, said: "The right to reside in the country, with the same privileges as the subjects of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subjects of these powers."

Whether it is best that the Chinese or other peoples should be allowed to come to this country without limit and engage in its industrial pursuits without restraint is a serious question, but one which belongs solely to the national government. Upon it there has always been a difference of opinion, and probably will be for years to come.

But so far as this court and the case before it is concerned, the treaty furnishes the law, and with that treaty no state or municipal corporation thereof can interfere. Admit the wedge of state interference ever so little, and there is nothing to prevent its being driven home and destroying the treaty and overriding the treaty-making power altogether. But it is not necessary to consider further this feature of the case, because this demurrer must be sustained upon other grounds.

These complainants cannot jointly maintain this suit. There is no privity of interest between them. They are neither partners nor co-contractors. If either has a cause of suit it is on account of his separate contract with the city concerning the improvement of distinct streets or parts thereof. They have no common interest in the subject or object of the suit, but assert distinct and several claims against the defendant growing out of distinct and several contracts and matters relating thereto. The complainants are misjoined and the bill is so far multifarious. Yeaton v. Lenox, 8 Pet. [33 U. S.] 126; West v. Randall, [Case No. 17,424;] Story, Eq. Pl. §§ 279, 283, 544.

On the argument of the demurrer it was sought to be maintained that the complainants and other persons not named therein, who, like the complainants, are engaged in taking and performing contracts for the improvement of streets, constitute a class, called contractors, who therefore have a common interest in the subject of this suit, and that such being the case a bill may be maintained by one or more for the benefit of the whole, as in the case of a creditor's bill or a bill by the part of a crew of a privateer against prize agents for an account.

But there is no analogy between these cases and the one under consideration. All persons engaged in making street improvements, may have an interest in the questions involved in this litigation, but they have no interest in the object of this or any suit to enjoin the defendant from enforcing the act against Chinese labor, unless they are actual and proper parties to it. Persons engaged in making street improvements under several and distinct contracts with the city, are not, therefore, a class of persons having a common interest in the subject of street improvements, concerning which any one or more may sue for the whole. Story, Eq. Pl. § 97 et seq.; Adams, Eq. § 319.

Neither does it appear that the matter in dispute here exceeds in value the sum of five hundred dollars. The matter in dispute is the alleged right of the complainants to perform the two several contracts which they have taken for the improvement of the streets without being prohibited from employing Chinese labor. The injury which they may sustain by reason of the act being enforced against them is the only practical test of the value of the matter in dispute. The bill alleges that this will be more than one thousand dollars; but the allegation is vague and uncertain, and the estimate appears to include not only the loss which may arise upon the contracts which the complainants now have, but others which they may hereafter undertake.

Again, it is easy to see how the Chinese who are excluded from a certain field of labor by this act, and the property holders who, notwithstanding the pretense in the emergency clause, that it was made for their benefit, are thereby compelled to pay the increased cost of improving the streets adjoining their property are injured by the operation of it, but the case of the contractor is different. If, as is assumed, the exclusion of Chinese labor increases the cost of the

work, then presumably the contractor gets more for doing it. No one is bound to take a contract to improve the streets; and it being understood when the contract is let that Chinese labor shall not be employed, the reasonable inference is that parties make their bids accordingly.

The demurrer is sustained, and the restraining order vacated.

On a rehearing of this case before Mr. Justice FIELD, and DEADY, District Judge, on August 21, 1879, the decree sustaining the demurrer was affirmed, and the bill dismissed. In delivering the oral opinion of the court, Mr. Justice FIELD, in substance, said:

I agree with the ruling of the district judge in sustaining the demurrer to this bill; and for the additional reason that the plaintiffs have an adequate remedy at law. Assuming that the act in question is invalid, because in conflict with our treaty with the emperor of China, then the plaintiffs, as bidders or contractors, may disregard it, and if the city refuses to give them contracts to which they are otherwise entitled, or to pay them for contracts performed with the aid of Chinese labor, they may sue the city at law, either to compel the municipal authorities to give them the contracts to which they are entitled, or to pay them for those they have performed.

NOTE, [from original report.] It is said that the state has the same right as an individual to say who it will employ. This proposition assumes that the state is the employer of persons who work upon street improvements. But this is denied upon the ground that the owner of the property being compelled to pay for the improvement is the real employer, and that the state only interferes to compel the owner to make the improvement, and to secure uniformity in the character and time of doing the same.

But admitting, for the present, that the state has such a general right, and further that it is the employer of persons who work upon street improvements under contractors, yet the state, being a member of the Union, and subordinate to the constitution, laws and treaties of the United States, in the exercise of its powers, it may be restricted in the exercise of this right in particular instances, by the operation of such constitution, laws or treaties. For instance, the state has the general power of taxation, but as a member of the Union it is restrained in the exercise of this power by the operation of the constitution and laws of the United States, so that it is in effect prohibited from taxing articles of great value, the property of its citizens, because the same are also the agencies or means by which the national government exercises its comparatively supreme powers. The bonds and notes of the United States, issued by it in pursuance of its power to borrow money, are instances in point.

Therefore, if the state cannot exercise this general right to say who it will employ in this class of cases without coming in conflict with the operation of the treaty, then it is virtually prohibited from so doing. This treaty having guaranteed to the Chinese the right to reside here permanently with the same privileges and immunities as the subjects of Great Britain, Germany and France, which certainly includes the right to labor for a living, if it includes anything, the state cannot, in the exercise of any of its admitted general powers, limit or deny this right.

If this act had provided that no alien should be employed on street improvements or public works it might be said that it did not discriminate against Chinese and was therefore not obnoxious to the charge of infringing the treaty. But as it is, the act in effect denies the Chinese the privilege of laboring for a living in a field where it permits all other aliens to be employed without restriction, and thus so far denies to them the privileges and immunities enjoyed by the subjects of other nations, which is directly contrary to the treaty.

The only legal remedy for the evils, real or fancied, of Chinese or other immigration, is by an appeal to the national government, in whom the power over the subject is exclusively vested. But the fact is, the anti-Chinese legislation of the Pacific coast is but a poorly disguised attempt on the part of the state to evade and set aside the treaty with China, and thereby nullify an act of the national government. Between this and "the firing on Fort Sumter," by South Carolina, there is the difference of the direct and indirect—and nothing more. M. P. D.

Case No. 778.

BAKER v. The POTOMAC.

[18 How. Pr. 185;[1] 41 Hunt, Mer. Mag. 711.]

Circuit Court, D. New York. Oct. 1859.

APPEAL—WEIGHT OF EVIDENCE.

This court, on appeal, upon a question of fact which has been established in the usual way, and with reasonable satisfaction, before the commissioner, will not disturb the decree of affirmance of the court below, where the rebutting proof is very general and indefinite.

[Appeal from the district court of the United States for the southern district of New York.]

[In admiralty. Libel by Elisha Baker against the ship Potomac for repairs and for materials furnished. Decree for libelant. Respondent appeals. Affirmed.]

Benedict, Burr & Benedict, for libelant.

Beebe, Dean & Donohue, for respondent.

NELSON, Circuit Judge. The only question in this case arises on the report of the commissioner in the court below, in respect to the amount of repairs made, and materials furnished, to the ship Potomac. The court below placed its decision upon a defect in the exceptions taken to the report, as relating either to matters settled in the decree and not before the commissioner, or not sufficiently specific and pointed to raise the objection. I am inclined to think the court right in both grounds stated. But, independently of this answer, I have looked into the evidence before the commissioner, without regard to formal objections, and am satisfied that the weight of it sustains the report; at least the evidence furnished on the part of the respondent, tending to reduce the amount and value of the repairs,

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

and to change the terms upon which they were made, is so questionable, that we are not disposed to interfere with the report, as the witnesses were personally before the officer making it, and who had a better opportunity to determine the degree of credibility to be given them than we can have. The extent and cost of the repairs seem to have been established in the usual way, and with reasonable satisfaction, and the rebutting proof is very general and indefinite. Decree below affirmed.

Case No. 779.

BAKER v. REDFIELD.

[See Boker v. Redfield, Case No. 1,606a.]

BAKER, (REYNOLDS v.) See Case No. 11,727.

Case No. 780.

BAKER v. ROOT.

[4 McLean, 572.] [1]

Circuit Court, D. Michigan. June Term, 1849.

LANDLORD AND TENANT — HOLDING OVER — MUST BE AT SAME RENT — TRUSTS — LIABILITY OF TRUSTEE — MISAPPROPRIATION OF TRUST FUNDS.

1. A person having occupied a certain tenement under a written lease, at a certain rent, remained in possession sometime after the expiration of the lease—*held*, that he was bound to pay the same rent, as under the written lease.

2. Where property is received in trust, and the trustee sells it and receives the consideration and appropriates it, he is liable, [in assumpsit,] the same as an agent, should the sale not be objected to.

At law.

Mr. Seaman, for plaintiff.

Mr. Howard, for defendant.

OPINION OF THE COURT. This is an action of assumpsit. In consideration of two thousand dollars received by the defendant, he agreed to save the plaintiff harmless from all liability, as one of the firm of Root & Co. Also, to pay rent for his house and lot in Cold Water, one hundred dollars a year for two years, commencing 1st May, 1840; also to take proper care to remove the said Baker's store house, etc., to fit it up, said Baker paying for removing and fitting up, and rent of store $75 a year. And Root guarantied the payment by Hanchett of a note for $253, if suit should be brought upon it by 1st April, 1840. Root stated to one of the witnesses that Hanchett, the partner of Baker, proposed that he should take a lot in the village of Cold Water, with the house thereon, to apply on the judgment against Baker & Hanchett, and also upon a demand in favor of Root against Hanchett for $150. This was agreed to, and the lot was conveyed to Root. Root was to discharge Hanchett from his own debt, and discharge the judgment against Baker, or indemnify him against it. Root held the property until he sold it to Cooley, for barrels which were used by Root in his business.

The court charged the jury, that the plaintiff claimed a right of recovery on two grounds. 1. For rent for the house, $100 per annum, and for the store $75 per annum. The store was removed by Root, for which he had been credited $75. The premises were occupied some years after the written lease expired. And it is contended that the plaintiff can only recover for these years what the premises were worth. But, the court instructed the jury, that the defendant having occupied the premises under a written lease for a fixed price, and remaining on them after the expiration of the lease, without any other agreement, the same rent must be paid. And that interest from the time rent was due may be given by the jury. That the action was not on the guaranty, which is only referred to to show the nature of the transaction.

The plaintiff claims, as the second ground of recovery, the amount of the judgment on the note, which defendant agreed to pay on the purchase of the house and lot in Cold Water. The plaintiff also claimed the right to recover this amount against the defendant, if the house and lot were received by Root on trust, as he sold it for barrels which he afterwards sold for cash, and this it is contended makes him responsible on a general count for money had and received. And also, on the common count, if the jury should find that Root received the house and lot and promised to pay the judgment. And the court so instructed the jury.

The jury found for the plaintiff. Judgment.

BAKER, (SCHAUM v.) See Case No. 12,440.

BAKER, (SIMMS v.) See Case No. 12,868.

BAKER, (SMITH v.) See Case No. 13,010.

Case No. 781.

BAKER et al. v. SMITH et al., (two cases.)

[1 Holmes, 85.] [1]

Circuit Court, D. Massachusetts. Jan., 1872.

APPEAL — REVIEW — WEIGHT OF EVIDENCE — DISPUTED QUESTION OF FACT.

On an appeal from a decree of the district court, based wholly upon its finding on a disputed question of fact, the burden is on the appellant to show affirmatively a mistake in the finding. The decree will not be reversed where the evidence is such as merely to raise a doubt in regard to the question of fact.

[Cited in The Maggie P., 25 Fed. 206.]

[See The Grafton, Case No. 5,655; The Sunswick, Id. 13,625; Taylor v. Harwood, Id. 13,794.]

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

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

Admiralty appeals from [unreported] decrees of the district court of [the United States for the district of] Massachusetts in cases of cross-libels for damages caused by a collision between the schooners Nellie Doe and Trade Wind. The only question in the cases was whether or not the Trade Wind had a proper light at the time of the collision.

T. M. Stetson for appellants.
Marston & Crapo, for appellees.

SHEPLEY, Circuit Judge. These cases, which were heard and tried together, are appeals from the decrees [unreported] of the district judge for the district of Massachusetts, sustaining the libel of the owners of the Trade Wind against the Nellie Doe, and dismissing, with costs, the libel of the owners of the Nellie Doe against the Trade Wind.

The cases, which grew out of a collision between the two vessels in Vineyard sound, about three miles northerly of Cape Pogue, present, for the consideration of the court, questions purely of fact. In cases of this description there is usually great discrepancy and conflict in the testimony of the witnesses; and where the decision of the district judge is based entirely upon his finding upon a disputed question of fact, and no error is alleged in his application of the law to the facts, parties can hardly expect this court to reverse such a decree, merely by raising a doubt founded on the number or credibility of the witnesses. The appellant, in such a case, has all the presumptions against him, and the burden of proof cast on him affirmatively to show some mistake, made by the judge below, in the law or the evidence. It will not do to show that on one theory, supported by some witnesses, a different decree might have been rendered, provided there be sufficient evidence, to be found in the record, to establish the one that was rendered. The Marcellus, 1 Black, [66 U. S.] 417.

On the twenty-first day of January, 1868, the schooner Trade Wind was lying at anchor in the Vineyard sound, two or three miles north-east by east from Cape Pogue. There was a fresh wind from east to north-east. The weather was cloudy or misty, and there had been some snow-squalls. But it was not foggy, nor was the air so obscured that a vessel's light could not have been seen at a considerable distance, and, by a proper lookout, at a sufficient distance to have avoided a collision. The Trade Wind does not appear to have been anchored in an unusual place, or moored in an unusual manner. She was anchored in a "fairway," under circumstances in which she was bound "to exhibit, between sunset and sunrise, where it could best be seen, at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon, and at a distance of at least one mile," as provided in art. 7 of the act of April 29, 1864, (4 Stat. 259).

The schooner Nellie Doe had been at anchor in the early part of the night off Chatham. She had got under way, and was running for Holmes Hole, with the wind free, with mainsail, foresail, and two jibs set; and about about half-past three in the morning, sailing in a westerly direction up the sound, she ran into the Trade Wind, and both vessels were damaged.

The only negligence on the part of the Trade Wind specifically charged in the answer of the claimants of the Nellie Doe is in the allegation that the Trade Wind was "at anchor in the frequented track of vessels, without showing any signals, lights, or any mode whatever of notifying her presence to vessels on their course, and totally invisible to and unseen by the officers and crew of the Nellie Doe."

If the proof sustains this allegation, then the Trade Wind was in fault.

The master, mate, and one seaman, on board the Trade Wind, testify affirmatively and positively that there was a white light in the starboard fore-rigging, about fifteen or twenty feet above the deck; that it was a globe lantern, such as is generally used for a signal lantern on vessels of that class, and that it was burning brightly at the time of the collision; and the testimony of Sylvia, a Portuguese sailor on the Trade Wind, who was examined on other points in behalf of the Nellie Doe, tends to confirm the testimony of the three other witnesses, so far as the light is concerned.

Five witnesses from the Nellie Doe testify that they did not see a light on the Trade Wind, and most of them are quite positive that if there had been a light burning they could have seen it. And it is quite clear from all the testimony in the case that the light, if brightly burning, could have been seen that night at a distance of at least a mile, by persons who were looking for a light. But, taking into consideration the affirmative character of the testimony on the one side, and the merely negative character of the testimony on the other, after a careful review of all the testimony, and taking into consideration all the attending circumstances,—the relative position of the two vessels, the position of the sails of the Nellie Doe, the direction from the vessels of the West Chop Light,—it seems not difficult to explain the apparent contradiction in the testimony, by the fact that the light of the Trade Wind was obscured from the lookout on the Nellie Doe by the intervention of the sails of the Nellie Doe at a time when the eyes of those on board the Nellie Doe were so intently strained in looking in a different direction for the West Chop Light, that they failed to discover the light of the Trade

Wind, which they might readily have done had they been looking in that direction.

Although the evidence on this point cannot be fairly considered as of a character not likely to raise a doubt in relation to the facts so affirmatively and positively testified to by the witnesses from the Trade Wind, yet it cannot be considered as affirmatively showing that there was any mistake in the finding of the district judge upon this question of fact. On the other hand, the preponderance of the evidence seems to sustain the decree of the court below. Decree affirmed, with costs.

BAKER, (STUDLEY v.) See Case No. 13,559.

BAKER, (SUNDERLAND v.) See Case No. 13,617.

Case No. 782.

BAKER et al. v. TAYLOR.

[2 Blatchf. 82.] [1]

Circuit Court, S. D. New York. March 20, 1848.

COPY-RIGHT—TITLE TO—CONDITIONS PRECEDENT—EFFECT OF MISTAKE—PUBLICATION.

1. Under the copy-right act of February 3d, 1831, (4 Stat. 436,) the deposit of the title-page in the proper clerk's office, the publication of notice according to the act, and the delivery of a copy of the book, are indispensable conditions precedent to a title to a copy-right.

[Cited in Boucicault v. Hart, Case No. 1,692; Parkinson v. Laselle, Id. 10,762. Distinguished in Myers v. Callaghan, 5 Fed. 730.]

[See Boucicault v. Wood, Case No. 1,693; Struve v. Schwedler, Id. 13,551.]

2. Where the title-page of a book was deposited in 1846, and the notice of the entry, as printed in the copies of the book, stated the entry to have been made in 1847: *Held* that, under section 5 of the act, the error was fatal to the title.

[Cited in Donnelley v. Ivers, 18 Fed. 594; Schumacher v. Wogram, 35 Fed. 211. Distinguished in Farmer v. Calvert Lithographing, etc., Co., Case No. 4,651; Myers v. Callaghan, 5 Fed. 730.]

3. Whether the error arose from mistake or not, makes no difference.

4. A sale of a book naturally imports publication, and the presumption is that the purchaser exercised his right to know the contents of the book and to make them known to others, and that an actual publication followed the sale.

[Cited in Parton v. Prang, Case No. 10,784.]

5. Hence, where copies of a book were sold prior to the date of the deposit of a copy of the title-page: *Held*, that such sale was evidence of a publication of the book at the time of the sale.

[Cited in Parton v. Prang, Case No. 10,784. Distinguished in Farmer v. Calvert Lithographing, etc., Co., Id. 4,651.]

6. And, where a printed copy of the book, then complete, was deposited in the clerk's office at the same time the title-page was deposited there: *Held*, that these facts, in connection with the fact of such prior sale, warranted the inference of an actual publication of the book prior to the date of such deposit.

[Cited in Daly v. Brady, 39 Fed. 266.]

7. Under section 4 of the act, a person is not entitled to the benefit of a copy-right, unless he deposits the title-page before the publication of the book.

[See Struve v. Schwedler, Case No. 13,551.]

[8. On motion to enjoin an infringement of copyright, the affidavit of defendant is competent evidence against the oath of the plaintiffs to the bill.]

In equity. This was an application [by Isaac D. Baker and Charles Scribner against John S. Taylor] for a provisional injunction to restrain the defendant from infringing an alleged copy-right of the plaintiffs to a book entitled "The Sacred Mountains, by J. T. Headley, author of 'Napoleon and his Marshals, etc.: Illustrated." The bill alleged, that the plaintiffs, being sole owners of the said work, which was composed and written by said Headley, but had not then been published, on the 10th of November, 1846, deposited in the office of the clerk of the district court for the southern district of New York, a printed copy of the title-page of the book, and on the same day delivered to the said clerk a printed copy of the book itself; and that, previous to its publication, they caused to be printed on the page immediately following the title-page, in each copy published: "Entered according to the act of congress, in the year 1847, by Baker & Scribner, in the clerk's office of the district court of the southern district of New York." The bill alleged that the year 1847 was printed by mistake for 1846.

The defendant opposed the application, on an affidavit of his own, stating that, at the time the title of the book was deposited, he was a clerk of the plaintiffs, and made known to them the said error in the imprint before the book was published, but that they declined having it corrected; and that he personally knew that the plaintiffs, by themselves and their clerks, sold divers copies of the book prior to the 10th of November, 1846. [Injunction refused.]

Seth P. Staples, for plaintiffs.

Hiram P. Hastings, for defendant.

BETTS, District Judge. The act of congress, entitled "An act to amend the several acts respecting copyrights," passed February 3d, 1831, (4 Stat. 436,) embodies the provisions of the acts of May 31st, 1790, and of April 29th, 1802, on the subject, and imposes on persons claiming the privilege of a copy-right the same duties and liabilities which attended the right under the prior statutes. It is quite useless to go into the general learning appertaining to the subject, or to state at large the decisions rendered in Great Britain under the English statutes. The supreme court of the United States, in the case of Wheaton v. Peters, 8 Pet. [33 U. S.] 591, has given an exposition of our statutes, which is obligatory on this court, and essen-

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

tially covers the main question raised on this motion. The principle declared by that decision is, that under the laws of the United States a copy-right title is not perfected without a strict compliance with the provisions of the statute. Those requirements which, in England, are generally regarded as directory, and not as conditions precedent to title, (1 Daniell, Ch. Pr. 419; Curt. Copyr. 198, 205; Gods. Pat. 211,) are, under our laws, important and indispensable pre-requisites to a perfect title. Depositing the title-page in the proper clerk's office, publishing a notice according to the act, and delivering a copy of the book, are held to be conditions, the performance of which is essential to the title. On that authority, I think the point is placed beyond question, that the failure, in the present case, to publish the notice demanded by the act, in the manner directed, creates a fatal defect in the plaintiffs' title. Even though the failure to publish the statutory notice arose from mistake, this court would have no power to accept the intention of the party, in place of a performance, any more in respect to the insertion of that notice on the proper page, than in respect to the deposit of the title of the book.

But there was no mistake in this case. The plaintiffs knew of the error before the book was published. They, however, regarded it as trivial, and not worth the expense and trouble of correction. But congress, in the 5th section of the act of 1831, have seen fit to make the copy-right dependent upon the particular act of giving the notice, and, to mark its importance, the statute sets forth the words in which the notice shall be given. The direction must be strictly complied with.

The affidavit of the defendant, which, on a motion for an injunction, is competent evidence against the oath of the plaintiffs to the bill, proves sales of the work by the plaintiffs prior to the 10th of November, 1846, when the title of the book was deposited. It is argued for the plaintiffs that these alleged sales were only consignments of the work in advance of the publication, and that publication, by putting the book in circulation, was not made until after the date of the deposit of the title. There is no proof to support this version of the facts. A sale naturally imports publication. The purchaser having the right to know the contents of the book, and make them known to others, no presumption can be raised that the right was not exercised, or that an actual publication did not follow the sale. On the contrary, the presumption is the other way. And the inference is strong, that actual publication was made, as sworn to by the defendant, anterior to the 10th of November, from the fact that a printed copy of the work, then complete, was on that day deposited in the clerk's office, the deposit of the book, complete for circulation, and the deposit of the title being simultaneous acts. The 4th section of the act, in express words, denies all benefit to a person, under the act, unless he shall, before the publication of his work, deposit the title-page, &c.

The plaintiffs have failed to show themselves entitled to the injunction prayed for.

Case No. 783.

BAKER et al. v. The TROS.

[31 Leg. Int. 133;[1] 10 Phila. 223; 21 Pittsb. Leg. J. 116.]

Circuit Court, E. D. Pennsylvania. 1874.

SALVAGE—CONTRACT WITH WRECKING COMPANY—RIGHTS IN REM OF ASSISTANT OF CONTRACTOR.

Where salvage services are performed merely by the permission of another wrecking company, which had possession of the vessel, and which services were rendered with the understanding that the wrecking company, and not the vessel, was to be responsible. *Held*, that the vessel is not liable for such salvage services.

[See The Marquette, Case No. 9,101; The Silver Spray, Id. 12,857; The Whitaker, Id. 17,524, Id. 17,525.]

Appeal from the decree of the district court [of the United States for the eastern district of Pennsylvania.]

[In admiralty. Libel by B. & J. Baker & Co. against the ship Tros for salvage. Libel dismissed.]

Samuel C. Perkins, for libellants.
Henry Flanders, for respondents.

Opinion by McKENNAN, Circuit Judge. The only question, which it is necessary to consider in this case, relates to the right of the libellants to resort to the vessel and her cargo for compensation for the salvage services rendered by them. That they did render valuable services is not denied, nor is the amount claimed for them contested by the respondent; but it is maintained that their services were performed exclusively upon the footing of an engagement by a salvor, who was employed by the master of the vessel, and that, therefore, they have no remedy against the respondent.

The ship was a Norwegian vessel, and on her voyage from Marseilles to Philadelphia, with a cargo of iron, went ashore at Watchapique inlet, on the coast of Virginia, on the 6th of February, 1873. The master left the vessel on the 10th of February, and repaired to Philadelphia, to make arrangements for getting her afloat, instructing the mate, if any aid was offered during his absence, to decline it. On the twelfth the libellants' steamer, "B. & J. Baker," arrived at the vessel and proffered assistance, but the mate declined it, informing her captain of his master's instructions. The following day, during a gale, a signal of distress was set on the "Tros," in answer to which a boat was sent from the B. and J. Baker, and the crew of the "Tros" were taken off. On the next

[1] [Reprinted from 31 Leg. Int. 133, by permission.]

day, the 14th, the officers of the libellants' steamer put a steam-pump on board the "Tros," stating, in reply to an inquiry of the mate, "that if it was not wanted they could take it back again." The master of the "Tros," having made an agreement with the Coast Wrecking Company of New York, for the salvage of his vessel, that company's steamer Lackawanna reached her on the morning of the 15th, when she was given in charge to the steamer's officers, and they went to work to extricate her. "On the evening of the 15th, Capt. Stoddart of the firm of B. & J. Baker & Co., of New York, arrived at the 'Tros,' when G. W. Chadwick, the officer in charge of the Lackawanna, told him that he was then in charge of the 'Tros;' that Captain Stoddart asked permission to furnish aid in getting her off; that he at first declined to make any use of his force or material, but finally, at the solicitation of said Stoddart, he agreed to employ his lighters, steam-pump, and some of his men, fully explaining to said Stoddart that he employed such force and material as the agent of the Coast Wrecking Company of New York; that he was to be paid by said company according to the usual rates of said company, and was to have no claim whatever upon the ship." The facts embodied in this compendious statement of the proofs are supported by the uncontradicted testimony of the witnesses. Their import is free from all ambiguity. They establish

1. That the services of the libellants were declined by the officer in charge of the respondent's vessel.

2. That an agreement was made by the master of the respondent vessel with the Coast Wrecking Company of New York for the salvage of the vessel and her cargo, and that possession of her was surrendered to that company for that purpose.

And 3. That the libellants' services were performed only by the permission of the Coast Wrecking Company, and under its direction, with distinct notice that it was to be responsible for their compensation, and not the vessel. Upon what principle or reason then can the vessel be held liable? It is argued that its liability results from the fact that the libellants were the first to render assistance. But this extended only to the relief of the crew, without any contemplated further service. However meritorious it may have been, the saving of human life does not constitute an independent ground of salvage compensation. When it is characterized by great hazard to the salvor, and is accompanied by the preservation of property, it will doubtless enhance the allowance of remuneration for the latter service, but it is only a service of humanity, the value of which is incomputable by any measure of pecuniary recompense.

Certainly no other assistance was rendered before the arrival of the Lackawanna. It is true that before her arrival they had placed on board the "Tros" a steam-pump, but no use whatever had been made of it. Whatever priority they might have acquired, under other circumstances, by their proximity to the vessel, and their readiness to afford assistance, they did not assume any charge of her, or perform any actual service for her relief. She was not derelict, nor does she appear to have been in a condition of such imminent peril as to require immediate efforts to save her, or to warrant an intrusive interposition by the libellants. She was in the actual custody of an officer on board, and it pertained to him to determine whose assistance should be accepted. Against his will they could not entitle themselves to the character or reward of salvors, and their conduct repels any presumption that they sought to do so: The Dodge Healy, [Case No. 2,849.] Their only title to compensation, therefore, accrued by reason of the services performed after the vessel was put into the possession of the Coast Wrecking Co. The evidence in the cause determines the footing upon which these services were rendered. It seems to me to exclude any other conclusion than that the libellants were subordinate to the wrecking company, as its auxiliaries only, and that they accepted employment from it upon condition that it should be liable for their compensation, and not the vessel. By their own stipulation, therefore, the vessel is not their debtor, and their libel must be dismissed with costs.

BAKER, (UNITED STATES v.) See Cases Nos. 14,498–14,503.

Case No. 784.

BAKER et al. v. VASSE.

[1 Cranch, C. C. 194.][1]

Circuit Court, D. Columbia. Nov. Term, 1804.

BANKRUPTCY — PROVABLE CLAIMS — NOTE GIVEN BEFORE BANKRUPTCY BUT PAYABLE AFTER.

A note given before the bankruptcy of the maker, payable after and taken up by the payee (the indorser) before final certificate, may be proved under the commission.

[Cited in Re Perkins, Case No. 10,983.]

[See In re Broich, Case No. 1,921.]

At law. Assumpsit, upon a promissory note [by Baker and Comegyss against Ambrose Vasse.] The first count stated the note to have been given to the plaintiffs without valuable consideration, but to be indorsed by the plaintiffs to enable the defendant to raise money for his accommodation; that the plaintiffs indorsed it in blank; and that the note so indorsed was, in a regular course of mercantile negotiation, transferred, for a full and valuable consideration received by the defendant, to one Matthew Lawler; that when it became due the payment was demanded

[1] [Reported by Hon. William Cranch, Chief Judge.]

(but not stating by whom) and not being paid was protested, and notice was given to the plaintiffs whereby they became liable to pay; that the plaintiffs paid it on the 17th May, 1802, of which the defendant had notice, whereby he became liable to pay to the plaintiffs, and in consideration thereof promised to pay. The declaration also contained the usual money counts. The defendant pleaded, 1st, non assumpsit; 2d, a discharge under the bankrupt law; 3d, that the note was not drawn payable to plaintiffs, to be indorsed by them for the accommodation of defendant, to enable him to raise money for his own use.

The case was argued by Mr. C. Lee, for the plaintiffs, and Mr. Simms and Mr. E. J. Lee, for the defendant, and the question made was whether the note upon which this action was brought, could have been proved under the commission of bankruptcy against the defendant. KILTY, Chief Judge, and FITZHUGH, Circuit Judge, were of opinion that it could not. CRANCH, Circuit Judge, that it could; but the court intimated that they would reconsider the case; and a verdict was taken for the plaintiffs subject to the opinion of the court on a case to be stated. [Judgment for defendant.]

The case stated that on the 10th November, 1801, at Philadelphia, the defendant signed and delivered to the plaintiffs his note for $2,500, payable one hundred and twenty days after date; that the plaintiffs on the day of the date of the said note, indorsed the same for the accommodation of the defendant, and to enable the defendant to raise money upon it for his own use, and redelivered said note to the defendant; that at the time of indorsing and redelivering the said note, the plaintiffs received from the defendant his indorsement upon their note for a like amount, payable at the same time, for the accommodation of the plaintiffs, to enable them to raise money for their own use, which was the only consideration for the indorsement of the first-mentioned note; that plaintiffs paid the whole of each of said notes to the last indorsees before the commencement of this suit, to wit, on the 17th May, 1802, with the interest and charges of protest, on the first note which was paid to M. Lawler, an indorsee thereof, and they have never received payment of any part thereof from the defendant. That sometime in the year 1801, the defendant sold the first-mentioned note, (the cause of action in this suit,) and received the whole proceeds for his own use; that the amount of the note upon which this suit is brought was demanded of the plaintiffs on the day it became due, to wit, on the 13th of March, 1802; that on the 10th of February, 1802, the defendant committed an act of bankruptcy at Philadelphia, and a commission was duly issued against him upon that act, on the 13th of February; that on the 4th of May the commissioners granted their discharge to the defendant, and on the 28th of May he obtained a final certificate of discharge from the judge of the district court; that the debt due on the first-mentioned note was not proved under the commission of bankruptcy, the commissioners having refused to permit the same to be proved.

For the plaintiffs, it was contended, that they could not prove this note under the defendant's commission; that no debt was due to plaintiffs till they paid the note, and the payment was not made till the 17th of May; that a debt contracted after the act of bankruptcy will not support a commission, nor can it be proved under the commission. Bamford v. Burrell, 2 Bos. & P. 1. But that if the rule were otherwise its being an accommodation note would prevent its being proved. Howis v. Wiggins, 4 Term R. 714; Brooks v. Rogers, 1 H. Bl. 640; Cowley v. Dunlop, 7 Term. R. 565.

For the defendant. Mutual notes were given, and therefore this was not an accommodation note, but for valuable consideration. If such a consideration passed, the debt was contracted when the note was given. Notes payable at a future day, may be proved under a commission. Bankrupt Act, § 39, (2 Stat. 32;) Cooke, Bankr. Laws, 122, 123; Macarty v. Barrow, 2 Strange, 949, Ex parte Wardwell, [Chilton v. Whissin,] 3 Wils. 17. A surety in a bond may prove under the commission, and if he pay the debt after the bankruptcy of the principal he cannot recover against him. Toussaint v. Martinnant, 2 Term R. 100; Martin v. Court, Id. 640. Where a party is bound to pay at all events, as these plaintiffs were, he may prove under the commission, though the debt is payable in future. Hancock v. Entwisle, 3 Term R. 435. If the plaintiffs had the note before a final dividend, they might have proved. Cowley v. Dunlop, 7 Term R. 565. They are not prevented from proving, because it is an accommodation note. Staines v. Planck, 8 Term R. 389. From Cowley v. Dunlop, [7 Term R. 565,] it seems that Howis v. Wiggins, and Brooks v. Rogers, are of doubtful authority; but those cases differ from this, that there, there were not, as here, mutual accommodations. Mutual notes are good considerations for each other; they are not contingent, but actual debts solvenda in futuro. Rolfe v. Caslon, 2 H. Bl. 570; Vide, also, [Joy's Lessee v. Cossart,] 2 Dall. [2 U. S.] 127, where the plaintiff may prove under commission if he could maintain debt. Ex parte Thomas, 1 Atk. 73, where an indorsee proved a note indorsed after bankruptcy. Walton's Case, Id. 122, where an indorser was allowed to prove against the drawer's estate, a bill taken up after bankruptcy; and Span's Case, Green, Bankr. Law, 39, where a holder proved a bill against acceptor's estate, which was negotiated after the acceptor's bankruptcy, and although he had not the bill at the time of his bankruptcy. Cooke, Bankr. Laws, 214, 215; Cooke, Bankr. Laws, 211.

Before KILTY, Chief Judge, and FITZHUGH and CRANCH, Circuit Judges.

CRANCH, Circuit Judge. The question is, whether the plaintiffs could have proved this note under the commission against the defendant. There is no doubt that the note might have been proved under that commission by somebody. The defendant's estate was already liable for its amount. But it never has been proved under the commission by anybody. The note therefore still exists as a note unsatisfied, and clothed with all its original obligation. The contract which it raised is still in full force as a special and express contract, and the principle of law is well settled, that where the parties have made an express contract, the law will not interfere and raise an implied one. For the law implies a contract only where the parties have failed to make an express agreement, and where otherwise injustice would be done to one of them. The present action being grounded on an implied assumpsit only, it might, perhaps, be sufficient for the defendant to show that there was an express contract respecting the same transaction. The plaintiffs cannot recover upon both the express and implied contract, for if there is an express contract, there cannot be an implied one. But waiving this bar to the plaintiffs' recovery, I am of opinion that the plaintiffs could have proved the debt under the commission against the defendant, and consequently that his certificate is a bar to the action. Cases have been cited on both sides, which are certainly in some degree contradictory to each other. I shall therefore pass over all the cases which precede that of Cowley v. Dunlop, [7 Term R. 565,] in which they were all taken up and reconsidered; and which, although it did not decide the question in that case, yet, if I do not misconceive the arguments of the judges, will go very far to decide the present. In the present case the note was originally given and made payable to the plaintiffs on a sufficient consideration; it therefore was a note upon which an action might have been maintained, and immediately created a debt payable in future. Nothing was defective in the original transaction; it was not a contingent debt, but an absolute engagement to pay a sum certain at a certain time, for a valuable consideration. The two notes were mutual considerations for each other, and in an action brought upon either of them against the maker, he cannot support an allegation that it was nudum pactum. It is true that if he had been obliged already to pay the other note in consequence of his indorsement, he might plead it by way of set-off, or maintain a counter action against the plaintiff; but until the two notes are thus mutually opposed to each other, both are valid, and remain good evidence of mutual debts. This note then constituted a good claim against the defendant's estate at the time of his bankruptcy. The estate was not only liable for it, but was the principal debtor, to whom the holder might and in justice ought to resort for payment. It ought not to be in the power of the holder to decide whether the certificate should or should not be a bar to the claim. The legislature has attempted to avoid this evil, by declaring that the certificate should be a bar, not only to such claims as were proved, but such as might have been proved under the commission, not contemplating the possibility that the mere transfer of the debt could prevent the certificate from being a bar. In the case of Cowley v. Dunlop, 7 Term R. 565, the judges were equally divided upon the question then before the court. Lawrence and Grose, justices, were decidedly of opinion that the defendant's certificate was a bar to the action; and Ld. Kenyon, C. J., in his argument admits principles which if correct are decisive in favor of the present defendant. He admits that if the bill had not been once proved against the defendant (the acceptor) and a dividend received, which, in contemplation of law, he considers as a satisfaction of the bill, and if it had been returned upon the indorser, subsequent to the bankruptcy, the indorser would thereby be remitted to his former right, and be in the same condition as if he had never passed it away, (so as to stand in the place of the indorsee) and consequently might have proved the debt under the commission. But he contends, that inasmuch as the holder of that bill had proved it under the defendant's commission, and received a dividend, whereby the express contract created by the bill was executed on the part of the defendant, and had become extinct, there was no right remaining under that bill to which the plaintiff could be remitted, and therefore when the plaintiff paid the balance of the money due upon the bill to the indorsee, a new implied contract arose on the part of the defendant which could not have been proved under the commission, and which therefore was not barred by the certificate. In the present case the note has never been proved under the commission, and therefore it still remains a valid, express contract, attended by all its resulting rights; and consequently, according to his lordship's opinion, upon being returned upon the indorser, he was remitted to his former right, and might have proved the debt against the defendant's estate. If the arguments of the plaintiffs' counsel are correct, an executor, an administrator, or an indorsee, obtaining possession of the securities after the act of bankruptcy committed, could not prove the debts. By which means a class of creditors, who had bona fide given credit to the securities, would, contrary to the express words of the act of congress, be precluded from any share in the bankrupt's estate; and the bankrupt himself would be placed in a much worse situation after his certificate than he was in before. For

the moment he had given up every thing in the world, he would find himself still encumbered with a load of debts, and exposed to the vengeance or the malice of unrelenting creditors, without a hope of escaping from the burden. Because, under a second commission, he would be entitled only to a discharge of his person unless his estate shall pay seventy-five per cent. on the amount of the debts; and, by the statement of the case, he cannot have any estate at all. A construction of the law which will produce these consequences ought to be very obvious, and at least produced by a necessary implication. I can see no such necessity, and therefore I am obliged to reject such a construction. The judgment of the court was accordingly for the defendant.

NOTE, [from original report.] The cases of Buckler v. Buttivant, 3 East, 72, and Houle v. Baxter, Id. 177, were not cited, nor seen by the court, until after their opinion was given. They fully justify it.

BAKER, (VOSS v.) See Case No. 17,012.

Case No. 785.

BAKER v. WARD et al.

[3 Ben. 499.] [1]

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

GOLD CONTRACT—CHARTER PARTY—FALSE REPRESENTATIONS—PARTIES.

1. Where a vessel was chartered for a voyage from New York to Havana, for the sum of $2,900, payable in gold on the proper discharge of the cargo in Havana, of which sum $2,201.50 in gold had been paid: *Held*, that the owners of the vessel were entitled to a decree for $698.50, without reference to any premium on gold.

[Distinguished in Hus v. Kempf, Case No. 6,944.]

[See note at end of case.]

2. Where a charter party of a vessel stated her to be "of the burthen of 427 tons, or thereabouts," but contained no other statement as to her carrying capacity: *Held*, that any other agreement as to her carrying capacity must be held to have been waived by the charterer, and that evidence of false representations by the owners as to her carrying capacity, and of the charterers being induced thereby to make the charter, was inadmissible.

[Cited in Rawson v. Lyon, 23 Fed. 108.]

[See Watts v. Camors, 10 Fed. 145.]

3. Where a charter party was signed by the libellant as master and agent of the vessel, and the charterers agreed in it to pay the charter money to him or his agent: *Held*, that a suit to recover the charter money was properly brought by the master alone, without joining the owners of the vessel as libellants.

[See Bangs v. Lowber, Case No. 840, and Clark v. Wilson, Id. 2,841.]

[In admiralty. Libel by Samuel Baker against James E. Ward and others on a charter party. Decree for libellant.]

Smedberg & Da Costa, for libellant.

Beebe, Dean & Donohue, for respondents.

[2] BLATCHFORD, District Judge. On the 26th of July, 1866, the libellant, as master of the British bark Vivid, entered into a charter party at New York with the respondents, for the charter of the vessel to them, for a voyage from New York to Havana, for the sum of $2,900 charter money, payable in gold on the proper discharge of the cargo in Havana. The libel avers the performance of the charter by the vessel, by the delivery of the cargo at Havana on or before the 25th of October, 1866, and that only $2,201.50 in gold has been paid on account of the charter money, and claims a decree for $1,005.84, in the lawful money of the United States, being the equivalent of $698.50, in gold, at the time of the commencement of the suit.

The answer sets up, that, at and before the making of the charter party, the libellant, in order to induce the respondents to enter into the charter, falsely and fraudulently represented to them that the vessel would carry and had already carried 3,000 round barrels of oil; that the respondents, relying upon such representations and believing the same to be true, chartered the vessel and loaded her for the voyage mentioned in the charter with all the cargo she could carry; that she would not carry 3,000 round barrels of oil, but only 2,600; that such representations were false and known by the libellant to be so; that the respondents sustained great damage therefrom; and that, by reason thereof, the charter was void.

The charter party, of which a copy is annexed to the libel and forms a part of it, contains no statement of the carrying capacity of the vessel. It merely states, that the vessel is "of the burden of 427 tons or thereabouts." The respondents, at the trial, offered to show, by evidence, the making by the libellant, and the falsity, of the representations before named; that such representations induced the respondents to enter into the charter party and to agree to pay a larger sum for charter money than they would otherwise have agreed to pay; that the libellant knew such representations to be false; and that, on the voyage in question, the vessel was loaded to her full capacity and carried only the bulk of 2,600 round barrels of oil. The court excluded such evidence, on an objection to it by the libellant. The evidence was inadmissible, for the reason that, the charter party being in writing, parol evidence was not admissible to vary its terms, and that any stipulation or agreement, as to the carrying capacity of the vessel, which was not found in the written con-

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

[2] Since the decision of the supreme court of the United States, in April, 1871, on the legal tender act, [Knox v. Lee, 12 Wall. (79 U. S.) 457,] I have thought it best to publish here this decision, made by Judge Blatchford, in March, 1868, and omitted in its order, so that all the cases in this court, in which the gold question was involved, may be included in these reports.

tract, must be considered as having been waived by the respondents. 1 Pars. on Mar. Law, bk. 1, c. 8, p. 230; The Eli Whitney, [Case No. 4,345;] Pitkin v. Brainerd, 5 Conn. 451; Renard v. Sampson, 2 Kern. [12 N. Y.] 561.

The answer excepts to the libel on the ground that the libellant has no interest in the alleged cause of action set forth in the libel, and, therefore, cannot maintain this action, and on the further ground that the owners of the vessel should have been joined and made parties libellants in the action. The charter party was made with the libellant and describes him as master and agent of the vessel, and by it the respondents agree to pay the charter money to the libellant or to his agent. The respondents are, therefore, estopped from denying the right of the libellant to bring this suit, and it was not necessary to join the owners of the vessel as parties.

The libellant is, therefore, entitled to recover the amount unpaid on the charter money, namely, the sum of $698.50, with interest thereon, at the rate of 7 per cent. per annum, from October 25th, 1866. But he claims that he should have a decree for this amount in gold, or for an amount which is the equivalent, in legal-tender notes, of that amount in gold. I have heretofore considered this question, both on principle and on authority, and have held that, under circumstances such as exist in this case, the party suing is entitled only to a decree for the number of unpaid dollars due to him under his contract. and that the addition of the words "in gold," in the contract, is, in view of the legal-tender acts of February 25th, and July 11th, 1862, (12 Stat. 345, 532,) to be treated as surplusage, or, what is the same thing in effect, that the decree is to be for the debt at the number of dollars expressed in the contract, with the privilege to the debtor to discharge it in the legal tender notes. The Blohm, [Case No. 1,556;] The Mary J. Vaughan, [Id. 9,217.] If the libellant should have one of the alternatives which he asks for in this case, a decree for the $698.50, with interest, "payable in gold," (and he can have nothing more than his contract calls for, so many dollars in gold,) still the respondents would have the right to discharge the decree, dollar for dollar, in legal tender notes. The law is express to that effect. The United States notes are made, by law, "lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports" and certain interest due to and by the United States. A decree in this case for so many dollars, payable in gold, would be a private debt, to be paid within the United States, and it would be impossible to withhold from the respondents the privilege of paying it, dollar for dollar, in legal tender notes, without holding the statutes on the subject to be void, and without declaring that what the law-making power has said shall be lawful money and a legal tender in payment of the debt, shall not be lawful money or such legal tender.

The libellant seeks, however, to evade the force of the legal tender act, by claiming, in his libel, that the number of dollars due to him in gold is "equal to the sum of $1,005.84, lawful money of the United States," and by asking a decree for the latter sum. The meaning of this averment must be merely, that the $698.50 in gold is equal to $1,005.84 in the United States notes which are made a legal tender by law. The gold and silver coins of the United States continue to be lawful money of the United States, and to be legal tenders to the extent prescribed by statute, as well since the passage of the acts making the United States notes legal tenders, as before. The silver dollar, containing the prescribed weight of silver, is still the unit, and is still lawful money and a legal tender, according to its nominal value; and the double eagle, eagle, half eagle, and quarter eagle, containing severally the prescribed weights of gold, are still lawful money, and are still respectively legal tenders, for twenty, ten, five, and two and a half of such units. The intent of the acts of congress was to put the United States note representing nominally one dollar, on the same footing, as to being lawful money, and a legal tender for a private debt, as the coined dollar. Wherever a debt exists which amounts to so many dollars in gold, an equal amount of United States notes, at their nominal value, will discharge it. If this were not so, the legal tender acts would be a juggle. They could be evaded without difficulty. All that it would be necessary to do would be to increase the amount of a contract debt to a number of dollars sufficiently large to deprive the debtor of the privilege which the acts intended to enforce upon him. But the court has no power to do this. The number of dollars is nominated in the contract. The words "in gold" mean no more than the words "lawful money." The contract is for so many dollars, lawful money, and the decree must be for that number of dollars, and it can be discharged in any money that is lawful money and a legal tender. When the statutes say that the United States note of one dollar nominal value shall be lawful money and a legal tender for a private debt, within the United States, they mean that it shall be a legal tender, at its nominal value, for a debt amounting to one dollar in any other money that is lawful money within the United States, and that such debt may and shall be fully discharged by the payment or tender of such note. Some of the statutes of the United States, as, for instance, the act of January 18th, 1837, (5 Stat. 137, § 9,) in making certain coins of the United States a legal tender, say that they shall be legal tenders "according to their nominal value." Other statutes merely say that they shall be legal tenders. The statutes in regard to the

United States notes only say that they shall be "a legal tender." But the necessary meaning of all those statutes is, that the coins and notes shall be legal tenders according to the nominal values impressed on them, and which they exhibit to the eye. Now, to say that the respondents must pay $1,005.84, in United States notes, to discharge $698.50, of private indebtedness, payable in gold, would be to say that the United States note of one dollar, instead of being a legal tender at its nominal value, for one dollar of the $698.50 gold, shall be a legal tender at less than its nominal value, for such one dollar of gold, and that the indebtedness represented by such one dollar of gold shall not be fully discharged by the payment or tender of the United States note of one dollar. The decree would violate the express language of the acts of congress. Moreover, such a decree would violate the contract of the parties. The libellant contracted, at New York, for the payment to him, at Havana, of so many dollars in gold. He and the respondents did this with the full knowledge, on the part of both of them, that, so far as this contract provided for the creation of a debt which the respondents should ever be called upon to pay within the United States, the respondents would have the privilege of paying it in United States notes, dollar for dollar, at the nominal value of such notes. To deprive the respondents of this privilege, which the libellant voluntarily conferred upon them, would be to do what the court has no right to do. The libellant has resorted to this forum for the collection of his debt, and he must submit to the law of the forum.

It was urged by the counsel for the libellant, that two cases, recently decided by the supreme court of the United States, one at the December term, 1865, (Cheang-Kee v. U. S., 3 Wall. [70 U. S.] 320,) and the other at the December term, 1866, (Thompson v. Riggs, 5 Wall. [72 U. S.] 663,) establishes a contrary doctrine to that held by this court. I have examined those cases with care, and am unable to see anything in either of them that is in conflict with the views expressed in this decision.

The case of Cheang-Kee v. U. S., [supra,] only decides that, in a suit brought by the United States, to recover duties on imports, after the passage of the legal tender act of February 25th, 1862, [12 Stat. 345,] a judgment in favor of the United States, against the defendant, for "$1,388.10, payable in gold and silver coin, for duties," is a proper judgment; that the statement in the judgment, that the amount recovered is "payable in gold and silver coin, for duties," is merely a declaration of the legal effect of the judgment; and that such statement, although unnecessary, is strictly correct, and cannot affect the validity of the judgment, for the reason that it is a judgment for duties on imports, and that nothing but gold and silver coin is a legal tender for that description of indebtedness to the government. If any conclusion is to be drawn from that decision, as an authority bearing on the present case, it is a conclusion adverse to the view urged by the libellant, for it would seem to follow from the decision, that where, as in the present case, one of a private debt, something else, in addition to gold and silver coin, is a legal tender for the debt, a judgment for the amount of the debt, "payable in gold and silver coin," is improper.

The case of Thompson v. Riggs, [supra,] was this: At the time of the passage of the legal tender act of February 25th, 1862, Thompson had in the hands of Riggs, as a banker, on deposit, $6,600. The deposit was not a special deposit, but was a general deposit, and was subject to no condition or special agreement of any kind, but was made under such circumstances that Thompson parted with his title to the money, and such title became vested in Riggs, and Riggs became debtor for the amount to Thompson. Two years after the passage of the legal tender act, and when gold had risen to a premium of 57 per cent. above the value of legal tender notes, Thompson demanded the $6,600 in coin. Riggs tendered it in legal tender notes. Thompson then sued to recover a sum of money equal to the value in legal tender notes of $6,600 gold coin. The suit was not brought to recover any thing that was deposited after the passage of the legal tender act. There was a verdict and a judgment for Riggs, the defendant. Thompson then carried the case by writ of error to the supreme court, which affirmed the judgment. The language of the court (Mr. Justice Clifford delivering its opinion) in the case is to the effect, that, where a special deposit of bullion or coin is made with a banker, under such circumstances that the title to the thing or money deposited does not pass to the banker, but remains in the depositor, then the banker becomes the bailee of the depositor, and the latter may rightfully demand as his property the identical thing or money deposited; but that, where the deposit is general, and under such circumstances that the title to the money deposited, whether it is coin or legal tender notes, passes to the banker, the transaction is unaffected by the character of the money in which the deposit is made, and the banker becomes liable for the amount of the money as a debt, and can discharge the debt by any money that is by law a legal tender. The Bank of Kentucky v. Wister, 2 Pet. [27 U. S.] 318, 325. These views of the supreme court give no support to the claim made by the libellant.

The true doctrine on the subject is no where expressed better than by Pothier, (Traite du Contrat de Vente, note, 416, Cushing's translation, pp. 264, 265:) "It remains to be observed, in regard to the price, that it may be rendered in a money different from that in which it is paid. If it is paid to the seller in gold, the seller may repay it in

pieces of silver, or vice versa. In like manner, though, subsequent to the payment of the price, the pieces in which it is paid are increased or diminished in value, though they are discredited, and, at the time of the redemption, their place is supplied by new ones of better or worse alloy, the seller, who exercises the redemption, ought to repay, in money which is current at the time he redeems, the same sum or quantity which he received in payment, and nothing more nor less. The reason is, that, in money, we do not regard the coins, which constitute it, but only the value which the sovereign has been pleased that they shall signify; Ea materia forma publica percussa, usum dominiumque non tam ex substantia proebet, quam ex quantitate. D. 18, 1, 1. When the price is paid, the seller is not considered to receive the particular pieces so much as the sum or value which they signify, and consequently, he ought to repay, and it is sufficient for him to repay, the same sum or value in pieces which are current, and which have the signs, authorized by the prince, to signify that value." These views apply to all debts solvable in money, and to all money which the sovereign declares to be lawful money. Of course, I assume that the legal tender acts are constitutional and valid laws. I hold them to be so both on principle and on authority.

The libellant is entitled to a decree for $698.50, with interest from October 25th, 1866, and for the costs of the suit.

[NOTE. The act of 1862 (Rev. St. § 3588) provides that "United States notes shall be lawful money, and a legal tender in payment of all debts, public and private, within the United States except for duties on imports and interest on the public debt." Where a note is for dollars, payable by its terms in specie, the terms "in specie" are merely descriptive of the kind of dollars in which the note is payable, there being more than one kind of dollars current, recognized by law, and mean that the designated number of dollars shall be paid in so many gold or silver dollars of the United States. The act of February 25, 1862, in declaring that the notes of the United States shall be lawful money and a legal tender for all debts, only applies to debts which are payable in money generally, and not to obligations payable in commodities or obligations of any other kind. Trebilcock v. Wilson, 12 Wall. (79 U. S.) 687. A contract payable in gold and silver coin is an agreement to deliver coins of the standard weight and fineness, and it cannot be satisfied by a tender of United States notes. Bronson v. Rodes, 7 Wall. (74 U. S.) 229; Knox v. Lee, 12 Wall. (79 U. S.) 457; Butler v. Horwitz, 7 Wall. (74 U. S.) 258; Bronson v. Kimpton, 8 Wall. (75 U. S.) 444. Where it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver, damages should be assessed and judgment rendered payable in coin. Butler v. Horwitz, supra. See, also, Edmondson v. Hyde, Case No. 4,285. Where a contract is payable in gold coin, and the payee takes a judgment payable in currency, its amount should be for a sum equivalent in value to the amount of gold coin as bullion. Gregory v. Morris, 96 U. S. 619. The circuit court for the southern district of New York, in 1868, in awarding a decree on a bottomry bond payable in "United States gold," refused to allow a premium on the sum named in the decree in order to make such amount equal to gold. Cowan v. The Jacmel Packet, Case No. 7,154.]

Case No. 786.

BAKER v. WHITING et al.

[1 Story, 218.] [1]

Circuit Court, D. Maine. May Term, 1840.

EQUITY—NEWLY DISCOVERED EVIDENCE—MISTAKE OF COUNSEL—LACHES.

1. Where a rehearing is sought on the ground of newly discovered evidence, after an interlocutory decree, the court will grant such a rehearing upon the filing of a supplemental bill, if the evidence is of such a nature as to entitle the party to relief upon a bill of review, or a supplemental bill in the nature of a bill of review, after a final decree, but not otherwise.

[Cited in Jenkins v. Eldredge, Case No. 7,267; Doggett v. Emerson, Id. 3,961, Id. 3,962; Bentley v. Phelps, Id. 1,332; Reeves v. Keystone Bridge Co., Id. 11,661; Gillette v. Bate Refrigerating Co., 12 Fed. 109.]

2. Error of judgment, or mistake of law by counsel, as to the pertinency or force of evidence, furnishes no ground for a rehearing.

[Cited in Doggett v. Emerson, Case No. 3,961; Page v. Holmes Burglar Alarm Tel. Co., 2 Fed. 333.]

3. Where the party, seeking relief, had knowledge of the evidence before the decree, or might by a reasonable diligence or inquiry have obtained it, he is not entitled to relief.

[Cited in Bentley v. Phelps, Case No. 1,332; India Rubber Co. v. Phelps, Id. 7,025; Page v. Holmes Burglar Alarm Tel. Co., 2 Fed. 333; Colgate v. W. U. Tel. Co., 19 Fed. 829; Spill v. Celluloid Manuf'g Co., 22 Fed. 96.]

[See Massie v. Graham, Case No. 9,263; Purcell v. Miner, 4 Wall. (71 U. S.) 519.]

4. The general rule in cases of this sort is, not to allow a rehearing and a supplemental bill, where the newly discovered evidence is merely cumulative upon the litigated facts already in issue.

[Cited in Doggett v. Emerson, Case No. 3,961; Blandy v. Griffith, Id. 1,530; Bentley v. Phelps, Id. 1,332.]

5. Under the circumstances of this case, the petition for a rehearing was not granted.

[6. Cited in Bentley v. Phelps, Case No. 1,332, to the point that in chancery, where an averment is deemed requisite, and by its omission an error in pleading has occurred, which is not pointed out or objected to at the trial, the defect is usually regarded as waived or cured.]

[7. Cited in Brooks v. Moorhouse, Case No. 1,956, to the point that a court of equity will not ordinarily entertain jurisdiction of a matter which the person has had an opportunity of litigating in another court, and which had there been decided against him, unless it appears that circumstances beyond his control prevented his making the defense or trying the question.]

In equity. Petition by [Timothy] Whiting for a rehearing, and for leave to introduce new evidence in this cause, which was formerly before this court, and is reported in 3 Sumn. 476, [Baker v. Whiting, Case No. 787.] [Denied.] The petition, in substance,

[1] [Reported by William W. Story, Esq.]

stated as follows: That the petitioner denies, expressly, that he ever was constituted agent of Tidd & Stimpson, or either of them, or their heirs. And that he never understood, that it was important to ascertain, whether they ever had any particular and properly constituted agent, and if so, who was such agent. Nor was he ever advised, that it was necessary to make the same appear in point of law; but, on the contrary, he was advised by his counsel in the cause originally, that it was a matter of no consequence; and he never received any other or different advice; and, for the circumstances relating thereto, he prays leave to refer to his affidavit.

That the petitioner did well understand, that John Cooper, Esq. had been the agent of Peck, the former proprietor of township No. 12; but that he did not know, that the said Cooper was the agent especially for the said Tidd & Stimpson, though he believes, that he was so told by the said Baker, before the bringing of the suit in equity, as he has stated in his affidavit. Yet, if he should be deemed to have had cause for inquiring into the truth thereof, he prays relief, on account of his utter ignorance, and of the advice he had received in regard to its being of no material importance.

That if this declaration did not refer to the time, for which the plaintiffs undertook to charge and treat the said Cooper as owner, but to a former period, then the petitioner submits, that there was no occasion for inquiry. And if the declaration was true, and known by the said Baker to refer to the period set forth in the bill, it was fraudulent in the said Baker and his wife to proceed against him, on the ground of his being such agent, the said Baker well knowing the contrary.

That since the decretal order of the court the petitioner has made most earnest inquiry, and discovered, that the said Cooper was the actual agent of the said Tidd & Stimpson, and of the heirs of Tidd, after his decease; and that the said Stimpson and the heirs of said Tidd did refuse to redeem the land from the said sale for taxes.

That the petitioner had no knowledge or notice of the intention of the plaintiffs to introduce in evidence the paper, purporting to be a license to erect a mill, made by him to Aaron L. Raymond and Paul Howe; and that it was not charged in the bill, nor annexed to the interrogatories, nor to the commission, and that no interrogation was framed by the plaintiffs pointing to it; and that if notice had been given to him in regard to the introduction of this paper, it would have led him to show the general agency of the said Cooper for the proprietors, and consequently, the particular agency of the said Cooper for Tidd & Stimpson, and the heirs of Tidd; and thence to the fact, stated by him, of their refusal to redeem the land, all of which circumstances lay in the same train.

The petitioner prays for a rehearing of the said cause, so that the same may be opened upon the point of agency, both at law and in fact, to afford him an opportunity to exhibit the truth in relation to such fact of agency; and to avoid extreme injustice being done in charging him, as agent of Tidd and his heirs, and Stimpson, when they, in fact, had another agent, and he was not their agent, and received no money from them for the payment of said taxes; but that they absolutely refused to pay them, or to redeem the said lands.

And if the prayer of the petitioner is opposed and pressed with the objection, that such circumstances might have been known and ascertained by him by diligent inquiry, and by advice and counsel, he then says, that they were all misled and deceived by the form of the false statements in the bill; and that the plaintiffs well knew the contrary, and must have suppressed the knowledge thereof from their own counsel, and therefore have obtained their decree by fraud, and are not, therefore, entitled to retain the benefit thereof.

That if the relief may not be obtained in the regular manner of a rehearing, the petitioner prays, that it may be granted by leave to proceed in some other and further manner, in the nature of review, and that all proceedings may be stayed in the meantime, and permission granted to perpetuate the testimony of John Cooper.

The affidavit of Whiting in support thereof, was as follows:

"I, Timothy Whiting, age seventy-two years, on oath declare and say, that since the hearing and opinion given by the court in the case of George Baker and wife, plaintiffs in equity against me, in the circuit court of the United States, for Maine district, at the present term, certain facts have come to my knowledge, which I am advised, and believe to be of great importance to me, and which, if they had been ascertained and exhibited in season, I have reason to believe would have been of a decisive character in my defence.

"I would refer, in the first place, to the affidavit of John Cooper, Esq., now on the files of the court, as containing two distinct facts; that for some years before, and also after August, 1821, he was the agent of several of the proprietors of said township No. 12, and among them of Jacob Tidd and Samuel Stimpson, and afterwards, on behalf of the heirs of said Tidd, and had the care of the lands in which they were concerned: secondly, that after the land was sold in August, 1821, for taxes, and purchased by me, the said Stimpson and the heirs of said Tidd refused to redeem the land stated by said Cooper.

"I further declare and say, as aforesaid,

that I had no knowledge of the above refusal to redeem the land, as stated by said Cooper, until it was first made known to me by him, at the time of making said affidavit. And I further declare, that I did not know, that the said Cooper was the agent in special of said Tidd & Stimpson, and of the heirs of said Tidd, as he has stated in said affidavit for the lands in said township No. 12.

"I further state, that true it is, sometime in the year 1835, said Baker did call on me in Boston, and make inquiries concerning lands which said Tidd, or Tidd & Stimpson formerly owned in the vicinity, where I lived, and in which the heirs of said Tidd were interested, lying in what are now the towns of Marion and Cutler, adjacent to said Whiting, and also in said No. 12, now Whiting; and that, in his conversation, the said Baker spoke of General Cooper as having been formerly agent for certain proprietors in those townships generally, and among them, I believe, he mentioned the said Tidd & Stimpson. Such is the impression on my mind. Said Baker then understood, that I was in possession of the land, which he supposed to have belonged to Tidd & Stimpson, in Whiting, claiming title, and he stated, that he had ascertained the circumstances respecting the sale and purchase by me for the taxes. Nothing was said or intimated to me by said Baker respecting any agency of mine at any time on behalf of said Tidd & Stimpson, or either of them, in regard to said lands in Whiting sold for taxes. I state the foregoing conversation according to the best of my recollection and belief.

"I should not seek to introduce the mention of the above circumstance in this statement, except so far as it may be proper to qualify, or affect, what I have said respecting my not having knowledge, that said Cooper was ever agent of said Tidd & Stimpson. In that conversation said Baker made principal inquiry about the land in Cutler, which he proposed to sell to me. He did not, to my recollection, at that time, set up any claim to the land in Whiting.

"I further declare, and say, that I understood the said Cooper was formerly the agent of John Peck, who once owned the township, excepting settlers' lots, to take care of the lands belonging to said Peck; and that those, to whom Peck sold, generally employed said Cooper to see to their lands. He was so requested and employed by myself, as well as others, before I moved into the State of Maine.

"I further state, that my acquaintance with the business and concerns of what is now the town of Whiting commenced about the year 1816 or 1817. I then understood, that said Cooper was the agent of a considerable number of the proprietors of said township, and I supposed the major part of them. General Cooper gave numerous permits on behalf of those proprietors for whom he acted, without objection from me, and he knew and made no objection to those, which I granted, which was done with his consent. Neither of us intended, as I believe, to exceed our respective rights, or those, for which we acted, or to exercise them in such a manner as to interfere with each other. I acted with his advice and consent, on the part of those, for whom he acted as agent, in giving permission to Raymond and Howe to erect a saw-mill at the Orange Rips. I had no notice of the intention to introduce in testimony the paper made by me to said Raymond and Howe, which I could have explained by General Cooper and other testimony.

"General Cooper formerly lived in Machias; but shortly after the separation of this state from Massachusetts, he removed with his family into the town of Cooper, about twenty miles distant. Since which he has lived very retired, and I have rarely seen him, not more than three or four times, to my recollection, until the 13th of May last, and I have had little intercourse or conversation with him since his removal, on the subject of said lands. General Cooper is father-in-law to Rufus K. Porter, Esq., who took the depositions, in which some of the deponents mention said Cooper having been agent to sundry persons; but no mention is made of Tidd & Stimpson.

"I would further state, that when the proprietors' lands were sold for taxes in Whiting, I had no wish to prevent any proprietors from redeeming by paying their proportions. On the contrary, I desired, that they should; and Messrs. Odiorne, Parkman, and Winthrop redeemed their parts. And two persons living in Boston, partners in business, viz. Messrs. Kilham & Mears, were willingly permitted by me to redeem, through General Cooper, after their lands were forfeited. I was the largest owner of said township.

"I further declare and say, that when I engaged the Hon. Prentiss Mellen as my counsel in this cause, and advised with him on the subject of the bill, and when he was drawing the answer, I endeavoured, to the best of my power, to communicate to him a general statement of all the circumstances, material to the case, and relating to my defence, so far as I comprehended the grounds and occasion, and as fully as I recollected the facts, and had the opportunity afforded me in the course of my consultation with him, in order to give him as full a view as I was able of the case on my part. And I do well recollect, that I then stated to Judge Mellen, that General Cooper had formerly acted as general agent for non-resident proprietors. I communicated to Judge Mellen, in substance, my conversation with Baker, and showed him a letter from Baker to me, which I afterwards forwarded to Judge Mellen, at his request. Judge Mellen said it was of no con-

sequence, who was the agent of any non-resident proprietors, except me; that the question was, whether I was the agent of Tidd & Stimpson, and he treated it as a matter of no importance, who else might have had any agency, and appeared averse to considering any such suggestion. I distinctly and perfectly remember, that I did endeavour to present that subject to his attention, and call his mind to that point; and I well remember the impression, which he appeared strongly to have, and which he left upon my mind, that it was a matter of no moment.

"I further declare, and say, that I did make to him the most direct and explicit denial of all agency on my part for the plaintiffs, and said Tidd & Stimpson, or the heirs of said Tidd; or that any money had been intrusted to me by them, to pay the taxes as set forth in the bill; and my defence was accordingly placed upon that denial, and the denial of all fraud, and upon my legal title. And relying on the sufficiency of this, with the advice I received, I did not suppose it to be important to ascertain, whether said Tidd & Stimpson, or the heirs of said Tidd, had employed any particular agent; and I was totally unadvised and ignorant in my own mind, of any use of ascertaining the extent of General Cooper's agency, under the impression, thus received from my counsel, that it was in nowise material to my defence. I was informed and understood, that the burthen of proof, in that respect, was upon the plaintiffs; and that the fact, that I was the agent, in opposition to the denial in my answer, was required to be established by conclusive testimony, equal to that of two witnesses; and that it was not incumbent to show, who was their agent, if I was not.

"And I again solemnly declare, that I was not the agent of said Tidd & Stimpson, or the heirs of said Tidd, or of any of them, by any appointment or authority from them, or either of them, directly or indirectly; and that I never intended, by any act or conduct of mine, to assume that character; although, in legal construction, in the view of the court, upon the evidence exhibited, I have been decided to have been such.

"In consequence of the state of evidence laid before the court, and remarks, which fell from the court, and upon suggestion to me of the other of my counsel, and also from them and by their advice, on my return from court, (which I left before the opinion was pronounced,) I immediately made a journey to the town of Cooper, and there ascertained the facts, stated by said Cooper in his affidavit, which I immediately enclosed to my counsel in Portland, requesting and urging them to take the proper measures for my relief, and obtain opportunity, if possible, for a further investigation of facts.

"I further say, that I was not informed of the testimony of the witnesses, until after my arrival in Portland to attend the trial of the case, except in a general manner, and that I was greatly surprised by the extent and amount of evidence at the hearing, beyond what I had an idea of, and in many respects and particulars different from my expectations.

"For the same reason as before stated, I have also procured the affidavits, which are now offered, of Enoch Hill, Isaac Crane, John Allen, and Eleazer Chase. I did not know, that these persons were acquainted with the facts they have stated, before their affidavits were taken, most of them having taken place sometime before I became acquainted with the country; they being advanced in life, living distant from each other, and two of them about thirteen miles from me, with whom I have had no connexion in business for ten or fifteen years past, and scarcely remember to have seen them.

"I beg leave finally to state, in words entirely of my own, if I may with propriety do so, that most of the lands, that I did own in that township, I conveyed to James Richardson, Esq., of Dedham, Massachusetts, some years since, in payment of a just demand against me; and having sustained a fair character through life thus far for integrity, which I believe the plaintiffs will not attempt to deny, it is extremely painful for me in my old age to be cast out from the society of the virtuous, by the sentence of judges of my native state. Timothy Whiting."

The deposition of John Cooper was as follows:

"I, John Cooper, of Cooper, in the county of Washington, and state of Maine, depose and say, that I was the agent of John Peck, the owner of township No. 12, now Whiting, from January 28, 1806, until the same was sold by him at different times to sundry persons. That I afterwards acted as the agent of Thomas L. Winthrop, Samuel Parkman, George and Thomas Odiorne, and Messrs. Jacob Tidd and Samuel Stimpson, all of whom purchased of said Peck; and that the non-resident proprietors' lands in said town were sold for taxes, in August, 1821. The deponent further saith, the above named Winthrop, Parkman, George and Thomas Odiorne redeemed their lands in said town, and had the same set off to them in severalty; and that the said Samuel Stimpson and the heirs of said Jacob Tidd, who deceased before said sale, refused to redeem their part, both before and after the time of redemption was out, giving as a reason, that the taxes were so high, they did not think it worth redeeming.

"The deponent further saith, that Major Timothy Whiting, who was the largest owner in said town, at no time acted as the agent of said Jacob Tidd and Samuel Stimpson, or of the heirs of the said Jacob Tidd deceased, according to the best of my knowledge and belief. Further deponent saith not. John Cooper."

There were other affidavits introduced by the petitioner, and also two receipts offered

by the original plaintiffs. It is unnecessary to recite them at large, as they are sufficiently referred to in the opinion of the court.

The questions upon the petition were argued by C. S. Daveis and P. Mellen, for the petition, and by Hobbs & Fessenden, against it.

The arguments for the petition were substantially as follows:

1st. That new facts, or facts discovered after a decree, or after publication passed in the cause, and which are materially pressing upon the decree, afford sufficient grounds to entitle the plaintiff to a rehearing. Young v. Keighly, 16 Ves. 350; Perry v. Phelips, 17 Ves. 178; Cook v. Bamfield, 3 Swanst. 607; Norris v. Le Neve, 3 Atk. 34; Ord v. Noel, 6 Madd. 127.

2d. That the new matter, upon which such a proceeding becomes proper and necessary, must have come materially and substantially to the knowledge of the party or his agents, after the decree, or at least after the time, when it would have been advantageously introduced in the cause. Ord v. Noel, 6 Madd. 127; Willan v. Willan, 16 Ves. 87; Earl of Portsmouth v. Lord Effingham, 1 Ves. Sr. 434; Norris v. Le Neve, 3 Atk. 34; Goodwin v. Goodwin, Id. 370; Dormer v. Fortescue, Id. 124; Jones v. Jones, Id. 110; Barrington v. O'Brien, 1 Ball & B. 173.

3d. That it must also appear, that a reasonable diligence was used to acquire a knowledge of the facts proved by the new evidence, before the decree. Young v. Keighly, 16 Ves. 349; Standish v. Radley, 2 Atk. 177; Gould v. Tancre, Id. 533.

Such being the principles laid down by the authorities, it was contended, that, under the circumstances of the present case, Whiting was entitled to relief. The point in issue was, originally, the agency of Whiting; and the agency of Cooper was only a matter of evidence, bearing collaterally on the main question, and might easily be supposed to have no material relevancy to the case. The fact of the agency of Cooper was, besides, expressly denied under oath by the defendant in his answer. It was communicated to counsel during the preparation of the case, and was by them considered as irrelevant, inasmuch as the question was not, who was the agent of Tidd & Stimpson, but only whether Whiting himself was their agent. Whiting had no certain or positive knowledge with relation to the agency of Cooper, further than the information, that he received from Baker; and the fact, that Cooper had removed from the vicinity of Whiting, rendered it difficult for him to acquire any information with regard to it. But in point of fact, the matter never came to the knowledge of Whiting, until after the time had entirely elapsed, within which it could have been used as evidence in the original cause, or he could have been capable of giving any instructions in regard to it, under the effect of Norris v. Le Neve, 3 Atk. 35. Gilb. Forum Rom. 187.

Again, inasmuch as the matter lay within the knowledge of the original plaintiffs, and they were in conscience bound to discover it, the decree has been obtained by fraud, and ought therefore to be set aside. Manaton v. Molesworth, 1 Eden, 18. If the fact was, as Cooper states it in his affidavits, it must have been known to the plaintiffs and parties in interest in the case, and they had a double interest in concealing their knowledge of it, and shutting up every avenue that might lead to it. They have, therefore, been guilty of an imposition upon the court.

The arguments against the petition were substantially as follows:

1st. If this is a mere petition for a rehearing, it must be for error, apparent on the decree, or pleadings and evidence. Perry v. Phelips, 17 Ves. 178; 2 Smith, Pr. 62, 64; Story, Eq. Pl. 336; and cases there cited. And the court will not receive new evidence, taken after the decree. Addison v. Hindmars, 1 Vern. 442; 2 Smith, Pr. 32, 33.

2d. If the present proceeding is to be taken as preliminary to filing a supplemental bill, in the nature of a bill of review, the court will not allow it to be filed, unless for the discovery of new matter, material and relevant, and of such a nature, as to make it a fit subject of judgment in a cause; nor unless the evidence establishes satisfactorily, that the new matter did not come to the knowledge of the party or his agent within such time, as that it could have been advantageously used in the original cause. Mitf. Eq. Pl. by Jeremy, 84, 85; Ord v. Noel, 6 Madd. 127; Wiser v. Blachly, 2 Johns. Ch. 488; Livingston v. Hubbs, 3 Johns. Ch. 124; 2 Smith, Pr. 64; Dexter v. Arnold, [Case No. 3,856.]

Reasonable diligence also must be used, if there have been laches or negligence, the title to relief is destroyed. Pendleton v. Fay, 3 Paige, 205; Young v. Keighly, 16 Ves. 348; Blake v. Foster, 2 Ball & B. 457–461; Barrington v. O'Brien, Id. 140. It is contended, that the facts show conclusively, that Whiting knew from the beginning, that Cooper could testify concerning the agency and that, if reasonable diligence had been used, his testimony could have been obtained, as easily as his affidavit, since the decree. The defendant's want of knowledge of the rules of proceeding, and the want of attention, or just appreciation of the value of the evidence on the part of his counsel, afford no ground for even an enlargement of publication, much less for a bill in the nature of a bill of review. Whitelocke v. Baker, 13 Ves. 511; Cann v. Cann, 1 P. Wms. 727.

But, assuming that reasonable diligence has been used, the newly discovered evidence is immaterial and irrelevant; and it is consistent with the mass of evidence, pro-

duced by the plaintiffs, so far as it relates to the agency of Whiting.

Again, this is a proposition to prove a fact, before in issue, and therefore is objectionable, as being cumulative. The authorities are wholly against it. Wood v. Mann, [Case No. 17,953;] Respass v. M'Clanahan, Hardin, 352; Bowles v. South, Hardin, 461; Head v. Head's Adm'rs, 3 A. K. Marsh. 121. Besides; the granting of such a bill is not a matter of right, but rests wholly in the sound discretion of the court, (Story, Eq. Pl. p. 332, § 417, and cases there cited,) and, under the circumstances of this case, it should be denied.

Again, assuming that the evidence is material, the decree should be sustained, because, Whiting was tenant in common with Tidd's heirs and Stimpson, and therefore purchased for the benefit of his co-tenants, on the 7th of August, 1821, and must account to them. Fonbl. Eq. (Last Ed.) bk. 2, c. 5, § 1, note c, p. 423; Van Horne v. Fonda, 5 Johns. Ch. 407; Farmer v. Samuel, 4 Litt. (Ky.) 187.

The court took time to advise; and afterwards the following opinion was delivered.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice. The petition in this case involved some novelty, as well as some nicety, as to the practice of courts of equity, in regard to the rehearing of a cause, and the introduction of new evidence after the cause has been argued, and an interlocutory degree has been pronounced, but before a final decree has been entered; and on that account we were desirous to take a little time to consider it, before we delivered our judgment.

It is plain, that a rehearing alone, without the introduction of the new evidence, would be utterly useless, since (as the learned counsel admit) they could not hope to change the opinion of the court upon the actual posture of the facts, originally in the cause. The main scope of the argument has, therefore, been addressed to the consideration of the new evidence. And it seems to us, that if it would have furnished a sufficient ground for a bill of review, or a supplemental bill in the nature of a bill of review, if a final decree had been pronounced, then it is competent for the court, in the present stage of the cause, to order a rehearing, and to direct the new evidence to be taken and brought before the court at the rehearing, as a part of the proofs in the cause. In this way complete justice may be done between the parties. But to compel the petitioner to wait until a final decree, and then to apply for a bill of review, or a bill in the nature of a bill of review, would not only occasion great delay, but also great expense to the parties, which ought, if practicable, to be avoided. The only other mode, by which the new matter can be brought before the court, is by a supplemental bill; but this course does not seem to us absolutely indispensable in a case, exactly circumstanced, as this is. See Story, Eq. Pl. §§ 337, 393, 890, and the authorities there cited; Gilb. Forum Rom. 49; Patterson v. Slaughter, 1 Amb. 292, 293. Indeed, the objection in this form has not been made at the bar; and the argument has proceeded upon the implied understanding, that, if the new evidence be admissible at all, the parties are content, that it should be received at the rehearing as more convenient, as well as less dilatory to them, than a more formal proceeding. In Standish v. Radley, 2 Atk. 177, Lord Hardwicke, upon a petition of the defendant, directed a rehearing of the original decree (it not being enrolled), and allowed the defendant to file a supplemental bill to bring before the court, at the rehearing, proof of certain releases, not before in issue, or known until after the decree. In Norris v. Le Neve, 3 Atk. 26, 32, 33, a petition for a rehearing, and to bring a bill in the nature of a bill of review, where the original decree had been made upon a bill and cross bill, was preferred before Lord Hardwicke by the defendant, partly upon new proofs, which were not before known, and partly upon new matters, which were not before in issue, after an interlocutory decree, and before the final decree. Lord Hardwicke was of opinion, that all the matters were sufficiently before the court upon the original hearing, upon the allegations in the original bill and cross bill, in the cause; and, therefore, that the defendants did not need a bill of review to bring the equity fully before the court. He also thought, that the new proofs offered were not new discoveries; and, therefore, he denied the petitioner. In Earl of Portsmouth v. Lord Effingham, 1 Ves. Sr. 430, upon the petition of the defendant, Lord Hardwicke allowed a bill of review to be brought upon new matter discovered since the decree, going to the title originally in issue. See Patterson v. Slaughter, 1 Amb. 293. In Attorney General v. Turner, 2 Amb. 587, the same great judge allowed a rehearing and a supplemental bill upon matters not before in issue, and newly discovered, upon the petition of the defendant. These seem all to have been cases, where a final decree had been pronounced by the court. But in Barrington v. O'Brien, 2 Ball & B. 140, and Blake v. Foster, Id. 457, Lord Manners allowed a rehearing, and a supplemental bill to be filed by the defendants upon newly discovered facts, after an interlocutory decree. The doctrine of these cases was fully recognized by Mr. Chancellor Kent, in Wiser v. Blachly, 2 Johns. Ch. 488, and Livingston v. Hubbs, 3 Johns. Ch. 124, and by the circuit court in Rhode Island in Dexter v. Arnold, [Case No. 3,856.] It is clear, therefore that the defendant would be entitled to relief by a rehearing, upon filing a supplemental bill, under the direction of the court, stating the new evidence, if it be of such a nature, and under such circumstances,

as that he might have relief upon a bill of review, or a bill in the nature of a bill of review; but not otherwise. The rule, I take to be clear, that such a rehearing, and such a supplemental bill, will be granted only, when the party could entitle himself to relief upon a bill of review, or a supplemental bill, in the nature of a bill of review, after a final decree.

The questions then properly before the court are, first, whether the defendant, Whiting, had knowledge, or could, by reasonable inquiry and diligence, have acquired knowledge of the facts stated in Cooper's deposition, (for the other affidavits are merely explanatory, and of little consequence without that,) before the publication of the evidence, or before the hearing, which was a year afterwards, so that he might have availed himself of it before the decree. If he had such knowledge, or could by reasonable inquiry and diligence have obtained it, then it is clear upon the authorities, that he is not now entitled to any relief. The cases before cited, as well as Young v. Keighly, 16 Ves. 348, and Partridge v. Usborne, 5 Russ. 195, are directly in point. See, also, Story, Eq. Pl. § 414, and cases there cited. Secondly, whether, supposing the former point to be decided in favor of the defendant, Whiting, the evidence of Cooper is of such stringency and force, and relevancy, as that it justly might, and ought to entitle him to a reversal of the decree, by overcoming the former evidence in the cause, as well as the receipts, now produced by the plaintiffs from Whiting, by one of which he acknowledges himself to have received in April, 1816, from Jacob Tidd, $26.91 for his proportion of taxes on township No. 12, (the land in controversy,) for 1814 and 1815; and by the other to have received from Samuel Stimpson, in October, 1817, the sum of $5.57 in full of taxes on the same township for 1816 and 1817, which receipts certainly point very distinctly to an agency in the land by Whiting for those, under whom the plaintiffs claim title.

As to the first point. The great object of the new evidence is to establish, that Cooper was, in fact, the agent of Stimpson & Tidd, and Tidd's heirs, as to their interest in the township No. 12; and thus to repel the allegations of the bill, that Whiting was their agent, and to support his answer, denying such agency; and further, to show, that, upon notice from Cooper in 1821 of the sale of the lands for taxes, Stimpson declined to redeem the same; and thereby to raise a presumption, that Tidd, or Tidd's heirs, had knowledge of the sale, and acquiesced in the same manner without intending to redeem. The presumption certainly applies with no force to Tidd, who was at that time dead, or to Tidd's heirs; for his heirs were all at that time under age, and incapable of waiving or affecting their own rights in the lands.

Upon the actual posture of the evidence, it seems difficult to assert, that Whiting had not full knowledge, before the cause was at issue, that Cooper was the agent of Stimpson & Tidd, and other non-resident proprietors. Whiting in his affidavit admits, that he knew, that Cooper was agent for several non-resident proprietors of the township, at least from 1816 or 1817 up to the time of the sale, he himself having become a proprietor, under a levy in execution, of a large interest in the same township, as early as 1813. But he adds, that he did not know, that Cooper was the agent in special (without explaining what he means by these words) of Tidd & Stimpson, and of the heirs of Tidd, as Cooper has stated in his affidavit, for their lands in the township. Now, this last allegation must be received with the qualification, which Whiting has in another part of his affidavit referred to, viz. that he (Whiting) was informed by Baker (the plaintiff), in 1835, that Cooper had been formerly the agent for non-resident proprietors in certain townships generally, and among them he believes Baker mentioned, of Stimpson & Tidd, for Township No. 12. Now, this must have been nearly or quite three years before the publication of the testimony, and four years before the hearing of the cause, at May term, 1839. It is difficult, under such circumstances, to resist the conclusion, that Whiting was thus put upon inquiry and the exercise of diligence, as to the agency of Cooper; for, if Cooper was, at the time of the sale, and for years before, the known and active agent of Stimpson & Tidd, it would be most important evidence to repel the presumption, that he was himself also their agent.

What strengthens this conclusion, and, indeed, establishes it almost beyond controversy, is the fact, stated by Whiting in he same affidavit, that at the time, when his counsel was preparing his answer to the bill, he mentioned the circumstance of Cooper's agency to the counsel; but he was then informed, that it was not material, who was the agent of Stimpson & Tidd, if he (Whiting) was not. Certainly, as matter to be put into the answer, it was not material; but as matter of evidence to disprove Whiting's own agency, it was and must have been very material. That at the moment, when the answer was drawing, it did not strike the counsel with its true force, does not reflect any discredit upon his judgment, because that was not the stage in the proceedings, in which it was required to be weighed and considered. But when the evidence was largely gone into, at a subsequent period, to establish the agency of Whiting, in support of the allegations of the bill, if Whiting had used even ordinary diligence in bringing it to the view of counsel, it is scarcely credible, that it should have then been passed by with indifference. It went to the very pith of the controversy.

But, then, it is said, that Whiting was misled by the language of his counsel; and

that he ought not to be made a sufferer therefor. But, I apprehend, that no court of equity has ever felt itself at liberty to grant an application of this sort upon the suggestion of an error of judgment, or a mistake of law by counsel, as to the pertinency or force of evidence to be used in a cause. In Norris v. Le Neve, 3 Atk. 36, speaking of new discoveries, which would entitle a party to a bill of review, it is said; "If they (the facts) were known to the parties' counsel, or to their attorney and solicitor, or agents, it is sufficient to rebut such an application, or there would be no end of suits. How many parties are there, that know not the merits of their own cause; but rely on the skill of their counsel or solicitor; and therefore, what counsel or solicitors know, must be allowed to be the knowledge of the parties." And, certainly, it would not do to allow clients to have a rehearing or review of a cause, simply because their counsel have not fully appreciated the merits of their cause, or even have overlooked the importance of certain points of evidence, and therefore have omitted to have it taken for the cause. I am very far from imputing to the learned counsel in this cause the slightest blame. What I wish to state is merely the general rule, which cannot be broken in upon without manifest danger to the interests of all the adverse parties in controverted suits; and it will certainly not do to lay down a new rule for this cause only.

There is another consideration, arising upon Whiting's affidavit. He states, that his acquaintance with the business and concerns of the township, commenced about 1816 or 1817; and he adds; "I then understood, that said Cooper was the agent of a considerable number of the proprietors of said township, and I supposed the major part of them. General Cooper gave numerous permits, on behalf of those proprietors, for whom he acted, without objection from me; and he knew and made no objection to those, which I granted, which was done with his consent." Now, this declaration clearly shows, that Whiting was well acquainted with Cooper's agency for many of the proprietors, as early as 1816 or 1817; and there is no pretence to say, that, being apprized of that fact, he was not put upon inquiry, as to the particular persons, for whom Cooper was agent, as soon as the present bill was brought. It was most natural, that he should actually have made such inquiry; and if he had, Cooper would at once have informed him, that he was the agent of Stimpson & Tidd, as well as of other persons. The very circumstance, that Cooper was the known agent of a large number of the proprietors, whose names were not known to Whiting, ought to have awakened in him a spirit of diligence. There was a still more impressive fact, to which I shall more particularly allude hereafter, which ought to have led him to make the inquiry; and that is, that he and Cooper, in managing the affairs of the township, mutually advised and acted in concert. "Neither of us (says Whiting) intended, as I believe, to exceed our respective rights, or those, for which we acted, or to exercise them in such a manner as to interfere with each other. I acted with his advice and consent on the part of those, for whom he acted as agent, in giving permission to Raymond & How to erect a saw-mill at the Orange Rips." Now, if Whiting himself was not the agent of Stimpson & Tidd in acts like this, which affected intimately the interests of all the proprietors, it would seem an almost irresistible conclusion, that he deemed the interests of Stimpson & Tidd to be represented by Cooper. It is not a little remarkable, also, that in this very paper, signed by Whiting, and giving the permission to Raymond & How, Whiting states himself expressly to be "the agent of the said township" (No. 12); thus, in effect, assuming to act as the representative of the proprietors.

And, here, it may be as well to dispose of that part of Whiting's petition, which complains of surprise, if not of fraud, in the introduction of that paper, as a part of Raymond's testimony. We think the complaint utterly groundless. That paper was properly introduced under the interrogatory addressed to Raymond for the production of all papers relative to permits to cut timber; and the counter paper, now offered by Whiting to explain the transaction, is in exact coincidence with the conclusion, deducible from the very language and objects, professed on the face of the former. And, if Whiting thought otherwise, after publication of the testimony, for one whole year before the hearing, he might have applied to have had it suppressed, or for leave of the court to introduce the counter paper at the hearing. See Whitelocke v. Baker, 13 Ves. 511. He did no such thing; and his present complaint must be deemed a mere afterthought, upon feeling the full pressure of the evidence at the argument.

But let us see, what is the new evidence relied upon of Cooper, and how far it establishes an exclusive agency in him for Stimpson & Tidd. Cooper, in his deposition, in answer to the first interrogatory, says; "That he acted as agent for John Peck, Esq., the principal owner in township No. 12, by verbal and written request, and by power of attorney, from 1794 to 1813 or 1814; and for Samuel Parkman, Thomas L. Winthrop, George and Thomas Odiorne, and Messrs. Jacob Tidd and Samuel Stimpson, who held under said Peck, by their verbal and written request, up to and including 1820. I was authorized to take a general supervision of their respective interests in said land." In answer to the second, he says; "That from about 1816, the general concerns of the township No. 12 were managed by Timothy Whiting (the defendant), who became the largest owner in 1813, and, considering me as the

agent for the non-resident proprietors, above named, consulted me on all measures proposed for the general benefit. But no special communication with said Jacob Tidd or Samuel Stimpson, or any other of the above named proprietors or their heirs, was either made or received, other than before mentioned, as in my first answer; and no particular power was given or accounts settled, except that of the general agency of said township, unless where the proprietors redeemed their lands, and had them set off in severalty." In answer to other interrogatories, he says, that Whiting, to his knowledge, never assumed to be the agent of Tidd or Stimpson, or either of the before named non-residents; or to the best of his remembrance, ever undertook to act on account of any other than himself, and in his own right, except with his advice, given as agent of the said non-resident proprietors. That he considered himself as acting for the non-resident proprietors generally; and, as Whiting managed the general concerns of the township, he occasionally informed him (Cooper), as agent for the non-resident proprietors, of his proceedings, that he might make the necessary communications to them. That he (Cooper) paid the taxes of the non-resident proprietors of the township No. 12, until 1820. That he never had any written power, or authority to act as agent for Tidd & Stimpson, in relation to township No. 12; but so acted by their verbal request. That he had a special power in 1803, from them to act in their behalf, under the direction of John Peck, for township No. 11. That he had no letters from Tidd & Stimpson to himself, and no copies of any letters to them. That he considered his agency for Tidd and Stimpson at an end, when they neglected or refused to redeem their land. That in the winter of 1821, and the fall following, he was in Boston, and had personal interviews with Stimpson respecting his and Tidd's land in the township No. 12; and Stimpson utterly refused to redeem, and gave him to understand, that Tidd's heirs also refused to redeem, stating as a reason, that the land was not worth redeeming; that in the winter of 1821, Tidd was too sick to be seen, and that in the fall he had deceased.

This is the substance of Cooper's testimony. And the first remark, which is called for, is, that it is merely cumulative to the issue made in the original pleadings, that of the agency of Whiting, and is supposed, by affirming the agency of Cooper, to negative that of Whiting. We shall presently see, how far that conclusion is justified. Now, it seems to be a general rule, perhaps not strictly a universal rule, in proceedings of this sort, not to allow a rehearing and a supplemental bill upon new discovered evidence, which is merely cumulative to the litigated facts already in issue. Such was the opinion of Mr. Chancellor Kent, in Livingston v. Hubbs, 3 Johns. Ch. 124, and it was in some measure recognized in Dexter v. Arnold, [Case No. 3,856.] But waiving this consideration, another remark, which strikes the mind upon the first blush of the deposition, is, that it distinctly and unequivocally shows, that as early as 1816, and from thence upwards, Whiting had the most thorough knowledge of Cooper's agency for the non-resident proprietors, that he advised with him in all the concerns of the township, and acted under his advice in all measures, which respected the general interests of the proprietors. Cooper expressly asserts, that from about 1816, the general concerns of the township were managed by Whiting, with his advice and consent, as agent of the non-resident proprietors; and among these were Stimpson & Tidd. So that, in fact, according to this very aspect of the case, Whiting was a sub-agent, as to the whole affairs of the township for those proprietors, and acted as such up to the very time of the sale. Now, a sub-agent is just as much disqualified, as an agent is, to make a purchase in opposition to the rights and interest of his principal.

But it is said, that Whiting did not, in fact, know, that Stimpson & Tidd were non-resident proprietors, for whom Cooper was "in special" an agent. Be it so. But how does that help the matter? He had the means of knowing, if he chose to inquire; and he undertook to act under Cooper for all for whom Cooper was agent. Nay, it appears to me, that Cooper's testimony justifies the court in saying, that Whiting understood, that Cooper acted as agent for all the proprietors, except those, for whom Whiting undertook to act, as agent, in managing the general concerns of the township. It is not even shown, that there were any other proprietors of the township, except Whiting and those for whom Cooper purported to act. There are some twenty receipts and permits between 1816 and 1821, in which Whiting acted and signed "for the proprietors," or authorized acts to be done, affecting the interests of all the proprietors, such as the cutting of logs on the township, besides the Orange Rip contract, where he describes himself "as agent of the township." Besides; it is perfectly clear from the receipts now offered as new evidence, that Whiting positively knew, that Stimpson & Tidd were non-resident proprietors; and he actually received from them the taxes on their lands in the township, in 1816 and 1817. Now, at that time, he either acted as their direct agent, or as their sub-agent under Cooper in the payment of these taxes; and therefore, in either view, there is difficulty in presuming, that he did not know, whether Cooper was acting "in special" for them or not.

But the other part of the conclusion attempted to be drawn from Cooper's testimony, that he was the exclusive agent, is also incumbered with many difficulties. Cooper may have been an agent of Stimpson & Tidd, and not exclusively their agent. We

have seen, that in the receipts and permits already referred to, Whiting acted as agent for the proprietors generally, and not for a part thereof. He nowhere signs, as sub-agent under Cooper. The receipts given by Whiting to Stimpson & Tidd, for the taxes in 1814, 1815, 1816, and 1817, profess no such sub-agency; but are apparently acts done by a primary agent. If Cooper means to affirm, that he always paid the taxes during his agency, until 1820, for Stimpson & Tidd, these receipts seem to contradict that suggestion. And it is not a little remarkable, that Cooper produces not a scrip of paper of any sort, touching his agency for Stimpson & Tidd, during its whole existence. No letters, no written receipts, no written charges, no written payments are produced. Every thing rests in general oral statements, after the lapse of more than twenty years.

But what presses upon my mind with peculiar force, is this, that from the written documents it is clear, that Whiting during the period assumed to act for the proprietors generally. Can he now be permitted, in order to justify himself in the sale for taxes, to disclaim that agency, and set up an adverse interest? If he can, ought the evidence to be admitted, unless it is perfectly clear, and fortified by written proofs, not dependent upon the frail memory of man? How can such a disclaimer consist with the language of the above receipts for the taxes of 1814, 1815, 1816, and 1817?

These last remarks are properly applicable to the second question, whether the evidence, if admitted, is of such stringency and force and relevancy, as justly to call for a reversal of the decree. To say the least of it, I entertain the most serious doubts upon that point. The most that the evidence properly establishes is, that Cooper acted as the agent of Stimpson & Tidd (not as an exclusive agent) by verbal authority; and Whiting may also have acted in the general concerns of the township for Stimpson & Tidd, by a like general authority, especially after he removed to the township, or managed its general concerns. But upon the other question, that Whiting either knew, or might by reasonable diligence have known, the facts, to which Cooper now testifies, as to his agency, there seems to me to be no just ground for doubt. Cooper's evidence on this point, in no proper sense, comes within the rule for the admission of new discovered evidence, according to the doctrine of courts of equity.

In respect to that part of Cooper's testimony, which states, that he communicated to Stimpson, in 1821, the tax sale, and he declined to redeem, it is a fact, that is not put in issue in the cause, and therefore, could be brought forward only by a supplemental bill. If it were admitted, it could not affect Tidd's heirs, but Stimpson only, for the reasons already stated. But there is this additional consideration, that if the cause were to be decided upon this ground, it would be upon the testimony of a single witness speaking to facts after twenty years, and to a confession, incapable, it may be, of being rebutted, after such a lapse of time. Besides; what is very material, is, that it does not appear, that Cooper ever communicated to Stimpson, that Whiting was the purchaser at the tax sale, or to Whiting, that Stimpson declined to redeem. These would be highly important ingredients if the defence had originally proceeded upon the ground, that Whiting was constructively, or expressly the agent of Stimpson & Tidd, and that they by their long acquiescence in his purchase, had waived the agency and right to redeem. But, if Whiting's defence, as now made, is to stand, that there never was any agency whatsoever for them, it does not seem practicable to give him the benefit of any such fact.

Upon the whole, our judgment is, that the petition ought not to be granted, and therefore, that the interlocutory decree already pronounced ought to stand.

Case No. 787.

BAKER et ux. v. WHITING et al.

[3 Sumn. 45.][1]

Circuit Court, D. Maine. May Term, 1839.

DEED—CONSTRUCTION—MAINTENANCE AND CHAMPERTY—EQUITY—TRUSTS—RIGHTS OF BENEFICIARY—CO-TENANT AS TRUSTEE—ADVERSE POSSESSION—EXTINGUISHMENT OF TRUST.

1. A deed of release for a valuable consideration, and intended to convey all the party's right and title, if it cannot take effect as a release, may be construed, in furtherance of the intention of the parties, as a bargain and sale, or other appropriate conveyance, ut res magis valeat, quam pereat.

2. The old cases with regard to maintenance and champerty go farther than would now be sustained in courts of equity.

3. A cestui que trust may lawfully dispose of his trust estate, notwithstanding his title is contested by the trustee. Neither the common law, with regard to maintenance and champerty, nor the statute of 32 Hen. VIII. c. 9, made in aid thereof, apply to a trust estate actually existing, either by the acts of the parties, or by construction of law.

[Cited in Wyman v. Babcock, Case No. 18,113.]

4. There can be no disseisin of a trust, though the exercise of an adverse possession for a great length of time may in equity bar or extinguish it.

[Cited in Hunter v. Marlboro, Case No. 6,908.]

5. A purchase by an agent will be deemed, by a court of equity, a purchase for his principals, unless the agent has openly and notoriously, and with full notice to his principals, discharged himself from his agency.

6. A tenant in common cannot, without the consent of his co-tenants, grant permits to persons to go on the premises owned in common, and to cut down timber thereon for their own use, for a compensation, called, in the language of the country, "stumpage."

[1] [Reported by Hon. Charles Sumner.]

7. All acts, done by one tenant in common, are to be done for the interest of all the co-tenants, and in conformity to their rights, until an adverse claim is notoriously set up and established by competent proofs.

8. Stimpson gave a deed of release of his interest, as a tenant in common, in certain premises to Baker; at the time of this conveyance, Whiting was in possession and seisin of the premises, claiming them in his own right, by virtue of a purchase under a tax sale. Whiting was one of the tenants in common of the premises, and was the agent of Stimpson and the other proprietors. *Held*, that the purchase of Whiting must be deemed a trust for the benefit of Stimpson and his grantee, Baker, to the extent of their interests; that he ought to be decreed to convey the legal title to the premises, after being satisfied of all just claims, which he had against them for taxes, for the purchase money laid out in the tax-sale, for his expenditures and improvements upon them, and also for his reasonable services as agent in the premises, deducting all sums of money received by him in the premises for "stumpage" or otherwise.

[See Curts v. Cisna, Case No. 3,507; Schedda v. Sawyer, Id. 12,443; Rothwell v. Dewees, 2 Black, (67 U. S.) 617.]

9. In equity, length of time is no bar to a trust clearly established; provided no circumstances exist to raise a presumption from lapse of time of an extinguishment of the trust, and no open denial or repudiation of the trust is brought home to the knowledge of the parties in interest, which requires them to act, as upon an adverse title.

[Cited in James v. Atlantic Delaine Co., Case No. 7,177; Lakin v. Sierra Buttes Gold Min. Co., 25 Fed. 345.]

[10. Time begins to run against a trust as soon as it is openly disavowed by the trustee, insisting on an adverse right and interest which is clearly and unequivocally made known to the cestui que trust.]

[Cited in U. S. v. Taylor, 104 U. S. 222; Speidel v. Henrici, 120 U. S. 386, 7 Sup. Ct. 611; Naddo v. Bardon, 47 Fed. 790.]

Bill in equity [by George Baker and wife against Timothy Whiting and others] and cross bill. The bill stated, that on or about the 10th November, 1800, John Peck, by deed of bargain and sale conveyed to Jacob Tidd, father of Emily, the wife of George Baker, and to Samuel Stimpson seven thousand and twenty-three acres of land situate in township No. 12, now Whiting, in the county of Washington, whereby the said Tidd and Stimpson became seised of an absolute estate in the said seven thousand and twenty-three acres of land in fee simple as tenants in common thereof, and in common with other owners of the said township. Afterwards Tidd and Stimpson employed the defendant, Whiting, as their agent, to take care of the said land and prevent any trespass thereon, and to pay all taxes lawfully assessed on the same, or give notice thereof to his constituents, which the said Whiting undertook to do. Jacob Tidd died in the year 1821, and thereupon one seventh of his interest descended to his daughter Emily, who became seised thereof. Another undivided seventh part descended to her brother William Dawes Tidd, son of the said Jacob, who became seised thereof, and afterwards died, so seised, unmarried and without issue, whereby one sixth part of the said undivided share of the said W. D. Tidd, descended and came to the said Emily. Samuel Stimpson afterwards conveyed all his interest to George Baker.

The bill charged a combination between Charles Peavy, Timothy Whiting, Timothy Whiting, Jr., M. J. Talbot and Samuel A. Morse and others, persons unknown, and that they entered into the said tract and disseised the complainants, under pretence, that the said lands were legally assessed for public taxes and duly advertised and sold to the said Whiting, Sen., as the highest bidder, and that the said owners neglected to redeem the same according to the laws of Maine, whereby the said Whiting, Sen., lawfully became the absolute owner thereof in fee simple; whereas the contrary is true, and that no such tax was lawfully assessed, nor was any sale thereof lawfully made. That Whiting fraudulently kept the complainants and the said Tidd and Stimpson, wholly ignorant and uninformed of the said pretended assessment and sale, that he might seem to acquire some legal title to the said seven thousand and twenty-three acres, through their neglect to redeem the same. That the said Whiting, Sen., after his pretended purchase, sold the said lands, absolutely and in good faith, and for a valuable consideration, to the said Morse, Talbot and Whiting, Jr., or some of them. The said grantees petitioned for partition as tenants in common, with persons unknown, and that, on notice given and proved, and proceedings had, partition was made by commissioners appointed for that purpose, and lands were set off in severalty to Morse, Talbot, and Whiting, Jr.

The bill alleged further, that Whiting, Sen., under some pretence of right had cut down, converted to his own use, and received pay for large quantities of timber, without the license or consent of the complainants, or persons under whom they claim, and that during the past winter, and up to the time of the filing of the bill, the said Peavy and others had entered upon the said lands and cut down a large number of timber trees thereon, which they were about to remove and convert into lumber, to the great and irreparable injury of the complainants.

The bill concluded with a prayer, that the defendants might discover and exhibit any and all letters, agreements, memorandums, original deeds and paper writings in their possession or control, relating to the matters stated and charged; that they might account for the value of the timber and trees, which were upon the said lands, and cut down by them or by Whiting, Sen.; that they might be restrained from cutting and removing the said timber, and that they might be required to release their pretended titles to the premises, and for further and other relief.

The answer of Timothy Whiting, admitted the title to have been originally in Emily Baker, as stated; but alleged, that it was

defeated by a tax-sale, on the 7th August, 1821, and further denied all agency for the complainants, or for Tidd or Stimpson, or that he ever undertook to act as agent for them. The answer stated, that the defendant, on 27th August, 1821, purchased seventeen thousand five hundred acres, lying in common with the residue of the said lands in the said plantation, at an auction sale of the same, by Enoch Hill, collector of taxes for that year, the same having been sold for the non-payment of certain taxes assessed on the said lands, being the unimproved lands of non-resident proprietors thereof, for the year 1821; the said taxes amounting to $357.85. The sale was advertised, previously, in the Eastern Argus, printed at Portland, and in the Eastport Sentinel, and notice thereof posted in the said plantation. The said collector executed and delivered a deed of the said land to the defendant on the 6th of November, 1821, to hold in fee simple, but subject to the legal right of redemption; but which was never redeemed, and so the defendant became the absolute owner thereof in fee. Whiting further alleged, that he owned several thousand acres in the town of Whiting, prior to August 27th, 1821, but had no means of knowing the exact quantity, and that, therefore, it became necessary for him to convey to Whiting, Jr., Morse and Talbot, in order to have his interest properly ascertained, and set off in severalty; that many years prior to the filing of the bill, Whiting, Jr., Morse and Talbot, had conveyed their said several parcels to the defendant, whereby the legal title became vested in him, and during the past winter and to the time of the filing of the bill, he entered upon lands owned by him in severalty, and no other, and cut down a large number of timber trees, as charged in the said bill, as he had a right to do. Whiting further alleged, that the deed mentioned in the bill, which was given by the said Samuel Stimpson to the said George Baker, was given in December, 1835, or January or February, 1836, at which time the land mentioned in the said deed was in the possession of the defendant or his assigns; the evidence of whose titles was all on record, and the said lands were then claimed to be the defendant's or his assigns', all which facts were well known to said Baker at the time he made his said purchase of the said Stimpson.

Answers were also put in by Samuel A. Morse, M. J. Talbot, and Charles Peavy, wherein they stated the origin of their interests in the estates mentioned in the original bill. A cross-bill was also filed by Timothy Whiting, Samuel A. Morse, and M. J. Talbot, charging a combination to purchase up stale or pretended titles, and praying for a dismissal of the original bill, a perpetual injunction in relation to the premises, and for further relief. The answer to the cross-bill denied all combination to purchase up stale or pretended titles, and concluded with a prayer for an injunction against Whiting to restrain him from cutting and carrying away timber from the premises, or permitting timber to be cut and carried away.

Hobbs, Fessenden, and Deblois, for plaintiffs.

Davels and Mellen, for defendants.

Before STORY, Circuit Justice, and WARE, District Judge.

STORY, Circuit Justice. Several objections have been taken to the present bill at the hearing, some of which involve matters of fact, and others matters of law. I will briefly state the opinion of the court upon all the points suggested at the argument.

The first question is, whether the plaintiffs have shown any title whatsoever to maintain the present bill; or, in other words, whether they have shown any interest or estate in the land in controversy. The bill states, that Baker and his wife are entitled in her right to one sixth of one undivided seventh part of the premises; and that Baker, in his own right, is entitled to one moiety of the premises, in virtue of his purchase and assignment from Stimpson, who was owner thereof. Mrs. Baker inherited from her father, Jacob Tidd, one seventh of the premises; and by the death of her brother, William Dawes Tidd, one seventh of one seventh; he, dying after he came of age, and his mother being entitled to share with his brothers and sisters. By the deed of Baker and his wife to Howe, in December, 1835, they released their right and title to four sixth parts of the premises; and the answer to the cross bill insists, that she never intended by that deed to part with the share derived from her brother. Be this as it may, it is very clear, that she has not conveyed it by this deed, since her right is still retained to the remaining two-sixths of the premises. So that Baker and his wife are fully entitled to the whole share derived from her brother. The bill is, therefore, maintainable by the plaintiffs in her right, so far as this interest goes.

As to the title derived by Baker by the deed of release from Stimpson of one moiety of the premises, as the release was for a valuable consideration, and meant to convey all Stimpson's right and title, if it cannot take effect as a release, it may be construed in furtherance of the intention of the parties, as a bargain and sale, or other appropriate conveyance, ut res magis valeat, quam pereat. This doctrine I take to be now well settled at law. But in equity there can be no question, that it is fully established. The case of Doungsworth v. Blair, 1 Keen, 801, is directly in point, if, indeed, so plain a principle required any authority to support it. In that case it was held, that an indenture, which was intended to be an indenture of release, but could not operate as such, might, for the purpose of carrying into effect the real intention of the parties, if there was

a proper consideration, be construed as a covenant to stand seised. The case of a valuable consideration is far stronger. See, also, 1 Story, Eq. Jur. § 168.

The main objection, however, taken to the operation of this deed, is, that at the time of this conveyance by Stimpson to Baker, the defendant was in full possession and seisin of the premises, claiming them in his own right, and of course, that Stimpson was then disseised, and the conveyance to Baker was void under the operation of the common law relative to maintenance and champerty, and the statute of 32 Hen. VIII. c. 9, made in aid thereof. This statute prohibits, under penalties, the buying or selling of any pretended right or title to land, unless the vendor is in actual possession of the land, or of the reversion or remainder. The object of the statute, as well as of the common law, was, doubtless, to prevent the buying up of controverted legal titles, which the owner did not think it worth his while to pursue, upon mere speculation; so that in fact, it might properly be deemed the mere purchase of a law-suit. 4 Bl. Comm. 135, 136; 1 Hawk. P. C. c. 83, §§ 1–20; Id. c. 84, §§ 1–20; Id. c. 86, §§ 1, 4–17. The old cases upon this subject have gone a great way, farther, indeed, than would now be sustained in courts of equity, which have broken in upon some of the doctrines established thereby. But be this as it may, neither the common law, nor the statute, applies to a trust estate actually existing, either by the acts of the parties, or by construction of law. Thus, a cestui que trust may lawfully dispose of his trust estate, notwithstanding his title is contested by the trustee; for the latter can never disseize the former of the trust estate; but so long as it continues, the possession of the trustee is treated, at least in a court of equity, as the possession of the cestui que trust. There can be no disseisin of a trust; although the exercise of an adverse possession for a great length of time may, in equity, bar or extinguish the trust. The whole question in the present case turns upon this; whether the defendant, Whiting, at the time of his purchase of the premises at the sale for taxes, in August, 1821, was the agent of the heirs of Jacob Tidd, of Stimpson, and of other proprietors of their undivided shares in the premises. If he was, then, upon the acknowledged principles of courts of equity he, as an agent, could not become a purchaser at the sale for himself; but his purchase must be deemed a purchase for his principals. It matters not, whether, in such a case, the defendant intended to purchase for himself, and on his own account, or not. For courts of equity will not tolerate any agent in acts of this sort, since they operate as a virtual fraud upon the rights and interests of his principals, which he is bound to protect. He was bound, as their agent for the premises, to give them notice of the intended sale, and to save the property from any sacrifice; and until he had openly, and notoriously, and after full notice to the principals, discharged himself from his agency, he could not be permitted, in a court of equity, to become a purchaser at the sale. If, indeed, as there is much reason to believe, at the time of the sale, he had funds of his principals in his own hands, sufficient to meet the taxes; and a fortiori, if he endeavored to dissuade, or to prevent other persons from becoming bidders at the sale, as some of the evidence states, his conduct was, supposing him to be agent, still more reprehensible. The validity of the conveyance, then, from Stimpson to Baker, depends upon the fact, whether the defendant, Whiting, was or was not the agent and mere trustee of the parties; and whether, if agent, eo instanti, that the conveyance under the tax sale was made to him, the law did not attach the trust to the lands in his hands. If it did, then the conveyance of Stimpson to Baker was valid. If it did not, then it was void, as falling within the reach of the doctrines respecting maintenance, champerty, and pretended titles. Those doctrines do not apply to trusts created in privity of estate, but to adverse and independent titles between strangers. It is quite a mistake to suppose, that a controverted trust may not be assigned by the owner, when it is clearly and unequivocally attached to property. If a contract is made for the sale of lands, the contractee may sell and assign the whole, or a part, or make a binding subcontract respecting the same, whether there be a controversy respecting the specific performance of the original contract, or not. The case of Wood v. Griffith, 1 Swanst. 55, 56, is fully in point upon this doctrine, even when the assignment or sale is made during the pendency of a suit for a specific performance.[2] I repeat it, therefore, that the whole question, whether the deed from Stimpson to Baker was a valid conveyance or not, depends upon the point, whether, at the time, the defendant was actually or constructively a trustee of the premises for Stimpson.

And, in my judgment, notwithstanding the stern denials of the answer of Whiting, the fact of the agency of the defendant, at and before the time of the tax sale, for Stimpson, as well as for the heirs of Jacob Tidd, and other proprietors, is completely established by evidence altogether unexceptionable and conclusive. It is proved by acts done, which in no other way could be lawful, or indeed could be fairly accounted for. And it is also proved by written documents and receipts, which admit of no reasonable doubt. It appears, that as long ago as 1815 the defendant, Whiting, became a purchaser,

[2] See, also, 2 Story, Eq. Jur. §§ 1048–1051, 1053, 1054; Harrington v. Long, 2 Mylne & K. 590; Hartley v. Russell, 2 Sim. & S. 244. In the case of Prosser v. Edmonds, 1 Younge & C. 497, 498, there was no trust, but a mere naked right to set aside a conveyance for fraud, which distinguishes it from the present case.

and, as such, a tenant in common with the other proprietors of these undivided lands. He undertook, at various times, between 1815, and the sale in 1821, as well as afterwards, to grant written permits to different persons to go on the premises, and to cut down timber thereon for their own use, for a compensation called, in the expressive language of the country, "stumpage"; and, for this compensation, he also at several times gave receipts. Now, as a tenant in common, he had no authority whatsoever, without the consent, express or implied, of his co-tenants to grant any such permits, or to authorize any such acts. They are expressly prohibited, not only by the common law, but by the positive penalties of the statute of the state upon this subject. These penalties are severe; and the law will never presume, that a party does an unlawful act, unless it is shown by some competent evidence. The presumption in the absence of counteracting evidence is, that it is done under lawful authority, if it might have been so done. A court of equity would, a fortiori, indulge in such a presumption in favor of a party, who is a tenant in common, that he acted as a common agent, for the common benefit of all the proprietors; since in that way he may promote the true interests of all. Indeed, all acts, done by one tenant in common, are presumed to be done for the interest of all the cotenants, and in conformity to their rights, until an adverse claim is notoriously set up, and established by competent proofs. In the present case, upon this sole ground, in the absence of all counter proofs, the acts of the defendant, Whiting, up to the tax sale in 1821, ought to be deemed to be done by him as a tenant in common, acting for the benefit of all, and therefore acquiesced in by all.

But the case does not rest upon this sole ground, either of fact or presumption. The very permits and receipts afford satisfactory evidence, that the defendant, Whiting, did not act solely for himself; but that he acted for the other proprietors. It is true, that in one case only does he give a receipt in terms for the proprietors of the undivided lands for stumpage. But in all the other cases, and they are numerous, his receipts always purport to be "for the undivided lands," and never, in any instance, purport to be on his own individual account. This is very strong evidence to establish the real nature of the transactions. If he was acting for himself alone, his silence on this point is wholly unaccountable. If he was acting for himself and other proprietors, then the language is clear and intelligible; and has its appropriate effect. In this way too the acquiescence of his co-tenants would be easily explained. In any other view it would be utterly unaccountable. I have, therefore, no doubt whatever on this point, that the defendant, Whiting, was agent for Jacob Tidd during his life (and he died in March, 1821), and afterwards for his heirs (some of whom were, as it is said, at that time infants), as well as for Stimpson and other proprietors. If so, the purchase by him, at the tax sale, became immediately by operation of the principles of a court of equity a trust for the benefit of the principals.

Then, it is said, that the plaintiffs are barred from any right in equity by the mere lapse of time. It does not appear what were the respective ages of the heirs of Tidd at the time of the tax sale, nor what was the age of Stimpson; and all of them were at that time (as it should seem) citizens of another state, and of course came within the common exceptions of the statute of limitations. But, what is more particularly applicable to the present case, twenty years had not elapsed before the filing of the bill; and, I apprehend, that, in the case of a trust of lands, nothing short of the statute period, which would bar a legal estate or right of entry, would be permitted to operate in equity, as a bar of the equitable estate. This doctrine seems to be admitted by the authorities ever since the great case of Cholmondeley v. Clinton, 2 Jac. & W. 1, and it has been repeatedly acted upon in the supreme court of the United States.[1] Indeed, in the case of Prevost v. Gratz, 6 Wheat. [19 U. S.] 481, it was broadly laid down, that, in equity, length of time is no bar to a trust clearly established, and that, in cases where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. This doctrine is regularly true, when it is received with the proper accompanying limitations; that no circumstances exist to raise a presumption from lapse of time of an extinguishment of the trust; and no open denial or repudiation of the trust is brought home to the knowledge of the parties in interest, which requires them to act, as upon an asserted adverse title.

Upon the whole, I am of opinion, that the purchase by the defendant must be deemed to be a trust for the benefit of the plaintiffs to the extent of their interest; that the defendant ought to be decreed to convey the legal title to them, after being satisfied of all just claims, which he has against the lands for taxes, for purchase-money paid at the tax sale, for his expenditures and improvements upon the land, and also for his reasonable services as agent in the premises, deducting all sums of money received by him in the premises for stumpage, or otherwise. And it ought to be referred to a master to take an account in the premises, and to make report thereof to the court, according to the principles of this decree.

As to the other defendants, Peavy, Morse, and Talbot, no case has been made out against them of any fraud or misconduct, calling for the interposition of the court. The

[1] See the cases cited in 2 Story, Eq. Jur. §§ 1520–1522; and Story, Eq. Pl. §§ 503, 751–759; and Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 168.

bill will, therefore, be dismissed against them, with costs. But the plaintiffs are entitled to costs, upon the cross bill, against the parties thereto, namely, Whiting, Morse, and Talbot, and may set them off pro tanto against the costs of the original bill decreed to Morse and Talbot.

The district judge concurs in this opinion, and a decretal order will be drawn up accordingly.

[NOTE. For opinion denying a petition by defendant, Whiting, for a rehearing, see Baker v. Whiting, Case No. 786.]

Case No. 788.

In re BAKEWELL.

[4 N. B. R. 619, (Quarto, 199;) 18 Pittsb. Leg. J. 289; 3 Pittsb. Rep. 323.]

District Court, W. D. Pennsylvania. Feb. 15, 1871.

BANKRUPTCY—PROOF OF CLAIMS.

[Although the bankruptcy proceedings have been stayed, having been superseded by arrangement under section 43 of the bankrupt act, the sole power to admit claims against the bankrupt's estate is not vested in the trustees under the arrangement, but they may and should be proved before the register.]

[Cited in Re Cooke, Case No. 3,169. Disapproved in Re Trowbridge, Id. 14,191.]

In bankruptcy. James T. Brady & Co. have offered to make proof before the register of a debt against the estate of said bankrupt, and upon notice being given to the trustees of said bankrupt, acting under the provisions of section 43 of the bankrupt act, [14 Stat. 538,] John M. Kennedy, Esq., their solicitor, appears, and pro forma resists the offer on the ground that the bankruptcy proceedings have been stayed, and that the trustees themselves have the sole power to admit claims against the bankrupt's estate, and that only in the case of contested claims can the powers of the court and register be invoked. This position of the trustees' solicitor is based upon the decision of Judge Treat, in the district court for the E. D. Missouri. In re Darby, [Case No. 3,570.]

In this matter the bankruptcy proceedings have been stayed—they having been superseded by arrangement under section 43. The provisions of that section are extremely vague, and it is difficult to determine what the trustees may or may not do. In this matter, however, we are not called upon to say what the powers of the trustees are, save in respect of the allowance of claims against the bankrupt's estate. The decisions upon the 43d section have been but few, and none of them bear upon this question but the case cited by the trustees' solicitor. In that case Judge Treat says: "Whenever the trustees and committee are satisfied that demands are correct, and need no testimony to be taken, they can allow the same. When they are not satisfied the demand should be proved before the register on notice to the trustees. All demands not allowed already should be presented to the trustees for allowance, in the first instance, and, if allowed by them, no further action need be had; but if the trustees demand proof, they can apply to the register or judge for an order to have testimony taken with respect thereto before the register, or otherwise, and for the claims to be passed upon by the register."

From this opinion I am compelled to dissent. I cannot find anything in the statute to justify it, but everything to deny its correctness. The first clause of section 27 [14 Stat. 529] provides "that all creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate pro rata," etc. Of course none others shall be entitled to share in the assets. Due proof of a debt can only be made by compliance with the 22d section of the act, [14 Stat. 527.] The second clause of that section provides: "To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, on oath or solemn affirmation before the proper register or commissioner, setting forth the demand," etc. From these two clauses it is clear that to entitle a claimant to have his demand, and to share in the estate, he must prove his debt in the manner provided by section 22. The trustees cannot make distribution of the estate to and among any other persons than those mentioned in section 27, as entitled to share therein, that is to say, "creditors whose debts are duly proved and allowed."

But there is more in the act than this. Section 43 preserves the bankrupt's right to apply for and obtain his discharge, as though the ordinary proceedings under the act had continued. Section 29 provides, that when the bankrupt files his petition for discharge, notice is to be sent by mail to all creditors who have proved their debts. If, then, the trustees have power to allow claims not duly proved, such creditors would not be entitled to notice of the application, and the discharge might be granted without their knowledge. Such a result was never intended. If the bankrupt's estate is not equal to fifty per centum of his liabilities (as principal debtor) duly proved, he must, in order to obtain a discharge, file the assent in writing of a majority in number and in value of his creditors who have proved their claims, to whom he is liable as principal debtor. If the rule in Re Darby, [supra,] be correct, the creditors whose claims were allowed by the trustees, without being duly proved, would be excluded from the operation of this section, because the trustees had not disputed their claims and compelled them to make due proof. The bankruptcy proceedings may be resumed by order of

the court, on sufficient cause being shown therefor, as the bankruptcy proceedings are only stayed until the further order of the court. No cause for resuming such proceedings can come to the knowledge of the court unless some party in interest makes complaint. Such complaint coming from a creditor should be from one who has proved his debts, one whose name is upon the records of the court.

It may be said, that under arrangement the trustees and committee of creditors may devise a system of their own for ascertaining the legal claims upon the estate. Such a suggestion involves the idea of judicial powers which the trustees and committee do not possess. There are numerous intricate questions as to what are provable and what are not provable debts, arising in bankruptcy proceedings, which trustees and committees would never discern, resulting oftentimes in the recognition and allowance of non-provable debts, to the injury of the general body of creditors. To say that trustees have power to allow debts without the form of regular proof, is certainly to say that they have the power to reject. Both powers certainly reside in them, or neither. If, then, the trustees have power to allow claims, it must follow that they must have judicial powers, and that in the exercise of such powers they determine the claims allowed by them as provable debts, when in fact they may not be provable. Having then allowed non-provable debts, they have gone one step towards determining a rule of their own for distributing the assets of the bankrupt, and their right to so determine may as well be recognized fully. But such a thing will not be contended for. No one will pretend that distribution can be made by the trustees to and among any but those whom the bankrupt act specifies.

There are still other considerations which enter into this question, but it is unnecessary to refer to them. Enough has been said to show that the provisions of the bankrupt act relating to the proof of debts, are as much in effect under arrangement as under the regular bankruptcy proceedings. Hence it follows, that James T. Brady & Co. have the same right, and are as much bound to make due proof of their debt before the register, as though the proceedings in bankruptcy had not been superseded by arrangement.

Samuel Harper, Register.

M'CANDLESS, District Judge. After a careful consideration of the opinion in Re Darby, [supra,] I am constrained to differ with my Brother TREAT, of the eastern district of Missouri.

To properly construe the 43d section, we must take the whole act together, and in doing so I can arrive at no other conclusion than that presented in the decision of Mr. Register Harper, which is hereby affirmed.

Case No. 789.

Ex parte BALCH.

[2 Lowell, 440;[1] 13 N. B. R. 160.]

District Court, D. Massachusetts. Oct., 1875.

NEGOTIABLE INSTRUMENTS—PAYMENT—EXTENSION OF TIME—ESTOPPEL—DISCHARGE OF INDORSER.

1. Company A. was promisor, and Company B. was indorser, of certain promissory notes. Both companies became embarrassed, and Company A. agreed to sell all its property to C., who had been the treasurer of both companies, at any time within one year, when he should have paid all the debts of the company. Friends of C. subscribed money, and put it into the hands of D., as trustee, to enable him to buy up the notes of Company A. indorsed by Company B. *Held*, that the purchase of these notes by the trustee with the funds of the subscribers was not a payment of the notes.

2. A representation by the holder of a note to the indorser that the note has been paid, does not discharge the indorser, who has been duly notified, unless he has suffered some loss or injury by reason of the representation.

3. A contract by the holder of a note to give time to the maker must be a valid and enforceable contract, as against the holder, or it will not operate to discharge the indorser.

In bankruptcy. F. V. Balch, trustee, offered proof against the assets of the Eliot Felting Mills, a bankrupt corporation, for the amount of three promissory notes of $5,000 each, signed by the City Mills and indorsed by the bankrupt corporation. It was admitted that the City Mills were primarily liable, and that one of the notes had not been duly protested, and the proof upon that note was abandoned.

The questions upon the other two notes arose upon the following state of facts: S. M. Weld had been treasurer of both corporations, and both stopped payment, and Weld and the Eliot Mills went into bankruptcy. Afterwards the City Mills voted to sell all their property for the purpose of paying their debts, which were equal to about the supposed value of the property. Still later, viz., March 17, 1875, a vote of the stockholders was passed, recalling the order for sale, and resolving to execute proper conveyances of all the property, which should be placed in the hands of Mr. Balch, as an escrow, to be delivered to Mr. Weld on his receiving his discharge in bankruptcy within one year from that date, provided he should elect, within one week after such discharge, to take the property, and should cause to be paid, or give a satisfactory guarantee against all the debts of the corporation, excepting one that was secured by mortgage. Weld was to run the mill in the mean time for cash, without subjecting the corporation to any liability, and, if he ultimately bought the property, was to have any profits earned in the interim. About ten days after this vote was passed a paper was drawn up, reciting that certain friends of Mr. Weld had

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

raised $25,000, to be lent him on his obtaining his discharge, and that it was desirable that the money should be applied at once to purchasing the debts of the City Mills, and agreeing that the money should be placed in the hands of Mr. Balch, to be applied to that purpose in such sums and at such times as Mr. Weld should direct, and that Weld should give his notes in exchange for the debts so purchased, and that Balch should hold the debts so purchased until Weld should obtain his discharge and give his notes for the several amounts. This agreement was signed by the several subscribers to the loan, including most of the stockholders and directors of the City Mills, with some others. Weld further agreed by the same paper to devote his time to the superintendence of the business of the City Mills, with a view to purchasing the same under the vote above mentioned. Mr. Balch immediately bought these two notes, one of which was overdue and had been duly protested, and the other, coming due on the day of his purchase, he caused to be protested. On or about the 16th of April, 1875, the property of the City Mills was seriously damaged by a flood, and the project for a purchase by Mr. Weld was abandoned, and this corporation went into bankruptcy at or near the time the notes were bought by Mr. Balch. Mr. Weld informed one of the assignees of the Felting Company that they had been paid.

E. Merwin & W. P. Walley, for the assignees of the Eliot Felting Mills, contended:

1. That as against the indorsers this debt was paid by its purchase.

2. The holder is estopped by the representation made by Mr. Weld, the real party interested, that the notes had been paid.

3. Time was given to the City Mills, who were the principal debtors, and thereby the indorsers were discharged.

R. M. Morse, Jr., for the creditor.

LOWELL, District Judge. Two of the three points are clearly against the objectors.

1. These notes have not been paid. The evidence clearly shows that they were bought and were to be held good, at least against the City Mills. Now, I admit that if a surety pays a note, it may often be a payment in his favor, and yet no payment as against him. In other words, the holder may still sue the maker upon the note, as trustee for the surety; or the surety may often sue the maker himself. But if the note has been paid by the principal it is gone. In this case there has been no payment by either principal or surety. The money did not come from either, and the purchase did not affect the surety in any way unless his situation was afterwards changed by the act of the purchaser; that is to say, unless the second or third point is good.

2. There is no estoppel, because that depends on an actual loss of something in the particular case; and there is no evidence of such loss.

3. The third point does not depend upon damage in the individual case. If time has been given to the principal the surety is discharged, whether there has been damage or not.

To constitute the giving of time there must be a valid contract which a court would enforce in favor of the principal against the creditor. I think there is no such agreement in this case. By the vote, the City Mills agreed to wait for one week after Mr. Weld should obtain his discharge, or for one year, whichever event should first come about, before disposing of their property excepting to him. He undertook nothing.

To the agreement between Mr. Weld and the subscribers to the loan the City Mills were not a party, and there was no occasion for their becoming a party to it, for it does not bind the parties to it to do or forbear any thing in respect to the City Mills. It is res inter alios. The clause on which the assignees more particularly rely is that which says that the debts of the City Mills shall be held by Mr. Balch, for the benefit of the subscribers, until Mr. Weld obtains his discharge and gives his notes. This has nothing to do with suing or not suing the City Mills. It means that Balch is to hold for the subscribers until he holds for Weld, and is intended merely for the security of the former. But granting that it intends that Balch should hold the very notes that he receives, still, if he should sue them, the City Mills would have no equity to prevent him. A breach of his trust, in this respect, would be nothing to them.

Besides, I have no doubt that the true construction of the vote of March 17 is that Weld might at any moment after the vote was passed, whether before or after he obtained his discharge in bankruptcy, make up his mind and notify the corporation that he should not, under any circumstances, take the property. If this be so, there is nothing in the second paper to vary it. So that even if we grant that there was an implied agreement that Weld, buying the debts, should not sue them until he had determined not to buy the property, that merely amounts to an undertaking that he would not sue until he chose to sue, which, I apprehend, would be no answer or ground of action against him, because the very fact of his suing would conclusively prove and determine his election. Debt admitted to proof.

Case No. 790.

Ex parte BALCH.

[3 McLean, 221.][1]

Circuit Court, D. Ohio. July Term, 1843.

ABATEMENT—PENDENCY OF ANOTHER ACTION—BANKRUPTCY—JURISDICTION.

1. The pendency of a suit between the same parties, and respecting the same subject matter, in another state, may be pleaded in abatement in the courts of the United States.

[Disapproved in Lyman v. Brown, Case No. 8,627.]

[See note at end of case.]

2. But to make such plea effectual, it must show that the court where the suit is pending has jurisdiction.

[See note at end of case.]

3. Certain things are required to give jurisdiction to a proceeding in bankruptcy, and all these must appear in the plea.

In bankruptcy.

Mr. Wright, for plaintiff.

Mr. Fox, for defendant.

OPINION OF THE COURT. The following point has been certified by the district court, sitting in bankruptcy, to this court, viz: "Whether the facts set forth in the plea of the said John T. Balch, if true, constitute a bar to the proceedings in this cause."

Benjamin A. Munford v. John T. Balch. The plea states, that heretofore, and before the said petitioner exhibited his petition, in this honorable court, to wit, on the 31st day of October, 1842, the said petitioner, one of the late firm of Churchill & Co., in behalf of himself and late partner, William Churchill, and one John W. Harris, filed their petition in the district court of the United States for the district of New York, against the defendant, setting forth, among other things, that this defendant owed to them a sum greater than five hundred dollars, the consideration being for merchandise bought; and which this defendant avers is the same note as set forth in the present petition of the said Munford; and setting forth also that this defendant, on or about the 29th of January last preceding the filing of the petition, then being a merchant in the city of New York, made and executed an assignment and conveyance in contemplation of bankruptcy, secured and preferred certain creditors of this defendant, a preference over the general creditors of this defendant, and that said assignment was made to John E. Mitchell and John Hudson, of the city of New York; and that this defendant, in the spring of 1842, departed from the state of New York with intent to defraud his creditors, and to avoid being arrested; and they prayed that he might be declared a bankrupt, pursuant to the act of congress, which petition was for the like matter, relief, and purpose, as the present petition. The assignees filed their exceptions, and upon argument the cause was referred to a commissioner of bankruptcy, on the 13th of December, 1842; that the petition was depending the 11th of January, 1843; that it was discontinued the 28th of April, 1843; and this is pleaded in abatement to the present petition.

The pendency of another suit between the same parties, and involving the same matters, may be pleaded in abatement to a new suit. But, to make such plea effectual, it must be shown that the court had jurisdiction of the case. The proceeding in New York by the creditors of the said Balch, was, to subject him to involuntary bankruptcy, under the first section of the bankrupt act, [5 Stat. 440, c. 9.] The act declares, "that all persons, being merchants, or using the trade of merchandise, all retailers of merchandise, &c. owing debts to the amount of not less than two thousand dollars, shall be liable to become bankrupts, within the true intent and meaning of the act, and may, upon the petition of one or more of their creditors, to whom they owe debts amounting in the whole to not less than five hundred dollars, to the appropriate court, be so declared accordingly, in the following cases, to wit: whenever such person, being a merchant, or using the trade of merchandise, or being a retailer of merchandise, &c. shall depart from the state of which he is an inhabitant, with intent to defraud his creditors, &c.

Several things are necessary to subject a man to this proceeding. 1. He must be a merchant. 2. He must have left the state with a view to defraud his creditors, or done some other act named in the statute. 3. The petitioners against him must have a claim on him of a sum amounting to five hundred dollars. 4. He must owe debts to the amount of not less than two thousand dollars. These four things must be shown in the petition, to give the court jurisdiction.

From the plea, it appears that the said Balch was a merchant; that he committed an act of bankruptcy by leaving the state to defraud his creditors; and that the petitioners against him had a demand on him exceeding five hundred dollars; but, it does not appear that he owed an amount of not less than two thousand dollars. This is essential to the jurisdiction of the court, and without it the proceedings in New York were of no validity. The plea is taken as true, and it must show jurisdiction in the court, whose proceedings are set up in abatement; and having failed to do this, the demurrer to the plea should have been sustained. This may be certified to the district court.

[NOTE. At law, the pendency of a former action between the same parties for the same cause is pleadable in abatement to a second action, because the latter is regarded as vexatious. But the former action must be in a domestic court; that is, in a court of the state in which

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

the second action has been brought. The rule in equity is analogous to the rule at law. Mutual Life Ins. Co. v. Harris, 96 U. S. 588; Lyman v. Brown, Case No. 8,627. Pendency of an action in a state court is no ground for a plea in abatement to a suit upon the same matter in a federal court for the same state. Gordon v. Gilfoil, 99 U. S. 168. To the same effect, see Stanton v. Embrey, 93 U. S. 548; Loring v. Marsh, Case No. 8,514; Parsons v. Greenville, Id. 10,776; White v. Whitman, Id. 17,561; Hughes v. Elsher, 5 Fed. 263. Contra, Earl v. Raymond, Case No. 4,243. See note to Brooks v. Mills Co., Id. 1,955, for discussion (1876) of the principle afterwards decided by Gordon v. Gilfoil, (1878,) supra. A plea of lis alibi pendens is not good when the litigation is in a court of foreign jurisdiction. Lynch v. Hartford Fire Ins. Co., 17 Fed. 627. See, also, Pierce v. Feagans, 39 Fed. 587.]

Case No. 791.

BALCH v. COLMAN et al.

[2 McLean, 85.][1]

Circuit Court, D. Indiana. May Term, 1840.

NEGOTIABLE INSTRUMENTS—RATE OF EXCHANGE—MEASURE OF DAMAGES.

1. The rate of exchange between two places is not exclusively regulated by the expense of transporting specie from one place to the other.

2. The true rule is the current rate at which drafts on New York sell in specie, or its equivalent, at Lafayette, the two points named in the contract.

[At law. Action on a promissory note by John T. Balch against Isaac and Samuel Colman and others.]

Messrs. Ingram and Baird, for plaintiff.

OPINION OF THE COURT. This action was brought on a promissory note for $536, payable at the Lafayette Bank, with the rate of exchange between the place of payment and the city of New York. At the time the note was given the Lafayette Bank, and the other banks of Indiana, redeemed their notes with specie; but having suspended specie payments for some months past, a question was raised, what shall be the rate of exchange which the plaintiff has a right to demand? Shall it be the present rate of difference between the depreciated currency of the state and funds in New York; or, shall it be the ordinary rate of exchange between specie, or its equivalent, at Lafayette, and funds in the city of New York? The judgment of this court is not given to be discharged in depreciated currency. The plaintiff has a right to demand specie, or its equivalent; and we can not regard the amount, which he has a right to recover by way of exchange, as of less value than specie. When the contract to pay the exchange was made, both parties, no doubt, looked to a sound circulating medium, convertible into specie, and, of course, of value equal to specie. And, in such a state, how is the rate of exchange to be ascertained? It is clearly not by ascertaining what would be the expense of transporting specie from the place of payment to the city of New York. This, undoubtedly, enters into the general calculation on the subject, and has great influence in fixing the rate, but there are other ingredients which must be looked to in making an estimate. Specie is not transported at the same rate as other merchantable commodities. There is the risk, the insurance, the delays, and other contingencies, which are taken into the account; and, not unfrequently, the scarcity or abundance of specie at the place of remittance, has an important effect on the price of exchange. The only correct rule, therefore, is to ascertain the ordinary rate of exchange between the two places; to be established by evidence, the same as the value of any other thing. The inquiry of the jury should be, what was the current price of drafts, in specie, or its equivalent, on New York, at Lafayette, at the time this note became payable. This must give the rate of damages which the plaintiff claims, for the difference of exchange between the two places.

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

Case No. 792.

BALCHELLER v. MASCOUTAH.

[7 Chi. Leg. News, 230.]

Circuit Court, S. D. Illinois. March 2, 1875.

AUTHORITY OF TOWN TO ISSUE BONDS IN AID OF RAILROADS—VOTE PREVIOUSLY GIVEN—ACT REPEALED.

1. That under the evidence the town authorities had the right to issue the bonds.

2. That when there had been a vote given under the constitution of 1848, by any town which was then authorized to issue bonds, the fact that the bonds were issued after the adoption of the constitution of 1870, cannot change it; that the constitution did not take effect on such a case at all.

3. That the legal effect of the language when it declared that no subscription should be made by any county court, or by the legal authorities of any incorporated city or town,—is when they were authorized to subscribe by the provisions of the act of 1869, and that it did not intend to repeal any specific authority given by a previous act of the legislature to a town named therein to make subscriptions of stock, or to issue bonds for the same purpose; that the act of 1869, did not repeal the act of 1867.

[At law. Action by William H. Balcheller against the town of Mascoutah on railroad aid bonds. Plaintiff demurs to rejoinders. Demurrer sustained.]

DRUMMOND, Circuit Judge. The decision in this case depends upon the construction to be given to the act of March 5th, 1867, authorizing the town of Mascoutah to issue bonds to such amount as the authorities by ordinance might determine, payable in not less than ten nor more than twenty years, and bearing 10 per cent. interest per annum, provided that no such bonds should be issued unless a majority of the taxpayers, to whom

the question was to be submitted, decided in favor thereof. The replication to which rejoinders have been put in, which have been demurred to, avers that there was a decision made by the taxpayers of the town of Mascoutah; that there was a regular vote upon the question on two different occasions, and that by a majority of the taxpayers the town authorities were authorized to issue bonds.

Now there are two points made. One is that the town authorities had no right to issue the bonds, and that they were issued since the adoption of the constitution. It is, after all, at most pleading in a circle and could not be considered as anything more than an irregular traverse of the replication. As to the question under the constitution we have already substantially decided that point, and it is very clear that where there had been a vote previously given by any town which was then authorized to issue bonds, the fact that the bonds were issued after adoption of the constitution can not change it. In truth the constitution expressly excepted the issue of all bonds where it has been authorized by an existing law by a vote of the people prior to its adoption. In other words, the constitution did not take effect upon such a case at all.

Then the other point is, that by the act of the 10th of March, 1869, the act of 1867 was repealed. This act was an act incorporating the St. Louis & Great Eastern Railway Company. We have not seen the act, but we suppose it is correctly cited in the brief of the counsel for the defense. That act declared —the 15th section—that no subscription should be made by any county, or by the legal authorities of any incorporated city or town, until after the question of such subscription was submitted "by order of the legal authorities to the legal voters thereof." Now there is some conflict between this act of 1869 and the act of 1867, but it is more apparent than real; for instance, the manner in which a subscription should be made, and the persons who were to authorize the subscription are different; in the act of 1867 the city authorities were to issue the bonds in such amounts as they might determine, payable in not less than ten or more than twenty years bearing 10 per cent. interest per annum. There was to be a subscription by the act of 1869. The legal voters were to authorize it; in the act of 1867, the taxpayers were to authorize it. Voters and taxpayers are not identical under our law. Ten per cent. was authorized by the act of 1867, 8 per cent. only was authorized by the act of 1869. Now the question is whether this act intended to repeal the act of 1867. Was it in the mind of the legislature to repeal the former act by the latter? We think that the weight of the argument is that it did not intend to repeal it; that the legal effect of this language, when it declared that no subscription should be made by any county court, or by the legal authority of any incorporated city or town, is when they were authorized to subscribe by the provisions of the act of 1869, and that it did not intend to repeal any specific authority given by a previous act of the legislature to a town named therein to make subscriptions of stock, or to issue bonds for the same purpose. But if this were doubtful, we think the doubt must be solved in favor of the position, that the act of 1869 did not repeal the act of 1867, because the supreme court of this state must have passed upon that question.

It is strenuously contended on the part of the defense that it did not. But what are the facts? The bonds were issued under the act of 1867, by the town of Mascoutah, on the hypothesis that an authority existed for that purpose, and a tax was sought to be imposed to pay the interest upon these bonds and a bill was filed to restrain the town authorities from levying the tax. It is said and we do not doubt truly, that no question was made in the circuit court as to the effect of the act of 1869 upon the act of 1867, but in the argument before the supreme court when it finally came before the court on a writ of error, that point was made by counsel; in other words the attention of the court was distinctly called to the position taken by counsel, that the act of 1869 did repeal the act of 1867. The attention of the court was again called to it in the application for a rehearing; the court had decided in effect that there was nothing in point of law to prevent the town authority from levying a tax, thereby holding that it was a legal tax authorized by law. Now to say that under such circumstances, the court could disregard the act of 1869, if it did in its opinion repeal the act of 1867, is really asking more than we can believe, unless the court was entirely derelict in its duty. Because it was not material whether the act of 1869 was named in the pleadings or not, nor whether it might be a law having more or less of a public character or not. If it operated in point of law as a repeal, it was the duty of the court so to declare and hold that there was no authority to issue the bonds, and therefore no authority to impose the taxes. And although they say nothing upon this point in their opinion, it must have been because they considered it was unnecessary and not because they thought they were not bound to take notice of the law. If they thought that the one law repealed the other, they certainly should so have said. Again, this act of 1869, is a law for the construction of the St. Louis & Southeastern Railway Company, a railroad that goes through some counties of the state; it authorizes the taking of private property for the road on the ground that it is for the public use; and it was the duty of the court to take notice of this law when its attention was called to it. And it was named as a law which by possibility might repeal the law of 1867.

So on both grounds we hold that these rejoinders are not good, and that the demurrer must be sustained.

Case No. 792a.

BALCHEN et al. v. The ELI WHITNEY.

[9 Betts, D. C. MS. 30.]

District Court, S. D. New York. March 19, 1847.[1]

ADMIRALTY—LIBEL IN REM.

[A libel in rem cannot be maintained by the charterers of a vessel against the vessel for a cause of action founded upon a stipulation or condition of the hiring not embraced in the charter party, or for misrepresentations or concealment of facts in respect to the tonnage or capacity of the vessel by the master or owners, leading to the charter party.]

[In admiralty. Libel in rem by George Balchen and William F. Schmidt against the ship Eli Whitney. Libel dismissed. Affirmed on appeal by the circuit court in The Eli Whitney, Case No. 4,345.]

BETTS, District Judge. The bill in this cause, demanding damages because of misrepresentation on the part of the master of said ship inducing the libellants to take the charter party in the pleading mentioned and the injuries sustained by them thereby: and also because of the non-performance of an agreement made by the master with the libellants previous to the execution of the charter party: and the voyage therein stipulated having being fully performed by the ship: and the claim and answer interposed in the cause reserving to the benefit of the owners all exception to the jurisdiction of the court over the subject matter of the suit: and on the hearing in court, the claimants having objected that the matters alleged in the libel are not of admiralty or maritime jurisdiction: and it not being made to appear to the court on the part of the libellants that any commissions were earned by them on the return voyage of the ship: if they are entitled thereto under this contract:

It is considered by the court that an action in rem cannot be maintained because of a misrepresentation or concealment of facts, by the owner or master of a ship, leading to a charter party upon her for a voyage: and it is further considered by the court that engagements entered into by an owner or master in relation to the charter of a vessel, antecedent to the execution of the charter party, and not made part thereof, cannot be enforced in rem against the ship.

Wherefore it is considered and decided by this court that the action cannot be sustained by the libellants against the ship, because of her being hired or being let to them upon any stipulation or condition not embraced in the charter party, mentioned in the pleading. It is further ordered and decided by the court that the said ship be discharged from arrest in this case, and that the libel be dismissed with costs to be taxed.

[1] [Affirmed in Case No. 4,345.]

BALCHEN, (PIEHL v.) See Case No. 11,137.

Case No. 793.

BALDERSTON v. MANRO et al.

[2 Cranch, C. C. 623.][1]

Circuit Court, District of Columbia. Nov. Term, 1825.

BILL OF LADING—ASSIGNMENT—TITLE TO CARGO.

The assignment and delivery of a bill of lading and invoice of goods in transitu, for a valuable consideration, conveys the legal title; and the goods cannot be attached as the property of the assignor.

[See The Mary Ann Guest, Case No. 9,197.]

This was a chancery attachment of the effects of Jonathan Manro, of Baltimore, in the hands of George F. Warfield and Fielder Luckett, by Ely Balderston, a creditor of Manro. It appeared that Manro, residing in Baltimore, and being largely indebted to sundry persons, on the 1st of March, 1823, made a deed of assignment of his property to the defendant, George F. Warfield, also of Baltimore, in trust for the payment of the creditors named in the deed, of whom the plaintiff was not one. This deed was duly acknowledged and recorded according to the laws of Maryland, and among other things assigned and transferred to the said trustee all the right of the said Manro to the returns, net proceeds, profits, and property in and to thirty-two bags of cocoa on board the brig Resolution; and for the better transferring the same to the said trustee, indorsed and assigned to him on the same 1st of March, 1823, the bill of lading and invoice thereof. It appeared also by the defendant's answer, that the trustee had lent his notes to Manro to the amount of $4,000 or $5,000 for which the trustee was liable, and he claimed a right to retain any surplus which might remain in his hands after paying the creditors named in the deed, to indemnify himself against that liability. The attachment was not issued until the 11th of March, 1823, ten days after the assignment and indorsement of the bill of lading to the defendant.

C. C. Lee, for plaintiff.

Mr. Taylor, for defendant.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion, that the assignment and indorsement of the bill of lading of the thirty-two bags of cocoa, transferred the legal title to Warfield, and that the court could not deprive him of that legal title, if his equity was equal to that of the plaintiff. Warfield is responsible for Manro to the

[1] [Reported by Hon. William Cranch, Chief Judge.]

amount of $4,000 or $5,000 and he is doubtful whether his other security is sufficient to indemnify him. If there should be a surplus of the trust-funds in his hands, after paying the trust-debts, he will have a right in equity to retain enough to secure an indemnification. It does not yet appear what that surplus, if any, will be; nor whether the other security, which he holds, is sufficient. Under such circumstances, a court of equity will not oblige him to relinquish that surplus, unless the plaintiff will indemnify him. We think that Mr. Warfield ought to take measures to obtain payment of the notes (for which he is responsible,) out of the funds pledged to the bank; and to settle the trust-debts, so as to ascertain what he will have to pay to the bank upon his indorsements, and what surplus there may be of the trust-fund; and that the cause should stand continued until he shall state such an account; and that the marshal pay into court the net proceeds of the sales of the cocoa, and that they be invested in some productive fund, until the court can make a final decree in the cause.

NOTE, [from original report.] At April term, 1826, the court ordered the bill to be dismissed with costs; and ordered the marshal to pay to Warfield the net proceeds of the sales of the cocoa.

Case No. 794.

BALDRAFF v. CAMDEN & A. R. R.

[25 Hunt, Mer. Mag. 77.]

District Court. 1851.

CARRIERS OF PASSENGERS—LIABILITY FOR BAGGAGE.

[Where a passenger paid for the extra weight of his baggage, which included a trunk containing coin and also wearing apparel, but did not inform the carrier of the contents of the trunk, which was lost in transit, the carrier was liable for the coin, though no special arrangement was made to accept or carry it.]

[At law. Action by Baldraff against the Camden & Amboy Railroad Company for loss of trunk and contents. Verdict and judgment for plaintiff.]

This was an action against the company, as carriers of passengers and their baggage, from New York to Philadelphia. The jury in the court below found a special verdict, as follows:—

That the defendants are carriers of passengers and their baggage, and not carriers of merchandise from New York to Philadelphia —that the defendants had published in the public daily newspapers of New York and Philadelphia, from May to September, 1846, an advertisement, and delivered to the plaintiff, (now defendant,) who is a German, and did not understand the English language as well as the other passengers, on the 22d of August, 1846, a card or ticket. The plaintiff took the defendants' line, upon the said 22d of August, 1846, and put on board the steamboat Independence, belonging to defendants, and forming part of defendants' means of conveyance, among other baggage, a trunk containing 2,101 silver coins, commonly called French five franc pieces, and also certain articles of wearing apparel. The said trunk was directed to the conductor, or other agent of defendants, on board of said boat. The extra weight of plaintiff's baggage, including the said trunk, was paid for, and the said agent did take charge thereof. The plaintiff did not notify the defendants, or their agent, that the trunk contained coins or money, and no special agreement was made by them to accept or carry the same. The said trunk was lost, and not delivered to the plaintiff upon the arrival at Philadelphia, or at any time thereafter.

If the court shall be of opinion that the defendants are responsible for the injury arising from the loss of the money or silver coins aforesaid, then the jury find for the plaintiff, and assess the damages at twenty-two hundred and forty-five dollars and ninety-five cents, ($2,245.95). If the court shall be of opinion that the defendants are not liable for the injury arising from the loss of the money or silver coins aforesaid, then the jury find for the plaintiffs, and assess the damages at $10.

The district court gave judgment that the plaintiff recover the larger amount.

Case No. 795.

In re BALDWIN et al.

[6 Ben. 196.][1]

District Court, S. D. New York. Oct., 1872.

CONTRACTING—PROOF OF DEBT.

On the petition of a creditor, showing that he and the assignee objected to the claim of B., another creditor, an order was made referring it to a referee to examine into the facts. Before any evidence was taken before the referee, the assignee appeared before the referee and objected to the proceedings, on the ground that, since the assignee was elected, B. had made proof of his claim in form satisfactory to the register, and that the proof had been delivered to the assignee, and registered by him, and that, since the election of the assignee, the petitioning creditor had not renewed his objection, and the assignee had never objected to the claim. B., however, insisted upon proceeding with the reference: *Held*, that the reference should not have been proceeded with, and that the order of reference should be vacated, leaving the parties to pay their own costs and expenses.

[In bankruptcy. Petition by Brewster for a reference to take proof of his claim against Theodore E. Baldwin and Edward W. Burr, bankrupts. Order for reference granted. Assignee objects. Order vacated.]

J. K. Murray, for Brewster.

T. M. North, for the assignee.

BLATCHFORD, District Judge. However proper the order of reference of the 10th of

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

February, 1872, may have been, on the assumption, that, prima facie, from the facts set forth in the petition on which it was made, the petitioning creditor and the assignee objected to the claim of Brewster, yet, when, before any testimony had been taken under the order of reference, the assignee appeared before the referee and objected to all proceedings under the order, on the ground that, since the assignee was elected, Brewster had made proof of his claim in form satisfactory to the register, who had received the same, and that the proof had been delivered to the assignee, and duly registered by him, and that, since the assignee was elected, the petitioning creditor had not renewed his objection to the proof of such claim, and no other creditor had made any objection to it, and that the assignee had never made any objection thereto, the reference should not have been proceeded with on the part of Brewster. There was no occasion for proceeding with it. The expense of proceeding with it was needlessly incurred. Nothing done in the course of it, after that, could bind the assignee. He did not afterwards appear on the reference, or produce any witnesses, or cross-examine any of the witnesses produced by Brewster. The original order of reference was granted ex parte, without due notice to the assignee, and only authorized the referee to take, on due notice to the proper parties, proof of the claim of Brewster, and such proof as might be offered in opposition thereto. When, in response to a notice, the assignee then appeared, and made the objection he did, in the terms above stated, the reference ceased to be one to which the assignee and the creditors generally of the estate, represented by him, could be considered as parties, so as to bind him and them as parties, or make him or them responsible for any expenses of the reference, if the assignee thereafter took no part in the proceedings. On such objection being made by the assignee, Brewster ought to have brought the matter before the court for instructions. Not having done so, he took the risk of going on. The entire aspect of the case, as it stood when the order of reference was made, on the facts set forth in the petition of Brewster, was changed, by the statement of the assignee that he had never objected to the proof of debt of Brewster, and had registered it as duly proved, and that no objection had, since the election of the assignee, been made to the proof of the claim, by any creditor. It was not the duty of the assignee to bring the matter before the court. He was not a party to the order of reference, and he discharged his entire duty by making the objection he did. The court must now do what it would have done, if, on the making of such objection by the assignee, the matter had been brought to its attention. It would have vacated the order of reference. There would have been no propriety in permitting the reference to proceed as between Brewster and the petitioning creditor, when it could not proceed as between Brewster and the body of creditors represented by the assignee. Although, where one creditor applies for an investigation, under section 22, [Act March 2, 1867; 14 Stat. 527,] of the claim of another creditor, it may be proper to hold the latter bound, as respects all the creditors, by the result of the investigation, yet, where, as in this case, a creditor applies for the investigation of his own claim, and the assignee, in response, says he has received proof of the claim, and registered it, and has never objected to it, it is not proper to permit an investigation of it to be had, as between such creditor and another creditor, against the objection of the assignee, when the estate cannot be bound by the result.

The order of reference is vacated, leaving the parties respectively to pay their own costs and expenses.

Case No. 796.

In re BALDWIN.

[19 N. B. R. 52; 8 Cent. Law J. 186.]

District Court, D. Massachusetts. Dec., 1878.

BANKRUPTCY—PROOF OF DEBT BY SECURED SURETY—SUBROGATION.

[1. In America, when the principal is insolvent, a solvent surety, who holds collateral security for his indemnity, is a trustee of the security for the creditor.]

[2. A bank held a note of a bankrupt for $3,000, and made proof in full against the bankrupt estate. An indorser of the note, who held, as collateral security, stocks pledged to him by the bankrupt, afterwards paid the debt to the bank, and sold the stocks for $1,045. *Held*, that the surety should give credit for the amount realized from his security, and should take a dividend only upon the excess of the original debt as proved.]

In bankruptcy. The bank held a note for three thousand dollars, signed by bankrupt and made proof in full against his estate. An indorser of the note, who held, as collateral security, stocks pledged to him by the bankrupt, afterwards paid the debt at the bank, and sold the stock for one thousand and forty-five dollars. The register certified the question to the court, and no one appeared to argue it.

LOWELL, District Judge. The equity announced in Maure v. Harrison, 1 Eq. Cas. Abr. 93, that a creditor is to have the benefit of the securities given by the debtor to a surety, was assumed to be sound by Sir William Grant in Wright v. Morley, 11 Ves. 22, but was soon after overruled by Lord Eldon in Ex parte Waring, reported in three different books, (19 Ves. 345, 2 Rose, 182, 2 Glyn & J. 406.) Lord Eldon appears to have been afraid that the business of traders and bankers would be injuriously hampered if the relation of trustee and cestui que trust were

established in such cases; so that, as he said, a banker could never deal with the securities, even with the consent of the pledgor, until he had consulted with all the holders of the notes or bills. He held, however, in that case, that where both principal and surety were bankrupt, the same equity could be worked out by a sort of accident, that is to say: the assignee of the surety would have no right to use the pledged property as his general assets, because they were his only for indemnity; and the assignee of the pledgor could not take them without furnishing indemnity, and, therefore, to prevent a dead-lock between the two, the property must be applied to relieve both estates by paying the bills or notes pro tanto; not, however, by virtue of any equity which the bill-holders had, but as the only means of settling the two estates. This is the explanation of that case given by another learned lord chancellor, and is undoubtedly the true one. City Bank v. Luckie, 5 Ch. App. 776. This doctrine has been somewhat grudgingly admitted by the courts in England, and has been strictly limited to cases in which both parties were technically bankrupt or insolvent; that is, where their estates were being settled by the courts or in some equivalent mode; though a careful examination of the cases will show that the merchants of England have been disposed to take a larger view, and to administer the equity whenever the principal debtor has become insolvent, which is the American rule. See Powles v. Hargreaves, 3 De Gex, M. & G. 430; Ex parte Carrick, 2 De Gex & J. 208; Trimingham v. Maud, L. R. 7 Eq. 201; Ex parte Gomez, 10 Ch. App. 645; Ex parte Smart, 8 Ch. App. 220; Ex parte Prescott, 3 Deac. & C. 218; Ex parte Hobhouse, 2 Deac. 291; Inman v. Clare, Johns. Eng. Ch. 769; Vaughan v. Halliday, 9 Ch. App. 561. In this class of cases it has been uniformly held that when the creditors of this class had this incidental equity, or rather, when such an equity was cast upon them, they could prove against either estate only the balance remaining after the security was realized and distributed. Powles v. Hargreaves, 3 De Gex, M. & G, 436; Banner v. Johnston, L. R. 5 H. L. 157; Coupland's Claim, 5 Ch. App. 167; Leech's Claim, 6 Ch. App. 388; Ex parte Brett, Id. 838; Ex parte Joint Stock Discount Co., L. R. 19 Eq. 1, 10 Ch. App. 198.

This is an exception to the general rule that security need only be credited as against the estate which furnished it; but it appears to be sound. It would be inequitable to permit proof in full against the estate of the surety, when the very purpose of the pledge was to protect him to the extent of the value of the property. In this country the doctrine of Maure v. Harrison, 1 Eq. Cas. Abr. 93, has been adopted without the limitation annexed to it by Lord Eldon. It is held here that even a solvent surety is a trustee for the creditor when the principal is insolvent. Moses v. Murgatroyd, 1 Johns. Ch. 119; Russell v. Clark, 7 Cranch, [11 U. S.] 97, per Marshall, C. J.; Bank of Auburn v. Throop, 18 Johns. 505; Vail v. Foster, 4 Const. [4 N. Y.] 312; Pratt v. Adams, 7 Paige, 615; Toulmin v. Hamilton, 7 Ala. 362; Paris v. Hulett, 26 Vt. 308; Eastman v. Foster, 8 Metc. [Mass.] 19; Rice v. Dewey, 13 Gray, 47; In re Jaycox, [Case No. 7,242;] Story, Eq. Jur. §§ 368, 499; 4 Kent, Comm. 163; 1 Lead. Cas. Eq. (3d Amer. Ed.) 163. The difficulty anticipated in Ex parte Waring [supra] has not been found to occur. No doubt the surety and principal together can deal with the security as they please, so long as both are solvent, and the creditors have not interfered. But after the insolvency of either the principal or the surety, the law of this country undoubtedly is, that the property is to be applied to the debt upon which the surety is bound. It has even been held that he may apply it after his own liability has been barred by lapse of time, or in some other mode. See Phillips v. Thompson, 2 Johns. Ch. 418; Eastman v. Foster, 8 Metc. [Mass.] 19. And a bankrupt surety, being a trustee, may recover the property in his own name. Kip v. Bank of New York, 10 Johns. 63.

It would seem to follow, from the foregoing considerations, that a creditor, who has this clearly recognized equity, might be obliged, upon some proper terms as to the costs being paid by the assignees, to resort to the property to the extent of its value, before proving his debt against the estate of the principal debtor. So is the argument of the late Judge Hall, in his very able and elaborate opinion in Ex parte Jaycox, [Case No. 7,242.] The decision, however, did not touch this point. In that case Judge Comstock was an indorser upon the notes of the bankrupts for a large amount, and held a mortgage conditioned for the payment of the notes and for his indemnity. The holders of the notes proved in full, and refused to modify their proofs, but, on the contrary filed a stipulation that they made no claim to the security: "It being understood that this release and surrender are not in any manner to release or affect the right of the said George F. Comstock to enforce a certain mortgage, etc." Judge Hall held that the creditors had the right to prove in full, waiving their security. What the resulting equities would be, between the surety and them, or between the surety and the assignees, was not before him, but he intimated an opinion upon it. Afterwards, the indorser being sued at law, the court of appeals held that he had no defense arising from this state of things. They intimate that there was neither law nor equity to release him, in whole or in part; but that appears to be beyond the point in issue. Merchants' Nat. Bank v. Comstock, 55 N. Y. 24. That decision is sound, because the assignees of Jaycox and Green were not parties to the

suit, and it did not appear that the indorser had been disturbed in his title to the security. If Judge Hall's opinion is right, the assignee might have filed his bill against the surety and the holders of the notes, to have it declared that they had waived their equitable right to security, and had thereby exonerated the surety pro tanto, and asking that the security might be given up and the holders be restrained from prosecuting the surety, excepting for the excess, if any, of their debt above the amount of the security. I have not seen the report of such a suit in that or any other case. If such a bill will not lie, the surety may indirectly have, as in that case he appears to have had, the benefit of the full proof, and of the security besides.

It has several times been held that the creditor may prove his debt in full, notwithstanding security held by a surety. Meed v. Nelson, 9 Gray, 55; Provident Inst. v. Stetson, 12 Gray, 27; Ex parte Braithwaite, 36 Law T. (N. S.) 520; same case on appeal, Ex parte Barnfather, Id. 841. It must be remembered, however, that the courts of bankruptcy had limited powers, and peculiar modes of proceeding. In a case somewhat similar in its principles to this, both the judges said that by admitting the debt to proof, they did not decide that the creditor could have a dividend on the whole amount. Ex parte Barham, 1 De Gex, M. & G. [1 Mont., D. & D.] 179. In another case they said, in both courts, that the right of the surety, if he should afterwards come in, was not, by any means, to be considered as decided by the admission of the full amount of the creditor's debt. Ex parte Braithwaite, 36 Law T. (N. S.) 520, 841. The cases most nearly resembling this, that I have found, are Ex parte Sherrington, 1 De Gex, M. & G. [1 Mont., D. & D.] 195, and Ex parte Mann, 5 Ch. Div. 367. In the former, the creditor had proved his debt in full, and the surety applied to sell his security, and the order was passed for a sale, and that the creditor might have the proceeds when he reduced his proof by an equivalent amount. In the latter, the surety's security was an assignment of certain debts due to the principal who afterward became bankrupt; by consent of the surety, the assignee collected these debts; and the register then ordered that he should apply the proceeds to pay the bills, although they had been proved in full by the holder. This order was affirmed on appeal. The holder not being before the court, they made no order for the reduction of his proof. The case seems to recognize an equity according to the American rule; that is, when only the principal was bankrupt. Ex parte Sherrington was not cited, and has never been overruled that I am aware of.

I think the law of England and of Massachusetts probably is, that when the court has jurisdiction of all the parties, so that complete justice can be done, the creditor must give credit for the security which the surety must apply towards his payment; but in the absence of the surety the creditor may, in the first instance, prove in full. The intent of the statute in permitting a surety who has paid the debt after the bankruptcy to prove it, is simply to put him on the footing of a creditor, which, by the old law, he could not be, unless he had paid before the bankruptcy. Now, if the surety had paid before the proceedings were begun, it is plain that he would be a secured creditor, and must give credit for the value of his security. Then, in subrogation to the creditor's proof, the surety should stand exactly as if he himself had proved. Whether we hold that the creditor has a distinct equity which chancery might require him to enforce; or that he may prove in full, leaving the assignee to establish and work out the resulting equities when the time comes for a dividend; or whether we simply say, the surety is now in court, and has the standing of a creditor who has been partly secured; the result is, that he should give credit for the amount realized from his security, and take a dividend upon the excess only of the original debt as proved, and it is so ordered.

BALDWIN, The H. P. See Cases Nos. 6,811 and 6,812.

BALDWIN, (BANK OF NEWBERRY v.) See Case No. 892.

Case No. 797.

BALDWIN v. BERNARD et al.

[5 Fish. Pat. Cas. 442;[1] 9 Blatchf. 509, note; 2 O. G. 320.]

Circuit Court, S. D. New York. April 22, 1872.

PATENTS FOR INVENTIONS—EQUITY PLEADING — ENTITLING AFFIDAVITS—BONNETS.

1. It is irregular, in a suit in equity, to swear a person to an affidavit entitled in the suit, before the bill has been filed.

2. An affidavit may properly be taken before the filing of the bill, but it must not be entitled in the suit.

3. A hat may infringe the Blake patent, and yet be seamless throughout.

4. The essence of the invention of Blake being, that the product of the action of the dies to which the thing is last subjected is the completed body of the bonnet, embossed in imitation of straw, and shaped and ready for practical use, as the body of a bonnet, without further covering or ornamentation, the patent is infringed if the last embossing die gives the ultimate shape to the bonnet, although such dies may be of the same shape as a die to whose shaping action the bonnet had been previously subjected.

5. The question of withholding an injunction, if the defendant will take a license, considered.

[In equity. Bill by Nathan A. Baldwin against Henry O. Bernard and others for infringement of letters patent No. 33,978.

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

Motion for provisional injunction. Granted.]

Suit brought upon letters patent for an "improvement in the manufacture of coverings for the head," granted to S. A. Blake, December 24, 1861, and more particularly referred to in the report of the case of Baldwin v. Schultz, [Case No. 804.] Before the motion was heard the defendants moved to dismiss the application, on the ground that the affidavit of one Eicke, relied on to prove a sale by the defendants of the hats alleged to infringe, was sworn to April 6, but the bill was not filed until April 8, and the subpoena was not issued until April 12.

S. F. Gordon and George Gifford, for complainants.

C. B. Stoughton and S. D. Law, for defendants.

BLATCHFORD, District Judge. It is undoubtedly irregular to swear a person in a suit before the bill has been filed. The irregularity consists in having the affidavit sworn to under the title of a suit, in which no bill has been filed. If the title had been omitted, there would have been no irregularity. This is continually done in applications for habeas corpus and mandamus, and to swear falsely in such affidavits is indictable as perjury. The suit is commenced when the bill is filed. Eicke's affidavit ought not to have been entitled in the suit. On this ground the affidavit of Eicke should be excluded, but I will permit it to be resworn. The parties must be considered as having had reasonable notice of it. They have had a copy of it.

The affidavits were then read, and, after argument on both sides, the following opinion was orally pronounced:

BLATCHFORD, District Judge. If I have correctly understood the counsel for the defendants, I see nothing in this case to distinguish it from the one in which Schultz and Hecht were defendants. I have listened carefully to everything that has been urged, and it has made no impression different from that produced upon my mind in the other case. The counsel for the defendants has entirely misapprehended the scope and effect of the former decision as to the Blake patent. It is very true that Blake, in his patent, describes that particular sort of hat which required, in order to make it, that that there should be an opening cut in it. But that particular form of hat constituted no part of the invention of Blake. A hat may infringe the patent, and yet be seamless throughout. The essence of the invention, as it appears in the patent, is this: that the product of the action of the dies to which the thing is last subjected is the completed body of the bonnet, embossed in imitation of straw, and shaped and ready for practical use, as the body of a bonnet, without further covering or ornamentation. Now, this is true of the bonnet of the defendants. It is embossed fit for use, and shaped to the form in which the last dies used in its production leave it. It is of no consequence that other dies may have been used previously to shape it. It is no matter if it had been shaped by fifty dies previously. Bernard, in one of his affidavits, himself says that the last die used must be of the same shape as the previous one. This constitutes an infringement. This last die is the one that does the embossing. When the embossing is done by dies that have a shape, that shape is given by the embossing dies. Bernard, in his affidavit, says that it is absolutely indispensable that the embossing dies should have the same shape as the previous dies; and the embossing dies give the ultimate shape, because their shape is not altered. In my former decision I said: "It is claimed, on the part of the plaintiffs, that, according to the description in the specification of the Blake patent, the product of the action of the dies is the completed body of a bonnet, embossed in imitation of straw, and fit for use as the body of a bonnet, in the shape given to it by the dies, and without further ornamenting or covering its surface;" and I said I thought these views of Blake's invention were correct. The defendants do not afterward cover their hats, do not afterward ornament them, do not alter them in any manner. If the brim and top of the hat, as well as the body, are embossed by the dies, it is none the less an infringement. I also said, in that decision, that the proper construction of the claim of Blake's patent is, "that it claims a bonnet, the body of which is embossed, in imitation of straw or other braid, by dies, which, at the same time, give to it its ultimate shape." Its ultimate shape. It is no matter how many dies have previously given shape to it. It may have been one; it may have been twenty. It makes no difference what number. This last embossing die of the defendants is the one that gives the ultimate shape to the bonnet, because it is of the same shape as the previous die. The defendants say that there are two operations in the production of their bonnet. This is nothing but trying to evade the patent by splitting the thing into two—making two operations where only one was necessary. That will not do. A case very similar to this, in this particular, was lately tried in the district of Connecticut—Wallace v. Holmes, [Case No. 17,100]—in which the patent sued on was for a lamp-burner, to be used with a chimney, and so described in the patent. The defendants made and sold the burner; but, because they did not make or sell the chimney with it, they said they did not infringe. But it was held they did, as all the purchaser would have to do would be to buy a glass chimney next door and put it in. So, in this case, there was a purpose of infringing, I should say, in making two operations where only

one is necessary. Courts always look with suspicion upon such a transaction. As to the Roger and Ledion patent, if that patent covered this invention, as to one thickness of muslin, it might be a patentable improvement to make the bonnet of two thicknesses. The defendants say that there is nothing in the fact of there being two thicknesses. Why do they not make their bonnets out of one thickness? There must be something in the using of two thicknesses. None of the parties who make the bonnets have used one thickness. The defendants may make as many hats as they please out of one thickness of muslin. In regard to the other suit—the suit against Schultz and Hecht [Baldwin v. Schultz, Case No. 804]—it is true that the parties on both sides in that suit were satisfied that the hearing should be had upon affidavits. The plaintiffs took the defendants' affidavits. The defendants took the plaintiffs'. The plaintiffs were willing to accept the defendants' affidavits as true, just as they were. The defendants did not care to cross-examine the deponents who made affidavits for the plaintiffs. It is not alleged here that any one of the witnesses knew anything else that could be brought out. Blake fixed 1860 as the date of his invention, and the defendants do not undertake to show that Blake did not make the invention when he said he did. The defendants say that if you take their hat from the first die and put it into their embossing die, you will get no salable hat; but, if you put the coating or putty upon the hat, after using the first die, and then use the embossing die, you will have a salable hat. But the point is, that they put the putty on, and then emboss the hat. They say that there is no infringement, because they do not emboss directly upon the muslin. True it is that, looking on the completed hat, the eye rests simply on the coating or putty, but the corrugations extend into and through the muslin, and show, as is here apparent, on the inside of the hat. This operation has an effect, over and beyond the mere ornamentation. There is a durability and stiffness in the hat made of this fabric. It is very light, yet, at the same time, it has the requisite stiffness. Now, this durability and stiffness and lightness are due to the fact that the hat is made out of two or three thicknesses of muslin, stamped in this way. If these defendants do not make the article out of one thickness of muslin, there must be something in this idea of Blake's of using two thicknesses. At first blush, one would say that there could not be any difference between a fabric made of one thickness of muslin and a fabric made of two thicknesses, with paste between them. Yet these defendants do not use one thickness. They do use two thicknesses. Hats made of one thickness look to me just as good, but the evidence and the conduct of the defendants go to show me that they are not, and that there is something in the use of two thicknesses which makes their employment necessary and useful. As to the coating, the bonnet is none the less an infringement because a coating is put upon it. Putting on this coating or putty may be an improvement—perhaps it is a useful improvement. But it is a mere addition. The defendants may have something more than Blake has, but it is none the less apparent that they have what Blake has. The same questions were before me in the Schultz and Hecht case. That case was fully argued. There is nothing which leads me to suppose that their counsel did not defend them to the best of his ability. Every point involved seems to have been presented. Besides I studied that case thoroughly, and gave more time and attention to it than to almost any other case that has lately come before me. Especially did I thoroughly study it, after its second argument, to make myself familiar with it, in view of the fact that, after having first given a decision one way, I felt called upon to give one the other way. If the defendants in the Schultz and Hecht case would not permit the case to be opened otherwise, there was certainly nothing wrong or fraudulent in making an arrangement to secure such re-opening. If a mistake had been made, it was the duty of the counsel, to himself, his clients, and the court, to get the case re-opened, if possible. If this had not been done, it would all have had to come before the court at another time. If there was any suppression of truth or lack of full consideration, the court ought to look into it. So, too, if any prior patent should be brought before me, or if any new testimony should be offered, it would be entitled to consideration, just as if the other case had never been heard. But there is nothing of that character. In regard to the suggestion about a license, the defendants knew of this patent, and had notice of the proceedings in the other case. They engaged in this business with their eyes open. They took the risk upon themselves. They asked for a license, but they did not ask for it on the ordinary terms. They wanted to impose conditions upon the licensers. It is undoubtedly true that, in some cases, and under certain circumstances, I have said I would not grant an injunction, except on refusal of the defendants to accept a license. I belive such was the fact in the Car-Brake Case, [Hodge v. Hudson River R. Co., Case No. 6,560,] the Fat Acid Case, [Tilghman v. Mitchell, Case No. 14,042,] and, if I recollect correctly, in one of the Hoop-Skirt Cases, [Doughty v. West, Case No. 4,028;] but in all of those cases the plaintiffs were perfectly open and free to grant licenses to anybody. The more licenses they had, the better it was for them. But that is not the case with these plaintiffs. They undertake to show, in their affidavits, why it would be prejudicial to them for these defendants to

have a license. (Mr. Law stated that the defendants do not want a license, such as is offered them, because they can not honestly live up to its terms.) The conduct of these defendants, in this regard, is certainly very honorable, and I should think they were just such persons as the plaintiffs would desire to be licensees. It does not very clearly appear, I confess, how granting a license would injure these plaintiffs. In Waller's affidavit, it is not very clearly expressed. (Mr. Gordon called attention to the fact that the plaintiffs are themselves large manufacturers, and that they and their present licensees can supply the market, and that this appears in the bill of complaint, as well as in the affidavits.) I did not observe that the plaintiffs are themselves manufacturers of the bonnets. They are entitled to the injunction.

[NOTE. Patent No. 33,978 was granted to S. A. Blake December 24, 1861. For another case involving this patent, see Balwin v. Schultz, Case No. 804.]

Case No. 798.

BALDWIN v. The BRADISH JOHNSON.

[3 Woods, 582.] [1]

Circuit Court, S. D. Alabama. Dec. Term, 1878.[2]

MARITIME LIENS—PRIORITIES—STATE AND FEDERAL LAWS.

1. The lien of a mortgage on a vessel, duly recorded according to section 4192, Rev. St., is inferior to all strictly maritime liens, but is superior to any subsequent lien for supplies furnished in the home port, given by state legislation.

[Cited in The Josephine Spangler, 9 Fed. 775; The Lillie Laurie, 50 Fed. 221. Overruled in The Madrid, 40 Fed. 678. Disapproved in The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 502.]

[See The John T. Moore, Case No. 7,430; The Grace Greenwood, Id. 5,652; The Kate Hinchman, Id. 7,621. Principle doubted in The De Smet, 10 Fed. 483; The Josephine Spangler, 11 Fed. 440. Contra, The General Burnside, 3 Fed. 228; The Rapid Transit, 11 Fed. 322; The J. W. Tucker, 20 Fed. 129; The Arctic, 22 Fed. 126; The Venture, 26 Fed. 285; The Amos D. Carver, 35 Fed. 665; The Wyoming, Id. 548; The Menominie, 36 Fed. 197; Clyde v. Steam Transportation Co., Id. 501; Zollinger v. The Emma, Case No. 18,218.]

2. A state cannot, by its legislation, create a lien upon a vessel which shall have priority over one already existing by virtue of an act of congress.

[Cited in The Lillie Laurie, 50 Fed. 221. Disapproved in The Canada, 7 Fed. 733.]

3. No court can, by rule, create maritime liens or change the order of existing liens.

[Appeal from the United States district court for the southern district of Alabama.

[In admiralty. Libel by Edward Baldwin against the steamer Bradish Johnson, (J. M. Stone and J. H. Stone, claimants.) Other creditors intervened, claiming liens for seamen's wages, supplies furnished in foreign and home ports, taxes, etc. Thereafter Charles Cavaroc Jr., intervened, claiming a lien by virtue of a mortgage of the steamer. The decree of the district court postponed the lien of the mortgage to the lien for supplies in the home port in The Bradich Johnson, Case No. 1,770. Charles Cavaroc, Jr., appeals. Reversed.]

The Bradish Johnson was seized upon a warrant issued upon the libel of Edward Baldwin. Other creditors, some of whom had furnished supplies to the steamer in her home port, and others of whom held admiralty liens for seamen's wages, and for supplies furnished in foreign ports, filed libels. All the cases were consolidated, the steamer was sold by order of the district court, and the proceeds paid into the registry of the court. Thereupon, under admiralty rules thirty-four and forty-three, Charles Cavaroc, Jr., filed his intervention, claiming the proceeds of the steamer, after the payment of costs and the general admiralty liens, by reasons of a mortgage upon said steamer, which, he averred, had been duly recorded according to the act of congress, before any other lien upon the boat had been created. On March 11, 1876, one Vincent J. Wood, who was at that time the sole owner of the Bradish Johnson, sold her to J. M. Stone and J. H. Stone, citizens of Alabama, for the price of $7,200, of which three thousand dollars were paid in cash, and the residue, $4,200, was evidenced by the notes of the purchasers, which they secured by a mortgage duly executed on the boat. This mortgage was recorded in the office of the collector of customs of the port of Mobile, on April 18, 1876, and about that date the Bradish Johnson was enrolled in said custom house, and the port of Mobile has ever since been her home port.

The Code of Alabama declared as follows: "Section 3465. A lien is hereby created on all ships, steamboats and other water crafts, whether the same be registered, enrolled, licensed, or not, that may be built, repaired, fitted, furnished, supplied or victualed within this state, for work done or materials supplied by any person within this state, for or concerning the building, repairing, fitting, furnishing, supplying or victualing such ships, steamboats or other water crafts, and for the wages of the masters, laborers, stevedores and ship-keepers of such vessels, steamboats or other water crafts, in preference to other debts due and owing from the owners thereof, which said lien may be asserted in any court of competent jurisdiction. Section 3466 Lien lost if action not brought in six months.—b. The lien hereby created shall expire after the lapse of six months from and after the maturity of the claim or debt, unless within the said six months judicial proceedings shall have been commenced to assert such lien." Under these provisions of

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

[2] [Reversing Case No. 1,770.]

the statute law, and after the registration of said mortgage, a large number of liens had been created for supplies, etc., furnished the Bradish Johnson in her home port of Mobile, and other ports of the state of Alabama. The district court referred the claims of all the creditors of the boat to a commissioner to report a tableau of distribution. The commissioner reported accordingly, and recommended the payment, first, of the costs of suit; second, of the maritime liens under the general admiralty law; third, liens under the state law, and these being sufficient to exhaust the proceeds of the steamer in the registry of the court, there was nothing left for distribution to the mortgagee. The report of the commissioner was confirmed by the decree of the district court. From this decree Cavaroc appealed to this court.

Alex. McKinstry, Thomas H. Herndon, John Little Smith, Peter Hamilton, T. A. Hamilton, Wm. Boyles, and G. Y. Overall, for libelants.

John T. Taylor and Thos. N. Macartney, for Cavaroc, the mortgagee.

WOODS, Circuit Judge. The appellant Cavaroc concedes that liens by the general maritime law, such as for seamen's wages, supplies furnished the steamer in a foreign port, take precedence of his mortgage, but he denies that the lien given by the law of Alabama to material men and others, for repairs and supplies in the home port of the steamer, is entitled to priority over the lien created by the registration of his mortgage under the act of congress. This contention presents the main question brought up by the appeal. Section 4192 of the Revised Statutes of the United States, which became a law July 19, 1850, declares that "no bill of sale, mortgage, hypothecation or conveyance of any vessel, or part of any vessel, of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance is recorded in the office of the collector of customs where such vessel is registered and enrolled. The lien by bottomry on any vessel, created during her voyage by a loan of money or materials necessary to repair, or enable her to prosecute her voyage, shall not lose its priority, or be in any way affected by the provisions of this section." I think it clear that the effect of this section is, that where a bill of sale, mortgage, hypothecation or conveyance of a vessel is recorded in accordance with the terms of the law, it is valid, not only against the mortgagor, his heirs and assigns, and persons having actual notice thereof, but against other persons.

It is not contended by the appellant that a mortgage so recorded would prevail over strictly maritime liens, but it is claimed that its lien is better than any subsequent lien not recognized by the general maritime law. In the case of The Lottawanna, 21 Wall. [88 U. S.] 558, it was held by the supreme court, that according to the maritime law, as accepted and received in this country, material men who furnish repairs and supplies to a vessel in her home port, do not acquire thereby any lien upon the vessel. The question is, therefore, reduced to this, can the states, by the passage of laws giving a lien upon vessels for supplies furnished in the home port, override a lien created by a mortgage recorded according to the act of congress and declared to be valid against all liens except maritime liens? No reason is perceived why supplies furnished in the home port of the vessel, where the mortgage is of record, should take precedence of the mortgage. The act of congress, in effect, gives validity to the lien of the mortgage, from the date of its record. No state law can postpone this lien in favor of one subsequently made.

It is insisted, however, that a contract for supplies to a vessel is a maritime contract, that the state law of Alabama has given a lien for such supplies, and that by an amendment to admiralty rule twelve, promulgated by the supreme court, on May 6, 1872—[Webb v. Sharp,] 13 Wall. [80 U. S.] 14,—the material man is allowed to sue in rem, in the admiralty courts, to enforce such lien, and that, therefore, the lien takes precedence of the lien of a mortgage duly recorded before the debt for supplies was contracted. In other words, it is claimed that the twelfth rule, as it now stands, gives the same lien for supplies in the home port as that given by the general maritime law for supplies furnished in a foreign port. In reply to this, it is sufficient to say that neither the supreme court of the United States, nor any other court, can, by rule, either create liens or postpone one lien to another. It may regulate the practice and method of procedure, but it cannot displace one lien in favor of another. So, by allowing material men, who have furnished supplies to a vessel in her home port, to proceed in rem, when the state law has given a lien, the court does not attempt to give the lien any precedence over prior liens, by mortgage or otherwise. In the case of the Lottawanna, supra, the court says (page 579): "As to the recent change in the admiralty rule (the 12th) referred to, it is sufficient to say that it was simply intended to remove all obstructions and embarrassments in the way of instituting proceedings in rem in all cases where liens exist by law, and not to create any new liens which, of course, this court could not, in any event, do, since a lien is a right of property, and not a mere matter of procedure."

The priority of a lien is also a right of property, and the supreme court could not, by rule, any more interfere with the priority

of liens than it could create liens. So that the case stands just as it did before the amendment to the twelfth admiralty rule, and the question comes back, can a state, by its legislation, create a lien which shall have priority over one already existing by virtue of an act of congress? The question carries with it its own answer: White's Bank v. Smith, 7 Wall. [74 U. S.] 646; Aldrich v. Aetna Ins. Co., 8 Wall. [75 U. S.] 491. In my judgment the lien of a mortgage, duly recorded, is superior to any subsequent lien for supplies in the home port, given by the legislation of a state. This view has been held by Judge Drummond, in The Grace Greenwood, [Case No. 5,652,] and in The Kate Hinchman, [Id. 7,620.] See, also, Scott's Case, [Id. 12,517.] It has also heretofore been held by the circuit court for the district of Louisiana. See the case of The John T. Moore, [Id. 7,430.]

It follows, therefore, that the mortgagee is entitled to be paid out of the proceeds of the boat, next after the payment of the costs and general maritime liens, and before the liens created by the state law, for repairs and supplies in the home port. A decree in accordance with these views has been handed to the clerk for entry upon the minutes of the court.

Case No. 799.

BALDWIN v. The E. MORRIS.[1]

District Court, D. Connecticut. Feb. 19, 1877.

MARITIME LIENS—PRIORITY.

[1. A steamboat registered in New York was purchased by libellant's son, and was taken to Fair Haven, Conn., for repairs. The son had no means of his own or credit in Fair Haven, and a verbal arrangement was made between him and the libellant by which the latter agreed to advance money for the necessary repairs, wages of workmen and seamen, and outfit and stores on the credit of the boat, and to permit her to be taken to the Potomac, in the expectation that her profits there would repay the advances and discharge the lien. Repairs were made upon the vessel accordingly, and her hailing port was changed to Washington, D. C. *Held*, that libellant had a lien against the steamboat for the repayment of the money expended and advanced upon her credit in a foreign port for necessary repairs and supplies.]

[2. After being repaired, the vessel was taken to Washington, where she arrived January 19, 1876, and where other repairs were made. The owner obtained, on the security of the boat, the indorsement of his note for $1,000, to secure which note and bills, amounting in all to $1,500, a deed of trust to one Lowe was executed. The boat made regular trips on the Potomac from March 9, 1876, to April 13, 1876, but ran in debt. In March or April, 1876, one Hall verbally agreed to purchase one-half of the boat for $2,625, free from the $1,500 mortgage, and paid $1,409 on account thereof. Hall subsequently found that there were about $4,000 claims against the boat, and declined to make any further payments, on the ground that he had already paid for more than one-half of the boat. Prior to June 8, 1876, the owner had become involved in debt, and the boat had been libelled by the crew and by material men. Advances to pay the wages of the crew and some of the claims of the material men were obtained; and June 8, 1876, the first deed was released, and a second deed of trust to secure claims of Washington parties to the amount of $4,577 was made to Lowe. Lowe, Hall, and the persons secured by the deed of trust were all ignorant of libellant's lien, the owner asserting that the boat was free from liens except to Washington creditors. Libellant, however, was not aware of the representations or of the deeds of trust until the boat returned from Washington. On July 6, 1876, the vessel left Washington for New Haven, Conn., and during the remainder of the season plied between New Haven harbor and neighboring watering places, but at a loss. On July 24, 1876, Hall came to New Haven to protect his claim for the advanced purchase money, and met libellant and the owner at the office of his counsel. At this meeting, libellant stated that he had a claim upon the boat for $1,800 or $2,000, but in such terms as to lead Hall to understand that the claim was only against the owner personally. A second mortgage was given to Hall for the $1,409. The libel was filed October 12, 1876. On November 23, 1876, the boat was sold at auction by the trustee under the deed of trust, for $175, subject to all claims on liens. Hall bought the boat from the purchaser for $2,000. Hall, before and after buying the boat, had bought claims secured by the deed of trust, and his total claim at the time of the trial amounted to $5,209. *Held*: (1) That the libellant's lien had not been lost or waived as against bona fide purchasers, without notice, by libellant's delay, the period of eight months before bringing his libel not being, under the circumstances, an unreasonable time; (2) that, upon the evidence, the libellant was not estopped by concealment or misrepresentation from enforcing his lien against bona fide purchasers; and (3) that libellant's lien was superior to the title of Hall either as mortgagee or purchaser.]

[In admiralty. Libel in rem by Murray L. Baldwin against the steamboat E. Morris. Joseph T. H. Hall interposed a claim of title to the vessel. Decree for libellant.]

Charles Ives, for libellant.

Wm. K. Townsend and Henry G. Newton, for defendant.

SHIPMAN, District Judge. This is a libel in rem against the steamboat E. Morris upon a maritime lien for money alleged to have been expended for repairs and supplies, or loaned to the captain and owner to pay for repairs and supplies in a foreign port, upon the credit of said boat. Joseph T. B. Hall appears to defend, claiming the title to said steamboat.

The facts in the case are as follows: Theodore E. Baldwin, a steamboat captain, an inhabitant and resident of Washington, in the District of Columbia, after Nov. 29th, 1873, and a son of the libellant, purchased for the sum of $1,500, on August 19th, 1875, the steamboat E. Morris, in the city of New York, where she was then registered. The bill of sale was duly recorded. The vessel was a side-wheel tug boat, had been laid up at the wharf for two or three years, and was very much out of repair. The captain intended to run her himself as a freight and passenger boat upon the Potomac river, and

[1] [Not previously reported.]

bought her for that purpose. Before she could be used upon any waters, she needed extensive repairs both to her boiler, engine, and wood work. She was towed to Fair Haven, in this district, for the purpose of repairs, where there are a marine railway, ship yards, steam engine shops, and conveniences for the repairs of vessels. His father, the libellant, lived in Fair Haven, and was an experienced owner of vessels. Theodore E. Baldwin returned to Washington, leaving the repairs of the boat under the general oversight of his father. The captain had no means of his own, or credit in Fair Haven, which was well known to the libellant; and whatever repairs and supplies were furnished must be furnished either upon the credit of the boat, or upon the responsibility of some other person than the owner. A verbal arrangement was made between him and the libellant by which the latter agreed to advance money for the payment of the necessary repairs, wages of the workmen and seamen, her necessary outfit and stores upon the credit of the boat, to permit her to be taken to the Potomac, and go into business there, in the expectation and belief that her profits would be able to repay the advances and discharge the lien.

Serious and extensive repairs were made upon her under this arrangement, all of which were necessary. The engine was taken to pieces, and was repaired; new ash pans were cast; new crank was made; bilge pump was repaired; mast was taken out; wheels were repaired; decks were canvassed and painted; bells were put on the engine; she was caulked; graving pieces were put on the hull; steam pipe was repaired; her name and hailing port, "Washington, D. C.," were painted on the stern; and stores and outfit were purchased. These repairs occupied from September, 1875, to December, 1875. She then left for New York, to be inspected, and to receive a portion of her outfit, which could not be bought in Fair Haven. She arrived in Washington January 19, 1876. Before she left Fair Haven, the libellant advanced money to the captain for the purpose of procuring repairs and an outfit, which was spent in necessary repairs and outfit of the boat and wages; paid the wages of the workmen necessarily employed on the steamer, and bills for the necessary stores and outfit thereof, and for materials and labor necessarily used and employed on said steamer in said necessary repairs,—all of which money so spent and advanced amounted to the sum of $1,722.26, and was repaid therefor the sum of $413.00, leaving the balance due, for moneys necessarily expended in and upon the repairs, outfit, and wages, the sum of $1,308.76. The bill of the libellant, as presented, was the sum of $2,095.27, from which I deduct the sum of $150, charged for his own services in the oversight of said repairs, upon the ground that this was a voluntary service, and not rendered under a contract of hiring; also the sum of $143.66, expended by the captain from the moneys loaned to him in other than necessary repairs and supplies; the sum of $17, expended by the libellant for lawyer's fees; and the sum of $62.35, expended after the return of the boat from Washington, and not coming within the contract or agreement heretofore named, and not advanced on the credit of the boat. The said sum of $1,308.76 was all advanced and expended for necessary repairs and supplies upon the credit of the boat in a foreign port, which supplies could not have been procured upon the credit of the owner.

After the boat arrived in Washington, the captain deemed best, in order to fit her for the passenger trade, to put on a new upper saloon, and make other repairs; and for this purpose, he obtained, on the security of the boat, the endorsement of John B. Archer and Levi P. Wright upon his note of $1,000. Other expenses were incurred; and to secure all the bills and said endorsement, amounting to $1,500, a deed of trust of the boat was executed by the owner to R. P. Lowe. She was duly enrolled at the port of Georgetown, March 1, 1876, and licensed for the coasting trade. The boat commenced to make regular trips up and down the Potomac river on March 9th, 1876, but was unsuccessful, lost money, ran in debt, and stopped running April 13th, 1876. After the execution of said deed of trust, and in March or April, 1876, Joseph T. H. Hall verbally agreed with the owner to purchase one-half of the boat for $2,625, free from the $1,500 mortgage, and paid $1,409 toward the purchase money, but subsequently found that there were about $4,000 claims and debts upon account of materials furnished for the boat, and declined to make any more payments upon the ground that he had already paid for more than one-half of the boat.

Before June 8th, 1876, T. E. Baldwin had become burdened with debt. The boat was libelled by the crew, who were kept on board after she stopped her trips, and was released on bond, and was also libelled by material men of Washington for coal supplies furnished in her home port. The first deed of trust was surrendered and released. Between June 8th and July 6th, the seamen's wages, amounting to $916.72, were paid by J. B. Archer and L. P. Wright. On June 8th, 1876, a new deed of trust was drawn, and was executed on July 6th, 1876, by the owner to R. P. Lowe, to secure all the debts of Archer Wright and of the material men in Washington, to the amount of $4,577.63, and the boat was released from attachment. All the persons named in said deed and said Hall were ignorant of the alleged lien of the libellant, of which the owner did not inform them, but asserted that she was free from liens except as to said Washington creditors. They were guilty of no laches, and acted in good faith. The conduct of the owner in

misrepresenting to his Washington creditors the nature and extent of his father's lien was extremely reprehensible, but the libellant was not aware of these representations, and did not know of the mortgages or deeds of trust until after the boat returned from Washington.

On July 6th, 1876, the boat left Washington for New Haven, for the purpose of running as an excursion boat from New Haven harbor to the watering places in the vicinity. She commenced her trips forthwith, and ran regularly until September, when the season closed. In the meantime she had lost money. On July 24th, 1876, said Hall came to New Haven to look after his claim for said advanced purchase money for said boat, and met, at the office of his counsel, the libellant and the owner. The negotiations resulted in the owner's giving said Hall a second mortgage upon the boat for $1,409. An important point in this part of the case is the alleged concealment upon the part of the libellant of his lien, and a consequent estoppel in pais against now asserting it as against the defendant. I find that at this interview the libellant did substantially declare to said Hall that he had a claim upon the boat for $1,800 or $2,000, but that said Hall was of the opinion that this debt was not a debt against the boat, but was a personal claim against his son, and that the assertion of the libellant that he had a claim against the boat made no impression upon the mind or memory of either said Hall or his counsel, who did not suppose that any lien existed, and took the second mortgage under that supposition; but I cannot find that the libellant intentionally or actually concealed or withheld the knowledge of said lien from said Hall, or wilfully or knowingly caused said Hall to believe that no lien existed.

The libel was filed October 12th, 1876, and the boat was taken into the custody of the marshal. She was sold at public auction by the trustee named in the deed of trust on November 23d, 1876, subject to all claims or liens, valid or invalid, to John B. Archer, for $175, who on December 5th, 1876, sold her to said Hall for $2,500. Said Hall heard from his counsel about November 1st, 1876, that the libellant claimed a lien upon the vessel. Before that he had purchased the interest of L. P. Wright and A. R. Shepherd, two of the cestuis que trustent, as hereinafter named, in the vessel; and he has expended in all upon the boat and the purchase of claims against her the sum of $5,215, as follows: Paid to T. E. Baldwin $1,409, to John B. Archer $2,500, to L. P. Wright $1,256, to A. R. Shepherd $50. He has agreed to purchase Emory & Co.'s claim for a coal bill of $198.27, which is named in the second deed of trust. The market value of the boat is from $1,500 to $2,500.

The conclusions of law from the foregoing facts are:

1st. The libellant acquired a valid maritime lien against said steamboat for the repayment of said sum of $1,308.76, expended and advanced for necessary repairs and supplies in a foreign port, upon her credit, with interest from January 19th, 1876.

2d. Said lien has not been lost or waived as against the bona fide purchasers without notice of said lien, by any delay on the part of the libellant in enforcing his lien. The period of eight months before bringing his libel was, under the circumstances of this case, not an unreasonable time.

3d. The libellant is not estopped by concealment or misrepresentation from enforcing his lien against bona fide purchasers.

4th. The lien of said libellant is superior to the title of said Hall, either as mortgagee or purchaser.

Let a decree be entered for the payment to the libellant of the sum of $1,308.76, and interest from January 19th, 1876, and costs, and, in default of payment, for the condemnation and sale of said boat.

BALDWIN, (HALE v.) See Case No. 5,913.

BALDWIN v. HARTER. See Case No. 11,263.

BALDWIN, (HESTER v.) See Case No. 6,438.

BALDWIN, The HEZEKIAH. See Case No. 6,449.

Case No. 800.

BALDWIN v. LAMAR.

[Chase, 432.] [1]

Circuit Court, D. South Carolina. May Term, 1869.

JUDGMENT—ENTRY—DESTROYED RECORD—FILING TRANSCRIPT—PARTIES—PRACTICE—SCIRE FACIAS.

1. A verdict having been obtained in 1860, no further proceedings are had in the cause until 1867. In the meantime the record has been destroyed. The plaintiff may file a transcript of the record in his possession, upon which a judgment may be entered as upon the original record.

2. In such case, the defendant having died in the meantime, his personal representative must be made a party, and a rule served to show cause why the transcript should not be filed, does not operate to make him a party.

3. It seems that when the personal representative is a non-resident, it should be done by scire facias.

4. The copy of the record produced, was in the possession of the plaintiff.

At law. The facts are fully stated in the opinion of the CIRCUIT JUSTICE.

Chamberlain & Seabrook, for plaintiff.

Magrath & Loundes, for defendant.

CHASE, Circuit Justice. This was originally a suit on which a verdict was obtained May 9, 1859, by the plaintiff against the de-

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

fendant, for twenty-five thousand three hundred and fifty dollars. On motion, this verdict was set aside, and a new trial was ordered. On May 18, 1860, another verdict was rendered against the defendant, for fourteen thousand six hundred and sixty-six dollars and sixty-six cents. On June 4, the time for filing the bill of exceptions was extended for two months. On August 8, the time for filing exceptions was again extended to November 1, 1860.

The civil war, which soon followed, prevented any further action at that time. On February 13, 1867, the plaintiff proposed to file a transcript of the proceedings of the circuit court in this case, and also in the case of Baldwin v. C. A. L. Lamar, and others. A rule was issued upon the administratrix Lamar, to show cause why the order prayed for should not be made. The rule was duly served and returned, and on May 21, 1867, the order was made and the transcript filed. A motion is now made for a judgment upon the verdict evidenced by this record. The statute of the state, which has been practically adopted as the rule of proceeding in this court, provides that the transcript of a record lost or abstracted, when proved and filed, shall have precisely the same effect as if the record had never been disturbed. The question, then, is: What would be the right of the plaintiff in the verdict, obtained in May, 1860, had it remained on the record of the court during the whole period, and now, for the first time, a judgment was asked upon it? Undoubtedly a judgment ought to be entered upon the verdict; but it can not be entered nunc pro tunc. The accidents and events of the war must be regarded as causing inevitable delay. A judgment will only be rendered when asked. The plaintiff would be entitled to a judgment at this term, if this was all. But Lamar, the defendant, has been dead four years. The plaintiff appears to have taken for granted that the issue of the rule to show cause why the order to file the transcript should not be entered, made the administratrix a party to this record. We do not think so. We think that the record stands precisely as it would stand if there had been no war, and this was the next term after the verdict. If Mr. Lamar had died after the rendition of the verdict, before judgment could be entered, it would then be necessary to make the administratrix a party. This could be done in various ways, according to circumstances. It could be done on motion, or by a rule to show cause, or by a scire facias; and we think a scire facias should be issued in this case especially; the administratrix is not a citizen of this state, and it is proper that she should have the opportunity of pleading to the scire facias. We do not know that any plea will avail her. We do not propose to go into an examination of any question of jurisdiction or other defense in advance. The case was transferred to this court from the circuit court for the district of Georgia. We have been asked to make an order for re-transfer. No such order will now be made, but the case will be continued in order that the administratrix of the deceased defendant may be made a party to the record.

Case No. 800a.

BALDWIN v. LE ROY.

[3 Betts, C. C. MS. 62.]

Circuit Court, S. D. New York. June 1, 1844.

VENDOR AND PURCHASER—ASSUMPSIT BY VENDEE TO RECOVER BACK PURCHASE PRICE — IMPLIED COVENANTS.

[1. In New York, no action lies in behalf of a grantee against the grantor on a deed of real estate without covenants.]

[2. A covenant that the grantor has title is not implied in a deed without covenants.]

3. Indebitatus assumpsit by a grantee against a grantor, on the ground of a failure of consideration, by reason of the complete failure of the grantor's title, cannot be maintained on a deed without covenants.]

[At law. Assumpsit by Daniel V. B. Baldwin against Jacob Le Roy to recover the price paid by plaintiff to defendant for certain real estate. On motion for a new trial. Motion granted.]

BETTS, District Judge. The application for a new trial on the part of the defendant in this case rests upon exceptions to the charge and ruling of the judge on the trial of the cause. The defendant, by a power of attorney executed August 31, 1836, authorized Elisha Starr to sell any lands owned by the defendant in the western states and territories, and purchased for him by the said Starr or I. Dewey, or received in exchange for other lands, purchased by them for the defendant. On the 7th day of November, 1836, Starr conveyed in the name of the defendant and his wife, to the plaintiff, certain real estate, situated in Milwaukee, territory of Wisconsin, and purchased conformably to the terms of the power of attorney, for the consideration of $1,800, which was paid in full. The conveyance was with covenants of seizin and warranty. The judge ruled at the trial that the power of attorney did not authorize Starr to convey with covenants, and decided that the deed was to operate only as a conveyance in fee as if executed without the insertion of covenants.

The counsel for the defendant excepted to the admission of the deed as evidence, but on the argument has discussed only the question whether the attorney had power to insert the covenants given with this deed, and has conceded, that otherwise than in respect to those covenants, the deed operates to the same effect as if executed personally by the defendant. The plaintiff not having excepted to the exclusion of the covenants, it is not necessary in this position of the case to review the construction put by the judge on the power of attorney, and the waiver of the

defendant's exception also excuses the consideration of the formality and sufficiency of the deed itself. The action was assumpsit to recover both the consideration money paid, with interest, upon the ground that, at the time of the conveyance, the defendant had no title to the lands sold; and it rested upon the doctrine that, on an entire failure of the consideration, the vendor of real estate has a right to reclaim the purchase money and interest, although he has received a conveyance perfect in law to pass the title. The conveyance executed was without seal, but it appears that, by the law of Wisconsin, a scroll or designation of the place of seal operates as a deed. Acts Wis. p. 156.

Whether, if the laws of the place of contract had placed the transfer of real or personal estate on the same footing, and had adopted to both the remedies appropriate at common law to either, the same rule must be administered in other forums, might be a grave question; but it is merely a speculative one in regard to the present case, for it is shown that this instrument has in Wisconsin all the effect of a common law deed of bargain and sale.

The objection has been strenuously urged that the plaintiff did not prove at the trial any failure of title in the defendant, and that it is in no respect inconsistent with the evidence that there should have been vested in him at the time of the conveyance a valid title to the property. The exception on the trial was pointed to admission of but one item of proof on that head,—the certificate of the commission of the land office, authenticating certain proceedings in that office, alleged to have relation to the lands in question. The defendant's counsel construes the exception as contesting the admissibility and effect in law of the various papers embraced within the certificate, to support the allegation that the defendant had no title to those lands. Such is not the bearing of the exception: It evidently regards those documents as the only proof offered by the plaintiff to show a failure of title, and demands their exclusion as incompetent to establish the facts. Manifestly the exceptions cannot be sustained in that point of view. The documents were so authenticated as that by the laws of congress plaintiff was entitled to read them in evidence, if pertinent to the case, and the exception should accordingly have been to their legal effect and relevancy. There was already evidence given tending to establish the same fact. The Chicago treaty, the deposition of Starr, &c.; and in aid of that proof, the plaintiff offered the records of the land office, to show that the government had never granted those lands. The defendants had a right to call on the judge to decide whether the documents were full proofs to the point in inquiry, or merely to be received as auxiliary to other evidence, or what other, if any effect, was to be given them; but I think, as the case stands on paper, the defendants are not entitled to the absolute exclusion of that evidence.

A further point is made, that the judge charged the jury as matter of law that the defendant's title had failed; when it should have been submitted as matter of fact to them to find on the evidence, the court being authorized only to determine the construction and effect of the written documents, but not the effect of the entire proof. The bill of exceptions is very concise in detail, but I think it is manifest from the proceedings stated in it, that there was no contest before the jury as to any matter in pais. Both parties regarded the case as turning on points of law—the sufficiency of the power of attorney and the right of the plaintiff in this form of action, to recover back the consideration paid; and, to obtain the judgment of the court on these points, the cause was disposed of upon the assumption that the title of the defendant had failed. It would be contrary to the notorious practice of the court for the judge to take upon himself the determination of mere matters of fact, and withdraw it from the jury; and rather than suppose so unusual an omission with the late, learned and cautious judge who presided in this court and on the trial of this case, I should read the charge set forth in the exceptions, not as positive and directory to the jury, but as hypothetical, resting upon the supposition of its being found "that in this case, the title of the defendant having failed," they were then instructed that "the money paid him was paid without consideration, and the plaintiff was entitled to recover it back in this form of action."

The final position in the charge is the gist of the controversy, and the conclusion to which I have arrived in this branch of the exception renders it of less moment that any definite judgment should be pronounced at this time on the other points presented. The mistake, if any, was merely formal, for it can scarcely be supposed that the jury, on the evidence spread upon the bill of exceptions, could have presumed any title in fact passed by the deed, or existed in the defendant at the time of its execution or since. But assuming, as was palpably the understanding at the trial, that the title had failed, the main question is as to the right of the plaintiff to sue for and recover the consideration money paid. It rests partly on the inquiry whether the legal operation of the deed supplies him the relief sought, and partly on the form of action adopted. I take it to be incontrovertably the case of this state, that no action lies in behalf of a grantee against the grantor on a deed conveying real estate without covenants. This is not only so by positive statute, which provides that no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not, (1 Rev. St. p. 738, § 140,) but the like doctrine

had been explicitly declared by the supreme court in 1804, (Frost v. Raymond, 2 Caines, Cas. 188,) and has never since been varied, (4 Kent, Comm. 476.) In Frost v. Raymond, the court discusses with great attention all the operative words in a deed in fee without covenants,—"grant, bargain, sell, alien, and confirm,"—and resolve that some of them imply a covenant of title by the grantor. This was also clearly the common law doctrine. The cases cited by the supreme court from the English adjudications sustain the positions laid down, and they are also strongly fortified by the opinion of Sergeant Sugden, and the case he adduces to support it, that if one sell another's estate without covenant or warranty for the enjoyment, it is at the peril of him who buys, because, the thing being in the realty, he might have looked into the title. Sugd. Vend. 315. The rule is different in a lease for years, for in such case it is adjudged that the words "grant," "demise," etc., imply a covenant of title in them. Co. Litt, 384a. but note 332; 3 Cro. Eliz. 674; Cro. Jac. 73. So also a contract to convey a fee simple, imports title in the vendor, and he cannot acquit himself of the engagement by making a bald deed, no title being in him at the time. 14 Mass. 425; 4 Conn. 350. Strong cases to this point are found in 2 Johns. 599; 10 Johns. 269; 12 Johns. 436; and the principle has been adopted and applied in other cases in this state, and by the supreme court of the United States. Bank of Metropolis v. Guttschlick, 14 Pet. [39 U. S.] 19. But none of these advance or countenance the doctrine that, after a deed in fee devoid of covenants is accepted by a grantee, he can raise an implied covenant thereon against the grantor. Had this been an action of covenant, therefore, it is plain, that the authorities would be decidedly against it, or that the plaintiff must have failed.

Is the right at all varied by changing this form of action, when the special undertakings or promises are made the foundation of the action? Assumpsit for money had and received is an equitable action of the broadest scope, but it can yield no fruit to the party unless the proof in the case shows his superior equitable and legal right to the money in question. What is then the gravamen to the action, the foundation upon which it rests? It must be a promise implied from the grant of land for a full consideration that the grant actually claims the title it purports to convey. In other words, this action, the same as one in covenant, is to be supported solely by this implied undertaking or promise of the vendor. The cases make no distinction favoring the claim in one form of action over that of another, or intimate that a promise may be implied, carrying all the effect of a covenant, in relation to the sale of land, when such covenant itself could not be implied.

The doctrine deduced from them all is, that there is no reason for allowing a party an action at law in such case, where he did not provide it for himself upon his contract. Sugd. Vend. 715. Lord Holt and the court affirm this to be the law, (2 Ld. Raym. 1119,) and recognize, in an action on this case for deceit, the principle that when the thing sold is in realty, without covenant of warranty, the validity of the right or title is at the peril of him who buys, (Cro. Jac. 197; 1 Serg. & R. 42; 4 Greenl. 101.) Gates v. Winslow was assumpsit to recover back the consideration paid, on receiving a quitclaim deed of lands, on this allegation, that no interest passed by the deed, and the court held that the action would not lie. 1 Mass. 65. This principle is reaffirmed with great strength of statement by Parsons, C. J., (4 Mass. 136,) and is fully recognized by the superior court of Pennsylvania and Maine, (Joyce v. Ryan, 4 Greenl. 101; Emerson v. Washington Co., 9 Greenl. 96; Dorsey v. Jackman, 1 Serg. & R. 42.) The court of chancery, acting with a view to the intrinsic equities of cases between parties, and without being controlled by rules that might be termed technical merely, will afford no relief to a vendee of land who has accepted a conveyance without covenants, when no fraud or deceit has been practiced by the grantor. In Thomas v. Powell, 2 Cox, Cas. 396, Ld. Loughborough, in such case, refused to impound the consideration money yet remaining in court and which had not reached the vendor. He held that the vendee must be remitted to his covenants, and if the deed contained none, the purchaser is entirely without remedy. Lord Rosslyn enforced the same principle, and held that even in a conveyance made by a master under decree of the court, the purchaser, after accepting the deed, could not recover back the purchase money because of a failure of title. Wakeman v. Duchess of Rutland, 3 Ves. 235. Abbott v. Allen, in this state, is a strong case to the same point. Chancellor Kent declared that if there be no fraud and no covenants taken to secure the title, the purchaser has no remedy in equity for his money because of a failure of title. 2 Johns. Ch. 519–523.

The precise point presented by this case has been repeatedly brought before the courts in England and this country, as shown by the authorities cited; and it has been uniformly adjudged, that neither in law on an implied covenant, nor in an action of assumpsit, nor in equity, can a purchaser of real estate who accepts a deed without covenants recover back the consideration money paid on a failure of title, unless there be fraud or deceit in the sale. All that is required in the disposal of the point presented is to ascertain what the fixed rule of law is; but it is also satisfactory to find it one not of arbitrary authority merely, but resting on the soundest principles of general justice. The court always looks to a whole instrument in writ-

ing and under seal as conclusive evidence of what the parties ultimately concluded between themselves. All antecedent propositions and understandings are deemed disposed of and substituted by what the deed expresses. So far then from countenancing the allegations that an important part of the stipulations are reserved, or can be implied out of the deed, beyond its language, the law holds that the writing is peremptory proof of what the parties ultimately agreed to between themselves, and that it would counteract more often than advance the understanding of both parties to raise, from a deed like this, engagements not expressed upon its face. 4 Kent, Comm. 474. This case is examined and decided solely upon the points presented by the exceptions and on the argument; that is to say, that the instrument of conveyance is to be regarded a mere grant of title without covenants of assurance, and that the right to retain the verdict rests upon the doctrine that a failure of title under such a grant enables the grantee to recover back the consideration paid, by action of indebitatus assumpsit. Under this view of the law, I am constrained to pronounce the ruling of the judge on the trial of the cause erroneous, and that the exceptions thereto must be sustained. A new trial is accordingly ordered, with costs to abide the event of the suit.

Case No. 801.

BALDWIN v. RAPLEE et al.

[4 Ben. 433.] [1]

District Court, N. D. New York. Dec., 1870.

SETTING ASIDE MORTGAGE—PAROL PROOF OF CONSIDERATION—USURY—PLEADING—ASSIGNMENT—CONCEALED FRAUD.

1. Where a mortgage purported on its face to have been executed to secure the payment of $10,000, according to the condition of a certain bond, and it appeared that no such bond was ever executed: *Held*, that that fact was not of itself fatal to the claims of the mortgagee, and that parol proof might be received to sustain the mortgage.

2. Where the note, to secure which a mortgage was alleged to have been given, was dated May 10th, 1868, and bore interest from that date, and the consideration of the note was not received till the 18th of that month; and, on a bill being filed by the assignee in bankruptcy of the mortgagor, to set the mortgage aside, it was claimed that the mortgage was void for usury: *Held*, that it was a sufficient answer to that objection to the mortgage, to say that there was no allegation in the bill, that the mortgage was usurious, or that there was any corrupt agreement or any intent to secure more than lawful interest.

3. Where a mortgage, which purported on its face to be given to secure a bond for $10,000, was assigned, but no bond was ever executed, and a note for $10,000, which was claimed to have been given for the consideration of the mortgage, was not delivered over when the mortgage was assigned: *Held*, that the mortgage was not thereby extinguished. The assignment of the mortgage, "together with the bond accompanying said mortgage, and therein referred to, and all sums of money due or to grow due thereon," was a transfer of the debt as well as of the mortgage, and would include the note as incident to the debt.

4. A deed or mortgage which misrepresents the transaction it professes to recite or the consideration on which it was executed, is liable to suspicion, and parol proof which contradicts or varies the terms of a mortgage, or is relied on to give it effect as a security for a debt, different from that which it is apparently intended to secure, should be of the most satisfactory character.

5. On a bill in equity filed to set aside a mortgage given as above, and assigned, it was attempted to sustain the mortgage as being given for an actual debt other than what was stated on its face: *Held*, that the defendants had not satisfactorily established their position, and that the mortgage must be set aside.

6. Even if there had been sufficient proof of an agreement to give a proper mortgage, and if a cross bill had been filed to obtain a reformation of the mortgage executed, yet whether, under the circumstances, a court of equity would have given relief to the holder of the secret lien of an unrecorded mortgage, as against the assignee in bankruptcy, quere.

7. Whether in a court of equitable jurisdiction the limitation of six months contained in the bankruptcy act, begins to run in the case of a concealed fraud, from the time of its commission or from the time of its discovery, quere.

[In equity. Bill by Mason L. Baldwin, assignee in bankruptcy of Jefferson T. Raplee, against Nehemiah Raplee and Ira Raplee, to set aside a mortgage executed by the bankrupt. Decree for complainant.

[Subsequently the respondents took an appeal to the circuit court, and a motion to dismiss the appeal was thereafter denied in Baldwin v. Raplee, Case No. 802. The final decree in the circuit court is nowhere reported.]

HALL, District Judge. This is a bill in equity, filed by the plaintiff, as the assignee in bankruptcy of Jefferson T. Raplee, a bankrupt, for the purpose of setting aside a mortgage for $10,000 and interest, executed by the bankrupt to the defendant Nehemiah Raplee, and bearing date April 14th, 1868. This mortgage appears to have been acknowledged, by the bankrupt, before Spencer S. Raplee, a notary public,—who is a brother of the bankrupt,—on the 15th day of April, 1868; and it was duly recorded on the 26th of July, 1869, at 8¼ o'clock, A. M.:—the bankrupt, who had for several years been doing business as an individual banker, having failed and closed his bank on the 23d of the same month. By an assignment dated on the 24th of the same month, the mortgage was assigned by Nehemiah Raplee to the defendant Ira Raplee, as security for a pre-existing debt, due to him from Jefferson T. Raplee, and for which Nehemiah Raplee was liable as his surety.

The creditor's petition against Jefferson T. Raplee, as an involuntary bankrupt, was filed on the 30th day of July, 1869, and under that petition the plaintiff was duly appointed assignee.

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

The mortgage in question was in the form of a deed or grant, with a provision and declaration in the following language; viz.: "This grant is intended as security for the payment of the sum of *ten thousand* (10,000) *dollars and interest*, according to the condition of a bond this day executed and delivered by the said *Jefferson T. Raplee, party of the first part*, to the said party of the second part; and this conveyance shall be void if such payment be made as herein specified." The words of such provision which are above *italicised* were written, and the others were part of the printed blank used in drawing the mortgage.

The assignment to Ira Raplee was in form an assignment of the mortgage "together with the bond accompanying said mortgage, and therein referred to, and all sums of money due and to grow due thereon;"—and it contained a covenant that there was unpaid and "due on said bond and mortgage the sum of $10,894 18."

The mortgage contained the usual power of sale, but no express covenant for the payment of the money therein mentioned.

The plaintiff's bill alleges that the mortgage was executed on the 14th of April, 1868, or on some other day between that date and the filing of the creditor's petition in bankruptcy, as aforesaid; that he was informed by the mortgagee and believed that no such bond as was described in the mortgage was ever at any time delivered by the bankrupt to the mortgagee; and that the plaintiff did not know of any other or further condition or terms of payment of the moneys mentioned in said mortgage. The bill also alleges that the United States internal revenue stamp affixed to said mortgage appeared by the record thereof to have been cancelled by the bankrupt on the 18th day of April, 1868; that no bond such as is described in the mortgage had ever been delivered to or possessed by said Ira Raplee, or been seen by him; and that the assignment to said Ira was made as collateral security, as aforesaid. The bill further alleges that said mortgage was executed and delivered to the said Nehemiah Raplee, as aforesaid, when the said bankrupt was largely indebted to divers persons, and insolvent, and with intent thereby to hinder, delay and defraud the creditors of the said bankrupt; and was taken and received by the said Nehemiah Raplee with the like intent, and with full knowledge of the insolvency of the bankrupt, and of his said fraudulent intent; and that it was executed and delivered by said bankrupt without any good or valid consideration whatever; and also that the assignment of said mortgage to Ira Raplee was also without any valuable consideration, and was received by him with full knowledge of the bankrupt's insolvency, and was utterly void as against the plaintiff; but it was not alleged that the mortgage was executed for the purpose of giving a preference to said Nehemiah Raplee over the other creditors of the bankrupt, or to defeat the object of the bankrupt act, or evade any of its provisions; or that it was executed or accepted in fraud of that act.

The defendants, by their answer, admitted and stated the execution of the mortgage on the 14th, and the acknowledgment thereof on the 15th April, 1868; the affixing and cancelling of the internal revenue stamps on the 18th of the same month; that it was not recorded until the 25th day of July, 1869; and that the assignment thereof to Ira Raplee was executed on or about the 24th day of July, 1869. The answer also admits that no bond was delivered to Ira Raplee at the time of the assignment of the mortgage; and it avers that the mortgage was duly delivered by the said Jefferson T. Raplee to said Nehemiah, on or about the 19th day of April, 1868.

The answer of the defendants, in respect to the allegation that no bond accompanied the mortgage, and in respect to the consideration of the mortgage, and the debt it was actually intended to secure, is as follows, viz.: "These defendants, further answering, aver and say, and each for himself says,—the said Nehemiah, of his own knowledge, and the said Ira, on information and belief, that, at the time the said mortgage mentioned was made, executed, and delivered by the said Jefferson T. to the said Nehemiah, in fact, no bond accompanied the same; that the blank used in preparing said mortgage contained said printed clause or words, but which are not expunged or erased at the execution thereof, through inadvertence or oversight; that, in truth and in fact, the real and true consideration of the said mortgage was the sum of $10,000 in cash, before that time lent and advanced to the said Jefferson T., by the said Nehemiah, and for which the said Nehemiah then held, and ever since has and still holds, the promissory note of the said Jefferson T.; and to secure the payment of the said sum so lent and advanced, and the said note, the said mortgage was made, executed, and delivered, by the said Jefferson T. to the said Nehemiah; that no part of said sum so lent and advanced by the said Nehemiah to the said Jefferson T., on the said note or any part thereof, has ever been paid." And, again, in another part of said answer: "And these defendants, further answering, aver and say, and each for himself avers and says, that he is informed, and believes, that no bond was ever executed to accompany the said mortgage, and the said Jefferson T. did not execute such bond, and the said Nehemiah, of his own knowledge, avers and says, that it was intended that the said mortgage should be held as security for the payment of the said sum of $10,000, so as aforesaid lent and advanced by the said Nehemiah to said Jefferson T., and the interest thereon; said sum being represented by the said note given by the said Jefferson T. to the said Nehemiah,

and which sum or note has never been paid."

The answer also alleges, that the debt of the bankrupt to Ira Raplee, in respect to which Nehemiah Raplee was liable as security as aforesaid, was, in part, upon a note of said bankrupt for $5,000, given on or about the 4th of July, 1867, and payable thirty days after that date; and the remaining $5,000 was upon a certificate of that amount made by the bankrupt, as an individual banker, under date of January 1, 1869, and payable in current funds, with semi-annual interest.

The defendants denied all knowledge or suspicion of the bankrupt's insolvency, and averred that they had no cause to believe he was insolvent, or unable to pay his debts, until long after said mortgage was executed, and they denied that it was executed or accepted with the intent to hinder, delay, or defraud creditors.

There are other allegations and admissions in the bill and answer, but it is not deemed necessary to refer to them more particularly in this preliminary statement.

Upon the taking of the proofs in the case, Nehemiah Raplee was sworn as a witness for himself and his codefendant, and was examined at length in respect to the execution, consideration, delivery, and purpose of the mortgage in controversy. Jefferson T. Raplee, the mortgagor, had absconded immediately after his failure, and was absent from the state; and his father testified that he did not know where he was; and, of course, his testimony has not been produced.

Nehemiah Raplee's testimony is, in several points, entirely inconsistent with the allegations of his sworn answer. Instead of testifying that the mortgage was delivered on or about the 19th day of April, 1868, he first testified that it was delivered a short time after the 10th of May, 1868; and, instead of testifying that the mortgage was given for $10,000 in cash, previously lent and advanced by him to Jefferson T. Raplee, for which he then held his note, he testified that the mortgage was given for the transfer by him to Jefferson T. of a mortgage of Daniel Ellis, to the amount of $3,446 36, and his the said Nehemiah's check for $6,553 77, on said Jefferson T. Raplee's bank; that said mortgage of Ellis was assigned, and said check given and dated on the 18th May, 1868, on which day the mortgage of $10,000 was delivered, together with a note of Jefferson T. Raplee's for $10,000, dated on the 10th day of May, 1868. The mortgage, he says, was given as security for the payment of this note, dated more than three weeks after the date and alleged acknowledgment of the mortgage, and more than a week before the date of the check, and of the alleged assignment of the mortgage. The note is produced, and is in the handwriting of Jefferson T. Raplee. The mortgage and the certificate of acknowledgment, including the date, are also in his handwriting. The revenue stamp on the mortgage has on it the date, "Apr. 18, 1868," with initials, "J. T. R." and "N. R.," but neither of these initials are believed to be in the handwriting of either Jefferson T. or Nehemiah Raplee. The certificate of acknowledgment is signed by Spencer S. Raplee, the brother of Jefferson. On the note is an internal revenue stamp, purporting to be cancelled by J. T. Raplee's signature; but it is evident that this signature is in the handwriting of his brother, S. S. Raplee; and it is almost certain that the date on the stamp was first written April 20 or 21, 1867, and subsequently changed to May 10, 1868. This note appears to have been first endorsed on the back, "N. Raplee, Note, $10,000," and the letters "J. T." afterwards written above the "N." The assignment of the mortgage from Nehemiah to Ira Raplee is produced, bearing date July 24, 1869, and purporting to have been acknowledged on the same day; but the assignment refers to the record of the mortgage, on the 26th of the same month, or two days afterwards; and gives the exact time of such record, and the book and page on which it is to be found. The revenue stamps on this assignment purport to have been cancelled on the 24th July, 1869, and to have on them the initials of Nehemiah Raplee, and also the initials "J. T. A.," but the cancellation is not supposed to be in the handwriting of Nehemiah Raplee. This assignment was also recorded on the 26th, only half an hour after the recording of the mortgage assigned. It also appears, from the testimony of Nehemiah Raplee, that he had a mortgage on all the real estate of Jefferson T. Raplee, not embraced in the $10,000 mortgage; that such mortgage was given him three or four years before the failure of Jefferson T. Raplee, and that it was not recorded until after the failure. The mortgage now in controversy purports to have been executed in the presence of S. S. Raplee,—his name appearing as the subscribing witness thereto,—but his testimony furnishes no evidence as to the time of the execution of the mortgage, or of his having cancelled the stamp of the note, or being present at its execution.

The testimony of Nehemiah Raplee is certainly open to much criticism, and is, in many respects, indefinite and unsatisfactory. No assignment of the Ellis mortgage to Jefferson T. Raplee is produced, and such assignment is not proved, except by the testimony of Nehemiah Raplee, who also testified that this mortgage was afterwards owned and used by him; having, as he says, been reassigned, or the assignment from him to Jefferson T. having been given up and cancelled before it was recorded; but which he does not profess to be able to state. The bank pass-book of Nehemiah Raplee with his son's bank showed a balance of more than $2,000 against Nehemiah Raplee. He testified that he could not explain it, but that the balance should have been at least four or five thousand dollars the other way. Nehemiah Raplee swears

that he supposed Jefferson T. Raplee to be solvent down to the day of his failure, and had no suspicion of his insolvency; but his testimony shows that he had abundant reason to believe his son to be unable to meet his obligations as they fell due, and the father's denial of his knowledge or belief of such insolvency must, in charity, be attributed to his ignorance of the legal signification of the term, as it would otherwise necessarily be considered a wilful perversion of the truth.

Ira Raplee also testified, that, at the time the assignment to him of the mortgage in controversy was executed by Nehemiah Raplee, no bond was delivered to him: that he asked Nehemiah about the bond, and he said he thought there was no bond, but if he had one, he (Ira) should have it also. He further testified that he had given all that occurred between Nehemiah and himself, and, from his testimony, it appears that nothing was said between them in respect to the note, the payment of which, it is now said, the mortgage was given to secure; and that no other writing in respect to that transaction ever passed between Nehemiah and Ira Raplee.

The $10,000 note of Jefferson T. Raplee was not produced by this witness, upon his examination, when he produced the mortgage and assignment, which were marked as exhibits; but it was afterwards produced and marked as an exhibit, upon the examination of Nehemiah Raplee, the payee. The note produced is payable one day after date, to the order of N. Raplee, but there is no assignment or indorsement on the note, transferring it or directing its payment in any form.

Ira Raplee also testified that, when the assignment of the mortgage was made to him, he asked Nehemiah Raplee for the bond; and that Nehemiah then said, "I have not the bond here, and I am not sure there is any; I will look when I go home, and if I have it, you shall have it."

Nehemiah Raplee further testified, that at the time of the assignment to Ira, he had no bond there, and that he thought Ira asked him about the bond, and that he told Ira that if he had one he should have it; and that he looked afterwards, and did not find any bond. And it is not pretended by him that he in any way intimated to Ira Raplee, at or before the mortgage was assigned to him, that the mortgage was given to secure the payment of the $10,000 note of Jefferson T. Raplee.

It was urged, in behalf of the plaintiff, that the mortgage could not be enforced, because it is, by its terms, a security for the payment of $10,000, according to the condition of a bond of even date therein described, and no such bond was ever executed.

But the mortgage is declared to be intended as a security for $10,000 and interest; and, under the cases of Jackson v. Bowen, 7 Cow. 13, Goodhue v. Berrien, 2 Sandf. Ch. 630, Shirras v. Caig, 7 Cranch, [11 U. S.] 34, and similar cases, it must be considered that the fact that the bond so described was never executed, is not of itself necessarily fatal to the claims of the mortgagee, and that parol proof may be received to sustain the mortgage. Whether, under the proofs in this case, it should be sustained, is a different question, and will be discussed after disposing of other objections urged against the mortgage.

It was also urged that the mortgage was void for usury, because the note produced is dated on the 10th of May, 1868, and bears interest from that date, and the alleged consideration of the note was not received by the maker, or parted with by the mortgagee, until the 18th of that month. It is sufficient to say, in answer to this objection, that there is no allegation in the bill that the mortgage was usurious, or that there was any corrupt agreement, or any intent to secure more than lawful interest; and that there is not sufficient proof to sustain an allegation of corrupt agreement and unlawful interest, if it had been made.

It was also insisted that the assignment of the mortgage to Ira Raplee was without any assignment of the debt secured by the mortgage, and that, under the cases of Langdon v. Buell, 9 Wend. 80, Jackson v. Blodget, 5 Cow. 202, Merritt v. Bartholick, 36 N. Y. 45, the transfer of the mortgage without the transfer also of the note which evidenced the debt thereby secured, extinguished the mortgage.

It is true, the note was not indorsed or delivered to the assignee at the time the mortgage was assigned, but the assignment itself, by its express terms, assigned the mortgage, "together with the bond accompanying said mortgage, and therein referred to, and all sums of money due and to grow due thereon," which is clearly a transfer of the debt, as well as of the mortgage, and would include, as incident to the debt, the note which was the direct evidence of its existence. This objection must, therefore, be overruled.

It was also urged that, by the return of the Ellis mortgage to Nehemiah Raplee, the mortgage was extinguished to the extent that the assignment of such mortgage entered into the consideration of the mortgage in controversy; but this testimony of Nehemiah Raplee, which shows that the Ellis mortgage was returned to him, also shows that it was purchased by him of Jefferson T. Raplee, and paid for by giving up evidences of debt then held against Jefferson T. Raplee. There is, therefore no evidence to show that any part of the $10,000 note has been paid.

The question whether the parol proof in the case is sufficient to sustain the validity of the mortgage in controversy remains to be examined.

A deed or mortgage which misrepresents the transaction it professes to recite, or the

consideration on which it was executed, is, of course, liable to suspicion, and must sustain a rigorous examination. Shirras v. Caig, ubi supra. And parol proof which contradicts or varies the terms of a mortgage, or is relied upon to give it effect as a security for a debt different from that which it is apparently intended to secure, should be of the most satisfactory character; and it should be carefully scrutinized,—especially when such proof is the unsupported testimony of the party chiefly interested in sustaining the mortgage.

In this case, the mortgage, on its face, purports to be a security for the payment of a debt of ten thousand dollars, evidenced by the bond of the mortgagor, bearing even date with the mortgage; but it is admitted that no such bond ever existed; and it is alleged that the mortgage was in fact intended to secure the payment of a note of the mortgagor dated nearly four weeks after the date and acknowledgment of the mortgage. The mortgagee, in making an assignment of the mortgage, more than a year after its date, and after the mortgagor had failed and absconded, assumes to assign with it the bond therein described; and when then questioned in regard to the bond, stated that he did not know as there was a bond, but if there was, the assignee should have it, but said nothing whatever in regard to its being accompanied by, or being given to secure the payment of the note which it is now said it was intended to secure, and subsequently, as he testified, he "looked a good deal at different times" for the bond. There is no satisfactory explanation of the circumstance that the mortgage is dated the 14th of April, and the note the 10th day of May, when neither was delivered, or the consideration paid or transferred, until the 18th of May, 1868; there are suspicious circumstances in respect to the cancellation of stamps, and their dates, as before stated; and then there are the entirely inconsistent statements of the sworn answer and oral testimony of the mortgagee, in reference to the time of the actual delivery of the mortgage, and the consideration of the debt it was intended to secure. The sworn answer avers that it was given for $10,000 in cash, before then lent and advanced to the mortgagor by the mortgagee, and for which the mortgagee then held the note of the mortgagor, and was delivered on or about the 19th day of April, 1868; while the oral testimony of the mortgagee shows that it was delivered on the 18th of May, 1868, and given for the Ellis mortgage, for which $3,446 36 was allowed, and a check of $6,553 77; thus assuming that it was given for a present valuable consideration, and not for a pre-existing debt; and not for cash lent and advanced, as alleged in the answer. The insertion of the time and place of the recording of the mortgage in the assignment after its execution and acknowledgment, and before it was recorded, is of little consequence, except as showing that papers executed by some of the parties were altered after their execution, in view of the then existing circumstances.

Besides these circumstances of suspicion, and others which appear in the preceding statement, it is to be observed that the general statement of Nehemiah Raplee, that this mortgage was given upon the consideration stated in his oral testimony, and to secure the payment of the $10,000 note, is not well supported by his detailed statements of what occurred between him and the mortgagor, in respect to the giving of the mortgage and the purpose for which it was to be given, and was given, and what was said and done at the time the mortgage and note were delivered. In the first part of his examination, and in reply to the question of his counsel, "For what purpose this mortgage was given," he replied, "To secure me for a part of the money I had loaned him." In reply to the question, "Was that indebtedness represented in this note?" he replied, "It was represented there for $10,000. I wish to be understood; that represented $10,000 of his indebtedness to me." In reply to the question, "How came he to give you the note and mortgage?" he testified as follows: "Previous to his giving this mortgage, he was up to my house and said he was to make a payment on the coal property, and wanted to borrow some more money. I said I would help him what I could, and told him he was getting about all I had, and I wanted security. His reply to me was, that he could give me a mortgage on his banking building and lot, which he thought was good security for $10,000. He came down here; the conversation was at my house; the next time he came he brought the note and mortgage. He was in the habit of coming Saturday night or Sunday morning. I looked them over a few minutes on Sunday, and did not look at them again until several days after, when I took them from my desk and looked them over. I found out that his estimation, in looking over the figures of certain transactions, was correct, and I then put them away satisfied. There was only enough estimated to amount to $10,000 of what I had let him have. He delivered me a statement at the time of so much of his indebtedness to me as covered the note and mortgage. I have looked a part of two days for the statement, but cannot find it. I have means of stating what made up the amount of the $10,000. I let him have a bond and mortgage amounting to $3,446 33. I gave him my check dated on the 18th May, 1868, for $6,553 77. The two items make just ten thousand dollars."

There are other portions of Nehemiah Raplee's testimony which have some slight bearing upon the questions under discussion, but it is believed that it does not strengthen the case of the defendants. By their answer

and the character of their proofs, they have assumed the burden of sustaining the mortgage by parol testimony, and showing that it was, in fact, given to secure the payment of the $10,000 note referred to; and the testimony on the case has not satisfactorily established their defence. A decree will therefore be made, setting aside the mortgage in controversy, and discharging the premises mortgaged from any lien under the same, with costs.

It has not been forgotten that it was claimed that there was at least proof of a valid agreement to execute a proper mortgage, and that such agreement would, in equity, be so enforced as to give it the effect of a mortgage. If a cross-bill had been filed to obtain a reformation of the mortgage executed, or to give effect to the agreement for a mortgage, the relative equities of the mortgagee and the assignee in bankruptcy, as the representative of the general creditors of Jefferson T. Raplee, would have been brought into competition, and it is not considered at all probable that a court of equity would have given relief to the holder of the secret lien of the unrecorded mortgage against the representative of creditors who had trusted the bankrupt, and deposited their money in his bank, on the faith of his being the owner of the property covered by the mortgage in controversy here, and of the Pennsylvania property, free of incumbrances, when the defendant, Nehemiah Raplee, held unrecorded mortgages on such property to its full value, with full knowledge that the bankrupt was insolvent, and that he was continually receiving deposits, as a private banker, from persons ignorant of his financial condition.

It was substantially conceded, upon the argument, that the assignee in bankruptcy could not avoid the mortgage in controversy on the ground that it was made and taken in violation or fraud of the provisions of the bankrupt act—it having been executed and delivered more than six months before the petition in bankruptcy was filed against Jefferson T. Raplee. It has not, therefore, been deemed necessary to discuss the question whether, in a court of equitable jurisdiction, the limitation of six months, contained in the bankrupt act, begins to run, in the case of a concealed fraud, from the time of the commission of such fraud, or from the time of the discovery of such concealed fraud, as in other cases where the statute of limitations is pleaded. See Carr v. Hilton, [Case No. 2,437;] Moore v. Green, [Id. 9,763;] Pritchard v. Chandler, [Id. 11,436;] and Martin v. Smith, [Id. 9,164;] and also the authorities cited in those cases.[2]

Nor has it been deemed necessary to discuss the question whether, under the principles established in Shawhan v. Wherritt, 7 How. [48 U. S.] 627, the holder of a secret lien, under an unrecorded mortgage, can overreach the title of an assignee in bankruptcy, by recording his mortgage after he has knowledge of an act of bankruptcy committed by the mortgagor.

A decree will be entered in accordance with this opinion.

[2] [See U. S. v. Maillard, Case No. 15,709.]

Case No. 802.

BALDWIN v. RAPLEE.

[5 N. B. R. 19.]

Circuit Court, N. D. New York. June Term, 1871.

BANKRUPTCY—APPEAL—JURISDICTION—FILING OF TRANSCRIPT.

[1. The circuit court obtains jurisdiction of an appeal from a decree of the district court by filing and serving notice of appeal, and not by the filing of the transcript.]

[2. The time for filing the transmiss may, by consent of the parties, be extended beyond the time specified in the statute, the statutory provision being only directory.]

[Cited in Morris v. Brush, Case No. 9,828.]

[See Sweatt v. Boston, H. & E. R. Co., Case No. 13,684.]

[Appeal from the district court of the United States for the northern district of New York.

[In equity. Bill by Mason L. Baldwin, assignee in bankruptcy of Jefferson T. Raplee, to set aside a mortgage executed by the bankrupt. Decree for complainant. Respondent appeals. Heard on motion to dismiss the appeal. Denied.]

In December, 1870, a decree of the district court was entered in favor of the complainant. [Baldwin v. Raplee, Case No. 801.] The respondent filed notice of appeal, gave the requisite bond, and had a citation issued all within ten days and in due time; but the transcript upon appeal was not filed in the circuit court until May, 1871, and after two terms had passed. This had happened through an agreement of counsel that the transcript should be printed before being filed, and the appeal and the argument were stipulated over the two intervening terms. A motion was now made to dismiss the appeal because the transcript was not filed, and the appeal thus entered at the term next after the taking of the appeal, and it was claimed that this was a matter of jurisdiction and could not be waived by stipulation. [Denied.]

C. G. Judd, for the motion.

Wm. Kernan, opposed.

Before WOODRUFF, Circuit Judge, and HALL, District Judge.

WOODRUFF, Circuit Judge, denied the motion, and said that while the sweeping language used by Chief Justice Chase in Alexander's Case, [Case No. 160,] seemed to imply that the motion should be granted, yet it was evident that no such question was before him, and his language was not as well considered as if the points had been argued.

That while there would not be any doubt that if the appeal were not taken in ten days under section eight, this court would not and could not get any jurisdiction of the appeal. Yet the court does, by the filing and serving notice of appeal within the ten days, obtain jurisdiction, and that the words of the eighth section which refer to the entering of the appeal at the next circuit, are merely directory, and that the time for filing the transcript may be enlarged by agreement, as was done in this case.

Case No. 803.

BALDWIN v. ROSSEAU et al.

[1 N. Y. Leg. Obs. 391.]

Circuit Court, S. D. New York. 1843.

BANKRUPTCY—TRADING—ACT OF BANKRUPTCY—PREFERENCE.

1. R. and E. for several years were engaged in the business of planing and dressing deals, principally for other persons, but until the close of the navigation of 1841, they had been in the habit of purchasing, manufacturing and selling on their own account; subsequent to that time, with the exception of one or two small purchases, and a few trifling sales, they discontinued this branch of the business, but continued the other branch of it. On the 8th of July, 1842, they committed an act of bankruptcy: *Held*, that they must be considered traders [within the meaning of the bankrupt act of August 19, 1841, (5 Stat. 440, c. 9)] at the time they committed the act of bankruptcy.

[As to who are "merchants," within the meaning of the act of 1841, see Wakeman v. Hoyt, Case No. 17,051; In re Eeles, Id. 4,302; Everett v. Derby, Id. 4,576; Hall v. Cooley, Id. 5,928.]

2. The giving a mortgage of the whole of the bankrupt's estate and effects to a particular creditor, to hinder and delay the general creditors, is an act of bankruptcy, within the express terms of the statute. [Act Aug. 19, 1841, (5 Stat. 440, c. 9.)]

In bankruptcy. This was an application [by Ephrahim Baldwin against Lewis Rosseau and Charles Easton] for a decree in bankruptcy at the instance of a creditor. The case came before the court upon petition and answer, and the evidence taken before a commissioner. [Application granted.]

It appeared that the respondents had for several years been engaged in the business of planing and dressing deals, on a large scale, at their establishment for that purpose, at West Troy, in the county of Albany, and that the principal part of the materials wrought by them belonged to other persons; but until the close of navigation in the autumn of 1841, they had also been in the practice of purchasing, manufacturing and selling on their own account. At that time, with the exception, at most, of one or two small purchases, and a few trifling sales in the course of the ensuing winter and spring, they discontinued this latter branch of their business, but continued the other branch of it as usual. For several years past, Grant, Silliman and A. J. Rosseau had been their endorsers for the purpose of enabling them to obtain money to be used in the prosecution of their business, and at the time of the commission of the alleged act of bankruptcy, stood responsible as their endorsers for between $5,000 and $6,000, and were also their creditors to the amount of about $800 for money loaned. They were also largely indebted to others. The debt of the petitioning creditors was for a steam engine sold by him to them to be used in propelling their machinery, while they were fully engaged in carrying on both branches of their business. Shortly before the alleged act of bankruptcy, the respondents, finding themselves unable to meet their pecuniary engagements, proposed to their creditors, by some of whom suits had already been commenced, to secure their respective claims by giving a mortgage payable at a future day, on all their property, which they estimated to be worth $28,000; being several thousand dollars more than the whole amount of their indebtedness, including the responsibilities of Silliman, Grant and A. J. Rosseau, as their endorsers. But they insisted, however, on securing to their endorsers an absolute priority of payment, on the ground that they were under engagements to them to this effect, which they were not at liberty to disregard. Their other creditors were willing to grant them an extension of the time of payment, provided they should be placed on a footing of equality with the endorsers; but they refused to acquiesce in the condition of having a priority of payment secured to the endorsers. The respondents thereupon, on the 8th of July last, executed to Silliman, Grant and A. J. Rosseau a mortgage, payable in presenti, for $5,936.93, of all their real estate, consisting of the land on which their buildings and machinery were situated, and several other lots of ground, and including also several articles of personal property. They have ever since continued in the undisturbed possession and use of the mortgaged property, real and personal. It did not appear that they had any other personal property, except their household furniture. The execution of this mortgage constituted the alleged act of bankruptcy.

The case was ably argued.

Goodwin and Litchfield, for petitioning creditor.

Myers and Wright, for respondents.

CONKLING, District Judge, delivered the opinion of the court, and established the following points:

1. That as, for several years antecedent to the autumn of 1841, the respondents had confessedly been largely engaged in the business of buying and selling, and had then only ceased to do so, without any unequivocal act evincing their determination not to resume the business, they might properly be considered, under the circumstances of the case, as still being traders at the time of the alleged act

of bankruptcy. Such was the clear import of the decisions in the English courts.

2. That if they were not to be considered as being at that time traders in fact, so as to be liable to compulsory proceedings under the bankrupt act, in respect of debts then or thereafter contracted, yet, in as much as the act of bankruptcy charged against them the debt of the petitioning creditor, and their other debts all had their origin while they were using the trade of merchandise, they were on this ground to be treated as merchants in this proceeding. It is true the words "being merchants, or using the trade of merchandise," are in the present tense. But the act [of August 19, 1841, (5 Stat. 440, c. 9)] in this intent is precisely the same as the English acts, and yet these acts, as the cases cited on the argument clearly show, are unequivocally held to embrace cases like the present, even though the debtor may be shown to have left off trading long before the alleged act of bankruptcy. This is a reasonable construction of the act, and in accordance with its spirit. The opposite construction would lead to its evasion and the defeat of its objects.

3. Admitting it to be doubtful whether, in giving the preference secured by the mortgage, the respondents are to be considered as having acted "in contemplation of bankruptcy," still the mortgage is, under all the circumstances, to be adjudged fraudulent in law as having been given for the purpose of hindering and delaying creditors, and as such an act of bankruptcy, within the express terms of the first section of the act. Had the mortgage embraced only a part of the property of the respondents, it might perhaps have been regarded as a mere act of preference, and not an act of bankruptcy, unless executed in contemplation of bankruptcy. But it was made to cover all their real property, consisting of several other distinct pieces of land in addition to the land on which their buildings and machinery were situated, and also personal effects of considerable value. The property thus conveyed, according to the respondents' valuation, was worth more than four times the amount of all claims which the mortgagees had upon them, and clearly evinces an intention to hinder and delay the other creditors, and especially those who had already instituted suits against them. The inference is irresistible, moreover, that it was agreed, or at least tacitly understood, between the parties to the mortgage, that the respondents should continue in the possession of the property, both personal and real, as in fact they did. This is also a badge of fraud; and in this respect there is no difference between a mortgage and an absolute sale. The whole current of decisions, from Twyne's Case [3 Coke, 80, 1 Smith, Lead. Cas. 1] downward in England, and also in this country, properly understood, is believed to be in accordance with this view of the case.

In concluding his opinion, his honor remarked, that it was due to Messrs. Rosseau and Easton, under all the circumstances of the case as they appeared before the court, to remark, that it by no means followed from anything he had intended to say that they designed to commit any actual fraud upon their creditors. Their intention, desire and hope seemed to have been ultimately to pay all they owed; and it appeared to be questionable, at least, whether the ultimate interests of their creditors would not have been better promoted by leaving them to prosecute their efforts for this purpose, as, up to the present time, they have been doing.

Case No. 804.

BALDWIN et al. v. SCHULTZ et al.

[9 Blatchf. 494;[1] 5 Fish. Pat. Cas. 75; 2 O. G. 315, 319.]

Circuit Court, S. D. New York. Sept. 26, 1871; March 30, 1872.

PATENTS FOR INVENTIONS— HATS — COATING FOR TEXTILE FABRICS — NOVELTY AND UTILITY — EQUITY—INJUNCTION—AFFIDAVIT.

1. The reissued letters patent granted to the Modena Hat Company, as assignees of Henry Loewenberg, the inventor, April 30th, 1867, for an "improved fabric for hats, bonnets, &c.," on the surrender of original letters patent granted to said Loewenberg, February 28th, 1865, the claim of such reissue being, "The new compound fabric, hereinbefore described, having substantially a foundation of interlaced threads, and a surface composed of fibrous material, stiffened by gelatinous matter, and consolidated by pressure," are not infringed by the use, as a fabric, of muslin, having interlaced threads, but no surface of fibrous material, either as part of the fabric or artificially applied.

2. The letters patent granted to John L. Kendall and R. H. Trested, February 9th, 1869, for an "improved compound for coating textile fabrics for manufacture of hats and bonnets," the claim of such patent being for a compound composed of white French zinc, or its equivalent, or lead, ground in a colorless and inodorous oil, such as castor oil, and collodion, made by dissolving in ether gun cotton saturated with alcohol, are not infringed by the use of a compound not containing oil or collodion, but containing zinc white, starch, glue, glycerine, and damar.

3. In the claim of the letters patent granted to S. A. Blake, December 24th, 1861, for an "improvement in bonnets," namely, "A bonnet, cap, or other head covering, the body of which is made of two or more thicknesses of muslin, or other suitable fabric, shaped or formed with a series of raised or embossed stripes, in imitation of straw, or other braid, by means of suitable dies, in the manner herein set forth," the word "body" means a part of the bonnet which does not include the tip or crown-piece of the bonnet, and means that part of the bonnet to which the tip is united, in the finished bonnet.

4. According to the description in the specification of the Blake patent, the product of the action of the dies is the completed body of a

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus is from 9 Blatchf. 494, and the statement of facts from 5 Fish. Pat. Cas. 75.]

bonnet, embossed in imitation of straw, and fit for use as the body of a bonnet, in the shape given to it by the dies, and without further ornamenting or covering its surface, and is not merely a frame, or carcass, or skeleton, requiring to be afterwards covered or ornamented, to make its exterior surface so comely and presentable as to be salable as a bonnet, and is not merely a fabric having the completed exterior surface necessary in the bonnet salable as such, but not shaped into its ultimate shape by dies, and requiring further manipulation to put it into such ultimate shape.

5. The proper construction of the claim of that patent is, that it claims a bonnet the body of which is embossed in imitation of straw or other braid, by dies, which, at the same time, give to it its ultimate shape, such body being made of two or more thicknesses of muslin or other suitable fabric, united by starch or other suitable adhesive and stiffening substance.

6. The article produced according to the Blake invention is new and useful, an improvement in the trade, and patentable.

7. It is an infringement of the Blake patent to make a bonnet of three thicknesses of muslin, united by starch, and shaped by dies, which, at the same time, emboss it in imitation of straw braid, although a coating is put on the muslin-frame before it is subjected to the final action of the dies.

8. A hat may infringe the Blake patent, and yet be seamless throughout.

9. The essence of the invention of Blake being, that the product of the action of the dies to which the thing is last subjected, is the completed body of the bonnet, embossed in imitation of straw, and shaped and ready for practical use, as the body of a bonnet, without further covering or ornamentation, the patent is infringed if the last embossing die gives the ultimate shape to the bonnet, although such dies may be of the same shape as a die to whose shaping action the bonnet has been previously subjected.

[In equity. Bill by Nathan A. Baldwin and others against Joseph Schultz and Leopold Hecht, for infringement of letters patent. Dismissed. On a rehearing, decree is rendered for complainants.

[Final hearing on pleadings and proofs. Suit brought on three several letters patent, the property of complainants: (1) Letters patent for an "improved fabric for hats, bonnets," etc., granted to Henry Loewenberg, February 28, 1865, assigned to the Modena Hat Company, and reissued to them April 30, 1867; (2) letters patent for an "improved compound for coating textile fabrics for manufacture of hats and bonnets," granted to L. Kendall and R. H. Trested, February 9, 1869; and (3) letters patent for an "improvement in bonnets," granted to S. A. Blake, December 24, 1861. The nature of the inventions in controversy is sufficiently set forth in the opinion.] [2]

Solomon J. Gordon, for plaintiffs.

Thomas B. Hewitt, for defendants.

BLATCHFORD, District Judge. This suit is brought on three letters patent: (1) A patent granted to S. A. Blake, December 24th, 1861, for an "improvement in bonnets;" (2.) A reissued patent granted to the Modena Hat Company, as assignees of Henry Loewenberg, the inventor, April 30th, 1867, for an "improved fabric for hats, bonnets, &c.," on the surrender of an original patent granted to Loewenberg, February 28th, 1865; (3.) A patent granted to John L. Kendall and R. H. Trested, February 9th, 1869, for an "improved compound for coating textile fabrics for manufacture of hats and bonnets."

The defendants are manufacturing and selling stamped hats, made in imitation of straw braid. Such hats are made by the following process: The frame is made of three-ply buckram, that is, three thicknesses of muslin, united by starch, formed into the shape of a hat by the use of smooth, heated dies of the desired shape. The frame thus formed is then coated with a compound, made of two parts of zinc white and one part of boiled starch, to which is added a mixture of glue and glycerine, (consisting of twenty parts of dissolved glue to one part of glycerine,) equal to one-half of the quantity of starch used. After these ingredients have been thoroughly mixed together, there is added one one-hundredth part of damar, which has been previously dissolved in benzine. The whole mixture is then passed through a paint mill, and is then applied with a brush to the outside of the buckram hat frame. Two coats of the compound are thus applied, and, before the second coat has become dry, a small quantity of powdered soapstone is shaken through a sieve over the outer surface of the compound. After the hat has become dry, it is subjected to the pressure of two cold dies, which are of the same shape as the hat, except that the lower die, or female die, which comes in contact with the outer surface of the hat, is engraved in imitation of straw braid. The male die, or upper die, is smooth. The hat, with the compound upon it, is placed in the engraved female die, and a square piece of india rubber, large enough to cover the whole inner surface of the hat, and to come out beyond the brim of the hat, is laid over the inner surface of the hat. The upper, or smooth, die is then brought down with great force on the india rubber, which regulates the pressure, and makes it uniform over the entire surface of the hat. By this means, the surface which has upon it the compound, is pressed into the engraving of the female die, and takes and retains the counter shape of the female die. It is claimed, that the defendants, in making and selling hats made by the process thus described, infringe the three patents referred to.

The reissued patent of 1867 to the Modena Hat Company claims, "the new compound fabric, hereinbefore described, having substantially a foundation of interlaced threads, and a surface composed of fibrous material, stiffened by gelatinous matter, and consolidated by pressure." The specification indi-

[2] [From 5 Fish. Pat. Cas. 75.]

cates cotton flannel as a material consisting of interlaced threads covered with a fibrous material. To stiffen such material by gelatinous matter, it suggests saturating it with the glutinous solution in water of soluble glass, and drying the saturated cloth. To consolidate the material by pressure, it suggests the action on it of a die or dies placed in a suitable press. The foundation of interlaced threads is described as giving strength to the fabric. The saturated fibrous material is described as forming a pulpy layer capable of receiving and retaining a highly embossed surface. It is manifest that the defendants do not infringe this patent. Although they use muslin, which has interlaced threads, yet their fabric has no surface of fibrous material. They do not use cotton flannel, nor do they put upon their muslin an artificial surface of flock or ground cotton.

The patent of 1869, to Kendall and Trested, describes and claims, as their invention, a compound to be applied as a facing or coating to buckram frames, and similar textile fabrics, and to paper. The ingredients of this compound are stated to be, white French zinc, or its equivalent, or lead, ground in a colorless and inodorous oil, such as castor oil, and collodion, made by dissolving in ether gum cotton saturated with alcohol. The mixture forms a thin white paste, and its merit is described as consisting in the fact, that, when applied with a brush as a coating, it dries almost instantly, has a soft, polished surface, is pliable, can be struck up by dies without injuring the surface, and is water-proof. The defendants do not use this compound. Their compound contains no oil and no collodion. The patentees add to zinc white, oil and collodion. The defendants add to zinc white, starch, glue, glycerine, and damar. In using this compound, the defendants do not infringe the Kendall and Trested patent.

The serious contest in this case is as to the Blake patent. The specification of that patent says: "This invention consists in a bonnet, cap, or other head covering, the body of which is made of two or more thicknesses of muslin or other suitable fabric, united by some adhesive and stiffening substance, and shaped and formed into a series of raised stripes, by means of suitable dies, in such a manner that the sewing together of said stripes is obviated, and that such bonnet, cap or head covering is a perfect imitation of the ordinary bonnets or caps made by sewing together a large number of narrow braids of straw or embossed stripes of muslin. * * * In order to form a bonnet, I make a sheet, by uniting two pieces of muslin or other material, by means of starch or other suitable adhesive material. I prefer rice starch for this purpose, as it makes a good stiffening. I then cut from this sheet a single piece, or two pieces, of proper shape to form the bonnet and tip, and, after dampening them and putting them as nearly as practicable into form over a suitable mould or former, I subject them to the action of suitable dies, which may be inserted into a press such as represented in figure 4. The female die is provided on its inner surface with a number of creases or grooves formed according to the stripes to be produced on the bonnet. The male die is perfectly smooth on its upper surface, and it is covered with a layer of paper, mill board, or other suitable material, which, when exposed to the pressure of the female die, will readily adapt itself to the inner surface of said die, the whole being arranged similar to the machinery generally used for embossing paper, leather, etc. The blank is now placed upon the male die, and the female die is brought down by means of a screw, so that the fabric assumes the shape of the male die, and at the same time the desired stripes are embossed on its surface. When taken from the press, the surface of the fabric presents a series of stripes, a, such as represented in figures 2 and 3 of the drawing, resembling closely the stripes or braids from which ordinary straw bonnets are made. In forming a bonnet, cap or other head dress by this process, it is indispensable that the blank, which is to form the body of the bonnet or other head covering, is cut open on one side, in order to place it on the die in such a manner that all its parts are exposed to the action of the dies. The tip, which may be pressed or embossed separately from the body of the bonnet, or simultaneously with it, is cut out and inserted after the ends of the body have been joined. The embossing itself gives to the muslin or other fabric the required stiffness, and a bonnet made according to my invention is superior in lightness, and in its graceful look, to bonnets made according to the ordinary method, and, furthermore, much time is saved, since the sewing together of the several stripes is obviated. It is obvious, that, by changing the form of the dies, bonnets of different shapes, or caps, or other head coverings, can be made in a manner similar to the one above specified. I do not claim as my invention the within described manner of embossing muslin, substantially the same method having been practised long ago; but, having thus fully described my invention, what I claim as new and desire to secure by letters patent, is: A bonnet, cap, or other head covering, the body of which is made of two or more thicknesses of muslin or other suitable fabric, shaped or formed with a series of raised or embossed stripes, in imitation of straw or other braid, by means of suitable dies, in the manner herein set forth."

The first question is as to the proper construction of the claim of the Blake patent. It is to be observed, that Blake puts no coating or covering upon the exterior surface of the fabric of his head covering. The stripes are embossed directly upon one of the thicknesses of muslin. It is also to be noted, that

the specification of the patent draws a distinction between the body of the bonnet and the tip or crown-piece of the bonnet. According to the language used in the specification, the body and the tip, taken together, form the bonnet. The sheet, made of two or more thicknesses of muslin, united to each other by a suitable adhesive material, is the sheet from which the body and the tip are cut, either in a single piece or in two pieces. The claim is to a bonnet, in which the body thereof is made of two or more thicknesses of fabric shaped or formed with a series of raised or embossed stripes, in imitation of straw or other braid, by means of suitable dies, in the manner set forth. The word "body," in the claim, must be construed to mean a part of the bonnet which does not include the tip, and to mean that part of the bonnet to which the tip is united in the finished bonnet. It is the "body" which is to be made of two or more thicknesses of muslin or other suitable fabric, and it is the "body" which is to be shaped or formed with a series of raised or embossed stripes, in imitation of straw or other braid, and it is the "body" which is to be so shaped or formed by means of suitable dies, in the manner set forth in the specification.

The defendants have put in evidence six prior patents, as affecting the Blake patent, to show the state of the art, as bearing on the question of the construction of the specification of that patent, and to be used to attack the novelty of Blake's invention, and to aid in determining the question of the infringement of that patent. The date of Blake's invention is shown to be the very end of the year 1859. The six patents referred to are as follows: (1.) English patent to Alexander Daninos, dated February 4th, 1829, specification enrolled August 4th, 1829, for an invention "for the manufacture of improved hats and bonnets in imitation of Leghorn straw hats and bonnets;" (2.) English patent to Richard Archibald Brooman, dated April 11th, 1854, specification enrolled October 9th, 1854, for an invention "for improvements in the manufacture of hats;" (3.) Letters patent of the United States, granted to William Osborn, August 19th, 1856, for an "improvement in machinery for pressing bonnets and bonnet frames;" (4.) English patent to Gustavus Palmer Harding, dated July 14th, 1857, specification enrolled January 14th, 1858, for an invention "for improvements in the manufacture of hats, caps and other coverings for the head;" (5.) French patent to Roger and Ledion, granted September 15th, 1859, for the inventions described in the English letters patent to Marc Antoine Francois Mennons, next mentioned; (6.) English patent to Marc Antoine Francois Mennons, dated November 13th, 1860, specification enrolled May 8th, 1861, for an invention "for an improved manufacture for coverings for the head," being a communication from Gustave Victor Roger, a resident of France.

The Daninos patent employs two or three thicknesses of woven material, glued or cemented together, and treated by a waterproof composition. The hat is made of three pieces, the brim or rim being one piece, the sides another piece, and the top or crown another piece. Each piece is embossed or figured with an imitation of the plaiting and sewing seen on the surface of a real Leghorn straw hat. The brim or rim is embossed on both sides, an engraved plate being used for each side, and the embossing being done simultaneously by the two plates. The piece for the sides is embossed by being passed between a brass roller engraved with the design and a hard-wood roller covered with pasteboard. The piece for the crown is embossed by a brass plate. The top of the sides is glued or cemented to a rim which is turned up at the outer circumference of the crown, and the sides are also cemented or glued to a rim turned up on the brim. The characteristic distinction between a hat made according to the Daninos patent and the hat claimed in the Blake patent is, that the body of the Daninos hat is not formed or shaped with embossed stripes by means of dies. The dies which act in conjunction with each other to emboss the body of the Blake hat, give it its ultimate shape at the same time that it is embossed—the shape which it has as the body of the completed hat in the completed hat.

The Brooman patent describes a waterproof hat made of two thicknesses of felt cloth, with a sheet of gutta percha between them, formed into a hat by pressure in a mould, while the gutta percha is in a plastic state. The hat is not embossed in imitation of straw or other braid, nor could it be.

The Osborn patent describes a machine to form, by the pressure of two dies, all kinds, shapes and sizes of bonnets and bonnet frames, the dies being heated, and the article being formed by a single impression. It is sufficient to say, that this patent does not describe a hat made of two or more thicknesses of fabric, nor a hat embossed to imitate straw or other braid.

The Harding patent describes a process of making hats by stamping or pressing them into form between a hollow heated matrix and a hollow heated plunger. The material is described as being "cloth, velvet, plush and other similar materials," dressed with a solution of adhesive material. The specification says, that, "where requisite, a lining may be stamped up with the cloth, at the same operation;" that a water-proof solution or composition may be "used to cause adhesion, when the lining is employed;" and that "it will be readily understood, that any pattern or device capable of being produced by stamping, may be applied to the article to be formed, by engraving or otherwise preparing the matrix and plunger, to produce the effect required." There is not in the Harding patent any suggestion of a hat em-

bossed in imitation of straw or other braid. It is very questionable whether such an embossed imitation could be made on cloth or velvet, or plush, or other similar material, even when dressed as suggested by Harding. The vague suggestion, that any device which is capable of being produced by stamping may be applied to the hat by engraving or otherwise preparing the matrix and plunger, to produce the effect required, is too general and indefinite. The burden of proof is on the defendants, to show the actual prior existence of a bonnet or other head covering answering the description of the claim of the Blake patent; and the Harding patent fails to show this.

The Roger and Ledion patent and the Mennons patent (the latter being subsequent in date to Blake's invention) describe a hat made to imitate straw, by compressing it in an electrotyped mould. A composition is made of collodion, pulverized cotton and castor oil, forming a pasty mass. The mould is obtained by depositing copper on the outer surface of a straw hat, by the electrotype process. The specification says: "The carcase of the hat or bonnet, formed in the ordinary way, of any convenient tissue, is coated on all sides with the plastic composition above described, and left to dry, after which it is placed in the electrotyped mould," and operated upon in a press, the inside of the hat being filled with discs of vulcanized caoutchouc, which act as an elastic piston, and force the plastic matter into the interstices of the mould. The strength of the defendants' case is mainly rested on this Roger invention communicated to Mennons. Criticism is made by the plaintiffs on the Roger specification, that it gives no description, suggestion, or hint, that the body or carcase of the hat is to be made of two thicknesses of material, so as to form one compound body, such as is described in the Blake patent; and, that it teaches, that the carcase is to be formed before it is pressed between the embossing mould and the piston, and not that it is to be shaped by such pressure. To show what was understood in the art, at the date of the French patent, September, 1859, by the expression, in the specification of that patent, "the carcase of the hat or bonnet, formed in the ordinary way, of any convenient tissue," the defendants have introduced evidence proving that, as early as 1857, hat or bonnet frames were made of two or more thicknesses of muslin, stuck together by paste, and stamped into the shape of a hat by means of smooth dies, at one operation, the hat or bonnet frame, when completed, being seamless, and consisting of two or more thicknesses of muslin throughout. The frame, thus stamped into the shape of a hat, is the carcase of the hat, formed of a tissue, and must be regarded as being included in the word "carcase," as used in the Roger specification. In regard to shaping the hat, Blake says, in his specification, that he first puts the cut-out pieces as nearly as practicable into form, over a suitable mould or former. They are then shaped by the action of the dies, the fabric assuming the shape of the male or lower die, at the same time that its surface is embossed by the female or upper die. The defendants first form their carcase or frame into the shape of a hat by smooth heated dies. In that condition, it is the carcase of Roger, formed in the ordinary way, known prior to 1859, of two thicknesses of muslin, united by an adhesive and stiffening substance, and stamped into shape by smooth dies, at one operation. The defendants then coat the carcase with a compound, as Roger does. They then have two dies of the same shape as the hat, the female or lower die being engraved on its inner surface, the upper or male die being smooth, the hat being placed in the female die, the entire inner surface of the hat being covered by a piece of india-rubber, and the male die, by its pressure against the india-rubber forcing the coated surface of the hat to take and retain the counter-shape of the engraved inner surface of the female die. In substance, this is the operation performed by Roger, the only difference being, that Roger makes his piston of india-rubber or caoutchouc discs serve the purpose of the defendants' male die and piece of india-rubber combined. But, from the nature of india-rubber, these instrumentalities in the two operations are the equivalents of each other, in their action in connection with the hat frame and the female die or mould, in the process of embossing the fabric. The Roger specification speaks of the composition as being reduced to shape in the mould. So, too, the defendants reduce to shape, in their female die, the compound which has been applied in two coats to the frame. Blake does not reduce any coating to shape, for he has no coating. His embossing is made directly on the surface of the muslin. He dispenses with a coating, and says, in his specification, that "the embossing itself gives to the muslin or other fabric the required stiffness." I am unable, therefore, to perceive that the defendants, in making the hats complained of, have done anything more than they are warranted in doing by the Roger and Ledion patent, assuming, as must be done for the purposes of this case, on the wording of the stipulation entered into by the parties, that that patent antedates Blake's invention.

In view of the Roger invention, as earlier than Blake's invention, the Blake patent, in order to be upheld as a valid patent, must be construed to be limited to a hat in which the embossing is made directly on the muslin, without the intervention of any coating, the required stiffness being given by the embossing itself, without the use of a coating, and the hat being lighter, by reason of the ab-

sence of the coating. On this construction, the patent is valid, but, as the defendants use a coating, they do not infringe it.

It follows, that the bill must be dismissed, with costs.

On Rehearing.

After the foregoing decision was rendered, in September, 1871, the case was re-opened, in certain particulars, and further testimony was taken, and the case was reheard. The following decision was given in March, 1872.

George Gifford and Solomon J. Gordon, for plaintiffs.

George F. Langbein, for defendants.

BLATCHFORD, District Judge. A decision was rendered in this cause, in September, 1871, on final hearing, dismissing the bill. That decision proceeded upon the ground, that the defendants had not infringed two of the three patents sued on, namely, the re-issued patent to the Modena Hat Company, of April 30th, 1867, and the patent to John L. Kendall and R. H. Trested, of February 9th, 1869. As to the third patent sued on, that to S. A. Blake, of December 24th, 1861, it was stipulated by the parties, that a French patent, granted to Roger and Ledion, September 15th, 1859, antedated the invention covered by the Blake patent, and the court held that the defendants, in making the hats complained of, had not done anything more than they were warranted in doing by the description furnished, under such stipulation, as the description contained in the Roger and Ledion patent. The court also held, that, in view of the Roger and Ledion patent, as earlier, the Blake patent, in order to be upheld as a valid patent, must be construed to be limited to a hat in which the embossing is made directly on the muslin, without the intervention of any coating, the required stiffness being given by the embossing itself, without the use of a coating, and the hat being lighter by reason of the absence of the coating; but that, on such construction, the defendants did not infringe the patent, as they used a coating.

Before any decree was entered on that decision, it was discovered by the parties, that the description on which they and the court had acted, as the description contained in the French patent to Roger and Ledion, of September, 1859, was not the description contained in that patent, but was, to a considerable extent, in substance, the description contained in a French patent granted to Roger and Ledion July 19th, 1860. The only patent to Roger and Ledion, set up in the answer as antedating the Blake invention, is that of September, 1859. By consent of the parties, and on the order of the court, the case was reopened, so far as to admit of the taking of testimony to determine whether or not the hats made by the defendants infringe the Blake patent, in view of the Roger and Ledion French patent of September, 1859, and for further argument on the question of infringement and the proper effect to be given to such French patent, in determining that question. The defendants also had leave to introduce evidence of any additional matter of defence set up in the answer, but not theretofore relied upon and presented to the court, which they might see fit. Further testimony has been taken and the case has been reheard. The conclusion having been reached, in the former decision, that, in view of what was then understood to have been the Roger and Ledion patent of September, 1859, the bill must be dismissed, there were several matters of defence developed in the proofs, which were not considered or passed upon by the court, and which are now open for consideration.

The invention of Blake is not carried back to a date earlier than December 31st, 1859. It is shown, on the part of the defendants, that, as early as 1857, hat or bonnet frames were made of two or more thicknesses of muslin, stuck together by paste, and stamped into the shape of a hat, by means of smooth dies, at one operation, the hat or bonnet frame, when completed, being seamless and consisting of two or more thicknesses of muslin throughout. It is also shown, that, in the spring of the year 1859, hats and bonnets were made out of two-ply and three-ply buckram, (that is, two or three thicknesses of muslin stuck together by starch,) covered with satin, silk or velvet, by means of dies, at one operation, so that, when finished, the hat or bonnet was of one piece, seamless, and consisted of two or three thicknesses of muslin throughout, covered all over with silk, satin or velvet. It is also shown, that it was no new thing, at the date of Blake's invention, to stamp paper, and to stamp such two and three-ply buckram, in imitation of straw braid, to be used in making bonnets, by means of flat engraved plates or dies. It is claimed, on the part of the plaintiffs, that, according to the description in the specification of the Blake patent, the product of the action of the dies is the completed body of a bonnet, embossed in imitation of straw, and fit for use as the body of a bonnet, in the shape given to it by the dies, and without further ornamenting or covering its surface; and that it is not merely a frame, or carcase, or skeleton, requiring to be afterwards covered or ornamented, to make its exterior surface so comely and presentable as to be salable as a bonnet; and, further, that it is not merely a fabric having the completed exterior surface necessary in the bonnet salable as such, but not shaped into its ultimate shape by dies, and requiring further manipulation to put it into such ultimate shape. I think these views of Blake's invention are correct, and that the proper construction of the claim of his patent is, that it claims a bonnet, the body of which is embossed, in imitation of straw or other braid, by dies, which, at the same time, give to it its ulti-

mate shape, such body being made of two or more thicknesses of muslin or other suitable fabric, united by starch or other suitable adhesive and stiffening substance. None of the articles above mentioned as prior inventions anticipate Blake's invention, on this construction of his claim, which is the construction which, in the former decision, I adopted as the proper one, aside from what was then supposed to be shown by the Roger and Ledion patent of 1859. The article produced according to the Blake invention is new and useful, an improvement in the trade, and patentable.

The hat testified to by Shaw as existing in 1857 is too vaguely deposed to. It is not shown how it was, in fact, made. It is not produced. All that there is is the casual observation of it by a person who calls back his recollection of it fourteen years afterwards, and who says it was made, in one piece, of muslin, with a surface of paper in imitation of Leghorn braid, and that it had the appearance of having been shaped, and put into imitation of Leghorn braid, by the use of engraved dies, at one process. Such evidence cannot be admitted as sufficient to invalidate the Blake patent.

This leaves to be considered only the Roger and Ledion patent of 1859. According to the true text of that patent, now produced, there is no suggestion in it of the making of a bonnet by dies, in imitation of straw braid, out of two or more thicknesses of muslin, united into one fabric by starch or other adhesive and stiffening substance. The patent indicates the mould or die, of proper form, and arranged to produce the imitation of straw on "a fabric of flax or cotton," impregnated with pasty collodion, and speaks of making hats in that way. The patent of Blake makes it an essential point that the bonnet shall be made of two or more thicknesses of fabric, united into a sheet by starch or other suitable adhesive and stiffening material. The importance of using such stiffening material is dwelt on, and the fact that the bonnet, when embossed, has a stiffness of fabric, and, at the same time, a lightness. The evidence shows that there is an advantage, in cheapness of manufacture and in flexibility during manufacture, in using a fabric thus made of two thicknesses, over the use of a single fabric of equal thickness with the two.

The defendants' bonnet is made in the same way as the bonnet of the Blake patent, in all the features of the claim of that patent. It is made of three thicknesses of muslin, united by starch, and is shaped by dies which, at the same time, emboss it in imitation of straw braid. The fact that the defendants put a coating on the muslin frame before subjecting it to the final action of the dies, does not make the product any the less the Blake product. It is shown, that, in the defendants' bonnet, corrugations are formed in the fabric itself, by the dies, though to an extent diminished by the thickness of the coating. Adequate stiffness can be given by embossing directly on the muslin, without any coating. But the required stiffness is given when a coating is used.

There must be a decree for the plaintiffs, for a perpetual injunction and an account of profits, as respects the Blake patent, with costs, with a reference to a master to take the account.

[NOTE. The case of the same plaintiffs against Barnard, published as a note to the principal case, as reported in 9 Blatchf. 509, is reported herein, sub nom. Baldwin v. Barnard, Case No. 797.]

Case No. 805.

BALDWIN v. SIBLEY et al.

[1 Cliff. 150.][1]

Circuit Court, D. New Hampshire. Oct. Term, 1858.

PATENTS FOR INVENTIONS—ASSIGNMENT—EVIDENCE.

1. The granting clause of a deed was in the following words: "Give, grant, bargain, and sell . . . . one of Baldwin's peg-splitting machines, and the right to use the same and of vending to others to be used, in the county of Cheshire, excepting the town of Hinsdale, being the same machine for which letters-patent were issued," &c. *Held*, the deed contained no words authorizing the grantee to construct any machine whatever; that it was a conveyance of a single machine already in existence, and of the right to use and sell that single machine within the described territory.

2. Whenever a conveyance of a right under a patent is of a character to create an interest in the patent itself, it must be shown by an instrument in writing; while a license to make and use a machine, as it is not required to be recorded, need not be in writing; but such license conveys no interest in the patent, and no power to authorize a third person to construct the patented invention.

3. Consequently, oral declarations of a patentee, not made to the defendants, which, if admitted, would show an exclusive right within a described territory, in the person through whom defendants claimed to derive their right, were held inadmissible.

4. Evidence showing that defendants had, with the plaintiff's knowledge and without objection on his part, used their machine for a number of years, was held incompetent to establish an exclusive right in the person under whom defendants claimed to derive their right to use the machine in controversy.

5. Parol proof of a lost memorandum, shown by the patentee to one of the witnesses, which memorandum contained a list of the rights sold by the patentee, and enumerated among others the conveyance of the exclusive right within a specified district to the person under whom defendants claimed, was held inadmissible.

At law. Action on the case [by Stephen K. Baldwin against Amos Sibley and Delano Sibley] for damages for an infringement of a patent right. [On motion for a new trial. Overruled.]

Stephen K. Baldwin was the patentee of a

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

machine for cutting shoe-pegs, under letters-patent [No. 2,725] dated the 16th of July, 1842. The patent was renewed on the 8th of July, 1856, and reissued [No. 409] in the following November. The writ contained three counts, and alleged in effect the construction and putting in practice of twenty machines which imitated the invention of the plaintiff. As to everything except the using and putting in practice of one machine, the defendants pleaded the general issue, and in respect to this one they pleaded specially that after the obtaining of the letters-patent, and before the same were renewed and reissued, their machine was constructed and assigned to them for a valuable consideration, and was put in use by them, of right, by the authority and license of the plaintiff. The jury returned a verdict for the plaintiff, and defendants moved for a new trial, alleging error in certain rulings of the court, and also upon the ground of misdirections to the jury. It appeared at the trial that the machine in controversy had been constructed by one Hollon Farr, under a parol license from one Sylvanus Bartlett; under which license Farr had sold the machine to the first-named defendant, who, with the other defendant, had put the machine into use. A deed from Stephen K. Baldwin to Sylvanus Bartlett was introduced by the defence, under which it was claimed that Bartlett had obtained the right to manufacture and sell any number of the machines within a certain specified territory. According to the language of the deed, the grantors gave, granted, bargained, and sold "unto Sylvanus Bartlett one of Baldwin's peg-splitting machines, and the right to use the same, and of vending to others to be used, in the county of Cheshire, excepting the town of Hinsdale in said county, being the same machine for which letters-patent were issued under the seal of the patent-office of the United States." The court, however, construed the deed to convey to the grantee but one machine, with the right to use and sell the same within the described limits, and thus instructed the jury. This ruling of the court constituted one of the grounds of the motion for a new trial. The other rulings, to which objection was taken, sufficiently appear in the opinion.

Edmund Burke, for plaintiff.

John S. Wells and Causten Browne, for defendants.

CLIFFORD, Circuit Justice. It was insisted by the counsel for the defendants that the deed, when properly construed, authorized the grantee to make and use, and vend to others to be used, any number of machines he might see fit to make and sell within the territory defined and described in the deed. To that proposition it will be sufficient to say that the deed contains no words authorizing the grantee to make and construct any machine whatever. It purports to convey one of the machines, and the right to use and sell the same within the described territory, clearly leaving it to be inferred that the machine had already been constructed, and that it constituted the principal subject-matter of the contract. By the words of the deed, therefore, it is apparent that it was a conveyance, not of the right to make and construct a machine, but of the machine itself, as already constructed and in existence, and of the right to use and sell the same within the described territory. Reliance, however, is placed upon the succeeding phrase, which it becomes important to notice, as the whole instrument must be taken together in order to ascertain its true construction. All the ambiguity, if any, arises from that phrase, which is immediately connected with the one already recited, and reads as follows: "and of vending to others to be used in the county of Cheshire, excepting the town of Hinsdale in said county." Take the language as it reads, and it is too obvious to admit of a doubt that the whole paragraph is immediately connected with the word "same," which precedes it, and refers to the machine previously conveyed in the granting part of the deed; and this is made even more evident by the concluding portion of the sentence, in which the machine conveyed is described as being the machine for which the letters-patent were issued. Every one of these considerations is inconsistent with the idea that more than one machine was conveyed; and when taken together they afford a demonstration that the proposition assumed by the counsel for the defendants on this branch of the case cannot be sustained.

Second. Evidence was offered by the defendants tending to show that Sylvanus Bartlett, prior to the construction of the machine in controversy by Farr and its sale by him to the defendant, had a license, by parol from the patentee, to make and use, and vend to others to make and use, the patented machines within the territory described in the deed. It consisted of oral declarations of the patentee made at various times before the expiration of the original term for which the patent was granted. None of these supposed declarations, however, were made to the defendants or either of them; and being objected to by the counsel for the plaintiff, they were excluded by the court. On the same point and for the same purpose, the defendants also offered to prove that they had put in practice and used their machines for ten years before the original term of the patent expired, claiming to own it, and with the knowledge of the patentee, and without objection on his part. This evidence was also objected to by the counsel for the plaintiff, as incompetent and insufficient to establish a right in Sylvanus Bartlett to authorize Farr to construct the machine in controversy and sell it to the defendants, and it was accordingly ruled out by the court. They also offered to prove on the same point, and for the same purpose, that a paper or memorandum,

since lost, was given by the patentee to one of the witnesses in 1858, as and for a list of the rights which he the patentee had sold under his patent, and that the list so delivered to the witness recited that he had sold to Sylvanus Bartlett the right to make and use, and vend to others the right to make and use, the patented machines, within the county of Cheshire in this district, with the exception of the town of Hinsdale, as claimed by him in virtue of his deed. Objection was also made to this testimony by the counsel for the plaintiff, and it was excluded by the court; and these several rulings constitute the foundation of the second cause assigned for a new trial in this case. These second rulings will be considered together, as all the evidence was offered for the same purpose, as is properly stated in the motion, and the several offers of proof involved the same general considerations. It was offered to prove by parol that the patentee had conveyed the right to Sylvanus Bartlett to make and use, and vend to others the right to make and use, an indefinite number of the patented machines within the described territory. No pretence was set up at the trial that Farr had any other right or license to make and sell the machine in controversy, except what was granted to him by Sylvanus Bartlett, or that the defendants or either of them had any right or license to put the machine in practice and use it, except what they derived by the purchase of the machine from Hollon Farr. This statement embraces a summary of the exact state of facts; and the only question is, whether the rulings of the court were correct. It is admitted by the counsel for the defendants that a patent privilege or monopoly could not be assigned at common law, except by deed, for the reason that, being a franchise and part of the royal prerogative, it could only subsist by royal grant. But it is insisted that the rule is otherwise in this country; and within certain limits and subject to certain qualifications, the argument appears to be just, and may well be admitted. By the eleventh section of the patent act of the 4th of July, 1836, [5 Stat. 121,] it is provided that every patent shall be assignable in law either as to the whole interest or any undivided part thereof, by any instrument in writing; which assignment, and also every grant and conveyance of the exclusive right under any patent, to make and use, and to grant to others to make and use, the thing patented within and throughout any specified part or portion of the United States, shall be recorded in the patent office within three months from the execution thereof. Whenever a patent is renewed and extended by the commissioner of patents, it is provided by the eighteenth section of the same act that the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented to the extent of their respective interests therein. These two provisions beyond question are in pari materia, and so far as they relate to the same subject must be construed together. Most of the questions arising upon their construction, which were originally supposed to be involved in any obscurity, have been settled by the decisions of the courts; and in respect to some others which have not been so determined, the language of the respective provisions is too plain and unambiguous to admit of any serious doubt. As a general rule, an assignment of an interest in a patent must be in writing, for the reason that such transactions are required to be recorded, and in fact and reality are not authorized to be made in any other way. Gayler v. Wilder, 10 How. [51 U. S.] 493. Licenses to make and use the machine for the purposes for which it is constructed, when derived from the patentee, or from one holding a territorial right by virtue of a valid conveyance from him, are not required to be recorded, and consequently need not be in writing. Contracts not required by law to be in writing may be proved by parol evidence; and therefore a mere license to make and use the thing patented, when derived from an authorized source, may be proved in that way. Difficulties sometimes arise in determining whether, by the terms of the contract, the right conveyed in any given case amounts to an interest in the patent or is only a license to make and use the thing patented, within the principles just stated; but it seems to be well settled, that, wherever the contract is of a character to create an interest in the patent itself, it must be shown by an instrument in writing, which indeed is clearly to be implied from the very definition of assignment as generally understood in its application to patent rights. It is a grant in writing of the whole or a part of the exclusive right vested in the patentee by the letters-patent; and it makes no difference whether such part be designated as an undivided part of the whole patent, or as the grant of the exclusive right of the patentee within a particular district; for in either case it is a conveyance of an interest in the patent, and as such must be in writing, and is required to be recorded. Curt. Pat. (Ed. 1849,) pp. 233, 234. When the patentee sells to another a patented machine made by himself, or permits such other person to make the machine, the party thus authorized becomes a licensee, with the right of using and selling the machine; but he has no interest in the patent, and it is well settled that he cannot, by virtue of such a contract, authorize a third person to make the machine. All the cases agree that every grant which embraces any portion of the exclusive right under the patent is an assignment, and there can be no doubt that every such assignment must be in writing; and if so, it cannot be proved by parol evidence. Other tests have been suggested by which to determine whether a particular instrument amounts to an assignment, or only to a license; and, accord-

ingly, it has been held that an authority conferred upon a party to make or construct the thing patented, without mentioning his assigns, is nothing more than the grant of a power or the dispensation with a right or remedy which confers only a personal right upon the licensee, and is not transmissible to any other person. Several decisions have been made upon this subject, to which it may be useful to refer as the means of elucidating the particular question involved in this branch of the motion now under consideration. Where a patentee undertook, by deed under seal, to grant, bargain, sell, convey, assign, and transfer to another, his executors, administrators, and assigns, the right and privilege of making, using, and selling the thing patented, stipulating that the grantee should have the right and privilege of manufacturing the same to the extent that six persons could accomplish the object, with the right to vend the manufactured article in any part of the United States, it was held that this was a license or authority from the patentee, and need not be recorded. Brooks v. Byam, [Case No. 1,948.] One of the reasons assigned for holding that it was a license, and that it did not create an interest in the patent. was that the exercise of the right granted was not limited to any particular locality, and the same learned judge held that the right so granted was as entirely incapable of being apportioned or divided among different persons, and therefore that an assignment, by such grantee, of a right to another to make as many of the manufactured articles as one person could prepare was void. On the other hand, it was held by the supreme court, in Wilson v. Rousseau, 4 How. [45 U. S.] 686, that an assignee of the exclusive right to use two machines within a particular district can maintain an action for an infringement of the patent within that district even against the patentee, and the same court affirmed the principle in Woodworth v. Wilson, 4 How. [45 U. S.] 716, which was decided at the same term. At the trial it was understood by the court in this case that the evidence was offered by the counsel of the defendants to set up an exclusive right within the described territory; and it is proper to say that, if such was not the intention of the counsel at the time, he failed to make himself understood by the court. Whether so or not, however, it can make no difference in the determination of the questions presented in the motion for a new trial, as, in any point of view which can be taken of the case, the evidence was not admissible. If it was offered to set up an exclusive right in Sylvanus Bartlett, then it was inadmissible; because it was an offer to prove an assignment of an interest in the patent, which, to be valid and obligatory, must be in writing, and cannot be evidenced by parol testimony; and if it was offered to set up a mere license in the supposed grantee, then the right so conferred was a mere personal right in the licensee, which could not be transmitted to Hollon Farr. Gayler v. Wilder, 10 How. [51 U. S.] 492. Such, however, was not the nature of the right set up, as clearly appears from the offers of proof and from the course of the trial. Those offers were not made until the legal effect of the deed had been ruled by the court, and the parol testimony was offered as a substitute for the authority, which, it was insisted by the counsel for the defendants, might well be derived from the terms of the deed; and no doubt is entertained that the evidence offered, if admissible, would establish an exclusive right in Sylvanus Bartlett to make and use the machines, and vend the right to make and use the same to others. One thing, however, is certain, and that is, that the defendants either set up an exclusive right in Sylvanus Bartlett, or they did not. If they did, then the right could not be established by parol testimony; and if they did not, but merely set up a license in him to make and use the patented machine, then he could not assign that right in any way to another; so that, in either point of view, this cause for a new trial is destitute of any proper legal foundation.

Third. From the course of the argument it may be inferred that very little reliance comparatively is placed upon the third cause assigned for a new trial; and, considering the nature of the action, the character of the testimony, and the state of the record, it cannot be necessary to give it any extended examination. Suffice it to say, that, in view of the pleadings and of the well-known rule of law that all are principals in tort, it cannot be sustained. Accordingly the motion for new trial is overruled, and there must be judgment on the verdict.

Case No. 806.

BALDWIN et al. v. WILDER et al.

[6 N. B. R. 85.]

Circuit Court, W. D. Michigan. Dec., 1871.[1]

BANKRUPTCY — SUSPENSION OF PAYMENT OF COMMERCIAL PAPER.

[1. Prior to the amendment of July 14, 1870, (16 Stat. 276, c. 262, § 2,) to the bankruptcy act, a suspension of payment of commercial paper for 14 days, and within six months from the filing of the petition, was per se an act of bankruptcy, although the suspension was not fraudulent.]

[Distinguished in Mendenhall v. Carter, Case No. 9,426.]

[See Ex parte Thompson, Case No. 13,936; Ex parte Hollis, Id. 6,621; Ex parte Weikert, Id. 17,361; Ex parte Bininger, Id. 1,420; Ex parte Hall, Id. 5,920.]

[2. But, in any event, under the provision of the amendment of July 14, 1870, that if a merchant has fraudulently stopped payment, "or has stopped and suspended and not resumed payment of his commercial paper he shall be adjudged a bankrupt," such suspension, com-

[1] [Reversing an unreported decree of the district court.]

menced before and continued after the amendment, is per se an act of bankruptcy.]

[Distinguished in Re Hay, Case No. 6,253. Followed in Re Raynor, Id. 11,597.]

[3. A creditor need not commence proceedings to have his debtor adjudged a bankrupt within six months from the first suspension of the payment of commercial paper, if he can show that the debtor had suspended payment within the six months, although the suspension commenced before that time.]

[Approved in Re Raynor, Case No. 11,597. Disapproved in Re Brewer v. Bemis Brewing Co., Id. 1,850.]

[Appeal from the district court of the United States for the western district of Michigan.

[In bankruptcy.]

Don M. Dickinson, for creditors.

Eggleston & Kleinhaus, for debtors.

EMMONS, Circuit Judge. The only question necessary to notice is whether a suspension of payment of commercial paper for fourteen days, subsequent to the amendment of July fourteenth, eighteen hundred and seventy, and within six months from the filing of the petition, is per se an act of bankruptcy, when there has also been a suspension of payment of the same paper before that enactment. The learned judge of the court below held that a suspension commencing before the amendment and continued afterwards, was not affected by it, but must be governed by the original act under which it commenced; holding, also, that under the act as it stood before the amendment a suspension for fourteen days, without fraud, was not an act of bankruptcy. He dismissed the petition. We are unable to concur in either of these views. A suspension of payment for fourteen days, before the amendment, was per se an act of bankruptcy. If this were not so, we are clear that such suspension commenced before and continued after the amendment, for fourteen days, is so.

While section thirty-nine stood in its original form, a large majority of the adjudications held that under it a suspension of payment for fourteen days was per se an act of bankruptcy. In re Wells [Case No. 17,387] was a petition in invitum in the northern district of New York. The petition alleged that the respondent "being a merchant, &c., fraudulently stopped and suspended, and had not resumed payment of his commercial paper within a period of fourteen days." There was proof of the suspension, but no allegation or proof that it was fraudulent. Hall, J., says: "It was contended on the argument that this provision which authorises proceedings in invitum against any person, 'who, being a merchant, &c., has fraudulently stopped or suspended and not resumed payment within a period of fourteen days,' does not authorise such proceedings unless the original stoppage or suspension of payment was fraudulent, no matter how long such suspension may be continued." He holds that such is not the true construction of the provision, but that "its true construction requires an adjudication if a merchant, &c., who has suspended and not resumed payment of his commercial paper within a period of fourteen days, although such suspension or stoppage was not fraudulent." "The provision," he says, "embraces two cases: the one of an original, fraudulent stoppage, in which proceedings may be instituted at once, and the other of a suspension of payment, not fraudulent, and not per se an act of bankruptcy, but which, if continued for more than fourteen days, becomes an act of bankruptcy by its continuance." He applies the same rule to a petition where there was an averment of fraud in the petition. In re Weikert, [Case No. 17,361.] See, also, In re Cowles, [Id. 3,297.] In Re Thompson, [Id. 13,936,] Drummond, J., uses language which has been literally adopted by the amendment of July, eighteen hundred and seventy. Similar rulings are made in Re Sohoo, [Id. 13,162,] and Doan v. Compton, [Id. 3,940.] In Re Noyes, [Id. 10,371,] Longyear, J., in his charge, adopted and applied the doctrine. I think the opinion of Shipman, J., may be added to these. In re Ballard, [Id. 816.] Certainly he does not, as the respondents' counsel suppose, rule the other way.

A contrary construction makes the law read substantially as follows: If the merchant fraudulently suspends at all, if but for one hour, he shall be adjudged a bankrupt and the same consequence—no more, no less—shall issue if he continue this fraudulent suspension for fourteen days. All in reference to the fourteen days' suspension is thus stricken from the law. Were it necessary to sustain this petition we should reject this latter construction of the original act, and say a fourteen days' suspension was sufficient without fraud. A less number of judgments, with varying and somewhat contradictory reasons, decided that the petition must in all cases contain an averment that the stoppage was fraudulent. In re Leeds, [Case No. 8,205;] Gillies v. Cone, [Id. 3,095;] In re Davis, [Id. 3,615;] In re Lowenstein, [Id. 8,574;] In re Dibblee, [Id. 3,884.] But these same judgments, and others by the learned judge, hold that suspension by a solvent debtor is fraudulent; that the like act by an insolvent who neglects himself to go into bankruptcy is also fraudulent; and when it is added that he also holds that the omission to pay a single note at maturity is evidence of insolvency, it is not perceived that the least difference exists between the practical results of his judgments and those which simply affirm that suspension of fourteen days is per se sufficient. Substantially the same criticism may be made in reference to the decision by Field, J., in Re Jersey Window Glass Co., [Case No. 7,292.] Indeed, they who hold that the fourteen days' suspension is insufficient without fraud, create

such severe tests in reference to its existence, that practically mere suspension becomes sufficient. We prefer the more direct and less technical mode of arriving at the same result, which gives all the clauses of section thirty-nine a rational meaning.

It was to terminate this apparent conflict, and enact in plain language the construction which had made the fourteen days' suspension an act of bankruptcy per se, that the amendment was passed. It is in the very words of several judgments declaring how the former clause should judicially be read. It provides that if the merchant, &c., has fraudulently stopped payment, "or has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days he shall be adjudged a bankrupt." Looking to the reading of the original enactments, its literal adoption by an amendment, and the canons of interpretation which nearly all tribunals which administer the statute have to it, as a remedial and beneficient law whose spirit of equality should be extended by liberal constructions, I think no such exception to the operation of this clause should be set up by judicial implication. A suspension of payment should not be excluded because it had commenced before its passage. 2 N. B. R. 123, [In re Locke, Case No. 8,439;] 3 N. B. R. 86, [In re Muller, Id. 9,912;] 2 Abb. 243, [Silverman's Case, Id. 12,855.] I know of no precedent for giving a purely remedial statute a wholly prospective operation unless there is something in its language or nature that imperatively demands it. The general rule is quite the other way.

It seems to us, however, that this case requires no retrospective application of the amendment. The suspension continued for months after it was adopted. It is none the less a suspension afterwards, because there was also one before. Must a creditor commence proceedings within six months from the first suspension of commercial paper? Would not the petition be sustained by showing that the debtor had fraudulently suspended within six months, even though it commenced beyond that time? Is the suspension an indivisible act that once committed is not continuing? The law is full of analogies to the contrary. Every fourteen days' suspension, no matter how often repeated or how long continued, are but successive acts of bankruptcy, and the suspension by the respondents in this case, after the amendment, we must hold to be within it. Decree below dismissing petition reversed and ordered that an adjudication of bankruptcy be entered.

BALDWIN, (WOODSIDE v.) See Case No. 17,995.

BALDWIN MANUF'G CO., (WHIPPLE v.) See Case No. 17,514.

BALDY, (PIPER v.) See Case No. 11,179.

BALE, (UNITED STATES v.) See Case No. 14,504.

BALES OF.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the quantity or number of bales; e. g. "Bales of Cotton. See Two Hundred and Eighty-Two Bales of Cotton," Cases Nos. 14,291 and 14,292.]

BALES OF COTTON, (STEPHENS v.) See Case No. 13,366.

BALES OF TOBACCO, (UNITED STATES v.) See Case No. 14,505.

Case No. 807.

BALFOUR et al. v. WILKINS et al.

The BENLEDI.

[5 Sawy. 429.] [1]

District Court, D. Oregon. March 11, 1879.

SHIPPING — CHARTER PARTY — CONSTRUCTION OF RAINY DAY CLAUSE — DEMURRAGE — BILLS OF LADING.

1. The phrase "rainy day" being of itself indefinite and uncertain, the sense in which it was used in a particular contract may, therefore, be shown by the surrounding circumstances, including the usage of the particular port or trade to which the contract relates.

2. A charter party provided that the charterers should have thirty working days, not counting "rainy days," in which to load a vessel with grain at Portland, Oregon: *Held*, that the phrase "rainy days" was intended to apply only to the days on which the rainfall was such as to prevent the loading of the vessel with safety and convenience—the actual facilities of the port for so doing, being considered.

3. A contract entered into in Liverpool to load a vessel with grain in Portland, Oregon, is, in contemplation of law, made at the latter place, and, therefore, the condition and conveniences of such port for loading vessels with grain, or the established usage thereof upon that subject, may be shown to explain the meaning and use of dubious and uncertain phrases in the same, as, for instance, "rainy days."

4. The person to whom a bill of lading of a cargo is made, or the indorsee thereof, has the legal property in the same free from the lien for demurrage; and, therefore, the owners of a vesssel with an overdue claim for demurrage against the charterers, for which, by the terms of the charter party, they have a lien upon the cargo, are not bound to sign unqualified bills of lading to the charterers for such cargo, until such claim for demurrage is satisfied; and if such vessel is detained in port for want of a clearance, which, by the terms of the charter party, the charterers were to obtain, but did not for want of the bills of lading, such detention is, nevertheless, the fault of the charterers in not paying the demurrage or accepting bills of lading subject to the same, and, therefore, they are liable to the owners for the damage arising from such detention.

[In admiralty. Libel in personam by Balfour, Guthrie & Co. against Wilkins & Co

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

and J. M. ten Bosch, and in rem against the cargo of the Benledi, for demurrage and for damages for detention after loading. Decree for libelants.]

Ellis G. Hughes, for libelants.,
William H. Effinger, for defendants.

DEADY, District Judge. This is a suit in rem and personam, brought by certain parties constituting the firm of Balfour, Guthrie & Co., doing business in this city as the agents of Watson Brothers, of Glasgow, against certain persons constituting the firm of Wilkins & Co., of San Francisco, and J. M. ten Bosch, of this city, and the cargo loaded here on the British ship Benledi, for eight hundred and fifty-two dollars and sixty cents for demurrage and three hundred and forty-one dollars and four cents for damages for detention of said vessel after she was loaded.

The admitted facts in the case are as follows: On April 27, 1878, the ship Benledi, owned by Watson Brothers aforesaid, was duly chartered to the defendants, Wilkins & Co., for a voyage from the port of Portland, Oregon, to a port in the United Kingdom, or on the continent between Havre and Hamburg, the charterers to load said vessel at Portland with a full cargo of wheat or flour or other lawful merchandise to be carried for a specified freight. Among other things, the charter party provided that "the lay days for loading" at Portland should commence twenty-four hours after the discharge of inward cargo, and the report of the master that he was ready to receive cargo, and continue for "thirty working days to load," excepting "rainy days," which were "not to be counted as lay days in loading;" that, "for each and every day's detention over the specified number of lay days, four pence per register ton per day, day by day, shall be paid by the" charterers to the owners or their agents as demurrage; that the cargo should be stowed under the direction of the master, but the vessel should employ the stevedores named by the charterers, at the customary rates; and that the owners should have a lien upon the cargo for all freight and demurrage due under the charter party.

The Benledi arrived at Portland in ballast, on September 17, 1878, and on the twenty-fifth of the same month the master reported that he was ready to receive cargo, and the defendant, ten Bosch, acting as the agent of said Wilkins & Co., received said vessel and commenced loading her on October 30, and completed the same on November 11 following. The libellants, as the agent of the owners, claimed that the charterers had detained the vessel ten days beyond the time specified in the charter party and regularly demanded the agreed rate of demurrage therefor, which claim the charterers, by their agent, ten Bosch, denied and refused payment of the same, whereupon the libellants refused to sign the bills of lading for the cargo, unless the demand was paid or stated to be due thereon.

The charter-party provided that the vessel should be cleared in the name of the charterers, but on account of this dispute about the bills of lading, the charterers were unable to file a manifest of the cargo in the custom-house, and thereby the vessel was detained in port four days after she was otherwise ready to go to sea.

The difference between the parties about the demurrage and the bills of lading grew out of the question, whether, of the forty-eight days that elapsed between the time the master gave notice that he was ready to receive cargo and the completion of the loading, there were ten "rainy days" within the meaning of that phrase as used in the charter-party; and upon the correct construction of the clause in which this phrase occurs depends the proper determination of this controversy.

The defendants stand, as they claim, upon the letter of the contract, and insist that a day upon which any rain falls is a "rainy day" within the terms of the contract, and therefore not to be counted as a working lay day. On the other hand, the libellants contend that mere rain-fall does not make a "rainy day" within the meaning and spirit of the agreement, but the rain-fall must be such—the subject-matter, the usage, circumstances and facilities of the port being considered—as prevents the safe and convenient loading of such cargo.

The evidence shows that there was rain-fall on two days in September, thirteen days in October, and two days in November—in all seventeen days; and that the fall ranged from 1.100 of an inch to 87.100 per day, and averaged about 26.100 or a quarter of an inch. It also appears that during all the time between September 25 and November 11, wheat was loaded by the leading shippers in this port, and it does not appear that any one who had the wheat on hand ever declined to load it on account of the weather, but the reasonable inference is to the contrary.

On the trial, the libellants offered and were permitted to introduce, subject to further argument and objection, evidence from which it appears that it is the known and established usage of this port to load wheat on rainy days, unless the rain-fall is very heavy and accompanied by a driving wind, which very seldom occurs; and that the wharves are so constructed and the facilities for loading are such, that wheat can be as safely and conveniently put on board a vessel here in ordinary wet weather as in dry. Indeed, Mr. C. H. Lewis, a leading and long-established shipper and loader, testified that in his experience, he did not remember being prevented from loading by rain but on one occasion.

Different from this, but not contrary to it

or affecting the fact of the usage, the evidence introduced by the defendants showed that during the past four years there were a few instances in which parties, who did not have the wheat to put on board, claimed under charter parties similar to this, that days on which rain fell were not to be counted as working days, and such claim was either submitted to or compromised. But it is not pretended that in any instance a shipper declined to deliver wheat or a master to receive it really on account of the rainfall.

This contract, though made in Liverpool, was to be performed, so far as this controversy is concerned, in Portland, and, therefore, the presumption is, that the parties to it contracted with reference to the laws, usages and general circumstances and condition of this port, including its climate and modes and facilities of discharging and receiving cargo. In other words, the contract, so far as it was to be performed here is considered to have been made here. Andrews v. Pond, 13 Pet. [38 U. S.] 77; Naylor v. Ballzell, [Case No. 10,061;] Story, Confl. Laws, § 280.

Assuming, then, as we must, that this contract, as to loading the Benledi, was made here, is it competent to prove a usage in this port to load on days of ordinary rainfall, to ascertain the intention of the parties to the agreement so far as this "rainy day" clause is concerned? The decisions of the courts upon this subject have not been uniform, but the leaning of the later cases is to limit the office of usage, and with that tendency I agree.

But cases do and must arise, where the intention of parties to a contract could not be understood unless proof was allowed of the usage on the subject with reference to which it was made. And this is especially so in the case of mercantile contracts, and particularly the one styled a charter-party. The rule is laid down in Abb. Shipp. 250, 274, that the construction of a charter party "should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract relates;" and this is cited with approbation by the supreme court in Raymond v. Tyson, 17 How. [58 U. S.] 59, in which Mr. Justice Wayne says: "That a charter party is an informal instrument as often as otherwise, having inaccurate clauses, and on this account they must have a liberal construction, such as mercantile contracts usually receive, in furtherance of the real intention of the parties and usage of the trade."

In The Reeside, [Case No. 11,657,] Mr. Justice Story says: "The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful and equivocal character. It may also be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied." See, also, U. S. v. Robinson, [Case No. 16,177;] 13 Wall. [80 U. S.] 363.

Finally, in the well-considered case of Barnard v. Kellogg, 10 Wall. [77 U. S.] 390, the supreme court lays down the rule: "The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation, on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses according to the subject-matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it."

The phrase "rainy day" has no definite and certain meaning. It may be used and understood in many senses. In common parlance, it varies in signification from the day with light, passing April showers to the steady and strong pourdown of an Oregon December. Worcester defines "rainy" as follows: "Abounding in rain; showery; wet;" and Webster's definition is the same. But the definition, while it fixes some limit to the signification of the term, as that a rainy day is a wet one, and therefore not a dry one, does not free the matter from the uncertainty which is inherent in the expression.

Taken literally, in my judgment, the phrase "rainy day" means nothing less than a day of rain—a day on which rain falls during every moment of the period. Otherwise, the day is not wholly a rainy day but only partly so. Strictly speaking, as well say that a few minutes of sunshine make a fair day as that a shower makes a rainy one. Colloquially, it may be often used to describe a day upon which at least a moderate rainfall occurs during the greater portion of the time.

During a period of six years from 1873 to 1878 inclusive, as appears from the record of observations in the office of the signal service in this city, the days upon which any rain fell numbered from one hundred and fifty-one to one hundred and seventy-two a year, the average being one hundred and sixty-two days; and the total rain-fall during the same period ranged from 46.17 to 60.08 inches a year, the average being 52.96 inches;

while the average fall per day for each of such years varied from 0.28 to 0.34 inches, the average fall per day for the whole period being 0.33 inches or one third of an inch. The greatest rain-fall on any one day in such years varied from 1.66 to 3.05 inches, and the average of such days was 2.33 inches.

Judged by these figures the rain-fall upon the days in question was relatively very light, it being only one quarter of an inch per day as against one third of an inch for the past six years, which latter computation includes many days—fifteen in 1878, upon which the rain-fall was inappreciable or too small to be measured. Yet, the fact is, the phrase when used abstractly and without reference to the surrounding circumstances is altogether indefinite and uncertain. To say simply that a day is a rainy one is almost as vague an expression as that a thing is as big as a piece of chalk or as long as a string.

A contract to plow, ditch or cut wood, "rainy days" excepted, would not be understood or construed as would a contract to harvest grain, "rainy days" excepted. Reference being had to the subject-matter, it would be manifest that the parties had not the same degree of rain-fall in view in making the last contract as the others, because they could be conveniently performed in weather in which the moisture would make it unsafe and unfit to harvest. In short, the phrase is one which may be used in different senses according to the nature of the subject-matter concerning which it is applied, and therefore may, according to the uniform doctrine of the authorities, be explained by usage where one exists. 1 Greenl. Ev. § 292. The established usage in this port being to load wheat on all such days as rain fell upon, between September 25 and November 11, 1878, and it being presumed that the parties used this phrase in the contract with a knowledge of this usage, it follows that within the meaning of such contract and the intention of the parties thereto, there were no rainy days within the time allowed for loading the Benledi, nor in fact during any of the time she was in port.,

But I think the same conclusion may be reached, without invoking this usage, as such. The charter is a written contract which the court must construe. If it contains any vague or dubious terms or provisions, the court in ascertaining what the parties understood and intended thereby may consider the contract in the light of the surrounding circumstances. 1 Greenl. Ev. § 277. As declared in section 686 of the Oregon Civil Code: "For the proper construction of an instrument the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge may be placed in the position of those whose language he is to interpret."

This contract was made in Liverpool to be performed in Oregon. By it the charterers agreed to load the Benledi with wheat at Portland, the vessel to lay here for that purpose at the expense of the owners, for thirty working days, that is thirty days, excluding holidays, and longer if need be, at the expense of the charterers. But if after the working days commenced "rainy days" should occur, they were not to be counted. Now what was the object of this exception. Certainly not to enable the charterers to compel this vessel to lie here every day that any rain fell between September and May, six months it may be, at the expense of the owners, while they were waiting for a fall in the price of wheat to purchase a cargo cheaply. The only object in giving thirty working lay days to the charterers was to enable them to purchase a cargo and get it on board and a rainy day which would materially interfere with this purpose was to be excepted therefrom. Of course, the rain fall could not interfere with the purchase of cargo and therefore it can only be considered as affecting the loading of the same, supposing the charterer had the wheat on hand.

The burden of proof is upon the charterer to show that there were such days. The parties are presumed to have had in mind the known condition of things at this port when the contract was made, and contracted with reference to it; for instance, that there were covered wharves here from which cargo could be, and commonly was, safely and conveniently loaded in all ordinary rainy weather. The phrase "rainy day," then, as used in this contract, and as both parties to it must have understood it, means a day on which cargo could not be safely and conveniently loaded at this port.

Contracts must have a reasonable construction; and when they contain ambiguous or doubtful expressions these should be taken in that sense which best agrees with the general purpose of the contract. Chit. Cont. 74.

The much greater portion of the yearly mean number of days—one hundred and sixty-two, or over five months—on which some rain fell in the last six years, occurred in the usual season for shipping wheat from Portland for foreign ports. Under the construction claimed for this contract by the defendants, it would be in the power of the charterers in such a charter-party to detain a vessel here at the expense of the owners, from three to four months beyond the usual lay days, or the time deemed necessary for purchasing a cargo and putting it on board, simply because they had no cargo to deliver, and desired to wait for a more favorable market to purchase in. Now nothing is plainer than that the owners did not contemplate any such risk or any such delay as this, and nothing can be more unreasonable than to suppose that the parties to this contract ever intended to make any such one-sided and unjust agreement.

It may not be amiss to notice the fact, as strengthening this conclusion, if there can be any doubt about it, that this charter-party is a long printed formula, composed of disjointed and independent clauses intended for use in any part of the world, and particularly San Francisco, where, until lately at least, on account of the rarity of rain, there were no suitable conveniences for loading grain in wet weather. But the same forms appear to be used for any place, by striking out and inserting clauses to adapt them to the particular port for which they are then intended, and are usually very inaccurate and incomplete, and ought to be construed liberally in support of what appears to have been the real intention of the parties. Raymond v. Tyson, [17 How. (58 U. S.) 59.] Printed formulas are always general in their nature, so as to be used by different contracting parties, for similar subjects, but they do not contain the actual and immediate language of the parties thereto, as in the case of an agreement reduced to writing pro re nata, and therefore are not supposed to express the understanding and intention of the parties with the precision and completeness of a written agreement. 1 Greenl. Ev. § 278. The claim for demurrage must be allowed.

The demand for damages for four days' detention after the cargo was on board, rests upon the right of the libellants to retain the bills of lading until the demand for demurrage was satisfied, or to sign them subject to it, and of this I think there can be no doubt. The legal property in the cargo is in the person to whom the bills of lading are made or indorsed. The Thames, 14 Wall. [81 U. S.] 108; The Vaughan and Telegraph, Id. 266. Had the libellants given Wilkins & Co. clean bills of lading, the latter might have transferred them to third persons at once, as they intended to do, and thereby they would have lost their lien on the cargo for the demurrage. This they were not required to do. The claim for damage is also allowed. The defendants made a counter-claim for two thousand six hundred and nine dollars and thirty-one cents damages, on the ground of being kept out of the use of the money for which they might have disposed of the cargo of the Benledi, but for the withholding of the bills of lading. But as the libellants were justified in detaining the bills, they are not liable therefor.

There must be a decree for the demurrage —eight hundred and fifty-two dollars and sixty cents, with interest from November the eleventh—four months—twenty-eight dollars and forty-one cents, and for the damages for detention at Astoria, three hundred and forty-one dollars and four cents, with interest from November the twenty-fifth—three and one half months—ten dollars and six cents—in all, one thousand two hundred and thirty-two dollars and twenty-one cents, with costs and disbursements.

Case No. 808.

BALFOUR'S LESSEE v. MEADE.

[1 Wash. C. C. 18;[1] 4 Dall. 363.]

Circuit Court, D. Pennsylvania. April Term, 1803.

PUBLIC LANDS — TITLE DERIVED FROM PENNSYLVANIA — ACTUAL SETTLEMENT — WARRANTS OF ACCEPTANCE.

1. To constitute a settlement upon lands in "the new purchase," under the provisions of the ninth section of the act of the legislature of Pennsylvania, passed April 3d, 1792; there must be an occupancy, accompanied by a bona fide intention immediately to reside upon the land, either personally or by a tenant; and without this, the mere improvement of the land, is of no importance; except as evidence of an intention to settle.

2. The proviso of the 9th section of the act, applies only to those who had an incipient title at some time by actual settlement, preceding the necessity which obliged them to require the benefit of the proviso; or by warrant; and such settlement, if so made, would be sufficient, although it were prevented, by the existence of hostilities, from being such a one as this section requires, by the occasion mentioned in the proviso.

3. Who is an actual settler to whom a warrant may issue, under the law. Actual settlement, under the 9th section, consists in clearing, fencing, and cultivating two acres of land, at least, on each 100 acres; erecting a house thereon, fit for the habitation of man, and a residence continued for five years, &c.

4. The survey made for the plaintiff in this case, gave no title, because—1. it was not a returnable survey; 2. it was not authorized by a warrant; 3. it was not made for an actual settler; 4. it was not made by an authorized surveyor.

5. A warrant of acceptance gives no title under the law, it not having been founded on a settlement.

6. The dismissal of the caveat filed by the defendant, did not settle the question of title, but left the same to be decided by an ejectment if brought within six months.

At law. This was an ejectment for four tracts of land, lying north and west of the Ohio and Alleghany rivers and Conewango creek in Pennsylvania. The plaintiff's title rested upon settlement rights, surveys, and warrants. In 1793, the plaintiff was a surgeon in the army, in garrison at Fort Franklin. He took some of the soldiers, went out, cut down a few trees, and built up five pens or cabins, about ten feet square; and without putting covers on them, returned back to the fort in about six or seven days. In April 1795, he had these five tracts surveyed in the name of himself, Elizabeth Balfour, and four others, each four hundred acres. The deputy surveyor had, upon application of the plaintiff, directed one Wilson to make the survey, but something preventing him from doing it, the plaintiff employed one Steel to do so, and upon returning the surveys to Stokely, he prevailed upon him to write an authority to

[1] [Originally published from the manuscripts of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Esq.]

Steel to make the survey, which Stokely says he did, and antedated it, in order to make it appear to precede the survey. In May 1795, he obtained warrants of acceptance for two of the surveys of two of the tracts, having paid the consideration money for the whole.

In autumn 1794, Meade the defendant, finding no person settled upon these lands, built cabins upon the four tracts in controversy, covered them, or some of them, and then went off, not returning again until November 1795, when he came with his family to reside in one of the cabins, and fixed settlers upon the other tracts. In July 1795, the plaintiff gave notice to the defendant that he claimed the lands in question, that he intended to settle them, and forewarned him to proceed farther with his improvements thereon. In January 1796, the defendant caveated the plaintiff in form; and the same being tried before the board of property in March 1800, the caveats were dismissed, and warrants were ordered to issue; but they never did issue, in consequence of doubts afterwards existing respecting the plaintiff's title. In April 1796, the plaintiff made engagements with some persons to settle these lands for him; but after they had seen and approved the lands, they declined going on them, upon hearing of the defendant's claim. It was in proof by many witnesses, that the war with the Indians rendered it dangerous to settle in that country during the years 1793, 1794, and 1795, and that but few settlements were attempted before the spring or summer of 1796.

Mr. Dallas and Mr. Edward Tilghman contended, that the plaintiff had acquired a good right by settlement, survey, and warrant, to the lands in question, under the laws of Pennsylvania, and particularly the act of the 3d of April 1792, 3 vol. 209; and that the settlement of Meade in 1795, was in violation of the plaintiff's prior right, and of course void. That the plaintiff had been prevented by the Indian hostilities from settling or fixing settlers until the peace of Fort Grenville, made in August 1795, was ratified; in December 1795; and that he had attempted it in a reasonable time after that event. They cited [Fothergill v. Stover,] 1 Dall. [1 U. S.] 6; [McCurdy v. Potts,] 2 Dall. [2 U. S.] 98; [Sims v. Irvine,] 3 Dall. [3 U. S.] 457; Add. 216, 218, 354.

Mr. Ingersoll and Mr. M'Kean contended, that the plaintiff never had made a settlement within the meaning of the law, not having accompanied it with actual residence or intention to reside; that of course he never had an inceptive title to be protected, by the proviso in the 9th section of the act of 1792. They cited Add. 248, 335; the case of the Holland Co. v. Cox, in the supreme court of this state; and the decisions of the judges of that court, in a feigned issue tried at Sunbury.

The case was argued very much at length (beginning on Saturday and not ending before Tuesday at 2 o'clock, the court sitting until 9 o'clock at night on Saturday and Monday,) and with great abilities on both sides.

WASHINGTON, Circuit Justice, charged the jury. The importance of this cause led the court to wink at some irregularities in the argument of it at the bar, which has tended to protract it to an unreasonable length. Depending upon the construction of the laws of this state, and particularly on that of the 3d of April, 1792, it had at first the appearance of a difficult and complicated case. It is not easy at the first reading of a long statute to discover the bearings of one section upon another, so as to obtain a distinct view of the meaning and intention of the legislature. But the opinion I now entertain was formed on Saturday before we parted, open however as it always is, to such alterations as ulterior reason and argument may produce.

The better to explain and to understand this subject, it will be necessary to take a general view of the different sections of the [Pennsylvania] act of the 3d of April, 1792, upon which this cause must turn. The first section reduces the price of all vacant lands, not previously settled or improved, within the limits of the Indian purchase made in 1768, and all precedent purchases, to fifty shillings for every hundred acres; that of the vacant lands within the Indian purchase made in 1784, lying east of Alleghany river and Conewango creek, to five pounds; to be granted to purchasers in the manner authorized by former laws.

The second section offers for sale all the other lands of the state, lying north and west of the Ohio, Alleghany, and Conewango, to persons who will cultivate, improve, and settle the same, or cause it to be done, at the price of seven pounds ten shillings per hundred acres; to be located, surveyed, and secured, as directed by this law. It is to be remarked, that all the above lands lie in different districts, and are offered at different prices. Title to any of them may be acquired by settlement, and to all except those lying north and west of the Ohio, Alleghany, and Conewango, by warrant without settlement.

The third section, referring to all the above lands, authorizes applications to the secretary of the land office, by any person having settled and improved, or who was desirous to settle and improve a plantation, to be particularly described, for a warrant for any quantity of land not exceeding four hundred acres; which warrant is to authorize and require the surveyor general to cause the same to be surveyed and to make return of it, the grantee paying the purchase money and fees of office. The eighth section, which I notice in this place because intimately connected with

the third section, directs the deputy surveyor to survey and mark the lines of the tract, upon the application of the settler. This survey, I conceive, has no other validity than to furnish the particular description which must accompany the application at the land office for a warrant.

The fourth section, amongst other regulations, protects the title of an actual settler against a warrant entered with the deputy surveyor posterior to such actual settlement.

The ninth section, referring exclusively to the lands north and west of the Ohio, Alleghany, and Conewango, declares, that "no warrant or survey of lands within that district shall give a title, unless the grantee has, prior to the date of the warrant, made or caused to be made, or shall within two years after the date of it make or cause to be made, an actual settlement, by clearing, fencing, and cultivating, two acres at least in each hundred acres, erecting thereon a house for the habitation of man, and residing or causing a family to reside thereon for five years next following his first settling the same, if he shall so long live; and in default of such actual settlement and residence, other actual settlers may acquire title thereto."

Let us now consider this case as if the law had stopped here. A title to the land in controversy lying north and west of the Ohio, Alleghany, and Conewango, could be acquired in no other manner but by actual settlement. No sum of money could entitle a person to a warrant, unless the application was preceded by actual settlement on the land; or if not so preceded by actual settlement, the warrant would give no title unless it were followed by such settlement within two years thereafter. The question then is, what constitutes such an actual settler, within the meaning and intention of this law, as will vest in him an inceptive title, so as to authorize the granting to him a warrant? Not a pedis positio—not the erection of a cabin—the clearing, or even the cultivation of a field: these acts may deserve the name of improvements, but not of settlements. There must be an occupancy, accompanied with a bona fide intention to reside and live upon the land, either in person or by that of his tenant;—to make it the place of his habitation, not at some distant day, but at the time he is improving; for if this intention be only future, either as to his own personal residence, or that of a tenant; then the execution of that intention by such actual residence fixes the date of the commencement of the settlement, and the previous improvements will stand for nothing in the calculation. The erection of a house, and the clearing and cultivating the ground, all or either of them, may afford evidence of the quo animo with which it was done—of the intention to settle; but neither, nor will all, constitute a settlement, if unaccompanied by residence. Suppose these improvements made. the person making them declaring at the time that they were intended for purposes of temporary convenience, and not with a view to settle and reside. Could this be called an actual settlement, within the meaning and intention of the legislature? Surely not. But though such acts, against the express declarations of the quo animo, will not make a settlement, it does not follow that the converse of the proposition will; for a declaration of intention to settle, without actually carrying that intention into execution, will not constitute an actual settlement.

How do these principles apply to the case of the plaintiff? In 1793 he leaves the fort at which he was stationed, and in which he was an officer, with a few soldiers, cuts down some trees, erects four or five pens, (for not being covered, they do not deserve the name of cabins,) and in five, six or seven days, having accomplished the work, he returns to the fort to his former place of residence. Why did he retreat so precipitately? We hear of no danger existing at the time of completing those labours, which did not exist during the time he was engaged in them. What prevented him from proceeding to cover the cabins, and from inhabiting them? Except the state of general hostility which existed in that part of the country, there is no evidence of a particular necessity for flight, in the instance of this plaintiff. It is most obvious, that the object of his visit to this wilderness was to erect what he considered to be improvements, but they were in fact not inhabitable by a human being, and consequently could not have been intended for a present settlement. He was besides an officer in the army, and whilst in that service he could not settle and reside in his cabins, although the country had been in a state of perfect tranquillity. In short, his whole conduct, both at that time and afterwards—his own statements when asserting a title to the land—the recitals in his warrants of acceptance and certificates of survey,—all afford proof, which is irresistible, that he did not mean in 1793 to settle. Mistaking the law, as it seems many others have done in this respect, he supposed that an improvement was equivalent to a settlement, for vesting a right to those lands. It is not pretended, even now, nor is it proved by a single witness—not even by Crouse, who assisted in making the improvements—that he contemplated a settlement. It has been asked, could the legislature have meant to require persons to set down, for a moment, on land encompassed by dangers from a savage enemy? I answer, no: at such a time, it was very improbable that men would be found rash enough to make settlements. But yet no title could be acquired without such a settlement; and if men were found hardy enough to brave the dangers of a savage wilderness, they might be called imprudent men, but they would also deserve the promised reward, not for their boldness, but for their settlement. The first evidence we have

of an intention in the plaintiff to make an actual settlement, was in the spring of 1796, long after the actual bona fide settlement of the defendant with his family; for I give no credit to the notice from the plaintiff to the defendant in July 1795, since so far from accompanying it with actual settlement, he speaks of a future settlement, which however was never carried into execution. Every thing which I have said, with respect to the four hundred acres surveyed in the name of George Balfour, will apply, a fortiori, against the three other surveys in the names of Elizabeth Balfour, and the other warrantees, who it is not pretended were ever privy even to the making of the cabins, or ever contemplated a settlement upon those lands.

If the law then had stopped at the proviso, it is clear that the plaintiff never made such a settlement as would entitle him to a warrant. But he excuses himself from having made such a settlement as the law required, by urging the danger to which any person, attempting a residence in that country, would have been exposed. He relies on the proviso to the ninth section of the law, which declares, that "if any such actual settler, or any grantee in any such original or succeeding warrant, shall by force of arms of the enemies of the United States, be prevented from making such actual settlement, or shall be driven therefrom, and shall persist in his endeavours to make such actual settlement as aforesaid; then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued." Evidence has been given of the hostile state of that country during the years 1793, 1794, and 1795, and the danger to which settlers would have been exposed. We know that the treaty at Fort Grenville was signed in August 1795, and ratified in December of the same year. Although Meade settled with his family in November 1795, it is not conclusive proof that there was no danger even then; and at any rate it would require some little time and preparation, for those who had been driven off to return to their settlements; and if the cause turned upon the question whether the plaintiff had persevered in his exertions to return and make such settlement as the law requires, I should leave that question to the jury, upon the evidence which they have heard.

But the plaintiff, to entitle himself to the benefit of the proviso, should have had an incipient title at some time or other; and this could only have been created by actual settlement, preceding the necessity which obliges him to seek the benefit of the proviso, or by warrant. I do not mean to say, that he must have had such an actual settlement as this section requires to give a perfect title; for if he had built a cabin, and commenced his improvements in such manner as to afford evidence of a bona fide intention to reside, and had been forced off by the enemy at any stage of his labours; persevering at all proper times afterwards in endeavours to return when he might safely do so; he would have been saved by the proviso. But it is incumbent on the plaintiff, if he would excuse himself, from the performance of what has been correctly called a condition precedent, to bring himself fully and fairly within the proviso which was made for his benefit. This he has not done.

Decisions in the supreme court, and in the common pleas of this state, have been cited at the bar; two of which I shall notice, for the purpose of pointing out the peculiar marks which distinguish them from the present, and to prevent any conclusions being drawn, from what has been said, either to countenance or to impeach those decisions. The cases I allude to are: the Holland Co. v. Cox; and the feigned issue tried at Sunbury.

The incipient title under which the plaintiffs claim in those causes, were warrants, authorized by the third section of this law: the incipient title in the present case is settlement. The former was to be completed by settlement, survey, and patent, these to precede the warrant: and for the better explanation of this distinction, it will be important, to ascertain what acts will constitute an actual settler to whom a warrant may issue, and what constitute an actual settlement as the foundation of a title. I have before explained, who may be an actual settler to demand a warrant—namely, one who has gone upon and occupied land with a bona fide intention of an actual present residence; although he should have been compelled to abandon his settlement, by the public enemies, in the first stages of his settlement. But actual settlement intended by the ninth section, consists in clearing, fencing, and cultivating, two acres of ground, at least, on each hundred acres; erecting a house thereon for the habitation of man, and a residence of five continued years next following his first settling, if he shall so long live. This kind of settlement more properly deserves the name of improvements, as the different acts to be performed clearly import. This will satisfactorily explain what at first appeared to be an absurdity in that part of the proviso, which declares, that "if such actual settler shall be prevented from making such actual settlement." The plain meaning is, that if a person has once occupied land with an intention of residing, though he has neither cleared nor fenced any land, and is forced off by the enemies of the United States, before he could make the improvements, and continue thereon for five years, having once had an incipient title, he shall be excused by the necessity which prevented his doing what the law required, and in the manner required. Or if the warrant holder, who likewise has an incipient title, although he never put his foot upon the land, shall be prevented by the same cause from making those improvements,

&c.; he too shall be excused, if, as is required also of the settler, he has persevered in his endeavours to make those improvements, &c.

But what it becomes such a grantee to do, before he can claim a patent, or even a good title, is quite another question, upon which I give no opinion.

As to the plaintiff's surveys and warrants, they cannot give him a title. Not the surveys; First, because they are a mere description of the land, which the surveyor is authorized by the eighth section to make, and the applicant for the warrant is directed by the third section to lodge in the land office at the time he applies for a warrant. It is merely a demarcation or special location of the land, intended to be appropriated; and gives notice of the bounds thereof, that others may be able to make adjoining locations without danger of interference. This is not such a returnable survey, so as to lay the foundation of a patent. Second, It is not authorized by a warrant. Third, It was not done for an actual settler. Fourth, It was not made by an authorized surveyor, if you believe upon the evidence that the authority to Steel was antedated, and given after the survey was returned.

Not the warrant—First. Because it was not a warrant of title, but of acceptance. Second. It is not founded on settlement, but improvement; and if it had recited the consideration to be actual settlement, the recital would have been false in fact, and could have produced no legal or valid consequence.

As to the caveat; the effect of it was to close the doors of the land office against the further progress of the plaintiff in perfecting his title. The dismission of it again opened the door; but still the question as to title is open for examination in ejectment, if brought within six months, and the patent will issue to the successful party.

The plaintiff therefore having failed to show a title sufficient to enable him to recover in this action, it is unnecessary to say any thing about the defendant's title, and your verdict ought to be for the defendant.

The jury found for the defendant.

Case No. 809.

The BALIZE.

[1 Brown, Adm. 424.][1]

District Court, E. D. Michigan. June, 1872.[2]

WAGES—SEASON OF NAVIGATION — DESERTION—FORFEITURE—MITIGATING CIRCUMSTANCES.

1. Where a seaman is hired at a certain sum "for the season" of navigation, the presumption is, that the service is for the entire season.

2. The "season of navigation" as understood upon the lakes, comprises the eight months commencing April 1st, and ending November 30th.

3. Leaving a vessel before the expiration of the time of service, without the consent of the master, with the intention not to return, constitutes desertion by the maritime law.

[See The Union, Case No. 14,347; Cloutman v. Tunison, Id. 2,907; The Catawanteak, Id. 2,510.]

4. Such desertion works a forfeiture of all antecedent wages, unless a reasonable excuse be shown, founded upon gross misconduct or harsh usage.

[Cited in U. S. v. Kingsley, 138 U. S. 91, 11 Sup. Ct. 287.]

5. Slight and transient causes, such as the fact that the meat used on board was for a short time slightly tainted, do not constitute such an excuse as to relieve from forfeiture.

[See Ulary v. The Washington, Case No. 14,323; Magee v. The Moss, Id. 8,944; Coffin v. Weld, Id. 2,953; Relf v. The Maria, Id. 11,692; Coffin v. Jenkins, Id. 2,948.]

In admiralty. Libel of George M. Granger [against the tug Balize] for seaman's wages. [Dismissed.]

The libel set forth the hiring of libellant to serve as sailing master on the tug Balize, at the rate of $1,200 for the season, and five per cent. commission on the net earnings of the tug; that in pursuance of this contract, he entered into the service of the tug about the first of March, and so served until the twentieth of July, and claimed a balance due him of $860.10. The answer admitted the performance of the service substantially as set forth in the libel, but claimed that libellant agreed to serve for the entire season, and that the commission should not exceed three hundred dollars; that he deserted the tug on the twentieth of July, and took with him the mate, two wheelsmen, and the lookout, and that by reason of his desertion, claimants suffered damage in about the sum of $5,000. [For subsequent course of litigation, see note at end of case.]

H. B. Brown, for libellant.

The agreement to serve at $1,200 per season, and five per cent. commission, does not legally import a hiring for the entire season, but for an indefinite time, giving either party the power to terminate the same at pleasure, provided the time and place be reasonable. Heim v. Wolf, 1 E. D. Smith, 70; White v. Atkins, 8 Cush. 367; Rossiter v. Cooper, 23 Vt. 522.

Libellant's leaving the vessel was no desertion as understood by the maritime law. The rigid doctrine of desertion, as administered upon the ocean, has no application to contracts by the season, or service upon harbor tugs; certainly not to persons acting in the capacity of master. But whether this be so or not, claimants ought only to be permitted to recoup the damages actually suffered by his leaving the tug, for nothing is better settled than that desertion does not necessarily work a forfeiture of the entire wages.

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

[2] [Affirmed by an unreported decree of the circuit court.]

2 Pars. Shipp. 94, 100, note 5; Swain v. Howland, [Case No. 13,661;] Macomber v. Thompson, [Id. 8,919;] The Maria, [Id. 9,074;] The Moslem, [Id. 9,875;] The Mentor, [Id. 9,427;] Gladding v. Constant, [Id. 5,468;] Scott v. Russell, [Id. 12,546;] Gifford v. Kolloch, [Id. 5,409;] Cloutman v. Tunison, [Id. 2,907;] The Neptune, [Id. 2,022;] The Elizabeth Frith, [Id. 4,361;] The Martha, [Id. 9,144;] The Union, [Id. 14,347.]

This court should proceed by analogy to a court of common law, and award libellant what his services were really worth to respondents.

Although the court may hold that the unwholesome food furnished by the owner, and his interference in the management of the boat, was not such as to justify a desertion in the ordinary sense of the term, still I claim this may be considered by the court in palliation of the offense, if for these reasons the position of libellant was rendered uncomfortable and disagreeable to him.

An attempt was made to prove a large amount of damage suffered by the claimants, but it failed completely, and was virtually abandoned. There is not a particle of evidence showing that he induced others to leave with him.

Libellant's services in fitting out the vessel, and his board during that time, were all under his contract to serve as sailing master, were incidental and subsidiary to it, and he is entitled to recover for them, though he could not maintain a suit in admiralty for them as an independent cause of action. The Mary, [Case No. 9,190;] The Canton, [Id. 2,388;] The Scattergood, [Id. 11,106;] 2 Pars. Shipp. 185, 186; Wells v. Osman, 2 Ld. Raym. 1044, 6 Mod. 238; The Saratoga, [Case No. 12,355;] Pitman v. Hooper, [Id. 11,185;] The Thos. Jefferson, 10 Wheat. [23 U. S.] 428; The Phoebus, 11 Pet. [36 U. S.] 175; The Gazelle, [Case No. 5,289.].

Libellant is also entitled to recover here his commission upon the earnings which were given him incidentally as part payment for his services. The old doctrine of the English courts, that denied jurisdiction in admiralty wherever a special agreement existed between the seamen and master, was wholly overthrown in Coffin v. Jenkins, [Case No. 2,948,] and since that case was decided, American courts have repeatedly taken cognizance of these claims. Reed v. Hussey, [Id. 11,646;] Tompkins v. Howard, [Id. 14,089;] The Crusader, [Id. 3,456.]

And references are frequently made to an assessor to estimate the net profits. The Hibernia, [Id. 6,455;] The William Martin, [Id. 17,698;] Swain v. Howland, [Id. 13,661;] Hazard v. Howland, [Id. 6,280;] Duryee v. Elkins, [Id. 4,197.]

The obligation to provide proper food, renders it necessary that the master should provide such food as is usual in vessels engaged in that kind of business. The Cyrus, [Id. 3,930;] Foster v. Sampson, [Id. 4,982;] The Mary Paulina, [Id. 9,224;] Collins v. Wheeler, [Id. 3,018.]

Mr. W. A. Moore, for claimants.

LONGYEAR, District Judge. There was no disagreement between the parties, at the hearing, that the wages of libellant were to be at the rate of $1,200 for the season of navigation, and five per cent. on the net proceeds of the earnings of the tug, but not to exceed $300 in addition to the $1,200. The only matter in dispute in this regard was, whether libellant had the right to leave at any time before the close of the season of navigation, the libellant contending that he had such right, and respondents contending that he had not. The rate of wages being by the season, the presumption is that the service was to be for the entire season. If the contract was different from that, and libellant was to have the right to leave at any time, the burden was upon him to prove it. Libellant testified that he was to have that right. Thomas Murphy, master and part owner of the tug, with whom the contract was made, testified that such was not the contract, that, in fact, nothing of that kind was mentioned. These witnesses being equally interested, and standing in other respects equally fair, the evidence is equally balanced, and the proposition of libellant is not sustained. The case must, therefore, proceed on the basis of a contract to serve for the entire season. The proofs showed that libellant left the service of the tug without consent, and with the intention not to return, before the close of the season; the defense of desertion, therefore, is pertinent, which defense it now remains to consider.

"The season of navigation," as understood here upon the lakes, comprises the eight months commencing April 1 and ending November 30. A contract, therefore, for the season of navigation, whether for wages or otherwise, must be presumed to have been intended to cover that period of time, where nothing to the contrary appears. The contract in this case, therefore, commenced to run April 1, notwithstanding, as appeared by the proofs, the tug did not go into commission and commence running until about April 25. It is in proof that libellant left the vessel, as above stated, July 20. His wages during that period, April 1 to July 20 (three months and twenty days), at $1,200 for the season of eight months would be $550. The five per cent. on the net proceeds was limited by the contract, as we have seen, to $300 in the aggregate, for the entire season. As it was in proof that the five per cent. exceeded that amount, the pro rata share for the three months and twenty days libellant served would be $137 50. This, added to the $550, would make $687 50 pro rata of the wages agreed upon applicable to the time of actual service. From this we would have to deduct $110 paid libellant while he remained in service, leaving a balance of $577 50 as the extent

to which libellant would be entitled to recover in any event. Libellant served one month before the 1st of April, when, as we have seen, his contract commenced to run, overseeing repairs on the tug at Detroit, the home port, and he claims to recover also for that at the contract price. But it clearly did not come within the time limited by the express terms of the contract—the season of navigation; neither did it constitute any part, as incidental or otherwise, of the duties he contracted to perform, viz., those of pilot, or sailing master. Inasmuch, therefore, as that service did not come under the contract, and as at that time there was no lien and no process in rem on account of such service, no allowance could be made for it in the present form of action, in any event. The same reasoning applies to libellant's claim for his board during the same time, and for money loaned to the master.

The question then recurs, is the defense of desertion sufficient to defeat libellant's claim, in whole or in part?

1. As to the fact of desertion. As we have already seen, libellant quit without consent, and, as the proof shows, he did so against the express dissent of the master, and with the intention not to return. This constitutes desertion by the maritime law, unless he has made out a sufficient justification. The grounds of justification sought to be proven, viz., interference with his duties by the master, and unwholesome and insufficient food, I am satisfied are mere after-thoughts, and constituted no part of his reasons for leaving. He never made any complaint, nor did he at the time give those as the reasons for his leaving. In any view of the case, however, I do not consider the justification contended for sustained by the proofs. In fact, I am satisfied from the proofs, that libellant's only reason for leaving was that he had obtained other and perhaps more agreeable employment. The charge of desertion is, therefore, maintained as a matter of fact.

2. As to the effect of the desertion. By the strict rule of the maritime law, desertion works an entire forfeiture of all antecedent wages, and such must be its effect in this case, unless there is something that mitigates the offense. In the case of The John Martin, [Case No. 7,357,] which, like the present, was a case of desertion from a tug-boat, this court made use of the following language: "It is true the kind of service under consideration does not call for the same rigorous application of the law as ocean service, because there the consequences of desertion may be vastly more serious. The court may in its discretion alleviate the rigor of the general rule, and, in view of mitigating circumstances, may impose a less penalty than that of entire forfeiture of wages." To this doctrine I fully adhere. See, also, Lovrein v. Thompson, [Case No. 8,557;] Swain v. Howland, [Id. 13,661;] Gifford v. Kollock, [Id. 5,409;] The Union, [Id. 14,347.] The mitigating circumstances, however, must be such as to amount to a reasonable excuse, founded on gross misconduct or harsh usage. Slight and transient causes will not answer, especially where, as in this case, the desertion appears to have been deliberate and premeditated, and not the result of sudden impulse. Neither is it necessary, in order to maintain this defense, that it shall be made affirmatively to appear that any specific damages resulted from the desertion. Where this does appear, however, it will operate as an aggravation. Where, however, it is made affirmatively to appear that no damages resulted or could have resulted, the rule may be applied perhaps with less rigor.

The excuses contended for at the hearing, were: first, that the master interfered with libellant in the discharge of his duties; and, second, unwholesome and insufficient food. These have already been noticed in connection with the question of justification for desertion, and they were held insufficient for that purpose. Did they amount to a reasonable excuse? The proofs show that the only interference with libellant's duties by the master, consisted in orders, directions and advice to the former as pilot and sailing master, where to go and what to do in the employment of the boat. This was clearly nothing more than a legitimate exercise of the powers and functions of master, and did not constitute even a shadow of ground for complaint. The complaint of insufficiency of food is wholly unsupported by the proofs. The proofs show, however, that for a short time, meat was used that was slightly tainted. This, however, was but transient and of short duration; and the master explains that it was owing to circumstances at the time beyond his control. Libellant evidently so considered it, because he made no complaint of it at the time, and he remained in the service a considerable time after this cause of complaint had ceased. I am satisfied from the proofs that the main reason for his leaving was personal to himself, and for his own benefit. This, instead of being a mitigation, is rather an aggravation of the offense.

The best men are usually employed here, upon the lakes, before the commencement of the season of navigation; it is difficult to get good men after that time, and it will not do to encourage mariners to treat their contracts for service lightly, to break them at pleasure, and thus place owners at the mercy of their caprices and whims; and I desire it to be understood that the court looks upon all desertion, which is not fully justified, with disapprobation, and that the extreme penalty of the law will be inflicted in all cases where the party deserting has not a strong excuse, founded on gross misconduct or harsh usage towards him. In the view already taken, it is unnecessary to consider the claim of damages in consequence of the desertion. It is proper to remark, however, that although the respondents fail-

ed to establish such a state of facts as would constitute a basis for any specific measure of damages, yet sufficient appears from which it is fair to presume that damage to the owners must have resulted from the desertion. It is conceded on all hands that libellant possessed superior skill in the position in which he was employed, and that his services were also peculiarly valuable on account of his extensive acquaintance and popularity with owners and masters of vessels usually employing tugs, and also, on account of his knowledge of towing rafts, which this tug proposed to and did make somewhat a specialty. In place of libellant, the owners were obliged to take up with a man of qualifications inferior to libellant's in all respects; and although it is in proof that the remainder of the season was much less profitable for the towing business than that portion during which libellant served, yet it is fair to presume that with libellant's superior knowledge, skill and reputation, the tug would have earned much more than she did earn—how much more it would be impossible, as it is unnecessary, to determine. All that I intend to say, and all that is necessary to say here, is, that the owners were undoubtedly materially damaged by the desertion.

We see, therefore, the case has all the elements necessary to give the rule of the maritime law its full force, without any mitigating circumstances to break or alleviate it. It is therefore held that the balance due libellant for wages, as above stated, is forfeited, and the libel must be dismissed with costs.

Libel dismissed.

NOTE, [from original report.] This case was appealed to the circuit court. Pending the appeal, libellant brought suit for the same cause of action at common law, in the state court. The state court having, on motion, stayed the proceedings, the supreme court vacated this order by mandamus (27 Mich. 406), and directed the case to proceed to judgment. Before the trial of the case, however, the above decree of the district court, dismissing the libel, was affirmed by the circuit court on appeal. [Nowhere reported.] This decree was then pleaded in the state court, as res adjudicata, but was overruled, and a verdict rendered for the plaintiff for $602. The case was then removed to the supreme court of the state, by writ of error, where the judgment was affirmed at the October term, A. D. 1875. That court held that the decree of a court of admiralty, dismissing a libel in rem, was no bar to a suit at common law for the same cause of action.

Case No. 810.

Ex parte BALL.

[3 App. Com'r Pat. 328.]

Circuit Court, District of Columbia. June 29, 1860.

PATENTS—REISSUE—COMBINATIONS.

[1. The act of congress of July 4, 1836, § 13, (5 Stat. 122,) which empowers the commissioner of patents, upon the surrender to him of a patent, to cause a new patent to be issued whenever the surrendered patent shall be inoperative or invalid by reason of a defective or insufficient description or specification, or when the patentee claimed more than he had a right to claim as new, if the error has arisen by inadvertency, accident, or mistake, is to be construed liberally, according to its spirit, and not literally, as restraining and limiting the right to a reissue.]

[2. If a patent be defective or insufficient, either in the specification or in the claim, the patentee has a right, if he desires it, in the absence of fraud and deception, and on complying with the other requisites, to have a reissue for each distinct and separate part, effectually to cure the defect in the mode of stating it; and he has a right to restrict or enlarge his claim so as to give it operation, and to effectuate his invention.]

[3. If a new function is developed by the combination of different elements of the invention, this is not new matter, beyond the scope of the invention.]

Appeal [by Ephraim Ball] from the decision of the commissioner of patents, for refusing, on said Ball's application, to reissue in three divisions, A, B, and C, of the reissued patent No. 831 for improvements in mowing machines. [Reversed.]

MORSELL, Circuit Judge. In his specification he has stated under his first division, A, his claim particularly consisting of three clauses; under that of B, consisting of nine clauses; and under that of C, four clauses.

Reasons of appeal have been filed, sufficient to cover all the points of error supposed to exist in the decision of the commissioner. In the report of the commissioner in answer to the reasons, he states, in substance, that the first clause of the claim under letter "A" was deemed to have been anticipated substantially in the patent of Sylla and Adams, dated September 20, 1853, of Philo Sylla, 1855; and of Jonathan Haines, 1855. He says the same device is employed in each of these references in the same combination for connecting the end of the finger-beam to the main frame of the machine, which drags a cutting apparatus upon the ground. The lugs or hinges referred to in this clause is a well known equivalent of the hinge employed for the same purpose in the patents named, and was used in the machine of Obed Hussey, patented in 1833, for connecting the cutting apparatus to the main frame; the arrangement of this hinge with the parts to which it is connected and with which it operates in Bell's machine has been deemed to involve patentable novelty, as will appear by reference to the official letter of April 12, relating to division C.

The second clause was anticipated in the patent of Jonathan Haines, 1855, in which the front hinge that connects the front of the frame, through the medium of the drawbar, with the shoe at the heel of the finger-beam, is arranged above and in advance of the cutter and finger-beam, substantially as specified in this clause of the claim.

The third clause as stated in the official let-

ter of the 12th of April, involves two conditions relative to separate functions. The first, viz.: arranging the front hinge and the hinge at the heel of the finger-beam in a line which is parallel with the side of the frame, was found to have been anticipated in the patent of C. Wheeler, Jr., dated 1855, and substantially the same arrangement is to be seen in the other references cited and the other conditions, viz.: arranging the hinges and connections of the cutting apparatus or finger-beam so as to divide the strain between the opposite ends of the frame, and both sides of the axis of the driving wheels, was found distinctly anticipated in the patent of Wheeler and in the patent of Haines—both referred to above.

Upon a re-examination April 12, 1860, of divisions B and C of this application as amended they were regarded as embracing patentable novelty, and suggestions of amendment were made, which were believed to be necessary, in view of the condition of the art, and references were given to enable the applicant to restrict the claims, so as to embrace the substantial improvement of this applicant. For the reasons there assigned for requiring the amendments and refers to the official letters of that date. The specification of the original patent, as before stated, described the invention as an improvement on the machine patented in 1855 by Jonathan Haines, which machine embraces the substantive devices and their combinations which are employed in Ball's machine, Ball's invention being regarded as an improvement in the arrangement of the devices, and it is evident that it must be so regarded. For in comparing these two machines it is at once apparent that the principle of construction and of operation is the same, and that the difference in form and arrangement which were the invention of this applicant are distinctly seen, and of such a character as to be capable of an easy and brief description. In Haines' machine the cutting apparatus is drawn upon the ground by means of two hinged bars which connect the finger-beam to the front timber of the frame, and the end of the finger-beam which passes by the frame is connected to the rear end thereof by a curved rod or brace which is hinged to both, and the draw-bar on the inner side of the machine is hinged to the shoe in front of the finger-beam. Ball's improvement consists in taking from, rather than adding to, the Haines' machine; the finger-bar is cut off at a point outside of the hinge of the curved brace-rod at the rear of the frame, and it, together with the outside draw-bar, are thrown aside, and the inside draw-bar and lateral brace bar or rod are retained; the former is made broad and rigid where it is joined rigidly to the finger-beam instead of being hinged there like Haines', and the hinge of the lateral brace-rod is changed in its relation to the end of the finger-beam, from the position it occupies in Haines' machine. These changes in the construction and arrangement of the front hinge and the rear hinge (at the heel of the finger-beam) in a line with each other, parallel with and beyond the frame so as to permit a greater degree of vertical movement of the finger-beam, embraces the entire novelty of Ball's improvement upon the cutting apparatus, or its connections with the frame.

In regard to the other devices claimed, which are employed upon the main frame, viz.: The hangers or supports for the crank shaft, the independent axles, the ratchet wheels, pawls and springs, the case for enclosing parts of the gearing, the balance wheels and the swiveled pitman, the references cited in the several letters, present their prior use in other patented harvesting machines, and the mere reassembling of these old devices has not been deemed a patentable improvement or an advancement in this branch of the mechanic arts. The 13th section of the act of congress approved July 4, 1836, [5 Stat. 122,] empowers the commissioner, upon the surrender to him of a patent, to cause a new patent to be issued whenever the surrendered patent shall be inoperative or invalid by reason of a defective or insufficient description or specification, or when the patentee claimed more than he had a right to claim as new, if the error has arisen by inadvertency, accident, or mistake, &c. He quotes also the 5th section of the act of 1837, [5 Stat. 192,] the 13th section of the act of 1836, and the 8th section of the act of 1837, and says: "On the first examination of this application some doubts were expressed as to the alleged invalidity of the surrendered patents, (Nos. 831 & 832,) it not appearing that an adjudication upon this question had been had, nor was there any distinct fact presented to corroborate or sustain the belief of the applicant. The office was therefore left to discover wherein an error, if any, had been committed in the description of the surrendered patents, and this too from the unnecessary, prolix, and ambiguous specifications and claims. In the official letter of February 14, it was objected that the several divisions of the subject-matter were not such as contemplated by the law, because the law authorizes the issuing of the additional patents for distinct and separate parts only; and on the final examination the same opinion was expressed in the letter of the 12th of April relating to * * * division C, that all the clauses or specifications of claims which involve the use of substantially the same invention must be embraced in one patent. It was observed that each division contained one or more clauses of claims which covered a condition or arrangement indispensable to the integrity and operative capability of the invention as an improvement upon the harvesting machine. In other words, the several patents, as solicited, would necessarily have clashed with each other, from the nature of the im-

provements as set forth, which involve modifications and arrangements, instead of new parts, separable and distinct. Different assignees of these patents would have been mutual infringers in making and using the invention. For these obvious reasons the law of reissue and division contemplated the issuing of the additional patents for the distinct and separate parts only which were new at the date of the original patent, and capable of useful application independently of the other parts which were used with them in the particular machine in which they were described or originally patented. For these reasons the office did not deem it lawful or just to the public to put forth the several patents prayed for.

It will be observed that in the last part of the just recited report of the commissioner, he gives his opinion upon the various statutes providing for reissuing patents, in which he says doubts had been expressed in a former stage of the proceedings whether the alleged invalidity of the surrendered patents should not have been previously adjudicated upon, and also that some distinct fact should have been presented to corroborate or sustain the belief of the applicant. Also that the several divisions of the subject matter were not such as contemplated by the law, because the law authorizes the issuing of the additional patents for distinct and separate parts only and on the final examination the same opinion was expressed. As a principle thus intimated affects every part of this case, I have thought it best to take the consideration of the case in this order. That is my view in the construction of those statutes. He seems to think a stricter construction should be given than I can bring myself to think is correct. In the first place, he says the additional patents must be "for distinct and separate parts only." This word "only" I have not found used in any of the statutes. It is therefore the commissioner's own inference, and implies that the statutes are to be construed as restraining literally, and not liberally according to their spirit. This right to amend or correct the defects either in the description of the schedule, or in the matter of the summary of the claim, by a surrender of the old patent, in order to a reissue of a new and perfected patent, had its existence upon the broad principles of reason and justice, coeval with the authority to grant the protective exclusive right itself. It is an implied right contained in the grant itself by the public to the inventor. The real question is between those two parties, and the limitation or exception,—fraud and deception towards the public,—and the fair and equitable limits of the original invention, embracing all combinations, new and valuable, with their functions, so as, in the best and most effectual manner, to guard and protect this right shown by the specification, drawings, and model, taken together, from invasion by pretended inventors and pirates, and from the effect of subtle, refined distinctions. If, to do this, it should become necessary to divide and subdivide the invention, the reason is very sufficient, and within the provision of the law allowing the reissuing of separate patents. Whilst the patentee may be thus protected in his just and fair rights, it is not perceived how different assignees of the patents could be prejudicially affected, or in a worse condition than if the parts were all in one patent, an assignment of a part only, (as is not unfrequently the case.) I should think that, so far from any reason on the part of the public to complain, it would be deemed desirable that all the parts of the invention should be fully developed, that their interest also might be secured against similar dangers. It is objected by the commissioner that the integrity and operative capability of the invention would be affected. That the invention is not entire, but consists of separate and distinct parts, the first reissue and an inspection of the patent furnish unquestionable evidence. This answers the objection as to the necessity of a previous adjudication or some distinct fact to be presented. I think there was no such prerequisite of law; in the first place, the proceeding is to be an ex-parte proceeding before the commissioner as a ministerial officer, and in some respect like the proceedings in the first instance. There has been no decision sustaining such an objection, and the practice has been entirely otherwise. I think the oath of the party applicant stating the fact is enough.

That I am fully sustained in the principles I have stated, I will refer to a few decisions of the courts: In the case of Battin v. Taggert, 17 How. [58 U. S.] 83, Mr. Justice McLean, who delivered the opinion of the court as to the right of reissue, says: "So strongly was this remedy of the patentee recommended by a sense of justice and of policy, that this court, in the face of Grant v. Raymond, 6 Pet. [31 U. S.] 218, sustained a reissued and corrected patent before any legislative provision was made on the subject. The same principle had been practiced in the patent office, and had been sanctioned in the case of Shaw v. Cooper, 7 Pet. [32 U. S.] 310. The case of Grant v. Raymond, in delivering the opinion of the court, Mr. Chief Justice Marshall says: "The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals, and the means it employs are the compensation made to those individuals for the time and labor devoted to these discoveries, by the exclusive right to make, use, and sell the things discovered for a limited time. That which gives complete effect to this object and intention by employing the same means for the correction of inadvertent error which are directed in the first instance cannot, we think, be a departure from the spirit and character of the act. An objection much relied on is: That after the inven-

tion has been brought into general use those skilled in the art or science with which it is connected, perceiving the variance between the specification and the machine, and availing themselves of it, may have constructed, sold, and used the machine without infringing the legal rights of the patentee, or incurring the penalties of the law. The new patent would retroact on them, and expose them to penalties to which they were not liable when the act was committed. This objection is more formidable in appearance than in reality. It is not probable that the defect * * * in the specification can be so apparent as to be perceived by any but those who examine it for the purpose of pirating the invention, they are not entitled to much favor." Whilst using this case for the purpose of showing the favored principle of this claim of reissue, I will notice another part of it to show upon what previous grounds the right should be allowed. It was a case in which the secretary of state, acting as a ministerial official, allowed the reissue. This appears to have been upon the representation of the party himself on oath stating the facts generally with his new specification as in this case, and requiring no previous adjudication. In illustrating the extent and nature of this right, the chief justice says: "If the mistake should be committed in the department of state no one would say that it ought not to be corrected. All would admit that a new patent correcting the error, and which would secure to the patentee the benefits which the law intended to secure, ought to be issued, and yet the act does not in terms authorize a new patent even in this case. Its emanation is not founded on the words of the law, but it is indispensably necessary to the faithful execution of the solemn promise made by the United States. Why should not the same steps be taken for the same purpose if the mistake has been innocently committed by the inventor himself?"

I have thus endeavored to show the origin and nature of the right, and as before estimated that the statutes referred to by the commissioner are not to be considered as restraining, but as confirmatory of the principles laid down by the supreme court in the case just recited. With respect, then, to the reissue of patents, the two sections of the act of 1836, section 13 [5 Stat. 122,] and the act of [March 3,] 1837, § 5, [5 Stat. 192,] are to be taken together in construction, and the most just and equitable extent to which the terms of the law, in its true spirit, will admit of, ought to be adopted. If his patent is defective or insufficient either in the specification or the claim, he has a right, if he desires it, in the absence of fraud and deception, on complying with the other requisites, to have a reissue of patents for each distinct and separate part, effectually to cure the defect in the mode of stating it, and he has a right to restrict or enlarge his claim so as to give it operation and to effectuate his invention. See the case of Battin v. Taggert, 17 How. [58 U. S.] 84, and the case of Hussey v. McCormick, decided by Mr. Justice McLean, 19 September, 1859, [Case No. 6,948.] The patentee, in his reissue, is entitled to every advantage within the full scope of his invention.

It may be here asked, if a new function is developed by the combination of different elements of the invention, whether this would not be new matter, and not within the invention, to which, without stopping to give my own reason for supposing it, cannot be so considered. I refer to the case just referred to, of Hussey and McCormick, to show conclusively that it would not. It may again be said that there can be no legitimate combination, as in the case now before me, where the different elements relate to separate functions. This is counter to the principles and decisions in the books on patent law, and the great current of cases in the patent office, in which patents have been granted without such an objection, and it is difficult to perceive any reason to sustain the position. There is no technicality in the term. It is of common parlance, with significant and common sense meaning. See Mr. Justice Story's opinion in the case of Carver v. Braintree Manuf'g Co., [Case No. 2,485.] In that case it was contended that the patent was not for a legitimate or patentable combination, since the improvement consisted in the assembling together of two distinct features or devices, but the judge said: "I see no objection to its being called a combination of particular forms and arrangement of structure to complete the improved rib. In a just sense, that is a combination which requires different things or different contrivances or different arrangements to be brought together to accomplish the given end." The great matter is, is it new and valuable, or is the result such? There is nothing in the objection inconsistent with the patents surrendered. It is no sufficient objection to the patentability of a combination that each separate element of which the combination is composed is covered when considered separately; this is fully settled by the late decision of the supreme court, and, indeed, according to the authorities on the subject, has long since been considered as a settled question. The application in this case for reissued subdivisions is not without good authority to sustain it. The precedents to be found in the patent office in the instances of McCormick & Hussey, and the decision of Judge McLean in the case of the latter against McCormick, are directly in point, and I think are not to be gotten over. [Case No. 6,948.]

I have carefully and fully examined and compared (with the assistance of the learned advocate on the part of the appellant) all the references particularly alluded to by the commissioner, and have found none of them

to apply to the claims of Ball in the combinations in which they are made to stand.

With the foregoing views, I think the decision of the commissioner erroneous, and ought to be reversed, and the reissue as prayed are hereby ordered and directed.

Case No. 811.

Ex parte BALL.

[3 App. Com'r Pat. 344.]

Circuit Court, District of Columbia. July 2, 1860.

PATENTS FOR INVENTIONS—REISSUE—EVIDENCE.

[1. On an application for a reissue of a defective patent, the model filed by the patentee in compliance with the statute is admissible as evidence of the scope of the original invention, and the defects of the original patent.]

[2. The inventor was entitled to a reissue of letters patent No. 832 to Ephraim Ball, for improvements in reaping machines.]

Appeal [by Ephraim Ball] from the decision of the commissioner of patents, for refusing, on said Ball's application, to reissue, in four divisions, his reissued patent No. 832, for improvements in mowing machines. [Reversed.]

MORSELL, Circuit Judge. In this specification he has stated under his first division, No. 1, his claims, particularly consisting of four clauses; under No. 2, consisting of one; under No. 3, consisting of three clauses; and under No. 4, consisting of nine clauses.

He has filed five reasons of appeal: 1st. That the commissioner erred in refusing the reissue on the ground that new matter had been introduced, which the original model, papers, and drawings did not warrant or justify. 2nd. On the ground that certain references which he cited presented an anticipation of the useful invention, and parts of the useful invention for which patents were prayed. 3rd. That the reasons and objections which he gives therefor are untenable, and cannot be sustained by the patent law. 4th. For refusing to consider certain evidence which the said Ball presented in support of his said application, viz. the affidavits of N. C. Driver and Wm. H. Bell. 5th. Because, having failed to show that the said Ball was not the first and original inventor of the useful invention claimed, he erred in not allowing the application and division as prayed for.

The commissioner, in his report, in reply to said reasons, says: "The five reasons assigned for taking this appeal present three points for consideration: First, that the commissioner erred in deciding that the new applications and drawings embraced inadmissible new matter, which enlarged the scope of the original invention patented. Secondly, that it was error to decide that the alleged novelty of the invention had been anticipated by prior inventors, as evidenced by the references cited. Thirdly, that the commissioner erred in refusing to consider certain affidavits which this applicant proposed to submit and make them a part of the record. The grounds of the decision referred to in the first reason of appeal, as above cited, are clearly and fully set forth in the report of the board of examiners, to which attention is invited. Reasons for requiring the amendment will also be found in the official letter dated April 26." In regard to the second point or reason of appeal, it will be observed by references to the letters dated Feb'y 14, 1860, on the first examination, and April 26, that the office has not decided that this application does not involve some invention of a novel and patentable character, but rejected the application and refused the several divisions and claims for patents as prayed for, and required what were deemed necessary amendments, in view of the condition of the art at the date of the original patent. The grounds for refusing to consider the affidavits which were offered were twofold: First, because these affidavits were not furnished until after the examination had been made and an appeal taken, upon which a board of examiners had concluded their report, and submitted it to the commissioner. Secondly, because the law authorizes the reissuing of a patent for the same invention only, which was described in the surrendered original patent. What the same invention is must be determined from the original record, which cannot be enlarged by the suggestions of either the applicant or others. This is the settled practice of the office, under its rules, (vide section 44, p. 451,) and is imperatively necessary to protect substantive improvements, which have been patented to others, from being merged in the new descriptions of applications for the reissue of patents of earlier date.

I suppose the principles settled by me in the case 831, [Ex parte Ball, Case No. 810,] showing the origin, nature, and extent of the right involved in the above proposition, fully covers the question, and therefore little or nothing more need be added here, beside the broad principle of reason and justice upon which the right is supposed to be based. It was supposed that the provisions of the statute were not in any manner intended to narrow or restrain, but were confirmatory thereof to the fullest extent. As I understood the meaning of the commissioner, it is that what he calls the original record, however defective it may be in describing the invention, it must nevertheless be considered conclusive. Now it is true, as a general rule of law, that a record is conclusive of the matter it contains, but it will not be denied that the legislature has a right to change, alter, or even abolish the rule, and in cases of this kind it has been done, for the language is that whenever any patent * * * shall be imperative by reason of a defective or insufficient description, or specification. The word "any" is

surely broad enough to embrace the original record or patent; then suppose the defect to be in that and in the specification also, however they are to be amended. It becomes a question of the admissibility of evidence, and the next highest evidence of the true extent of the invention is the model, being one of the prerequisites of the statute, and of the foundation upon which the patent issues; it is the highest original source which exists, to be resorted to under such circumstances for showing the defects, and I think may be used. I am happy to find that in this opinion, I am fortified by Judge Holt and the former Commissioner Bishop's opinion on the same subject.

The commissioner refers me to the report of the examiners adopted by him as his decision. The first objection stated in that document relates to the capacity of the machine for carrying its cutter apparatus folded upon the main-frame, the adjustability of the length of the pitman which communicates motion to the cutters, &c. The description as here given of the claim is supposed to be different from that which has been made according to the true mode of folding as claimed, which is not by turning the runners 22 and cutting apparatus upon their pivot K and then fold them over on the machine by means of the hinge I. The hinge I is attached to the rear of a swivelled piece which is free to turn on the socket piece, J, and the folding of the finger-beam is due to the swivel piece which turns in the socket-piece and not turned on pivot K, which holds the socket piece to the under side of the projecting end of the main frame. It would not therefore be necessary to disorganize the machine before the finger-beam could be folded, the hinge I being attached to the rear of the swivel-piece and not on the socket-piece. It is alleged that "Mr. Ball has never proposed to connect the socket-piece in any other position than just where it is shown in the original patented drawing, and also in the original model, viz. to the under side of the cross-piece of the frame, and that while the socket-piece is so attached, the finger-beam can be raised, turned, and folded over the main frame in front of the axis of the main-supporting wheels, and further that it is owing to the socket-piece being attached to the under side of the front cross-piece as described in the reissues; that it is held in the folded position, while the machine is being drawn from one field to another, and that too without any other means to hold it close to the side of the frame than simply its own gravity, a means which the commissioner seems to have overlooked." I have examined the model of Ball, and am satisfied that it is capable of the alleged function, and which is not considered as new matter. It has already been shown that the original model may be resorted to as evidence of the extent of the true invention, with respect to its affecting third persons by the reissues; it is probable that none other than those examining for the purpose of pirating the invention would be the description of persons, and therefore it is not of much matter. I think it appears also that neither the Wheeler nor Haines machine is affected by the claims as made by Ball. I have also satisfied myself by a careful examination and comparison that neither the Sylla and Adams machine of 1853, P. Sylla's of 1855, nor Haines' of 1855 are applicable to Ball's ninth claim.

As to the number of models referred to, without stating specifically what part or parts are applicable to the claims of Ball, and on account of the "condition of the art," I have not particularly examined them. And I hope the commissioner, upon more reflection, will be satisfied that the law does not impose any such unreasonable, onerous duty on the judge. From the foregoing views which I have taken of this case, and of the principles settled in case 831, [Ex parte Ball, Case No. 810,] I am satisfied that there is error in the refusal to grant the said reissue, and the said decision is hereby reversed and annulled, and that the said reissues be made accordingly as prayed.

Case No. 812.

Ex parte BALL.

[Law, Dig. 620.]

[The case noted under this title in Law, Dig. 620, is the same as Ex parte Ball, Case No. 810.]

BALL v. BAILIE. See Case No. 815.

BALL, (DUNBAR v.) See Case No. 4,128.

BALL, (EMANUEL v.) See Case No. 4,433.

BALL, (GOVERNOR OF STATE OF ARKANSAS v.) See Case No. 530.

Case No. 813.

BALL v. PATTERSON.

[1 Cranch, C. C. 604.][1]

Circuit Court, District of Columbia. Dec. Term, 1809.

TROVER—PLEADING—EVIDENCE.

In trover for "a chest containing sundry tools," and a "trunk containing sundry clothes," the plaintiff cannot give evidence of the value of the tools and clothes; the defendant being charged only with the conversion of the chest and trunk containing the tools and clothes, and not of the tools and clothes themselves.

[See Ball v. Patterson, Case No. 814.]

At law. Trover for "a chest containing sundry tools" and "a trunk containing sundry clothes."

Mr. F. S. Key, for the defendant, objected to the evidence of the value of the tools, the conversion of the chest and trunk only, being averred. The conversion is the gist of the action.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Mr. Law, contra. The trover is of a "chest containing sundry tools," and "a trunk containing sundry clothes." The conversion is of the said chest, and the said trunk; that is, the chest containing the tools, and the trunk containing the clothes.

Mr. Caldwell, for the defendant. If it is a charge for converting the tools and clothes, it is too vague and uncertain.

THE COURT (THRUSTON, Circuit Judge, doubting) was of opinion that the defendant was charged only with converting the trunk and the chest, and not the tools and clothes, and of course evidence of the value of the tools and clothes was immaterial.

Case No. 814.

BALL v. PATTERSON.

[1 Cranch, C. C. 607.] [1]

Circuit Court, District of Columbia. Dec. Term, 1809.

TROVER—PLEADING.

A declaration in trover for "a tool-chest containing divers tools, and working utensils," and a "trunk containing clothes," is sufficiently certain.

[See Ball v. Patterson, Case No. 813.]

At law. The declaration having been amended, and a verdict rendered for the plaintiff, the defendant moved in arrest of judgment for uncertainty of the declaration, which was for "a tool-chest containing divers tools and working utensils," and "a trunk containing clothes."

Mr. Caldwell, for the defendant. A chest of tools would have been good; but a chest containing divers tools and working utensils, is not. It is too vague. Bottomley v. Harrison, 2 Strange, 809.

THE COURT was of opinion that the declaration was good as to the trunk and chest, and tools and clothes. Judgment for the plaintiff.

BALL, (ROOT v.) See Case No. 12,035.

BALL v. The SAM KIRKMAN. See Case No. 8,658.

BALL, (VIOLETTE v.) See Case No. 16,954.

Case No. 815.

BALL v. WITHINGTON et al.

SAME v. BAILIE.

[1 Ban. & A. 549; [2] 6 O. G. 933; Merw. Pat. Inv. 452.]

Circuit Court, S. D. Ohio. Oct., 1874.

PATENTS FOR INVENTIONS — REISSUE—BROADENED CLAIM.

1. The claim of complainant's reissued patent was, "One or more swinging bread-holders, suspended from the arms or end plates of a rotating reel, in combination with a furnace, so arranged and connected, that the products of combustion will pass into or through the chamber within which the bread-holders move." The specification shows, that the oven of the patentee is constructed with a solid bottom which completely shuts off the fire from the furnace, and flues by the side of the bread chamber so far removed, and so far cut off from the fire, that nothing but heated currents of air can pass into the chamber: *Held*, that the claim must be construed to be for the application of the rays of heat directly from the fire to the baking chamber, and that, as the original patent contained nothing calculated even to hint how this could be done, but the drawings and model suggest a mode of operation wholly different—viz., the baking of bread by the heat derived from the radiation of heated walls and heated currents of air, the reissued patent was broader than the original.

2. The reissued patent, granted to Hosea Ball, June 14, 1870, and extended for seven years from September 23, 1870, for improvement in ovens, *held* void for claiming what was not embraced in the original patent.

[In equity. Bills by Hosea Ball against John K. Withington and others and against John Bailie for infringement of letters patent. Dismissed.]

S. S. Fisher and John E. Hatch, for complainant.

Edward Boyd, for defendants.

Before EMMONS, Circuit Judge, and SWING, District Judge.

EMMONS, Circuit Judge. The bills charge infringement of letters patent, granted to complainant, September 23, 1856, for an "improvement in ovens," reissued October 12, 1869, and a second time reissued June 14, 1870, and extended for seven years from September 23, 1870.

By agreement of counsel, both cases were argued together, and the decision to be delivered, governs both.

The reissued patent, upon which the bills are founded, contains three claims; but the first, which is as follows, is the only one in controversy: "1. One or more swinging bread-holders, suspended from the arms or end plates of a rotating reel, in combination with a furnace, so arranged and connected, that the products of combustion will pass into or through the chamber within which the bread-holders move."

We prefer to rest the judgment solely upon the ground, that the original patent did not warrant that part of the claim, in the reissue, which includes the direct application of heat to the bread chamber. We say, the direct application of heat, because, we thus construe the words "products of combustion." The only significance which we can give to that part of the claim is, that the rays of heat from the fire must be radiated directly into the baking chamber. The reissued patent, as we construe it, claims a device which will accomplish this result. The infringement is said to depend upon the fact, that the defendants' apparatus applies the "products of com-

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reporter by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 452, contains partial report only.]

bustion" directly to the baking chamber, and that, as the reissue claims this feature, there is an infringement. That it does so, is entirely clear, all the "products of combustion," which ascend at all, move upward and around the swinging bread-holders. There is no proof, nor is there any suggestion from counsel, that there is any "product of combustion," heat excepted, which is efficacious in the baking of bread. Conceding, which we much doubt, that there are what may be called two principles, in a legal sense, in the application of heat to the baking of bread, we can draw the line between them only as follows: The one, that used by the defendants, and which we suppose complainant's reissued patent to claim, radiates the heat directly from the fire into the chamber, with no intervening wall or medium, the air excepted, between them. The other, heats the baking chamber by heating its external walls, or by carrying heated currents of air into it, but excluding all the direct rays of heat from the fire. The former mode greatly economizes fuel. The fire is in close juxtaposition to the baking bread, which is rotated in the chamber above the directly ascending, and, therefore, greatest possible amount of heat which can be economized from a given amount of combustion. This mode defendants' device employs to the full. Turning to that of the complainant, it completely excludes the employment of the principle, if principle it be. Not a single direct ray, radiated from the furnace, can enter the chamber. Its bottom is solid, and completely shuts off the fire of the furnace. The flues by the side of the bread chamber are so far removed, and so cut off, from the fire of the furnace, that nothing but heated currents of air can pass into the former, through the apertures in the side walls. There is not only not a word in the original patent calculated to hint at the leading idea or principle employed by the defendants, but, the drawings and model suggest a mode of operation wholly different. They rely upon heated walls and heated currents of air to bake the bread, and must have been contrived at a time when fuel was used, whose unconsumed gases and smoke were noxious, and which, therefore, had to be conveyed away without contact with the dough. So far from suggesting the defendants' device, or the unwarranted claim made in the reissue, had a baker, about to adopt the device of the defendants, believed that that of the complainant embodied the best application of heat, he would have abandoned his own device, in the belief that it was worthless. We do not think the case one, where a beneficial idea has been appropriated by another in a different form. The complainant delayed, rather than hastened, the direct application of heat employed by the defendants.

It may be said the claim necessarily uses the terms "products of combustion," in a sense other than that imputed to them by the court; and, as they were used in reference to a device in which the direct radiation of rays from the fire was impossible, necessarily, they must have contemplated something else; what this something else is, is not stated. The court is asked to presume there is some unknown "product of combustion" besides heat, which can be conveyed, through the apertures in the side walls, upon the bread. It is argued, if the court will but imagine some such improved incident to combustion, that then the original device embodied a mode in which it might be employed in baking, and thus it would lay the foundation for the claim made in the reissue. The answer is: We know of no such quality; all the products of combustive material, in this process, is the heat evolved, and as the original patent provided no mode for its application, the subsequent claim for it is void.

Although our judgment goes upon another ground, and we have not, therefore, fully considered, whether the patent for this combination is void, because no invention is involved in making it, still, such is our strong impression. We apprehend the new mode, which dispenses with smoke flues and separating walls surrounding the baking chamber, depends far more upon the modern use of fuel, which can, without injury, be consumed directly beneath the dough, than in any discovery on the part of complainant, or any one else, in the application, or law, of a new principle of heat, to baking. But, however this may be, previous patents had, in express terms, pointed out the mode, and claimed as a benefit, the direct application of heat to a baking chamber. The attention of those engaged in this department of industry had been directly challenged to this subject, and, what we deem somewhat material upon the mere question of invention, they had combined a furnace and chamber, for the direct application of heat, with an endless chain or apparatus for moving the bread over the fire. The reel is an old and familiar device. We should feel that we were carrying the doctrine which protects slight inventions to the last limit, if we were to hold that the combination of the reel and furnace in this case, involved invention. We have no disposition to deprive this species of property of its due protection. When a meritorious invention is presented, every disposition is felt to protect it from spoliation by the employment of other devices, in which, it is apparent, the idea of the complainant has been employed. We decide this case against the complainant, because convinced, that not only had the patentee no notion whatever that he had included in his device what is claimed in the reissue, but because, neither the patent, specification, nor model, would have suggested it to any one else.

The bills will be dismissed, with costs.

[NOTE. Patent No. 15,753 was granted to H. Ball September 23, 1856; reissued June 14,

1870, (No. 4,026.) For other cases involving this patent, see Garneau v. Dozier, 102 U. S. 230; Ball v. Langles, Id. 128.]

BALL, The DANIEL. See Case No. 3,564.

BALLANCE, (FORSYTHE v.) See Case No. 4,951.

Case No. 816.

In re BALLARD et al.

[2 N. B. R. 250, (Quarto, 84;) 1 Chi. Leg. News, 103.]

District Court, D. Connecticut. 1868.

BANKRUPTCY — SUSPENSION OF PAYMENT OF COMMERCIAL PAPER.

[The suspension of payment of commercial paper for 14 days is prima facie evidence of fraud, and casts the burden of proof on the debtor. In the absence of explanatory proof, such suspension is to be deemed fraudulent, within the meaning of the bankruptcy act of March 2, 1867, (14 Stat. 517, c. 176.)]

[Cited in Re Hercules Mut. Life Assur. Soc., Case No. 6,402; Baldwin v. Wilder, Id. 806.]

[See Hensheimer v. Shea, Case No. 6,328; Ex parte Thompson, Id. 13,936; Ex parte Hollis, Id. 6,621; Ex parte Weikert, Id. 17,361; Ex parte Bininger, Id. 1,420; Ex parte Hall, Id. 5,920.]

In bankruptcy. The question in this case arose upon a point of law made by the counsel for the alleged bankrupts, claiming that fourteen days' suspension of payment of commercial paper by a banker, merchant, or trader, must be accompanied by actual fraud, in order to constitute an act—or even to constitute prima facie evidence of fraud—of bankruptcy, within the meaning of the law. The question was argued, and all the known cases bearing upon this point cited by George G. Sumner and William Shipman, for petitioning creditors, and by Franklin Chamberlain, for the alleged bankrupts, and the following decision and opinion filed by the judge:

SHIPMAN, District Judge. The only question before the court in the present stage of this case is, whether the respondents have committed an act of bankruptcy. A number of their creditors have duly made application to have them declared bankrupts under those clauses of the act relating to involuntary bankruptcy. In their petition the creditors allege that the respondents are merchant traders and manufacturers, and that long before the date of the petition they fraudulently stopped and refused payment of their commercial paper, and have not resumed the same within a period of fourteen days, nor at any time since. There is no dispute about the facts. It is conceded that the respondents have suspended payment of their commercial paper, and have not resumed, and that this suspension has continued without interruption much longer than fourteen days. No explanatory proof is offered by the respondents, and the question arises whether, in this state of the case, the suspension is deemed fraudulent within the meaning of the act of congress. This court, in several uncontended cases, has decided that a suspension under such circumstances was to be deemed prima facie evidence of fraud, at least sufficient to cast the burden of proof on the debtor. This is the view taken by Judge Field, of the United States district court of New Jersey, in the case of Jersey City Window Glass Co., [Case No. 7,292.] It is sufficient to say that I adhere to this view of the law. Whether I should, in a case presented, go further, and concur with the views expressed by Judge Hall in Re Wells, Jr., [Case No. 17,387,] need not now be determined. It follows that a decree declaring the respondents bankrupts must issue.

Case No. 817.

BALLARD v. EDMONSTON.

[2 Cranch, C. C. 419.] [1]

Circuit Court, District of Columbia. Oct. Term, 1823.

APPRENTICE—MOTHER CANNOT BIND CHILD.

A mother cannot bind out her child as an apprentice.

[Cited in Charles v. Matlock, Case No. 2,615.]

The petition of Richard Ballard stated, that on the 9th of April, 1816, one Evan Edmonston, an infant under twenty-one years of age, by indentures signed and sealed by his mother, Sarah Edmonston, was bound to the petitioner for nine years from the 8th of June next following, to learn the trade of a tailor. That he came and served as an apprentice until about two months past, when he left the service of the petitioner, although the nine years have not yet expired, and the said Evan is still a minor, and refuses to return to his service, alleging that he is not bound by the indentures. The petitioner therefore prays that the said Evan may be brought before the court to abide such order as the court may deem just and equitable. The indenture was in the common form, but signed and sealed by the mother, and not by the son. By the 7th section of the act of Maryland of 1793, c. 45, it is provided, that, "in case the contract, whether defective in form or not, hath been partly executed, the said county or criminal court may award and compel the terms or any part of the terms to be performed by the master or mistress, or by the apprentice, as justice and equity may require; and the master or mistress of any apprentice may detain the said apprentice in his or her service, till discharged by the court aforesaid; and the said master or mistress may maintain such action against strangers, as if such apprentice had been legally bound to serve."

[1] [Reported by Hon. William Cranch, Chief Judge.]

Mr. Ashton, for the petitioner, contended, that under the 7th section of the act, as the contract had been so far executed, on his part, the court should order it to be completed on the part of the boy, although the indentures are defective in form. The act does not mean mere technical form of the indentures, but the invalidity of the indentures from any cause. Here the contract was, that the boy should serve the petitioner as an apprentice. The indentures were only a matter of form; and although they may be defective, the contract continues, and under that section of the law, may be enforced with such modification, or upon such terms as the court may deem just and equitable.

Mr. Coxe, contra. By the common law the infant could not bind himself, nor could the mother bind him. The act of 1793, c. 45, § 4, only authorizes the father to bind out his infant son. The mother has no such power. There were therefore no parties competent to contract, and therefore there was no contract. When a power is given by statute, all the requisites of the statute must be complied with.

THE COURT (THRUSTON, Circuit Judge, absent) decided, that there was no contract binding on the boy, and ordered him to be discharged.

BALLARD, (GOULD v.) See Case No. 5,635.

BALLARD, (GROW v.) See Case No. 5,848.

BALLARD, (MARTINS v.) See Cases Nos. 9,175 and 9,176.

BALLARD, (OAKLEY v.) See Case No. 10,393.

BALLARD, (UNITED STATES v.) See Cases Nos. 14,506, 14,507.

Case No. 818.

In re BALLOU.

[4 Ben. 135;[1] 3 N. B. R. 717, (Quarto, 177.)]

District Court, S. D. New York. May, 1870.

PRACTICE—PETITION AND BILL—LIEN—FRAUDULENT JUDGMENT.

1. A bankrupt suffered his property to be taken on legal process in favor of one of his creditors, under an execution issued on a judgment against him, the bankrupt intending thereby to give a preference to such creditor, and the creditor having reasonable cause to believe, at the time, that the bankrupt was insolvent: *Held*, that the transaction was void, under the 35th section of the bankruptcy act, [of March 2, 1867; 14 Stat. 534,] and that no valid lien was acquired in favor of the creditor by the taking under the execution.

[See In re Stevens, Case No. 13,391; Beattee v. Garden, Id. 1195; Catlin v. Hoffman, Id. 2,521; In re Davidson, Id. 3,599; Ex parte Binns, Id. 1,422; Ex parte Forsyth, Id. 4,948; Vogle v. Lathrop, Id. 16,985; Harvey v. Crane, Id. 6,178; Hood v. Karper, Id. 6,664; Vanderhoof's Assignee v. City Bank, Id. 16,842; Warren v. Tenth Nat. Bank, Id. 17,202; Ford v. Keys, Id. 4,933; Smith v. Buchanan, Id. 13,016.]

2. The property levied upon under the execution was, under an order of the bankruptcy court, delivered to the assignee, and sold by him, subject to the determination of the court as to the validity of the lien claimed by the creditor. The assignee filed a petition, praying that such lien might be declared void. The creditor's answer prayed that it might be adjudged valid, and that the assignee might be directed to satisfy the execution out of the proceeds of the property held by him. On an objection taken by the creditor, at the hearing: *Held*, that, as the matter was brought up by petition, instead of by bill in equity, it was irregular; that both petition and answer must fall, and the proceeding be dismissed, without costs, with leave to the creditor to file a bill in equity, or bring a suit at law, as he might be advised, within thirty days.

[Cited in Barstow v. Peckham, Case No. 1,064; In re Marter, Id. 9,143.]

[See Ex parte Bonesteel, Case No. 1,627.]

In bankruptcy.

G. A. Seixas, for assignee.

F. N. Bangs, for execution creditors.

BLATCHFORD, District Judge. On the proofs in this case, I regard it as established that the bankrupt, on the 9th of October, 1869 (the petition in bankruptcy having been filed on the 15th of October, 1869), being insolvent, suffered his property to be taken on legal process in favor of the firm of E. S. Jaffray & Co., under an execution issued on that day against him, on a judgment recovered on that day, in the marine court of the city of New York, by that firm, against him, for $486 80; that the bankrupt intended thereby to give a preference to that firm, as his creditors, they being such at the time; and that firm had reasonable cause to believe, at the time, that the bankrupt was insolvent, and that a fraud on the bankruptcy act was intended. The transaction was, therefore, void, under the 35th section of the act [of March 2, 1867; 14 Stat. 534,] and no valid lien was acquired in favor of the firm, by the taking under the execution. The petition of the assignee prays that such lien may be declared void. The answer of the firm to that petition, which answer was verified on the 17th of December, 1869, and filed on the next day, prays that the levy under the execution may be adjudged to be a valid lien, and that the assignee may be ordered to satisfy the execution out of the proceeds of the sale of the property. It appears, by the proofs, that the property levied upon under the execution was, on or about the 14th of December, 1869, under an order made by this court on that day, delivered to the assignee, the order providing that he should hold the proceeds separate from the other estate of the bankrupt, subject to the determination of this court on the petition filed by the assignee to ascertain the validity of the lien claimed by the firm, and that none of the rights or

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

liens of the firm should be prejudiced by the order. It also appears, that the property has been sold by the assignee, and that its proceeds have been kept separate, to abide the order of this court.

The objection was taken, at the hearing, by the counsel for the firm, that, inasmuch as the proceeding instituted by the petition of the assignee is one against the firm as claiming an adverse interest touching property or rights of property of the bankrupt, transferable to or vested in the assignee, it is wholly irregular, because it was not brought upon a plenary bill in equity, but by a summary petition and an order to show cause. On the authority of the recent decision made in the circuit court for this district, in the case of In re Bonesteel, [Case No. 1,627,] this objection must be held to be well taken. As the petition falls, the answer must fall with it, and also the prayer of the answer, that the assignee may be ordered to satisfy the execution out of the proceeds of the sale of the property levied upon. The petition is, therefore, dismissed, but without costs to either party, as against the other; and, as the fund is in the hands of the assignee, leave is given to the execution creditors to file a bill in equity, or bring an action at law, as they shall be advised, against the assignee, in a proper court, for the enforcement of such rights as they shall seek to claim against the assignee in the premises, provided that be done in thirty days herefrom, at the expiration of which time, if it be not done, the assignee may apply for directions as to the fund.

Case No. 819.

BALMEAR v. OTIS.

[4 Dill. 558.][1]

Circuit Court, D. Iowa. 1877.

EQUITY—JURISDICTION—STATUTORY SUIT TO QUIET TITLE—LAW.

An action brought under the Iowa statute to quiet title, is, in its essence, an equity suit, and must be brought and heard as such.

[See Leggett v. Cole, 3 Fed. 332.]

This was an action at law, [by Herman Balmear against H. W. Otis,] under the Iowa statute, to quiet title. Demurrer to the petition on the ground that the remedy for the case stated in the petition was in equity. [Sustained.]

Wright, Gatch & Wright, for plaintiff.

Mr. Richards, for defendant.

Before DILLON, Circuit Judge, and LOVE, District Judge.

DILLON, Circuit Judge. A proceeding under the Iowa statute to quiet title, is, in its essence, an equity suit. In the federal courts, whether a particular case is one at law or equity, depends upon the case stated in the petition. If the case there made shows a mere contest of legal titles, and the defendant is in possession, the remedy is at law.

If the plaintiff is in possession, or if neither party is in possession, and the petition or bill shows that equitable relief is necessary or proper, the jurisdiction is in equity.

The statements of the petition in this case show that the case is equitable in its nature, and the demurrer thereto must be sustained. It must be heard as an equity suit, and not as an action at law.

Demurrer sustained.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

Case No. 820.

In re BALMER.

[3 Hughes, 637.][1]

District Court, E. D. Virginia. April, 1878.

BANKRUPTCY—APPLICATION FOR DISCHARGE—FORM OF CREDITOR'S CONSENT THERETO.

1. Creditors who have not proved their claims in bankruptcy until after the day fixed for showing cause against the bankrupt's discharge, cannot then make objection to the discharge upon any other ground than fraud distinctly and specifically charged.

2. A creditor may consent to the bankrupt's discharge by an attorney in fact, or by his counsel, stating in open court that the consent is given; and it seems that an assent to the discharge need not be "in writing," since the enactment of section nine of the amendatory bankruptcy act of June 22d, 1874, [18 Stat. 180,] amending section 5112 of the Revised Statutes of the United States.

In bankruptcy. This was an application for a discharge in bankruptcy on a certificate of conformity from the register. [Granted.]

The day for showing cause against the discharge was the 10th of December, 1877. The register states that:

On the day to show cause the only proof on file was that of Thomas Dunnill for a balance of $14,809.87, and the bankrupt produced a power of attorney, executed by Dunnill (now in Europe) some time before the bankruptcy, by virtue of which he claimed the right to consent to his own discharge. I thought the authority was insufficient, and so he has since procured and filed the necessary assent of that creditor (and of E. E. Taylor & Co., who have since proved their debt).

Since the day to show cause, the following proofs in opposition to the discharge have been filed:

J. F. Allen & Co.	$ 60 57
Turpin & Bro.	100 54
Jackson, Turpin & Co.	252 42
John T. Wadsworth	1,045 00
	$1,458 53

The assent to the discharge is given by the necessary number and amount of creditors, but was not filed until after the day to show

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

cause as shown above, February 28th, 1878.

The proofs of claims by the four creditors named by the register were filed on the 6th February, 1878. The register afterwards made a supplementary report, in which he stated:

On the day to show cause why the discharge of the bankrupt should not be granted, the only creditor who had then proved his claim, Thomas Dunnill, appeared by counsel and offered to assent to the discharge upon the power of attorney previously referred to. This I thought was insufficient, and so I told Mr. Coke, the attorney, if he would give the assent for his client, there being no other claim proved, that I would consider the assent to be given. The amount of Mr. Dunnill's claim being very large, Mr. Coke thought he had better get the assent of his client personally, and I think I suggested to him to send the necessary paper to Europe for that purpose, which he concluded to do. At that time I knew of no opposition to the discharge, and I had been under the impression that your honor had ruled that the assent could be given after the day named; in fact, the amendment of June 22d, 1874, left some doubt upon my mind in regard to this subject, and I had then determined to lay the matter before your honor at the earliest opportunity, which you will no doubt remember I did. I therefore left the case open for the assent of Mr. Dunnill, to be filed under the former practice in such cases, making no regular adjournment, nor fixing another day. March 9th, 1878.

The bankrupt's counsel states in his brief, that on the day for showing cause against the discharge, "a written consent, signed by Thomas Balmer, attorney in fact for the creditor Dunnill, was tendered to the register and rejected as insufficient, which consent in writing I insist was legal and valid." No objection in writing to the discharge, in conformity with general order in bankruptcy 24, was filed in the cause until the 15th March, 1878. The objection then filed was in the form of a petition by the creditor John T. Wadsworth, setting out that he had reason to believe that the bankrupt Balmer did not surrender all of his property to his assignee, to wit, that he did not surrender a certain piano-forte now in Balmer's use, nor certain jewelry owned by him. It prays that the bankrupt may be made by order of court to submit to an examination under oath touching this charge; and that pending such examination the bankrupt's present application for a discharge in bankruptcy may be stayed.

The following was the decision of the court:

HUGHES, District Judge. Two questions arise for determination:

1. Can creditors who have not proved their claims in bankruptcy until after the day fixed for showing cause against the discharge of the bankrupt, then make objection to the issuing of the discharge on any other ground than fraud specifically and distinctly charged? and if not

2. Whether the consent of the only creditor or creditors who have proved their claims at the day for showing cause against the discharge, as given in this case, is sufficient under section nine of the amended bankruptcy act of 22d June, 1874, amending what is now section 5112 of the Revised Statutes of the United States?

1. I think it is perfectly clear under general order 24 in bankruptcy that the objection to the discharge in this case was not made in time or in proper form; and that it therefore cannot be allowed by the court. There has been no "specification in writing of the grounds of opposition" to the discharge filed at all in this cause. The petition does not in terms make objection to the discharge. It simply asks that the bankrupt's application may be stayed to await the result of an examination of the bankrupt under oath. It does not charge fraud or any wilful intent to defraud on the part of the bankrupt. It merely sets forth the belief that a piano-forte and certain jewelry were not surrendered, and asks a stay of the application for discharge. But even if this paper were such a "specification of the grounds of opposition" to the discharge, as is contemplated by general order 24, it was not filed "within ten days after the day" on which the creditors were required to show cause against it. That day was the 10th December, 1877. If we consider that the whole time during which the register kept the matter open, waiting for a personal consent in writing to arrive from Dunnill, was in law but one day; yet, that paper having arrived on the 21st January, 1878, the objection was still too late, because of not having been filed within ten days after that day. And even if we consider that the matter was before the register until the date of his certificate of conformity, to wit, the 28th February, 1878, the objection was still not in time; for it was not filed until the 15th March, 1878. I think, therefore, that, as "a specification in writing of grounds of opposition" to the bankrupt's discharge, this paper is insufficient in form; and I also think that it was invalid as not in time, under order 24. It can have no effect as such a "specification," and the objecting creditor, Wadsworth, must resort to his remedy under section 5120, which allows a discharge, after it is granted, to be revoked within two years for fraud charged and proved against the bankrupt.

2. The consent which was given in this case, by the consenting creditor, Dunnill, seems to me to have been, under all the circumstances, sufficient. That creditor (who was the only one who had proved his claim) was in Europe. The bankrupt was his general attorney in fact here, still empowered to act for him, inasmuch as his bankruptcy

had not terminated that power. Story, Ag. § 486. That attorney either offered or tendered to the register for his principal, a consent to the discharge in writing. The register declined to receive Balmer's consent as attorney in fact for Dunnill, but held the matter open until a specific consent in writing, signed by Dunnill personally, could be obtained from Europe, which in due course of mail was received, and was filed on the 21st January, 1878. Even if the clause in section 5112, which requires the consent of creditors to be in writing, has not been repealed by the ninth section of the amended bankruptcy act of 22d June, 1874, [18 Stat. 180,] the consent in writing which was offered or tendered to the register was valid and sufficient. The refusal of the register to receive such a paper as the law requires to be "filed in the case" cannot affect the rights of the person whom the law requires to file it, if he tenders it, or offers to file it. See Bennett v. Hunter, 9 Wall, [76 U. S. 326.] The creditor, through his duly accredited attorney, did all that he could do.

But in addition to the action of the attorney in fact, we have also that of Mr. Dunnill's attorney at law. This creditor's counsel offered also before the register to assent to the discharge. This assent could, of course, only be given orally, and was given orally. It is not necessary in this case to decide whether a creditor's consent to a bankrupt's discharge must be in writing; but I will say that, inasmuch as section nine of the amending act of June, 1874, repeals in terms the essential provision of section 5112, I think it repeals along with it the requirement that the consent of creditors shall be in writing at least so far as to make a declaration in open court by the creditor that he consents a sufficient consent in the contemplation of the ninth section of the amended act. If the consent is given out of court, it must needs be in writing without doubt. But if it be given orally before the register or in court before the judge, and is made to appear on the record by either the judge or the register, I deem such declaration of consent to be sufficient in contemplation of the amendatory section nine.

On the whole, I think the consent of Dunnill to Balmer's discharge in bankruptcy, as it appears on the face of the record before me, to be as complete as it could well be made, and that it is sufficient. The discharge may issue.

Case No. 821.

The BALTIC.

[2 Ben. 98;[1] 7 Int. Rev. Rec. 77.]

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

COLLISION AT PIER—BACKING—LOOKOUT.

1. Where a steam vessel attempted to make a landing at a pier next to a ferry slip, and backed out, after having gone in bow on, and the wind and tide swept her stern towards the ferry slip, and she continued backing until she came in collision with a ferryboat, which was coming into the slip and had slowed as soon as she saw the other steamboat backing, and had stopped and backed as soon as she had reasonable ground for apprehending a collision: *Held*, that the ferryboat was free from fault;

[Cited in The Servia, 30 Fed. 506; The Greenpoint, 31 Fed. 232; The Cement Rock, 38 Fed. 765.]

2. That the other steamboat was in fault in backing as she did, having no person on her after deck to look toward the direction in which she was backing.

[In admiralty. Libel by the United States against the ferryboat Baltic for damages resulting from a collision. Dismissed.]

Ethan Allen, Asst. U. S. Atty., for libellants.

B. D. Silliman, for claimants.

BLATCHFORD, District Judge. This is a libel filed by the United States, as the owners of the steamboat Flora, against the steam ferryboat Baltic, to recover for damages caused by a collision which took place between the two vessels, on the 19th of December, 1863, about half-past one o'clock in the afternoon, in the harbor of New York, about 300 yards distant from the Barge office dock, at the foot of Whitehall street. The Flora was attempting to make a landing at the westerly side of pier No. 1, East river, being the pier at the extreme east end of the Battery. The tide was strong flood, running from west to east, and the wind was blowing strong from the westward. From some cause, either because she missed her landing, and was in danger of being carried against the end of pier No. 1, by the force of the wind and tide, or because she desired to make room for another vessel which was at pier No. 1 to get out, the Flora backed out, after having gone in bow on and got her stem within the end of the pier. The wind and tide swept her stern to the eastward, and she kept her stern way on, with her engine in motion working backward, until she came in collision with the Baltic, which was on her regular trip from Brooklyn to her slip at the foot of Whitehall street, New York. The Baltic did everything she was bound to do, by slowing to half speed, and then stopping, and then backing, to avoid the collision. That she did not do more, as, for instance, that, instead of stopping at once, the moment she saw the Flora backing, at a distance off which then was perhaps half a mile, she slowed to half speed, was no fault on her part. She could have had no reason to suppose, and was not bound to suppose, that the Flora would keep on backing so as to make a collision probable. She slowed to half speed the moment she saw the movement of the Flora, and she stopped and backed as soon as she had any reasonable ground for apprehending that a collision was

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

imminent. There was nothing in view from the Baltic as a cause for the backing of the Flora, and nothing to indicate that there was or would be a necessity for the Flora to back to the extent she did. But, with the wind and tide such as they were, the slowing of the Baltic was a proper precaution. There having been no fault on the part of the Baltic, a decree dismissing the libel must, of course, be entered. But in addition to this, the evidence shows reckless carelessness on the part of the Flora. She appears to have blindly backed out into the harbor, with no person on her after deck to look towards the direction in which she was backing, and give signals from that part of the vessel, and no person on the lookout anywhere, and no person anywhere on her deck, except one man in her pilot house, whose attention was directed towards objects at the westward in the Hudson river. No reason is shown for her backing as far as she did. All the damage she suffered by the collision was the consequence of her own careless navigation. A decree will be entered dismissing the libel.

Case No. 822.

The BALTIC.

[2 Ben. 396.][1]

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

COLLISION IN EAST RIVER—FOG—SPEED—UNLAWFUL ANCHORAGE.

1. Where a brig lying at anchor in the East river, within the distance of sixty yards from a direct line between the landing places of one of the ferries, was run into by a ferry-boat in a fog in the early morning, the ferry-boat having previously made five trips on the ferry that morning, on which trips the light of the brig had been seen, and she had been avoided, and, on the trip in question, the ferry-boat, after starting from her slip, slowed to half speed, and ran on, looking for the brig, and, not seeing her, stopped her engine, and afterward started ahead again, and, as soon as she got way on her, shut off to half speed, and ran so till she sighted the brig at a distance of not over twenty yards, but, not being able to stop in less than thirty yards, was not then able to avoid a collision: *Held*, that the ferry-boat was in fault in going at too great speed, and that such fault contributed to the collision.

2. That the brig was violating an ordinance of New York city in lying where she was, and that such violation was a fault contributing to the collision.

[Followed in Brush v. The Plainfield, Case No. 2,058.]

3. That, both vessels being in fault, the damages must be apportioned.

[In admiralty. Libel by Baron de Livremento against the ferry-boat Baltic for collision. Decree for libellant.]

G. A. Forster, for libellant.

B. D. Silliman, for claimants.

BLATCHFORD, District Judge. This is a libel for a collision, filed by Baron de Livremento, the owner of the Brazilian brig Palma against the steam ferry-boat Baltic. The collision happened on the morning of the 14th of December, 1863, a few minutes after a quarter past six o'clock. The brig was lying at anchor in the East river, near the ferry-boat's slip, at the foot of Atlantic street, in Brooklyn. The ferry-boat plied regularly from the foot of Whitehall street, New York, to her slip at Brooklyn. She had been running on the morning in question since five o'clock, having left Brooklyn at that hour. The trip from one side to the other usually occupied six or seven minutes. She left Brooklyn again at half past five o'clock, and again at six o'clock. She left New York at a quarter past five o'clock, at a quarter before six o'clock, and at a quarter past six o'clock. The collision happened on the last-named trip. She had, therefore, made five trips on that morning before the trip on which the collision happened. On each of those trips she had passed the brig in safety. At the time of the collision, the tide was flood, and the Palma was heading to the southward and westward. There was a very thick and heavy fog at the time, it having been foggy since the previous afternoon, and very thick since before five o'clock. The Palma had anchored where she was on the previous afternoon, and had not shifted her position at all from the time she anchored, except as she swung with the changes of the tide. The ferry-boat struck the Palma, the starboard bow of the ferry-boat coming in contact with the starboard quarter of the Palma, and causing considerable damage. The pilot of the ferry-boat knew that the Palma was anchored there, and had seen her there at anchor on the previous afternoon. On the morning in question he had passed, on his trips, sometimes ahead of her, and sometimes astern of her, as she lay in the tide, and had made her light. On the five previous trips the tide was ebb, and the Palma headed to the north. On the collision trip, the tide was flood, and the Palma headed the other way. The Palma had a light in her rigging during the five trips of the ferry-boat, on that morning, prior to the trip on which the collision took place. This light the ferry-boat had looked for and made, and was guided by, on those five trips. Whether the light on the Palma continued to burn on the trip when the ferry-boat struck her, is disputed on the evidence. The ferry-boat, having left New York on such trip, slowed her engine down to what is called half speed, by shutting off, soon after leaving her slip on the New York side, and kept blowing her steam whistle every few seconds. She was looking for the brig. Not seeing her, she stopped her engine, and afterwards started ahead again, and, as soon as she got way on, shut off to half speed, and ran so till she sighted the brig, at a distance of not over twenty yards off. The engine of the ferry-boat was then stopped and reversed as quick-

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ly as possible, and her helm was starboarded, so as to throw her bow up the river with the flood tide. This was a proper manoeuvre, and caused the blow to be a glancing one, and comparatively light. The evidence is, that the ferry-boat, while running shut off, could stop her headway entirely in thirty yards, and that, if she had sighted the brig at a greater distance off than thirty yards, she would not have hit her.

It is impossible not to hold, on these facts, that the ferry-boat was in fault in going at too great speed in the fog, and that such fault contributed to the collision. Although the brig may have been in fault in anchoring where she was, and in not showing a light at the time of the collision, still such fault of the brig, although it partly led to the collision, cannot excuse the fault of the ferry-boat in not running at a sufficiently moderate speed in the fog to avoid the brig. She knew the position of the brig, and, although the brig had been anchored there since the previous afternoon, no notice to the brig to move her position is proved, and the ferry-boat seems to have been content to leave her there and to take the risk of hitting her, although it had been foggy from soon after she anchored, the fog increasing to the time of the collision. Having taken that risk, one element of it was, that the light on the brig, which was exhibited on the five trips, might cease to burn on the sixth. This view proceeds on the assumption that the brig did not have a light. Whether she did or not, I do not deem it necessary to find, for I am satisfied, on the evidence, that the brig was lying in a forbidden place. She was violating the ordinance of the city of New York (section 14, art. 2, c. 26, p. 291, Rev. Ord. 1859) which provides, that no vessel shall lie at anchor in the East river within the distance of sixty yards from a direct line between the landing places of either of the public ferries across the river. This ordinance was binding on the brig, and her violation of it was a fault. The Bedford, [Case No. 1,216;] The James Gray v. The John Fraser, 21 How. [62 U. S.] 187–189. Such violation contributed to the collision.

This case is in all its material features substantially like the case of The Bedford. There must be a decree apportioning equally between the two vessels the damages caused to the libellant by the collision, such damages to be ascertained by a reference.

Case No. 823.

The BALTIC.

[2 Ben. 452.][1]

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

COLLISION AT PIER—INEVITABLE ACCIDENT—BURDEN OF PROOF—APPORTIONMENT.

1. Where a vessel in motion comes in collision with a vessel at anchor, the burden of proof is on the former, to show that the latter was to blame, or that the collision was inevitable.

[Cited in The James M. Thompson, 12 Fed. 194.]

2. Inevitable accident, as respects a colliding vessel, means that such vessel has endeavored, by every means in her power, with due care and caution, and a proper display of nautical skill, to prevent the collision.

[Cited in The John Tucker, Case No. 7,431; The Delaware, 12 Fed. 573; The Mary Powell, 36 Fed. 599.]

3. Where a vessel was lying at the end of a pier which formed one side of a ferry slip, with her stern projecting six or eight feet into the slip, and a ferry-boat coming into the slip was carried by the tide against such vessel: *Held*, that the collision was not the result of an inevitable accident, as the ferry-boat might have gone further away from the pier; that, as the ferry-boat chose to attempt to enter the slip, with the other vessel in the position in which she was, she must take the consequences of the contingency to which she exposed herself.

4. That the other vessel was also in fault, in lying with her stern projecting across the entrance to the ferry slip.

[Cited in The Canima, 17 Fed. 272; The Margaret J. Sanford, 30 Fed. 716. Distinguished in Shields v. Mayor, etc., 18 Fed. 749.]

5. That the damages must be apportioned.

[Cited in The Mary Powell, 36 Fed. 600.]

In admiralty. This was a libel for a collision, which occurred on the 2d of October, 1865, about seven o'clock, A. M., between the steam tug Pope Catlin and the steam ferry-boat Baltic. [Interlocutory decree for libellant. The libellant's exceptions to the commissioner's report were afterward overruled in The Baltic, Case No. 824.]

The Baltic was a ferry-boat plying regularly across the East river, at the city of New York, from a slip at the foot of Hamilton avenue, in the city of Brooklyn, to a slip at the foot of Whitehall street, in the city of New York. The collision occurred on a trip of the ferry-boat from Brooklyn to New York. The Pope Catlin was lying with her bow to the westward, motionless, fastened outside of a small schooner, which was lying with her bow to the westward, fastened at the south end of pier No. 1, East river, which was the next pier westward of the ferry slip on the New York side. The Pope Catlin had just towed the schooner to that place from Brooklyn. The ferry slip had in it two berths for ferry-boats to lie side by side, with a structure of fenders between the two berths, such structure being much shorter than the jaws of the whole slip to the eastward and westward. The tide, at the time, was running strongly ebb, or to the westward, along the piers and the mouth of the slip. Out in the river, it was high water, or perhaps a little flood. The proper navigation of the ferry-boat, with such a tide, was to trend to the eastward, and sag to the westward with the ebb tide, while checking her headway, so as to enter that one of the two berths which was the more westerly, and which was the one for which she was des-

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tined. In going in, the port side of the ferry-boat struck the port side of the Pope Catlin, at a point about ten or eleven feet forward of the stern-post of the Pope Catlin, and caused considerable damage to her, by tearing up her deck, and otherwise. The principal part of the damage was shown to have been done by the port wheel of the ferry-boat (she being a side-wheel steamer), in its reverse motion, coming in contact with the tug, while the engine of the ferry-boat was working backward. The defence set up by the ferry-boat in her answer was, that the stern of the Pope Catlin extended some twelve feet beyond the easterly end of the pier at which she was lying, and the same distance across the entrance to the ferry slip, and in the direct line and track of the ferry; that the ferry-boat entered her slip slowly and carefully, with her engine reversed, but was carried by the tide against the tug, and was unable to prevent the collision; and that the collision was solely due to the negligence of the tug, in thus lying across the entrance to the slip.

W. J. Haskett, for libellants.
B. D. Silliman, for claimants.

BLATCHFORD, District Judge. Where a vessel in motion comes into collision with a vessel which is motionless, the burden of proof lies on the vessel so coming into collision, to show that the collision was inevitable, or that the motionless vessel was to blame. The Percival Forster, Lown. Col. 58. In the present case it is claimed, on the part of the ferry-boat, that the force which swept her against the tug was a vis major, and that, therefore, the collision was, so far as the ferry-boat was concerned, the result of inevitable accident. The ferry-boat must be held liable for the damages caused by her, while in motion, to the motionless tug, unless she shows affirmatively that her being carried against the tug was the result of inevitable accident, or of a vis major, which human care and precaution, and a proper display of nautical skill, could not have prevented. The Louisiana, 3 Wall. [70 U. S.] 164, 173; The Granite State, Id. 310, 313, 314. Inevitable accident, as respects a colliding vessel, means that such vessel has endeavored, by every means in her power, with due care and caution, and a proper display of nautical skill, to prevent the collision. The Lochlibo, 3 W. Rob. Adm. 310, 318. Within these rules, it is fully established, on the evidence in this case, that, so far as the ferry-boat is concerned, the collision was not the result of inevitable accident, or of a vis major. The evidence shows, and indeed it was admitted by the pilot of the ferry-boat, in his testimony, that, as she approached her slip, another ferry-boat was about the length of the Baltic ahead of the Baltic, bound for the easternmost berth in the slip; that the Baltic did not stop for such other ferry-boat, and that, if the Baltic had been alone, and such other ferry-boat had not been thus ahead of her, she would have been able to go nearer to the pier at the easterly side of the slip. The effect of this would have been, that the farther she got to the eastward, the farther would she have kept to the eastward, and away from the tug, when sagged to the westward by the ebb tide. I am satisfied, from the evidence, that if the ferry-boat had exercised due care, and had kept as far to the eastward as she ought, and as she could but for her crowding too closely upon the ferry-boat ahead of her, she would not have struck the tug. Even if the tug projected with her stern across the entrance to the slip, the ferry-boat, having chosen to attempt to enter her slip with the tug in that position, and under circumstances which made it difficult to escape a collision, must, a collision having taken place, bear the consequences of the contingency to which she exposed herself. The Hope, 2 W. Rob. Adm. 8, 10. If the tug had been wrongfully lying wholly across the entrance to the slip, that would not have exempted the ferry-boat from responsibility for colliding with her in attempting to enter the slip. There was, therefore, fault on the part of the ferry-boat, leading to the collision.

But there was also fault on the part of the tug. The weight of the evidence is, that she was lying with her stern projecting partly across the entrance to the ferry slip, and where she had no right to lie. The character of the blow she received, the place where she was struck, and, indeed, the fact that there was any collision at all, all go to show that she must have been lying with her stern projecting to the eastward of the east end of Pier No. 1.

There must be a decree apportioning equally between the two vessels the damages sustained by the tug by the collision, with a reference to a commissioner to ascertain and report such damages.

Case No. 824.

The BALTIC.

[3 Ben. 195.][1]

District Court, S. D. New York. April, 1869.

COLLISION—DAMAGES—EXCEPTIONS—INTEREST ON REPAIRS—DEMURRAGE—COSTS—APPORTIONMENT.

1. In estimating the damages caused by a collision, interest at six per cent. on the sum paid for the repairs of the injured vessel, is to be added.

2. To recover demurrage, the party must show, by evidence, that he sustained loss of service of his vessel, and that he sustained damage by such loss.

[Cited in Johanssen v. The Eloina, 4 Fed. 574.]

[See Barrett v. Williamson, Case No. 1,051; same case, on appeal, 13 How. (54 U. S.)

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101; Cannon v. The Potomac, Case No. 2,386; same case, on appeal, 105 U. S. 630; The Rhode Island, Case No. 11,743; The Stromless, Id. 13,540; The Santee, Id. 12,329; The Thomas Kiley, Id. 13,924.]

3. Where, in a suit brought to recover damages for collision, the court held both vessels in fault, and that the damages must be apportioned and ordered a reference to ascertain the damages, and the commissioner reported an amount as "due to the libellant:" *Held*, that the commissioner should have reported that sum as "the damages sustained by the libellant by reason of the collision," and that the report should be amended accordingly.

4. Where both parties excepted to the commissioner's report, and the libellant's exceptions were all overruled, and the claimant's principal exception was allowed, and it appeared that the evidence before the commissioner related almost wholly to items which were disallowed: *Held*, that, the costs of the reference and of the exceptions should be allowed to the claimant, but the costs of the cause to and including the interlocutory decree should be allowed to the libellant.

[Cited in Vanderbilt v. Reynolds, Case No. 16,839.]

5. That, if the difference between the two bills of costs was in favor of the libellant, it should be added to his recovery, but, if in favor of the claimant, it should be deducted from the recovery, or, if larger than the recovery, the latter should be deducted, and the claimant have a decree for the remainder.

[6. Cited in The Hercules, 20 Fed. 205, and The Mary Patten, Case No. 9,223, to the point that where both vessels are at fault, and only one injured, one may recover half her damage and full costs.]

In admiralty.

Weeks and Forster, for libellant.

Benjamin D. Silliman, for claimants.

BLATCHFORD, District Judge. This, a case of collision, in which a decree was made to the effect that the collision was caused by the negligence of both vessels, and that the damages should be equally apportioned. A reference was ordered to ascertain the damages and the question of costs was reserved. [The Baltic, Case No. 823.] The commissioner reports as due to the libellant on account of the matters mentioned in the pleadings, $959.13. No reference to report the amount so due to the libellant was made to the commissioner. What the commissioner ought to have reported, and what, from the evidence, he manifestly intended to report, was, that the $959.13 was the damages sustained by the libellant by reason of the collision. The report must be amended so as to conform to the fact and to the order of reference. I shall treat it, however, as being a report that the damages sustained by the libellant, by reason of the collision, amount to $959.13. Both parties have excepted to the report. The $959.13 is made up of three items: (1) Repairs to the libellant's vessel, $392.22; (2) Ten days' demurrage, at $45 per day, $450; (3) Interest on the $392.22, from December 26th, 1863, to the date of the report, at the rate of six per cent. per annum. The libellant has filed seven exceptions to the report, claiming: (1) That the interest on the $392.22 should be at the rate of seven per cent. per annum; (2) That the libellant ought to have been allowed interest at the rate of seven per cent. per annum on the $450 demurrage; (3) That the libellant ought to have been allowed $1,000 for permanent injury sustained by his vessel by the collision; (4) That he ought to have been allowed interest on such permanent injury. The fifth, sixth, and seventh exceptions of the libellant are to the exclusion by the commissioner of testimony offered by the libellant on the reference. The claimants have put in two exceptions to the report, claiming: (1) That no interest should have been allowed on the amount of the cost of repairs; (2) That no demurrage should have been allowed to the libellant.

There is no dispute as to the propriety of the allowance of the $392.22. Interest on that amount, it being the amount actually paid for repairs put on the libellant's vessel, as a consequence of the collision, forms a proper item in the damages; and the proper rate is six per cent. and not seven per cent. The Ocean Queen, [Case No. 10,410.]

As to the demurrage, I think the commissioner erred in allowing it. No proper case for its allowance is made out by the evidence, within the ruling in Williamson v. Barrett, 13 How. [54 U. S.] 101, 110, 111. The libellant wholly fails to show, by evidence, that he sustained any loss of service of his vessel, during the ten days while she was undergoing repairs, or that he sustained any damage by any such loss.

The claim for an allowance for permanent injury was properly rejected by the commissioner. The evidence on the part of the libellant on that subject is altogether vague and inconclusive, and the weight of it is, that the vessed was in as good condition after the repairs were made as she was before the collision.

I see no error on the part of the commissioner in excluding evidence.

All the exceptions on the part of the libellant are overruled. The first exception on the part of the claimants is disallowed and the second is allowed. The report of the commissioner must stand as a report made December 16th, 1868, reporting the amount, at that date, of the damages sustained by the libellant, by reason of the collision, at $509.13. This amount, with interest at the rate of six per cent. per annum, to the date of the decree to be entered, will be apportioned equally between the libellant and the claimants' vessel.

As to costs. I give to the libellant his costs in the cause, to and including the interlocutory decree of May 2d, 1868, and the costs of entering the final decree. The costs of the reference under the interlocutory decree, and the costs of the exceptions and of the hearing thereon, I award to the claimants, as the testimony before the commissioner re-

lates almost wholly to the items of demurrage and permanent injury, both of which are disallowed, and as the libellant's exceptions are all of them overruled, and the claimants' principal exception is allowed. If there is any balance in favor of the libellant, between the two bills of costs, it will be added to his recovery. If there is any balance in favor of the claimants, between the two bills of costs, it will be deducted from such recovery, if less than such recovery; and, if larger than such recovery, such recovery will be deducted from it, and the claimants will have a decree for the remainder.

Case No. 825.

The BALTIC.

[10 Ben. 631.][1]

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

COLLISION—DAMAGES—AGREEMENT TO REPAIR—DEMURRAGE.

1. A bark, having been injured by a collision with a steamer, arrived in New York, where the agents of the steamer repaired the damages. The owners of the bark then filed a libel to recover demurrage for the detention of the bark while being repaired. The owners of the steamer set up that it was agreed that the repairing of the damages should be in full satisfaction of the claim. They also claimed that they could have hurried the repairs so as to have finished them in much less time, if the master of the bark had informed them of an offer of a charter which it appeared he had and which he refused because he was not certain that his vessel would be ready in time to begin to load under it: *Held*, that the burden was on the steamer to establish the agreement that the making the repairs should be in full satisfaction for all damages, and that on the evidence she had not established it.

2. That the master of the bark was not bound to have communicated to the agents of the steamer the offer of a charter which he had had; that his refusal to accept it was in good faith, and that the libellants were entitled to recover demurrage for the detention of the bark.

[In admiralty. Libel against the steamer Baltic to recover damages for a collision, with demurrage. Decree for libellant.]

Thos. E. Stillman, for libellant.

E. P. Wheeler, for claimant.

CHOATE, District Judge. This is a libel to recover damages for a collision which occurred between the Norwegian bark Plutarch, of which this libellant was master and part-owner, and the steamer Baltic, on the 2d day of June, 1879, while the bark was bound on a voyage from Bordeaux to New York in ballast. The libel avers that "the bark continued on her voyage, and, on or about the 19th day of June, arrived in the port of New York; that the owners of the said steamer then assumed and superintended the repairs to the bark necessary to fit her for sea, and agreed to pay therefor; that the said bark, pending the completion of said repairs, was unfit for sea, and her owners lost the use and employment of her and were subjected to considerable expense for the maintenance and wages of the crew during the said period and for wharfage and other expenses." No question is made as to the responsibility of the Baltic for the collision, and it was shown that the repairs were paid for by her owners. The only question is whether she is liable for the detention of the vessel during her repairs. On this point the answer avers, (2d), "immediately on the arrival of the said bark in the port of New York at the termination of the voyage mentioned, it was agreed between the libellant and this claimant that this claimant should make, at its own expense, all the repairs necessary to restore the said bark to as good a condition as she was in before the said collision, and that the said libellant should allow the said claimant to make the same, and that the making by the said claimant at its own expense of the said repairs should be in full satisfaction and discharge of the said supposed cause of action alleged in the said libel and of all damages sustained by the libellant or by the owners of the said bark by reason thereof." The answer then avers performance of this agreement on claimant's part. It also avers, (3d), "immediately after the arrival of the said bark in this port, as aforesaid, this claimant offered to prosecute the same (i. e., the repairs), day and night, and this claimant offered that its said workmen should accompany said bark if it should go to any place in search of cargo, and it could have completed the said repairs in the space of three days, but the libellant then and there informed the claimant that the rates of freight were then so low that he preferred not to accept the same, nor to charter the said bark at that time, but to wait until such rates of freight should rise, and that the said claimant should and might make the said repairs at its own convenience; that the claimant, relying on the said statement so made, used only ordinary and reasonable diligence in and about repairing the said bark, and did not use extraordinary diligence in and about the same, as otherwise it would and could have done, and said vessel could easily have been taken from the pier at which she was lying to any other pier or port and have taken on cargo while said repairs were going on."

The proof is that before the arrival of the bark the claimant's agent sent a letter to be delivered to her master by the pilot, requesting him, immediately on his arrival, to call at the office of the respondent company, the owners of the Baltic, and that the claimant had also instructed a competent mechanic to be ready to have her repaired on her arrival. She arrived on Thursday the 19th of June, and on Saturday, the 21st, this libellant, her master, and his consignee, Mr.

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Boyesen, called at the office of the claimant company and there met Mr. Cortis, the managing agent of the company. The agreement set up in the second article of the answer that the claimant should repair the bark and that this should be in full satisfaction of all claim for damages by reason of the collision, was made orally during that conversation, if at all. There are three witnesses to what took place at that time, Mr. Cortis, Mr. Boyesen and the libellant. It is insisted on behalf of the claimant that the fair result of the testimony, considered in the light of the surrounding circumstances, is that the parties reached an understanding to the effect set forth as an agreement in the second article in the answer, although it is conceded that nothing was said in terms to the effect there set forth as to the repairs being in full satisfaction. This understanding, it is said, is to be properly inferred from the conversation as related by Mr. Cortis. His account is that, when they came in, he addressed the captain and said, "Captain, you had a slight collision on the Banks, I believe," to which the captain answered that he had; that he then said to the captain that it was their steamer, the Baltic, and asked the captain what was the extent of the damage, and the captain replied $800 or $900, he thought; that the captain said that the steamer had been handled in a masterly manner and was commanded by a good man; that he then told the captain that he would send a man on board and have the damages repaired to his satisfaction; that, as the damages were of a nature that would not prevent loading the vessel, the carpenters could go with her wherever he wanted to go to load, so that there would be no detention; that the captain then said he was satisfied, or all right, or something to that effect, and bade him good morning and left.

By the testimony of the captain and of Mr. Boyesen it appeared that when the subject was introduced and Mr. Cortis admitted that it was the Baltic which collided with the Plutarch, Mr. Cortis did not admit that it was the fault of the Baltic, but said in effect, "I don't know, captain, who is in fault in this business, but any way I will repair it for you." To which the captain said "all right" or "thank you." The testimony of Mr. Boyesen and of the captain is inconsistent with there having been anything said about the carpenters accompanying the ship so that there need be no detention, from which remark especially the inference is drawn of a waiver of all claim for demurrage and the acceptance of the agreement to repair as a full satisfaction. The witnesses are all of unquestioned character and intelligence. Upon the whole testimony I am not satisfied that any such remark was made or that the captain or Mr. Boyesen came away from the interview with any understanding on their part that what was offered to be done by the company was offered in full satisfaction, or with any condition that the captain should waive any claim he might have for demurrage, or that anything was said which should have led them to believe that that was Mr. Cortis's meaning or understanding. The defence set up is the making of a special agreement, as to which the burden of proof is on the claimant, and that burden he has not sustained. Nor is such an agreement to be inferred from the circumstances under which the offer to repair was made. Very likely Mr. Cortis had the idea in his own mind that he would avoid all claim for demurrage by promptly offering to repair the bark, and if no detention had in fact occurred, the course taken by him, which is certainly to be commended, would have had this effect. That he now thinks the subject was mentioned does not admit of any doubt, but the minds of the parties did not meet, so as to form a contract binding on them.

The evidence as to the detention is that before the claimant had commenced the repairs, the libellant, who came to this port with the intention of carrying a cargo of petroleum to Europe, was offered a charter by a broker, and that he refused it because he was not certain when the vessel would be repaired, and by the charter-party he would be obliged to agree to be ready for sea by the 16th of July, and to begin to load about ten days before that. He did not communicate this offer or the rejection of it to the claimant. No other charter offered till the 8th of July, when the repairs being nearly finished, he accepted a charter on the same terms on which the former charter had been offered. The repairs were commenced on the 24th of June and finished on the 11th of July. It was shown that by working night and day they could have been finished in eight working days, or by the 4th of July. The claimant did not offer to have the repairs go on night and day, and for a night's work the wages of the workmen would have been double what they were for a day's work. There was no proof of any special agreement such as is set up in the third article of the libel. It was shown that the vessel could have been safely moved while the repairs were going on and that cargo could in fact have been put on board of her by the 6th of July: that is, the repairs would not have prevented the commencement of her loading on that day and its prosecution afterwards.

It is insisted by the learned counsel for the claimant that the libellant was bound to communicate to the claimant the offer of a charter made to him; that if he had done so the claimant might have given orders for prosecuting the repairs more promptly or might have guaranteed that the vessel would be ready in time to receive her cargo under it; that as the libellant did not communicate this fact he is estopped to claim demurrage. This seems hardly to be the defence intended by the answer, but assuming that it is so, I think there was no duty to communicate the

fact. The libellant could not then know whether even with great diligence he could safely agree to be ready for sea by the 16th of July. Although he knew in a general way the nature of the injury to the vessel, yet until the repairs were commenced it was a matter of uncertainty how long a time they would take. The claimant had proposed what should be done, and if it desired to know of any offers made to the libellant for a charter it could easily have required the information, but in the absence of such request the libellant had no reason to believe that the claimant would make any change in the plans in consequence of this offer. I think his rejection of the offer was made in good faith and not because he was waiting for freights to rise. I see no duty on his part to communicate the offer, under the circumstances of this case. It is also claimed that he informed the claimant that he was waiting for better freights and that the claimant was thereby led not to repair as promptly as it might. It is true that in the law of estoppel in pais "when an act produces conduct from which flows injury, it cannot matter whether that conduct be affirmative or negative, active or quiescent." Continental Nat. Bank v. National Bank of Com., 50 N. Y. 586. There is some evidence that the captain, in conversation with the men employed by the claimant to do the work, said something about his waiting for freights to rise. The captain having been examined before trial, has had no opportunity to testify since this evidence was taken. But I do not think these men stood in such a relation to the matter that what he said to them was any notice to the claimant, nor did the claimant act upon it. There is, therefore, no estoppel growing out of it. And so far as this testimony is relied on as showing that the captain rejected the first offer, not because he thought he could not comply with the terms of the proposed charter, but because he thought freights would improve, I think it is entitled to very little weight and is clearly overborne by the other testimony in the case.

The libellant is entitled to a decree for sixteen days' demurrage, and costs, with a reference to compute the amount, unless the amount is agreed to.

Case No. 826.

The BALTIC.

[1 Blatchf. & H. 149.][1]

District Court, S. D. New York. Aug., 1830.

ADMIRALTY—SURETY FOR COSTS — PROCEDURE BY PETITION AND BY MOTION

1. The regular method of proceeding against a surety in a stipulation for costs in a suit in admiralty, is by petition, after notice to the surety. In such a case, the decree may be final and peremptory.

2. Upon a proceeding by motion, after a personal demand of the costs from the surety, a conditional decree only will be awarded.

In admiralty. This was a motion for a decree of condemnation against the surety in a stipulation in behalf of the libellant, in a suit in admiralty in rem, to pay costs, &c. [Granted.]

Notice of the decree dismissing the libel with costs, and of the return of the execution against the principal unsatisfied, was served on the surety, together with a taxed bill of the costs, and payment of the costs was regularly demanded.

BETTS, District Judge. The jurisdiction of the court over the parties and the subject matter, in bail stipulations, is fully established, and is exercised by awarding judgment and execution in a summary manner. The Alligator, [Case No. 248.] This power is necessarily incident to the court, in consequence of its jurisdiction over the principal cause.

It would be the more convenient and fit mode of practice, to pursue, in these cases, the course of the court in summary proceedings. The application to the court should be upon petition, a copy of which ought to be served on the party to be affected, and then the decree of the court might be peremptory. The present procedure, by motion, after a personal demand of costs from the surety, is sufficient to give the court cognizance of the matter, but, instead of a final, only a conditional decree will be awarded in this state of the case. The surety should have been directly apprized of the proceeding, and have had the opportunity to acquit himself of the obligation without incurring further costs or subjecting himself to be attached for contempt of court.

A decree must be entered, that the surety pay the taxed costs in the principal cause within ten days after notice of this order, or that an execution issue against him for that amount and also for the costs of these proceedings.

BALTIC, The, (NEW YORK MAIL STEAMSHIP CO. v.) See Case No. 10,213.

BALTIC, The, (UNITED STATES v.) See Case No. 821.

BALTIMORE, (BARNEY v.) See Case No. 1,029.

BALTIMORE v. CONNELLSVILLE & S. P. R. CO. See Case No. 827.

BALTIMORE, (DUFFY v.) See Case No. 4,118.

BALTIMORE, (HUGHES v.) See Case No. 6,844.

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

Case No. 827.

BALTIMORE v. PITTSBURGH & C. R. CO.

[1 Abb. (U. S.) 9;[1] 13 Pittsb. Leg. J. 576; 4 Amer. Law. Reg. (N. S.) 750; 6 Phila. 190; 3 Pittsb. Rep. 20; 23 Leg. Int. 308.]

Circuit Court, W. D. Pennsylvania. July Term, 1865.

CONSTITUTIONAL LAW — REVOCATION OF CHARTER —PRELIMINARY INQUIRY.

1. Where a charter of a corporation reserves to the legislature an unconditional power to alter or repeal the act, the corporation cannot complain that a subsequent repealing act is passed without adequate reasons. The legislature may repeal the charter arbitrarily.

2. But where a charter provides that "if the corporation shall at any time misuse or abuse" its franchises, the legislature may revoke the grant, the power of revocation is thereby made conditional upon the fact of some misuse or abuse; and this fact must be proved upon some inquiry giving the corporation an opportunity to be heard in defense, before the charter can be revoked.

3. It seems, that a proper mode for the legislature to institute the necessary preliminary inquiry into the fact of misuse, would be to pass a resolution directing that the attorney-general institute the proper proceeding in the courts, to ascertain the fact; and that if, in such proceeding, the charge be found true, the charter be revoked.

[In equity. Bill by the mayor, etc., of the city of Baltimore, to restrain the Pittsburgh & Connellsville Railroad Company from accepting an act passed by the Pennsylvania legislature in curtailment of respondent's privileges under its charter. Heard on demurrer to the bill. Demurrer overruled.]

This case presented only the question of the constitutionality of an act of the legislature of Pennsylvania, purporting to revoke the defendants' franchises. The original charter of the corporation conferred certain valuable railway franchises upon the company, and contained a reservation of the power to repeal, in the following terms: "If the said company shall at any time misuse or abuse any of the privileges herein granted, the legislature may resume all and singular the rights and privileges hereby granted to such corporation." The city of Baltimore advanced money to the corporation, which was expended in constructing the road contemplated by the charter. Subsequently the legislature, by an act passed in 1864, [August 19, (P. L. p. 1039,)] revoked and resumed the privileges granted by the original charter, so far as to restrict the company from building a part of the road which, under the original grant, they might have constructed. The city authorities, apprehending that this enactment, if accepted by the corporation, would diminish the security for the repayment of the advances which the city had made, filed their bill to restrain the corporation from accepting the act. And the corporation demurred to the bill.

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

[Before GRIER, Circuit Justice, and McCANDLESS, District Judge.]

GRIER, Circuit Justice. Is this repealing act repugnant to the constitution of the United States, on the ground that it impairs the obligation of the contract between the state and the company?

The objections made on the argument to the form of the pleadings and the right of the complainants to have the remedy sought in the bill, will be found to have been overruled in a similar case by the supreme court. We refer to the case of Dodge v. Woolsey, 18 How. [59 U. S.] 331. In that case, the complainant was a stockholder in the corporation whose interests were likely to be injuriously affected by the state legislation, if it should be carried into effect. In this case, the complainant is a creditor, who, on the faith of legislative acts granting certain franchises and privileges to the Pittsburgh and Connellsville Railroad Company, has advanced large sums of money which have been expended in constructing its road. If the corporation submits to this act of the legislature, divesting them of a most valuable part of their franchises, the security and rights of the complainant will be materially injured.

The bill is in the nature of a quia timet, and the complainant has a right to the remedy sought, if the court shall be of the opinion that the act of 1864 impairs the obligation of the original contract, or act of incorporation granted to the Pittsburgh and Connellsville Railroad Company. The only question, then, is as to the validity of this act.

That the act repealing the franchises of the corporation, or a material part thereof, and transferring its franchises and property to another corporation without its consent, impairs the obligation of the original contract, is not, and cannot be denied. Nor is it denied that an act granting corporate privileges to a body of men, who have proceeded on the faith of it to subscribe stock and borrow and expend money in constructing a valuable public improvement, is a contract; and that it is not within the power of either party to the contract to repudiate or annul it without the consent of the other.

The state claims no sovereign power to repudiate its contracts or defraud its citizens, and the constitution delegates no such power to the legislature. If, in the act of incorporation, the legislature retains the absolute and unconditional power of the revocation for any or no reasons; if it is so written in the bond, the party accepting a franchise on such conditions cannot complain if it be arbitrarily revoked. Or if this contract is that the legislature may repeal the act whenever, in its opinion, the corporation has misused or abused its privileges, then the contract constitutes the legislature the arbiter and judge of the existence of that fact. But the case before us comes within neither category. The act does not give an unconditional right

to the legislature to repudiate its contract, nor is the legislature constituted the tribunal to adjudge the question of fact as to the misuse or abuse.

Moreover, the case before us admits that the condition of facts upon which the legislature is authorized to repeal the act does not exist. It admits that the corporation has neither "misused nor abused its privileges."

A charter may be vacated by the decree of a judicial tribunal in a proper proceeding taken for that purpose, without any such reservation in the act of incorporation. Then both parties are heard, and a verdict of a jury on the facts can be obtained; which concludes the question. But the legislature possesses no judicial authority under the constitution, and has no established course of proceedings in the exercise of such power. The party who is injured by its action is not heard. The reasons usually alleged in the preamble to such acts are the mere suggestions of some interested party, seeking to speculate at the expense of others. Professional solicitors, who infest the lobby, are ever ready, for a sufficient consideration, to impose on the good nature of honest but often careless legislators, by the suggestion of any necessary falsehood. If any one feels curious as to the methods used by agents of corporations to obtain such legislative acts as may be desirable, he will find them fully exposed in the opinion of the supreme court delivered in the case of Marshall v. Baltimore & O. R. Co., 16 How. [57 U. S.] 314, 333.

We do not intend even to insinuate that any such secret service by "skillful and unscrupulous" agents, stimulated "to active partisanship by the strong lure of high profits" to use most "efficient means" to get the vote of the "careless" mass of legislators, has been used in this case. But we do say that the recitals in the preamble to this act exhibit a labored attempt to justify a more than doubtful exercise of power by an array of reasons which, even if true in fact, might be demurred to in law as insufficient.

The act does not contemplate the exercise of the right of domain by which the property of individuals or corporations may be taken for some public use, on making ample compensation. Its object is to transfer the franchises and property of one corporation, anxious by every means in its power to complete a valuable public improvement, to another, whose interest is not to complete the road, and which is not required to do so at any time in this or the next century.

Where, in a case like the present, the legislature is asked to take the property of one corporation and give it up to another, on the ground that one has abused or misused its privileges, the just and proper mode would be to pass a resolution ordering the attorney-general to institute the proper legal proceedings to ascertain the fact of "misuse or abuse." If such issue be found true, then that the charter be revoked or resumed. We do not say that, without such judicial proceeding ascertaining the existence of the condition in which the right of appeal is reserved, the act is absolutely void. But we do say that in all such cases the party injured, if he denies the existence of such "misuse or abuse," has a right to be heard, and to have that question tried before he shall surrender his property or his franchise.

We do not think it necessary to notice the numerous and conflicting cases which have been brought to our notice by the learned counsel. In the case of Erie & N. E. R. v. Casey, 26 Pa. St. 287, 1 Grant, Cas. 274, the court found, after a full hearing of the parties, that the fact of "misuse or abuse" did exist, and therefore the act was not void. It cannot, therefore, be any precedent for a case which admits that such facts do not exist. The principles of law, so far as they affect this case, are very clearly and tersely stated by Chief Justice Lewis, in his opinion to be found in 1 Grant, Cas. 274, with a review of the cases and a proper appreciation of that from Iowa.

The sum of the whole matter is this:

1. The complainant has shown a proper case for the interference of the court in his favor.

2. The act complained of is unconstitutional and void under the admissions of the case.

3. The complainant is entitled to the decree of the court on the pleadings, as they stand.

4. The defendants may have leave to withdraw their demurrer and answer over; and if they shall so request, an issue will be ordered to try whether the Pittsburgh and Connellsville Railroad Company have misused or abused their charter.

McCANDLESS, District Judge, concurred.

BALTIMORE, (WHEELING v.) See Case No. 17,502.

BALTIMORE & O. R. CO., (CULLY v.) See Case No. 3,466.

BALTIMORE & O. R. CO., (EGBERT v.) See Case No. 4,305.

BALTIMORE & O. R. CO., (KIRKPATRICK v.) See Case No. 7,847.

BALTIMORE & O. R. CO., (KNIGHT v.) See Case No. 7,882.

BALTIMORE & O. R. CO., (MARSHALL v.) See Case No. 9,124.

BALTIMORE & O. R. CO., (MILLER v.) See Cases Nos. 9,560 and 9,561.

BALTIMORE & O. R. CO. v. SUPERVISORS. See Case No. 829.

BALTIMORE & O. R. CO., (UNITED STATES v.) See Cases Nos. 14,509–14,511.

BALTIMORE & O. R. CO. v. VAN NESS. See Case No. 830.

BALTIMORE & P. R. CO., (STATE OF MARYLAND v.) See Case No. 9,219.

BALTIMORE CITY PASS. R. CO., (FIELD v.) See Case No. 4,763.

BALTIMORE CITY PASS. R. CO., (THOMPSON v.) See Case No. 13,941.

Case No. 828.

In re BALTIMORE COUNTY DAIRY ASS'N.

[2 Hughes, (1877,) 250;[1] 11 N. B. R. 253.]

District Court, D. Maryland.

BANKRUPTCY—CORPORATION — MOTION BY STOCKHOLDER TO SET ASIDE DECREE—LACHES.

[The correctness of a decree declaring a corporation bankrupt upon its voluntary petition cannot be impeached, after the lapse of a year, by a stockholder who had full knowledge of all the facts.]

[Cited in Re Collateral Loan & Sav. Bank, Case No. 2,997. Followed in Re Jefferson Ins. Co., Id. 7,253.]

[In bankruptcy. In the matter of the Baltimore County Dairy Association. This association was heretofore adjudged bankrupt in this court upon its voluntary petition. Heard on motion by Frank L. Morling to set aside the decree. Denied.]

L. P. D. Newman, for Morling.

Wm. Wirt Robinson, for respondent.

GILES, District Judge. It appears by the papers in this case that the original petition to have the said association adjudged bankrupt, etc., was filed in this court on the 17th of September, 1870, and that the same was referred to the proper register, who, on the 30th of said month, adjudged the said association to be bankrupt. The petition now filed sets forth "the petition of Frank L. Morling, a resident of Hookstown, in Baltimore county, in the state of Maryland, respectfully represents unto your honor, that he was one of the corporators of the Baltimore County Dairy Association, duly incorporated by the general assembly of Maryland, in the year 1866, chapters 123 and 124, named in the above entitled cause, long before the petition was filed to have the same adjudicated a bankrupt; that at the time of filing the same he was a corporator thereof, and ever since has been, and is now a corporator; he owns thirty shares of the capital stock of said association, of the par value of three thousand dollars; that the proceedings in said cause show that one W. F. Fundenburg, professing to act as secretary of said association, caused to be filed a petition in this honorable court praying that said association might be declared and adjudicated a bankrupt upon his petition, as such officer of said association. Your petitioner further shows that he is advised, and verily believes, that the act of said Fundenburg, as secretary, in filing the petition aforesaid, whereby said association was declared and adjudged a bankrupt, was and is wholly illegal and without warrant, under the provisions of 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2d, 1867, [14 Stat. 517,] and a fraud upon the rights of your petitioner, in that Fundenburg was not duly authorized, by a vote of a majority of the corporators of said association, at any legal meeting called for the purpose, to prefer the petition, no such meeting ever having been called for that purpose. Wherefore, your petitioner prays that the petition heretofore filed by said W. F. Fundenburg, in the above-entitled cause, may be dismissed with costs to said petitioner, and for such other and further relief as the nature of the case may require."

The answer of the secretary of said association avers and declares "that he denies all the allegations of the said petition, except as to the fact that the said F. L. Morling is a stockholder in said Baltimore County Dairy Association, of which he knows nothing; and avers and declares that all the provisions of the act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2d, 1867, were fully complied with by said association, in conferring upon your respondent, as its secretary, the authority made necessary by the said act, to prefer the said alleged petition on the 17th day of September, 1870, asking this honorable court to adjudge and declare said association bankrupt; and that said association was duly, legally, and properly so adjudicated by this honorable court, on a date which will appear by the records thereof. That even if the allegations of the said petition were true, which your respondent denies, it is now too late for said petitioner to ask this honorable court to set aside said proceedings, for the reason that said petitioner was fully cognizant of his own knowledge, and by information from others, of the action of said association in the premises, of the preferring of said petition, but made no objection thereto at the time of the filing thereof; nor at any time anterior to the date of the said adjudication, nor subsequently thereto up to the time of the filing of his petition, did he ever appear in this honorable court and show cause why the said association should not be adjudged bankrupt, and the usual proceedings taken on such adjudication."

Before the hearing on this motion the following statement of facts was filed: It is admitted in this case that the petition filed in this cause, on the 17th of September, 1870, by W. F. Fundenburg, was upon the direction of a meeting of the directors of the said Baltimore County Dairy Association, and not upon that of a majority of the stockholders of the said association. And it is further admitted that the petitioner, Morling, had due legal notice of the fact of the said petition, of the adjudication in bankruptcy, of the call for the meeting of creditors to appoint assignees, and of their subsequent appointment and proceedings to collect and set-

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

tle the estate of the said bankrupt. And also that the said petitioner, Morling, was at the time of filing the petition in bankruptcy, and still is, a stockholder, and claims to have been at such time, and now, a creditor of said association.

GILES, District Judge. It appears by the bankrupt papers on file in this court, that on the 17th of September, 1870, the said association was largely insolvent; indeed, this is not denied by the counsel for the petitioner. It also appears that the resolution of the directors of the said association, authorizing their clerk to file the original petition in bankruptcy, was passed by a majority of the directors at a meeting duly and legally called for that purpose. Under this state of facts, this court is now called upon, in a petition filed on the 9th of September, 1871, to set aside the decree in bankruptcy in this case. And this after nearly a year has elapsed since its adjudication, with full knowledge on the part of the petitioner; and when, too, the estate has been partially administered by the assignees. No reason is assigned by the petitioner for his delay in bringing his objections before the court. And while no good could be accomplished by setting aside these proceedings, much harm might acrue to the general creditors by the issuing of attachments by those who may have obtained judgments against the said association. I do not think that any court has ever set aside a judgment or decree under similar circumstances. The old maxim, "Vigilantibus, non dormientibus, leges subservient," will well apply here. In the case In re Lady Bryan Min. Co. [Case No. 7,978,] it does not appear from the report of the case at what time the motion to vacate the order adjudging the company bankrupt was made. I presume it was made shortly after the order was passed, as it was made by a creditor having a lien by attachment, which would have been dissolved if the order had been permitted to stand.

In dismissing this petition, I do not wish to be considered as deciding that the original petition was regular and according to law. The form No. 3, as adopted by the justices of the supreme court, in exercising the power vested in them by the 10th section of the bankrupt act, certainly justifies the inference that they supposed this was a matter of procedure which they had authority to regulate. On the 16th of May, 1867, the supreme court passed the following order: "Ordered, that certain rules and forms of proceedings in bankruptcy have been framed and adopted by the court, in pursuance of the act of congress approved March 2d, 1867, and the same are promulgated as such." Among these, rule 32 reads thus: "The several forms specified in the schedules annexed to these orders for the several purposes therein stated, shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case." And form No. 3, in the schedules annexed in said orders, is in these words:

"Corporation Petition.

"Statement to accompany petition of corporation (in bankruptcy).

"At a meeting of the stockholders (or, of the board of directors or trustees, as the case may be) of the ——— company (or association, or bank, or society), a corporation created by ——— of the state of ———, held at ——— in the county of ———, and state of ———, on this ——— day of ———, A. D. 18—, the condition of the affairs of said corporation having been inquired into, and being ascertained to the satisfaction of said meeting that the said corporation was insolvent, and that its affairs ought to be wound up, it was voted (or resolved) by a majority of the corporators (or stockholders, or directors, or trustees) present at such meeting (which was duly called and notified for the purpose of taking such action upon the subject aforesaid), that ——— be and ——— hereby ——— authorized, empowered, and required to file a petition in the district court of the United States, for the ——— district of ———, within which said corporation has carried on its business, for the purpose of having the same adjudged bankrupt; and that such proceedings be had thereon as are provided by the act of congress, entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2d, 1867. In witness hereof, I have hereunto subscribed my name as president (or other officer or agent) of said corporation, and affixed the {Seal of Corporation.} seal of the same this ——— day of ———, A. D 18—.

"President (or other officer) of said corporation."

And the counsel who framed the original petition in this case, and the register who acted on it, deemed they were strictly complying with the bankrupt law, in the mode and manner marked out by the supreme court.

Whether they did so or not I am not compelled now to decide, as a stockholder with full knowledge of all the facts, who remains silent for nearly a year after the adjudication in bankruptcy, will not be heard to impeach its correctness. The supreme court in the case of Zabriskie v. Cleveland, C. & C. R. Co., 23 How. [64 U. S.] 398, say (quoting approvingly the decisions in Ohio), "the supreme court of Ohio have recognized the obligation of corporators to be prompt and vigilant in the exposure of illegality or abuse in the employment of their corporate powers, and has denied assistance to those who have waited till the evil has been done, and the interest of innocent parties has become involved."

Upon this principle, so clearly enunciated, I dismiss the petition filed to vacate the proceedings in this case; the costs to be paid by the petitioner.

Case No. 829.

BALTIMORE & O. R. CO. v. SUPERVISORS.

Circuit Court, D. West Virginia. June, 1870.

[Cited in County Court v. Baltimore & O. R. Co., 35 Fed. 164, and Baltimore & O. R. Co. v. Ford, Id. 171. Nowhere reported; no written opinion filed.]

Case No. 830.

BALTIMORE & O. R. CO. v. VAN NESS et al.

[4 Cranch, C. C. 595.][1]

Circuit Court, District of Columbia. Nov. Term, 1835.

EMINENT DOMAIN—PROCEDURE—CONSTRUCTION OF STATUTES—AMENDMENTS—MISRECITAL OF DATE OF PRIOR ACT.

1. The time, to extend and construct the Baltimore and Ohio Railroad into and within the District of Columbia, given by the act of congress of March 2, 1831, c. 84, [4 Stat. 476, c. 85,] was extended by the act of February 26, 1834, c. 11, [4 Stat. 672,] to another period of four years.

2. The act of March 3, 1835, c. 38, [4 Stat. 757,] is not void because its title misrecites the date of the act to which it is supplementary; nor is it confined to the mere construction of the road; but gives authority also to condemn land for the use of the company; nor is it void because its title purports it to be an act supplementary to an act which expired by its own limitation; it being revived by a subsequent act.

3. If the act of 1831 expired by the limitation contained in its 5th section, it was revived by the act of February 26, 1834.

4. It is not necessary that the jury should be sworn on the lot to be condemned. It is sufficient that they meet on the lot. They may be sworn on another lot.

5. Notice, on the 27th of April, that the jury would meet on the land, on the 1st of May, to take the inquisition, is sufficient.

6. The railroad is a road for public use, and land may be taken therefor, upon just compensation being made.

Several inquisitions were taken, upon several warrants issued by a justice of the peace for the county of Washington, against D. Carroll, John A. Wilson, D. A. Hall, and Moses Tabbs and others, under the act of congress of March 3, 1835, c. 38, (4 stat. 757,) entitled "An act supplementary to an act entitled 'an act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio Railroad into and within the District of Columbia,' passed December, 1829." The act alluded to was not passed in December, 1829, but on the 2d of March, 1831, c. 84, [4 Stat. 476, c. 85.] These inquisitions being returned to the clerk's office by the marshal,

Mr. R. S. Coxe, for the defendants, moved the court to set them aside, for the following reasons:

1. Because there is no authority given by any act of the congress of the United States to warrant the said proceedings.

2. Because the said proceedings are wholly irregular and unauthorized by any law.

3. Because the jury did not estimate the comparative advantages and disadvantages of the contemplated railroad; but, in estimating the same, proceeded upon unfair and unequal principles.

4. Because the jury heard illegal evidence.

5. Because there was no lawful oath administered to the witnesses.

6. Because there has been no proper or lawful return of the said proceedings.

7. Because there was no legal or sufficient notice to the owners of the property through which the said road is laid.

Mr. Coxe contended that the act of March 3, 1835, [4 Stat. 757, c. 38,] was void, because its title referred to an act passed in December, 1829, when no such act existed; and that if it was not void, still it did not give any right to condemn land for the road; it only gives authority to locate and construct the road, but these powers do not imply a power to condemn the land. It refers to the act of 1831, which had expired by its own limitation, because the road was not commenced within a year after passing the act. If it was revived by the act of February 26, 1834, c. 11, the act of 1835 should have been supplementary to the act of 1834, and not to the expired act of 1831.

He contended, also, that the jury should have been sworn on the land, whereas the jury were sworn in all the cases, upon the land of Mr. Wilson only. That the act of 1831 only provides for the mode of proceedings by the marshal and jury; not as to any ulterior proceedings, or the return, or the jurisdiction of this court.

Mr. J. Dunlop, contra. The acts of 1831, 1834, and 1835 give the power to condemn the land, and refer to the Maryland charter of 1827, which requires the inquisition to be returned to the clerk, by whom it is to be filed in court, and it is to be affirmed, unless set aside by the court; and if set aside, a new inquisition is to be taken. There can be no doubt of the jurisdiction of the court.

The notices were all served on or before the 27th of April, and the jury was summoned for the 1st of May. There is no irregularity in the proceedings. There is no evidence that the jury estimated the comparative advantages and disadvantages; or that they proceeded upon unfair or unequal principles; nor that they received illegal evidence; nor in what manner the jurors were sworn. No error is shown in the return of the inquisitions.

Mr. Coxe, in reply, contended that the railroad is not a common highway. It is the exclusive right of the railroad company; and private property cannot be taken for private use. If it be doubtful whether congress has authorized the taking of private property,

[1] [Reported by Hon. William Cranch, Chief Judge.]

the court would so construe their act as not to violate the constitution.

CRANCH, Circuit Judge, delivered the opinion of the court. The act of congress of the 3d of March, 1829, c. 28, (4 Stat. 757,) entitled an act supplementary to an act entitled "An act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio Railroad into and within the District of Columbia," passed December, 1829, (section 3,) authorizes the railroad company to construct their road through or over the lots or squares in the inquisitions mentioned, "upon the same terms, and with the same privileges as are prescribed for passing through the squares enumerated in the first section of the act;" that is, in the same manner and with the same rights and privileges which are granted to them by the act of the 2d of March, 1831, [4 Stat. 476,] "for the construction of their said road within the District of Columbia beyond the limits of the city of Washington, any thing in the said act notwithstanding." By the first section of that act (March 2, 1831) the railroad company are authorized to exercise the same rights, powers, and privileges, and be subject to the same restrictions in the extension and construction of this road, as they may exercise, or are subject to, under and by virtue of their charter of February 28, 1827, in the extension and construction of any railroad in Maryland, and are entitled to the same rights, &c., provided that before they proceed to construct any railroad on any land, &c., they shall first obtain the assent of the owner, &c.; but if they cannot obtain such assent, they may apply to a justice of the peace of the county of Washington, who shall issue his warrant to the marshal to summon a jury of twenty inhabitants of the district, not interested, &c., "to meet on the land," on a day, not less than three nor more than fifteen days after issuing the warrant, to proceed to value the damages which the owner or owners of any such land will sustain by the use or occupation of the same required by the said company; and the proceedings, duty, and authority of the said marshal, in regard to such warrant and jury, and the oath or affirmation to be administered, and inquisition to be made and returned, shall be the same as are directed and authorized, in regard to the sheriff, by the fifteenth section of the act of assembly of the state of Maryland incorporating the said Baltimore and Ohio Railroad Company; and all the other proceedings in regard to such jury, and the estimating and valuation of damages, and the payment, or tender of payment of any damages ascertained by such valuation, and effect thereof, and of the view of any lands or other property or materials, as to giving the said company a right to use the same for the use or construction of any railroad within the said district as hereby authorized, shall in every case, and in every respect, be the same as is provided in and by the above-mentioned act of incorporation, in regard to the railroad thereby authorized to be constructed by the said company."

But, by this act of March 2, 1831, the railroad company were forbidden to cross any private property in the city of Washington, even with the consent of the owner. This prohibition was the cause of the act of March 3, 1835.

By the fifteenth section of the act of Maryland of February 28, 1827, each party is to strike out four of the twenty jurors, and the remaining twelve are to act as the jury of inquest, and the sheriff is to administer an oath to each juror that he "will justly and impartially value the damages which the owner or owners will sustain by the use or occupation of the same required by the said company;" and the jury, in estimating such damages, shall take into the estimate the benefit resulting to the said owner or owners, from conducting such railroad through, along, or near to the property of such owner or owners; but only in extinguishment of the claim for damages; and the jury shall reduce their inquisition to writing, and shall sign and seal the same; and it shall then be returned by the said sheriff to the clerk, or prothonotary of his county, as the case may be; and, by such clerk or prothonotary, filed in his court, and shall be confirmed by said court, at its next session, if no sufficient cause to the contrary, be shown; and, when confirmed, shall be recorded by said clerk or prothonotary, at the expense of said company; but if set aside the court may direct another inquisition to be taken in the manner above prescribed; and such inquisition shall describe the property taken, or the bounds of the lands condemned, and the quantity or duration of the interest in the same, valued for the company; and such valuation, when paid, or tendered to the owner or owners of the said property, &c., shall entitle the company to the estate and interest in the same thus valued, as fully as if it had been conveyed by the owner or owners of the same, &c.

Upon consideration of the proceedings in these cases, and the several acts aforesaid, the court is of opinion,

1. That the said proceedings are warranted by law.

2. That they are regular.

3. That it does not appear that the jury did not consider the benefits as well as the disadvantages.

4. That it does not appear that illegal evidence was received.

5. Nor that the witnesses were not properly sworn.

6. That the return of the marshal is correct in form.

7. The notice was sufficient.

Another objection, suggested in the argument, was, that it is taking private property for private use, which is not authorized by

the constitution. The fifth amendment of the constitution of the United States says, that private property shall not be taken for public use without just compensation. But the objection is that private property is taken for private use, with just compensation; which is not within the prohibition of the constitution; although it would be an arbitrary proceeding. But this railroad, although it may be profitable to the stockholders, is also a great public benefit. It does not prevent the public from enjoying all the advantages which they enjoyed before, and gives them a cheaper, safer, and more expeditious mode of travelling than they would otherwise have. If it may not be called a common highway, yet it is really a common good. It is a great public convenience. The land is really taken for public use. The condemnation of land, for such purposes, has been so general, and so extensive, for many years, that it may well be considered as established by the law of the land. Every state of the Union has granted charters for such objects, with similar powers. The rates of toll, &c., are established by law, which could not be done unless the object was of a public nature; nor would the legislature have power to restrain them in the exercise of their private rights. The state of Maryland also has a great interest in the road, as it is to receive five per cent. upon the gross receipts of tolls from passengers; and has an option to take a large portion of the stock within a limited time after the completion of the road. The condemnation of the land, therefore, is clearly for the Maryland public use; even if it be not for the use of the whole American public.

If the constitutionality of a law be doubtful, the court is not at liberty to declare it void; but is bound to give it effect. In Fletcher v. Peck, 6 Cranch, [10 U. S.] 87, Mr. Chief Justice Marshall, in delivering the opinion of the court, said: "The question whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought, seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled, by duty, to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." Again he said: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual fairly and honestly acquired, may be seized without compensation?" In the case of Horne's Lessee v. Dorrance, 3 Dall. 304, 312, [Van Horne v. Dorrance, 2 Dall. (2 U. S.) 304, 312,] the circuit court of the United States for the district of Pennsylvania admit, that, in a case of necessity, of which the legislature is the sole judge, it may take the real estate from A. and give it to B., on making compensation, to be ascertained by a jury, although the constitution of Pennsylvania expressly declares that the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable.

So that, whether the railroad is a public or a private object, in itself, the legislature, having deemed it to be so far a public object as to be worthy of their control and regulation, and of the exercise of their power to apply private property to its use, upon making just compensation, to be ascertained by a jury, we cannot say that the provisions of the act, which authorize the condemnation of land, for such a road, are void, as being unconstitutional, or as contravening any of the principles of natural justice.

The inquisitions were all confirmed, (MORSELL, Circuit Judge, doubting as to the last point.)

BALTIMORE STEAM TOWING CO., (WARE v.) See Case No. 17,167.

BALTZELL, (NAYLOR v.) See Case No. 10,061.

BALTZER, (DAVIS v.) See Case No. 3,625.

Case No. 831.

The BAMBARD.

[8 Ben. 493.][1]

District Court, E. D. New York. July, 1876.

SEAMAN'S WAGES—SAILING ON SHARES.

A master of a schooner sailed her on shares. A sailor, on leaving the vessel, had a settlement with the master and took the master's note for the amount of wages due him and some money loaned by him to the master. The note was not paid, and nine months after the discharge of the sailor, he filed a libel against the vessel to recover his wages. A settlement had been had between the master and the owners before the libel was filed: *Held*, that, although there was no evidence of a specific notice to the libellant that he was to be paid by the master only, yet under the circumstances, if the libellant ever had a lien on the vessel for his wages, he must be held to have waived it.

[Cited in The L. L. Lamb, 31 Fed. 34.]

[In admiralty. Libel in rem for seaman's wages against the schooner Bambard. Dismissed.]

J. J. Allen, for libellant.

Beebe, Wilcox & Hobbs, for claimant.

BENEDICT, District Judge. This is an action to recover for wages earned by a hand on board a vessel, engaged in the coasting

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

trade between Virginia and New York. It is brought some nine months after the libellant was discharged from the vessel. At the time of the discharge, a settlement was had between him and the master, for the wages then due, and also for money loaned by the libellant to the master; and the promissory note of the master for the balance of the account, payable at a future day, was then taken by the libellant. The vessel was sailed on shares, the master to furnish the crew; and a settlement between the master and owners was had before the commencement of this action. The note of the master not being paid, this action is brought to enforce a lien upon the vessel for the amount of the wages.

I am of the opinion, that the action can not be sustained, for the reason that the evidence shows that the service was performed upon the personal credit of the master. It is true that, in the case of a seaman, strong proof is to be required to establish an intention not to look to the vessel; and it is also true that there is, in this case, no evidence of a specific notice to the seaman that he was to be paid by the master. But other circumstances plainly point to the inference, that the libellant knew that the vessel was sailed on shares, and that he settled with the master upon the understanding that he was to look to the master alone for his pay. Further, the taking of the promissory note of the master payable at a future day, and the omission to proceed against the vessel for a period of nine months, no excuse for the delay being given, and the statements of the libellant that he had no claim against the vessel, warrant the determination that if the libellant ever had a lien it has been waived and cannot now be enforced against the vessel.

Libel dismissed, with costs.

BAMBERGER, (TERRY v.) See Case No. 13,837.

Case No. 832.

BAMFIELD v. ABBOT.

[9 Law Rep. 510.]

District Court, D. Massachusetts. Jan., 1847.

ARMY OF UNITED STATES—ENLISTMENT OF MINOR—STATE LAWS—HABEAS CORPUS.

1. A minor, who enlisted in one of the volunteer companies, raised under the act of congress of May, [13,] 1846, [9 Stat. 9, c. 16,] providing for the raising of military forces for the Mexican war, but which company has not yet been mustered into the service of the United States, or received or accepted by any officer thereof, and has not received any rations or clothing therefrom, cannot be held in custody as a volunteer, under the law of the United States.

2. Nor can such minor be held under the statute of Massachusetts of 1840, c. 92, § 5, which provides for the ordering out of the militia, by draft or otherwise.

[Cited in Re McDonald, Case No. 8,752.]

This was a writ of habeas corpus to bring up the body of Robert C. Rowe. The first question raised was, whether the courts or judges of the United States have jurisdiction to inquire into the cause of detention. The petitioner set forth that he was the legal guardian of the said Rowe, who was a minor, and restrained of his liberty by the respondent, as commander of a company of volunteers, enlisted in the United States service in the war against Mexico, claiming to hold him by virtue of a pretended engagement on the part of said ward to serve in said war under the command of the respondent. The return of the respondent did not deny any of the allegations in the petition, but set forth that the cause of the detention of the said Rowe was, that he voluntarily enlisted and was mustered in Company C of the first regiment Massachusetts volunteers, on the 28th day of December last, and has received his rations and clothing since that date.

N. T. Dow, for petitioner.

Mr. Rantoul, for respondent.

SPRAGUE, District Judge. The return is not full and explicit, in the statement of facts, and at the hearing I stated to the learned counsel for the respondent, that by its language I understood that the respondent claimed the custody and control of the said Rowe as a volunteer soldier, who had been mustered into the service of the United States and received from them clothing and rations as such, under the act of 1846, [Act May 13, 1846; 9 Stat. 9, c. 16.] And I suggested that if that was not the ground on which the respondent intended to rest his claim, the return might be amended so as to present the facts as he wished to have them understood, and time was given to the counsel for that purpose. The respondent, however, has not seen fit to make any amendment or addition to his return, and I must take it as asserting a claim to hold the said Rowe in custody as a volunteer under the law of the United States. Under this petition and return, therefore, I cannot doubt that it is my duty to inquire into the cause of detention.

It appears that the said Rowe is now between 18 and 19 years of age; that previous to the fourteenth of November last, his residence had from his birth been in the state of New Hampshire; that both his parents died more than two years ago; that in the summer of 1846, the petitioner was appointed his guardian, and that both had resided in the town of Dover in that state, but that the guardian had not interfered with the labor or earnings of the ward. But the said Rowe left Dover on or about the 14th of November, without the consent of his guardian, who had no knowledge where he had gone until a week or ten days ago, when he heard that he was in Boston, and had enlisted as a volunteer. On the 28th of December last, he enlisted as a member of Company C of the Massachusetts infantry, which was subsequently organ-

ized under the authority of the governor of Massachusetts, and the officers were commissioned by him. But the original enlistment, and the whole proceedings, were for the express and sole purpose of having the said company received into the service of the United States as volunteers under the act of congress for 1846. And that for this purpose the said Rowe and about forty-five others had been examined by a captain and surgeon of the United States army, who had certified to their physical qualifications, and that they had been, by order of the respondent, as captain of said company, held under military discipline, at quarters in the city of Boston, and not allowed to depart from those quarters except by the order or special permission of the respondent, with a view of having them mustered into the service of the United States as volunteers, but for want of a sufficient number of men, the said company had not in any manner been mustered into the service of the United States, or been received or accepted by any officer thereof, or received any rations or clothing therefrom. The said Rowe has not then come under the authority of the president or any officer of the United States, and I do not understand the learned counsel as contending that he can be held by the respondent under the act of congress of 1846.

But it is insisted that he may be held under the Massachusetts statute of 1840, c. 92, § 5. In the first place, that section refers to the dormant and not to the active militia of Massachusetts. In the next place, no order of the commander-in-chief of the commonwealth, or any other officer, is shown, calling forth the militia or placing them in a state of preparation for actual service, as contended for. And thirdly, the return of the respondent does not rest his claim to hold the said Rowe in confinement upon any such ground, and in this respect the return is not inconsistent with the evidence. Whether the said Rowe has subjected himself to the duties imposed by the laws of Massachusetts upon the militia of that state, I am not called upon to decide, and express no opinion. The claim of the respondent being in my opinion not sanctioned by law, and the said Rowe having declared his wish to be discharged, I am bound to order that he be set at liberty.

BAMKER, (PARKER v.) See Case No. 10,725.

Case No. 833.

BANCROFT et al. v. ACTON.

[7 Blatchf. 505.][1]

Circuit Court, S. D. New York. Aug. 26, 1870.

PATENTS FOR INVENTIONS—DAMAGES—COUNSEL FEES—ACT OF JULY 8, 1870.

1 There is nothing in the 55th section of the act of July 8th, 1870, (16 Stat. 206,) which entitles the plaintiff in a suit in equity for the infringement of letters patent, to recover, as an item of the damages prayed for in the bill, the amount of money paid by him to his counsel in the suit for services rendered therein.

[See Holbrook v. Small, Case No. 6,596; Whittemore v. Cutter, Id. 17,600; Stimson v. The Railroads, Id. 13,456; Philp v. Nock, 17 Wall. (84 U. S.) 460; Teese v. Huntingdon, 23 How. (64 U. S.) 2; Parks v. Booth, 102 U. S. 96; Arcambel v. Wiseman, 3 Dall. (3 U. S.) 306. Contra, see Allen v. Blunt, Case No. 217; Alden v. Dewey, Id. 153; Pierson v. Eagle Screw Co., Id. 11,156.]

In equity. [Bill by Lorey F. Bancroft and Andrew B. Yetter against Charles A. Acton for infringement of letters patent.]

William J. A. Fuller, for plaintiffs.

James Knox, for defendant.

BLATCHFORD, District Judge. The question raised in this case, which is a suit in equity for an injunction and an account of profits, and the recovery of damages, founded on the infringement of letters patent, is, whether, under the 55th section of the act of July 8th, 1870, (16 Stat. 206,) revising, consolidating and amending the statutes relating to patents and copyrights, the plaintiffs can recover, as an item of the damages prayed for in the bill, the amount of money paid by them to their counsel in the suit for services rendered therein. That section provides, that, upon a decree being rendered for an infringement, in a suit in equity brought to prevent the violation of any right secured by patent, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and that the court shall assess the same, or cause the same to be assessed under its direction, and shall have the same powers to increase the same in its discretion, that are given by such act, in its 59th section, to increase the damages found by verdicts in actions upon the case. It is manifest, that the sole object of this provision of the 55th section, which is new, is, to enable the plaintiff, by bringing a suit in equity, to recover, in such suit, not only the profits made by the defendant by means of the infringement, but also the damages sustained by the plaintiff thereby. In the absence of this provision, this could not have been done. But, under this provision, a plaintiff cannot recover, as damages, any items which he cannot recover as damages under the 59th section, in an action on the case. That section provides, that damages for the infringement of any patent may be recovered by action on the case. The damages spoken of in the 55th section can have no greater scope or extent than those spoken of in the 59th section. The provisions of the 59th section in regard to damages are but a re-enactment of the provisions on the same subject in the 14th section of the act of July 4th, 1836, (5 Stat. 123.) Under the latter

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

act, it is well settled, by authoritative decisions, that counsel fees paid or incurred by the plaintiff, in an action at law for the infringement of a patent, are not a proper element for the consideration of the jury, in the estimation of the damages to be recovered in such action. Day v. Woodworth, 13 How. [54 U. S.] 363. There is nothing in the 55th section of the act of 1870 which enables the plaintiffs in this suit to recover the counsel fees in question as damages therein.

BANCROFT, (ADAMS v.) See Case No. 44.

Case No. 834.

BANCROFT v. The AMERICA.

[N. Y. Times, Aug. 20, 1853.]

District Court, N. D. New York. Aug., 1853.

MARITIME LIENS—PRIORITY — DAMAGES FOR COLLISION.

[1. The claim of a libellant for damages occasioned by collision is a maritime lien upon the vessel at fault, or a charge or privilege which gives him substantially the same rights and remedies.]

[2. Maritime liens on a vessel sold under the order of a court of admiralty should, as a general rule, be paid out of the proceeds, in the inverse order of the dates of their creation.]

[3. The liens governed by this rule include wages, pilotage, towage, wharfage, claims for salvage, bottomry, damages for collision, and claims for materials.]

[4. But this order of preference should only be followed when the liens all belong to the same class.]

[5. No difference exists between seamen's wages for the same season of navigation on the lakes, or between the claims of material men who are concurrently giving credit in fitting out a vessel for a voyage, or preparing her for business at the commencement of a season. A season of navigation on the lakes may be assimilated to a voyage on the high seas.]

[6. In a libel in rem, all persons have a right to intervene for their interest, and the suit is, in substance, against such persons, as much as if they were specially named defendants. They are bound by the proceedings and decree, and a sale of the res under such proceedings extinguishes their rights.]

[7. A creditor who obtains a final decree before other creditors having co-ordinate claims have taken action is entitled to be paid in preference to those who do not assert their claims.]

[8. The claims of the holders of bottomry bonds, material men, and a libellant for damages for collision, are of equal rank, and are subject to the general rules of priority and preference.]

[Libel in rem by De Witt C. Bancroft against the steamboat America, J. W. Phillips, claimant.]

Before HALL, District Judge.

HALL, District Judge. The vessel of the libellant having been sunk by a collision with the America on Lake Erie, July 12th, 1852, a libel was filed to recover the damages, and on the 14th of December, 1852, $10,000 (ten thousand dollars) was awarded to him for the said damages. The America was sold, by order of court, September 10th, 1852, and the proceeds, amounting to $10,950, brought into registry.

Before the above mentioned decree was made, suits were commenced by seamen to recover wages, and so, after the sale, they were paid out of the fund without opposition. A suit was also commenced Oct. 2nd, 1852, to recover damages occasioned by a previous collision of the America, and those whose liens attached subsequent to the collision with the libellant's vessel, and which had possession of the America, and common-law liens, or liens under the state statute, were also directed to be paid out of the fund, though opposed by the collision claimant. The libellant then claimed, by petition, the whole residue of the fund, on the ground that he was entitled to preference over all the other parties.

Held, that the claim of the libellant for the damages occasioned by the collision was a maritime lien upon the America, or a charge or privilege which gave him substantially the same rights and remedies.

The maritime liens upon a ship sold under the order of a court of admiralty should, as a general rule, be paid out of the proceeds in the inverse order of the dates of their creation. These include wages, pilotage, towage, wharfage, claims for salvage, bottomry, damages for collision, and materials.

That this order of preference should be followed only when the liens all belong to the same class. But it is not intended to decide that a bottomry bond executed by the owner, or claims under contracts of freightment, are to be paid in the same order as though they were liens arising out of it, or founded upon the necessities of the ship. Nor is it intended to declare that any difference will be made between seamen's wages for the same season of navigation on the lakes, or between the claims of material men who are concurrently giving credit to a vessel, in fitting her out for a voyage, or preparing her for business, at the commencement of a season. A season of navigation on the lakes may be assimilated to a voyage.

This is a suit in rem, all persons having a right to intervene for their interest, and the suit is in substance against such persons, as much as if they were specially named as defendants. That they are bound by the proceedings and decree, and by a sale of the res under such proceedings their rights therein being extinguished.

That a creditor who obtains a final decree before other creditors having co-ordinate or equal claims have brought their actions is entitled to be paid in preference to those who do not assert his claim; the intervention of a creditor, for the purpose of obtaining payment of his claim, concurrently with or in exclusion of the libellant being in the nature

of a defence to the adverse claim of the libellant.

That the claims of bottomry bondholders and material men are of equal validity, and should be subject to the same general rules of priority and preference, and that the libellant's claim for damages should be considered of equal rank with the latter.

BANCROFT, (BACON v.) See Case No. 714.

BANCROFT, (CHAMPNEY v.) See Case No. 2,587.

BANCROFT, (FARNHAM v.) See Case No. 4,671.

BANCROFT, (HYDE v.) See Case No. 6,966.

Case No. 835.

BANCROFT et al. v. THAYER et al.

[5 Sawy. 502;[1] 8 Reporter, 39; 11 Chi. Leg. News, 304; 8 Amer. Law Rec. 257; 25 Int. Rev. Rec. 305.]

Circuit Court, D. Oregon. May 14, 1879.

POLICE POWER—CONTRACT WITH THE STATE—PUBLIC AGENTS—INJUNCTION.

1. A court of equity has power to enjoin the officers of a state from acting under a law which impairs the obligation of a contract made with the state.

2. Unless restrained by its constitution, a state, in the exercise of its police power may provide by contract that certain persons shall have exclusive privileges—as that, to supply the common schools of the state with text-books of a specified character and price.

3. An act of the state of Oregon authorized the adoption of text-books for the use of the common schools of the state, by a majority of the votes of the county superintendents, to be canvassed and declared by the board of education, and provided that the books so adopted should be exclusively used in such schools for the period of four years thereafter: *Held*, that such act did not constitute a contract with the publishers of the adopted books, by which the state was bound to use the same in its schools for said period, nor authorize the board of education to make any contract with such publishers on behalf of the state, concerning the furnishing and use of such books; but that said act was a mere regulation imposed by the state upon itself, and therefore the legislature might modify or abrogate it at pleasure.

[Cited in Ivison v. Board of School Com'rs, 39 Fed. 737.]

4. A state is not bound by the act of its agents, unless they are manifestly acting within the scope of their authority.

[In equity. Suit for an injunction by A. L. Bancroft and Hubert H. Bancroft against W. W. Thayer, governor, R. P. Erhart, secretary, and L. J. Powell, superintendent,—constituting the Oregon state board of education,—to restrain respondents from adopting a new series of text-books in the common schools of the state. Bill dismissed.]

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

H. Y. Thompson and George H. Durham, for complainants.

Joseph N. Dolph, for defendants.

DEADY, District Judge. This suit is brought to enjoin the defendants, constituting the state board of education, from taking steps to adopt a new series of text-books for the common schools of this state, under section 12 of the act of October 29, 1872, as amended by section 4 of the act of October 4, 1878, (Sess. Laws, p. 61,) in place of the one now in use, published by the complainants.

The bill states that the complainants are citizens of California, and the defendants, of Oregon; that in pursuance of the act of October 29, 1872, aforesaid, entitled "An act to establish a uniform course of public instruction in the common schools of this state," the board of education, among others, adopted six books, published by the complainants, and known as the "Pacific Coast Series," as text-books to be used in the common schools of this state for the period of four years from October 1, 1873, which books were furnished by complainants during said period at fixed prices, in sufficient quantities for said schools; that said board of education, in pursuance of said act, again adopted said books for said schools for another period of four years from October 1, 1877; that in November, 1876, and prior to said second adoption, said board passed a resolution, prescribing "the manner of binding, the mode of printing, and the price to be paid for such series of books as might be adopted by said board for the said period of four years," and that the complainants, on November 26, 1876, "duly filed with the said board of education" their "written obligation," "wherein and whereby they undertook and agreed that if said Pacific Coast Series should be adopted for use in the common schools of Oregon, for the said period of four years from October 1, 1877," the complainants "would in all things comply with the demands of said board, as in said resolution set forth;" that thereupon said series of books "was adopted by the said board of education in the manner and form by law provided, and became the text-books to be used in the common schools of the state of Oregon" until October 1, 1881; that the complainants are bound to furnish, and said schools to receive, said books for said period, and complainants have so far complied with said contract, and are ready and willing to do so until the expiration of the same; that the complainants, in order to perform said contract, have been obliged to expend large sums of money in the purchase of material and labor for the manufacture of said books, and to publish and to keep on hand large quantities of the same, and, therefore, if such state board shall violate or fail to comply with the terms of said contract, the complainants will suffer great and irreparable loss; that on April 17, 1879, said board, in

violation of said contract, and with intent to disregard it, ordered the defendant, Powell, to issue a circular to the county superintendents, directing them to vote upon the adoption of a series of text-books for said schools for the purpose of authorizing other and different books than said Pacific Coast Series, to be used in said schools during the remainder of said period of four years.

Upon reading and filing the bill, April 23, an order was made that the defendants show cause why a provisional injunction should not issue, as prayed for, and that in the meantime they be restrained accordingly. The defendants showed cause by demurring to the bill, which on May 6 was argued by counsel.

The demurrer sets up: 1. This court has no jurisdiction of the cause; 2. There is a defect of parties, in this, that the state is not made a party defendant; 3. The complainants have an adequate remedy at law; and, 4. There is no equity in the bill.

At the argument, upon the decisive authority of Osborn v. Bank of United States, 9 Wheat. [22 U. S.] 738, wherein it was held that a court of equity may restrain, by injunction, a public officer of a state from acting under a void law of a state to destroy a franchise; that as the state cannot be joined as a defendant, its agent may be sued alone; and that the prohibition to sue a state, contained in the eleventh amendment to the constitution, does not extend to cases in which a state is not made a party on the record, even if the state has the entire ultimate interest in the subject of the suit—the first and second causes of the demurrer were expressly abandoned and the third one was not insisted upon.

Under the fourth cause it was maintained by counsel for the defendants: 1. That the power to regulate the common schools of the state is a part of the police power of the state which cannot be alienated or restrained even by express grant; 2. The law did not give the board of education or any one power to contract with the complainants to furnish school books for the use of the common schools of the state for any definite length of time, or at all; and, 3. No such contract appears to have been made.

The term "police power of a state" is a convenient and comprehensive expression used to signify those powers by means of which it not only preserves public order and prevents crime, but also promotes and secures good manners in the intercourse between its citizens, and thereby prevents a conflict of rights. 4 Bl. Comm. 162; Cooley, Const. Lim. 572.

The constitution of Oregon (article 8, § 3) declares that "the legislative assembly shall provide by law for the establishment of a uniform and general system of common schools." Now, if this be a police power—a mode of preventing crime or promoting good manners—as it probably is, the legislature may exercise it by contracting with any one to furnish books of a prescribed character and cost for the use of said schools for a definite period. To authorize and provide that, by means of contract or legislative grant, a particular person or persons shall have the exclusive right to do or furnish a particular thing, upon certain conditions, for the use and convenience of the public, has always been a common mode of exercising the police powers of the state, and unless the constitution imposes some limitation upon the power of the legislature in this respect, its action is final and binding. Slaughter-house Cases, 16 Wall. [83 U. S.] 66. As was well said by Mr. Justice Miller, in delivering the opinion of the court in the case last cited: "It may be safely affirmed that the parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day continued to grant to persons and corporations exclusive privileges—privileges denied to other citizens—privileges which come within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied. Nor can it be truthfully denied that some of the most useful and beneficial enterprises set on foot for the general good have been made successful by means of these exclusive rights, and could only have been conducted to success in that way."

To say that the legislature cannot barter away the police power of the state, or that one legislature cannot make a law which another one cannot repeal, is simply begging the question. It is not a question as to the comparative powers of different legislatures, but of the state. However many legislatures there may be, there is but one state, and it is a continuous being. The legislature is merely a means by which it exercises its powers.

The question is, then, could the state, as organized, make the contract? If it could, good faith requires that it should keep it; and under section 10 of article 1 of the national constitution it cannot pass a valid "law impairing the obligation" thereof. That it would be wise to place some limitations upon the power of the state to bind itself by contract, I admit. But that power is not in the courts, and can only be exercised by the people in the formation of the organic law.

It is claimed by the complainants that they have a valid subsisting contract with the state to furnish certain text-books for its common schools until October 1, 1881; and admitting, for the time being, that the transaction which is alleged to have taken place between the complainants and the state officers amounts in form to a contract to that effect, the question arises, was any one authorized by the state to make such a contract on its behalf?

The power to contract is claimed to be given to the board of education by the common school act of October 29, 1872. This act provides, in sections 10, 11 and 12 (Laws Or. 503,) for submitting the question of school books every four years to a vote of the county superintendents of schools. The vote is obtained by the superintendent of public instruction, acting under the direction of the board of education, sending a circular to each county superintendent containing a list of the studies required to be taught in the public schools, who "shall, after due consideration, write opposite each study the text-book preferred" by him, and return the circular to the state superintendent, "who shall cause the same to be laid before the state board of education, and the text-book in any one branch receiving the highest number of votes shall be the authorized text-book in that branch in the public schools of this state for the four years next succeeding the official announcement of the superintendent of public instruction." Every four years after "the first selection of text-books" the superintendent shall issue similar circulars for another vote on the question, and unless some new book shall receive a majority of the votes, no change shall be made during the ensuing four years. Section 17 provides that the board shall have power "to authorize a series of text-books to be used in the public schools, in accordance with the provisions of this act." But the legislature of 1878 amended section 12 aforesaid so as to empower the board of education to order an election for school books at any time when in its "judgment" any book in use is supplied "at an unreasonably high price, or is found to be excelled by more recent publications in that branch, or for any good and sufficient cause." It is further provided that any book adopted at such election shall be introduced into all the common schools of the state within six months thereafter. The defendants are proceeding under this amended section to order a new election at once.

These are all the provisions of law on the subject, and it will be seen at a glance that the power of selecting—"adopting"—school books is not in the board of education but the county superintendents. The only power the board has in the premises is to call the election for school books and to canvass the votes and declare the result. The power given them by section 17 aforesaid "to authorize a series of text-books" adds nothing to the case in this respect, for they can only exercise such power in the manner suggested by calling an election by the county superintendents and declaring the result.

After a careful consideration of the matter I am unable to find any authority in this legislation for making any contract with reference to the supply of school books. The county superintendents may vote to adopt and the board must declare the result and thereby authorize the use of the books elected. But in all this there is no power to contract and bind the state beyond its power of revocation. Here the power of the officers ends, and the people in the several districts are left to get the books on the best terms they can, or do without them and forfeit their share of the public funds.

A law requiring the secretary of state to purchase stationery exclusively from the complainants for four years would bind the secretary, but not the complainants, and of itself would not constitute a contract between the complainants and the state. Nor would a formal agreement entered into between the parties. for the delivery of the stationery and specifying the character and cost of the material to be furnished change or enlarge the operation of the law in this respect. Such a law would be nothing more than a regulation which the state imposed upon itself in the person of its secretary and which by the agency of its law-making power, the legislature, it could change or abrogate at pleasure. Such, it seems to me, is the character and effect of this legislation to secure uniformity in school books. The act is not a contract nor a proposal which being accepted may become a contract, but a rule for the government of certain officers and people of the state. Neither does it authorize any one to make a contract as a means of carrying its provisions into effect or otherwise. It merely provides for the selection of a series of school books at certain fixed intervals and commands their use in the districts under a penalty. The state is the only party to the transaction, and may therefore modify the regulation at pleasure. An act directly requiring the schools to use the Pacific Coast Series for the ensuing four years would not be a contract with the complainants to that effect, nor authorize the board of education to make one with them to furnish such books. But the fact that this act provides that the selection shall be made through the intervention of certain officers does not change its character in that respect, and it is still merely a regulation imposed by the state upon itself to the effect, that only certain books shall be used in its schools for a certain period or until otherwise provided by the legislature. It is true, as appears, that the board of education from, as I supposed, a laudable desire to supply the defects and omissions of this crude and incomplete legislation, entered into an arrangement with the complainants at the time of the selection of their books, which, as between individuals, might well be considered a contract with a view of securing the people of the state a constant supply of the books adopted until October, 1881, of good workmanship and at a fair and fixed price.

But it is a well settled rule of law, that the state is not bound by the acts of its agents, unless it manifestly appears that they were acting within the scope of their authority;

and individuals as well as courts must take notice of the nature and extent of the authority conferred by law upon a person acting in an official capacity. "It is thought better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public." Whiteside v. U. S., 93 U. S. 257.

There being then, no valid contract between the complainants and the state by which the latter is bound to use the books of the former in its schools, it follows, of course, that the complainants have no right to the relief demanded, and therefore the prayer for an injunction must be denied and the bill dismissed.

BANCROFT, (UNITED STATES v.) See Cases Nos. 14,512 and 14,513.

BANCROFT, (WHITING v.) See Case No. 17,575.

Case No. 836.

BANERT et ux. v. DAY.

[3 Wash. C. C. 243;[1] Wall. Notes Dec.]

Circuit Court, D. Pennsylvania. May 2, 1814.

EVIDENCE—REPUTATION AS TO PEDIGREE—WHO IS COMPETENT — DEPOSITIONS — GENEALOGICAL TABLE UNDER SEAL OF FOREIGN OFFICER.

1. It is no objection to the testimony of a witness who deposes to general reputation of pedigree, that he is not one of the family, or intimately acquainted with it.

2. The deposition of a witness, now dead, as to pedigree, may be read for that purpose only; though it was taken in another cause, between other parties, and on a different subject.

[Questioned in Hall's Deposition, Case No. 5,924.]

[See note at end of case.]

3. A deposition taken under a rule of court, and sworn to before a justice of the peace, may be read: the provisions of the judiciary act refer to depositions taken without such rule.

4. A witness whose deposition has been taken de bene esse, must be proved to have been served with a subpoena, and is unable to come; unless he is so old, and generally so infirm, that his attendance could not be expected: the age of 65 is not of itself sufficient to entitle it to be read.

[See Brown v. Galloway, Case No. 2,006.]

5. A deposition, though merely to prove a pedigree, if taken by others than those named in the commission, cannot be read.

[See Armstrong v. Brown, Case No. 542; Guppy v. Brown, Id. 5,871; Munns v. Dupont, Id. 9,926; Willings v. Consequa, Id. 17,767.]

6. A genealogical table, certified under the seal of a foreign officer, is not evidence.

At law. Ejectment for land lying in Pennsylvania, claimed in right of the female plaintiff, as cousin and heir at law of F. Weiss, Jun. who died intestate, and without issue. [Plaintiff nonsuited.]

B. Tilghman, for plaintiff.

Hopkins, (of Lancaster,) for defendants.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

[This was an action of ejectment for lands in Lancaster county, formerly owned by Frederick Weiss, Sr., who died in 1751, and afterward by his son Frederick. The seisin of both father and son was admitted. The father had a brother and sister who died before him without issue. The plaintiff was the daughter of another brother. The lessors of the plaintiff claimed as heirs of the son. The defendants were in possession.][2]

The only questions decided by the court, were upon the admissibility of evidence. The following points were resolved:—

1. That it is no objection to the testimony of a witness who proves general reputation as to pedigree, that he is not one of the family, or intimately acquainted with it. The weight of his evidence, of which the jury must judge, will depend much on his means of information. 8 Johns. 129, cited in support of the evidence.

[Adam Drauck was called to testify as to the relatives of Frederick Weiss, Sr. In the course of his testimony he said: "I did not see any of his relatives. A gentleman named Kremer told me of his relations." He added upon subsequent examination that he knew personally some of Weiss' friends in Germany, and had brought letters over from them to him.

[Defendants' counsel objected, claiming that this was not evidence. Although hearsay might be evidence as to pedigree, such was not the case with mere gossip. It must be of persons intimate with the family.

[Tilghman, in reply, cited 8 Johns. 128, claiming that the objection was to the weight, rather than to the competency.

[Hopkins cited 3 Term R. 723: "What members of a family, and perhaps persons intimate, have said, is evidence, but what a mere stranger would say has always been rejected.

WASHINGTON, Circuit Justice. The testimony is competent.][2]

2. That a deposition of a witness, since dead, proving the pedigree of the plaintiff may be offered in evidence in this cause, for this purpose only, although it was taken in another cause, between different persons, and on a different subject. It is at least equal to what a person has said, who was not on oath, on the same subject. In support of the evidence, were cited Bull. N. P. 233, 239. Hurst v. Jones, [Case No. 6,934,] in the former circuit court of this district. Against the evidence, [Respublica v. Lacaze,] 2 Dall. [2 U. S.] 118: 2 Strange.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Esq.]

[2] [From Wall. Notes Dec.]

[Plaintiff then offered depositions taken in the case of Shultgheisser v. Eckart and wife, administrators of F. Weiss, Jr. This was objected to as taken in a different suit between different parties and in another court.

[Tilghman. We offer it to prove pedigree, —nothing else. Even ex parte depositions have been admitted. Hurst's Lessee v. Jones, Case No. 6,934; Lessee of Fackler v. Simpson, (Sup. Ct. Pa., May assizes;) Bull. N. P. 239. The respondent Eckart was a party to the suit in which the depositions were taken.

[Hopkins. The deposition offered was taken in suits between different parties, both plaintiff and defendant. Douglass v. Sanderson, 2 Dall. (2 U. S.) 116. Shippen, J., on page 118, says that depositions taken in other states are not evidence in cases of pedigree. Strange, 1151. Special evidence is not evidence even of pedigree.

[WASHINGTON, Circuit Justice. Independent of the case decided in this court, (Hurst's Lessee v. Jones, supra,) and the authorities cited from Buller, the opinion of the court is that, on general principles, the deposition is evidence,—for, if his declaration would have been admissible, surely his swearing to it does not make it inadmissible.][2]

3. A deposition taken under a rule of court, and executed by a justice of the peace, may be read: the 30th section of the judicial act relates to depositions taken without a rule of court. The decision in this case is in strict conformity with the practice of this and the district court.

[Plaintiff then offered the deposition of Bernard Frazier—taken, not under the judiciary act of September 24, 1789, § 30, (1 Stat. 173,) but under a rule to take depositions.

[This was objected to as being taken before a justice, not a judge, as required by the act; and it was claimed that, though taken under a rule, and not under the act, the same strictness ought to prevail. The rule does not designate before whom the depositions are to be taken. If no person is designated in the rule, the act of congress ought to be the guide.][2]

4. A witness, whose deposition was taken de bene esse, and is offered to be read, must be proved to have been subpoenaed, and to have been unable to come; unless it is shown, that he is so advanced in age, and generally so debilitated, that his attendance could not be expected. The witness in this case was only sixty-five years of age, and his deposition was rejected.

[WASHINGTON, Circuit Justice. The depositions were de bene esse. It is proved that Frazier is very aged, between 80 and 90. He came down here about two years ago and could hardly stir.

[PETERS, District Judge. There ought to be stricter proof; but as two years ago he was so feeble, and said he could not come again, I think it is circumstantial, and the depositions ought to be read.

[The depositions were admitted, and Tilghman read from the caption that Frazier was 63 years of age, or thereabouts. Thereupon, the court ruled that all presumption of inability was taken away, and the depositions were rejected.][2]

5. If a deposition be taken by other persons than those named in the commission, it cannot be read, although it is offered merely to prove a pedigree.

[Plaintiff offered depositions taken under a commission to Baden in the case above referred to. They were offered as ex parte depositions to prove pedigree.

[Objected to by defendant. Rejected.][2]

6. A genealogical table, certified under the seal of a foreign public officer, is not evidence.

[Plaintiff offered a genealogical table. Rejected.][2]

Upon the two last opinions being given, the plaintiff suffered a nonsuit.

[NOTE. The ruling in this case as to the admissibility of depositions in another suit seems to have been followed in Boudereau v. Montgomery, Case No. 1,694. Both cases were criticised by Baldwin, Circuit Justice, in the case of Hall's Deposition, Case No. 5,924. In Boudereau v. Montgomery the deposition was held inadmissible as such because the former suit was not between the same parties, but it was admitted as a declaration concerning pedigree, against the objection that it was made post litem motam. In the principal case it does not clearly appear that the deposition was made after controversy about the pedigree had arisen; and, if not, Mr. Justice Baldwin's criticism, which was based solely on the objection of post litem motam, does not apply to this case. In Hurst v. Jones, Case No. 6,934, sworn declarations made ante litem motam were held admissible.]

Case No. 837.

BANERT v. ECKERT.

[4 Wash. C. C. 325.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1822.

ARBITRATION AND AWARD — WITHOUT ORDER OF COURT—ENFORCING AWARD.

Pending an ejectment in the court, the parties agreed to refer it to certain persons to value the land in controversy, one third of which it was agreed belonged to the plaintiff, and two thirds to the defendant, and that if, by drawing lots, it should turn out that the plaintiff should take the whole, he was to pay the appraised value of the two thirds to the defendant. The award being made, the court refused to confirm it. The reference not being made under an order of court, the party complaining must resort to his ordinary remedy at law or in equity, founded on the agreement and award.

[Cited in U. S. v. Ames, Case No. 14,441.]

[2] [From Wall. Notes Dec.]

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Esq.]

Rule to show cause why the award made in this cause should not be confirmed. Pending the ejectment in this court, the parties entered into an agreement to refer it to certain persons to value the land in controversy, one third of which, it was agreed, belonged to the plaintiff, and the other two thirds to the defendant; and that the parties should decide by lot, which of them should take the whole land at the valuation, and that if it should fall to the plaintiff, the defendant should make a conveyance to him of his two thirds. The award was made, and the land was decided, in the manner pointed out by the agreement, to belong to the plaintiff. The defendant executed and tendered to the plaintiff a deed pursuant to the agreement.

Mr. Ewing, for defendant.
Mr. Ingraham, for plaintiff.

WASHINGTON, Circuit Justice, delivered the opinion of the court. The award, in this case, not having been under a reference by order of court, the agreement to refer can be considered only in the light of a private agreement of the parties, to be enforced by suit at law or in equity, as either may be best adapted to the case. Should either party refuse to comply with the award, he would commit no contempt of the court. The practice of the state courts,—[Kunckle v. Kunckle,] 1 Dall. [1 U. S.] 364,—by which awards like the present are enforced, grows out of the necessity of the case, produced by the want of a court of equity. But the same necessity does not exist as to questions depending in this court. It is of great consequence to the due administration of justice, that the line of demarcation between the law and the equity side of the courts of the United States should be constantly kept in view. Should we open the door of the former to applications like the present, we might as well shut that of the latter. Rule discharged.

Case No. 838.

BANG v. FARMVILLE INS. & BANKING CO.

[1 Hughes, 290.][1]

Circuit Court, E. D. Virginia. May, 1876.

FIRE INSURANCE—PAYMENT OF PREMIUM.

Although a policy of insurance provides in terms that the insurance company shall not be liable until the premium shall be actually paid, and that no such provision shall be construed as waived, except by some act as distinct as a clear, express agreement indorsed on the policy, *held*, that where insurance brokers, on delivery to them of a policy, were charged, in general account, with their knowledge, with the premium due on the policy, and they made no objection, the company was liable for the insurance money.

[See Frankle v. Pennsylvania Fire Ins. Co., Case No. 5,052a.]

[At law. Action on a policy of fire insurance by Frederick J. Bang against the Farmville Insurance & Banking Company. Judgment for plaintiff.]

The facts of the case are sufficiently stated by the CHIEF JUSTICE.

WAITE, Chief Justice. Woodward & Sherwood were the agents of the defendant at Jersey City, with authority "to take fire risks, fix rates of premium, receive moneys, countersign, issue, renew, and grant leave to transfer policies of insurance signed by the president and secretary of the company, and to transact the business of insurance in accordance with the rules and regulations of the company, and such instructions as might from time to time be given them by the officers thereof."

The plaintiff employed a firm of insurance brokers in New York to place a large amount of insurance for him upon his "frame building, known as Congress Hall, . . . in the village of Sharon Spa, N. Y." These brokers placed one thousand dollars with the defendant, and received from Woodward & Sherwood, as its agents, a policy for that amount, dated June 2d, 1875. The policy did not acknowledge the receipt of the premium, and contained conditions as follows: "This company shall not be liable by virtue of this policy, or any renewal thereof, until the premium thereof shall be actually paid." "The use of general terms, or anything less than a distinct, specific agreement, clearly expressed and indorsed on the policy, shall not be construed as a waiver of any printed or written condition or restriction therein." "The insurance may also be terminated at any time, at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy."

When the policy was delivered to the brokers, they were charged on the books of Woodward & Sherwood with the amount of the premium, less their commission of fifteen per cent. as brokers, and they credited that firm with the same amount on their own books. Woodward & Sherwood also at the same time credited the company with the premium. Soon after receiving the policy the brokers delivered it to Bang, charging him on their books with the premium. It is the custom of insurance agents to transact their business with brokers in good credit in this way. This practice had prevailed between Woodward & Sherwood and this firm of brokers for more than a year previous to this transaction. Statements were rendered the brokers monthly, showing each premium unpaid. As payments were from time to time made, they were so entered on

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

the books as to show the particular premium they were intended to meet.

Monthly statements were also made by Woodward & Sherwood to the company, showing the risks taken and the premiums collected, as well as those uncollected. Remittances were made in such manner as to indicate the particular premiums paid. The agents were charged on the books of the company with the premiums upon all risks taken. Whenever a policy was cancelled for non-payment of premium, as was sometimes done, the charge against the agents for the premium on that policy was balanced by a corresponding credit. The company had ample means of ascertaining from month to month what premiums were paid upon the outstanding risks and what were unpaid. It also appears from the testimony of the president of the company that the general course of business between the agents and the brokers, as well as their customers, was understood at the home office, and no objection was ever made. In August, Bang paid his brokers on account $450, and this amount was placed to his credit without applying it to the discharge of any particular premium. This was sufficient to pay in full all premiums on all the policies obtained up to and including that of the defendant, but left a considerable sum due on the general account, which included premiums upon a large number of policies obtained after that had been issued. The premium on the defendant's policy was never paid by the brokers to Woodward & Sherwood, and they reported it to the company in all their monthly reports as unpaid and the risk uncancelled. Several times during the summer Woodward & Sherwood called the attention of the brokers to the fact that there had been unusual delay in the payment, and intimated that, unless it was soon provided for, they would be compelled to give notice of a cancellation of the policy on that account. The brokers recognized the fact of the delay, and promised to give it attention at once, but no steps were taken to cancel the policy, neither was the charge for the premium marked off in any of the accounts.

Things remained in this condition until September 1st, 1875, when the property insured was destroyed by fire. Within a few days after, the brokers tendered the premium to Woodward & Sherwood, but they, under instructions from the company, refused to accept it. The share of the loss payable by the defendant, and which is not disputed, if any liability exists, is $763.13. Some questions were raised upon the trial as to notice and proofs of loss, but the testimony shows clearly that prompt notice was given immediately after the fire, and that as soon as the adjustment was completed proofs were furnished showing the amount of the entire loss, the amount of the whole insurance, and the percentage to be paid upon each policy. Copies of the written portions of the several policies other than that of the defendant were not given, but no objection was made at the time on that account, the company rejecting the claim on the sole ground that the premium had not been paid. It is now too late to make this objection. Blake v. Exchange Mut. Ins. Co., 12 Gray, 265. It was also objected at the trial that there was such overvaluation of the property for the purposes of insurance as rendered the policy void. The proof fails to sustain this defence.

The only other question presented by the pleadings or upon the trial is as to the effect of the non-payment of the premium upon the liability of the defendant. There is no doubt that Woodward & Sherwood had power to give credit upon the premium, and to waive that condition of the policy which required its payment before the liability of the company should attach. This was not denied at the trial. They were the agents of the defendant to transact generally its business of insurance at Jersey City, in accordance with the rules and regulations of the company, and these rules and regulations, it is agreed, provided for credit by special arrangement. Neither can there be any doubt that there was a waiver of the advance payment in this case, if it could be done in any other manner than by an express agreement to that effect indorsed upon the policy. This case is not materially different from that of Miller v. Brooklyn Life Ins. Co., 12 Wall. [79 U. S.] 285, in which it was said that "where the policy is delivered without requiring payment, the presumption is, especially if it is a stock company, that a credit was intended, and the rule is well settled where a credit is intended, that the policy is valid though the premium was not paid at the time the policy was delivered, as where credit is given by the general agent, and the amount is charged to him by the company, the transaction is equivalent to payment."

The real question then, is, whether this case falls within the provision of the policy which is relied upon. The language is not that there can be no waiver unless an indorsement to that effect is made upon the policy, but that "the use of general terms, or anything less than a distinct and specific agreement, clearly expressed and indorsed on the policy, shall not be construed," etc. This is no more than providing that nothing shall be construed as a waiver that is less distinct or specific than an agreement clearly expressed and indorsed on the policy would be. Here the acts are clear, distinct, and specific, and the intention of the parties is unmistakable. The policy was delivered, and simultaneously with the delivery the brokers, with their consent, were charged in general account for the premium. The case is in effect as it would have been if, upon the delivery of the policy, the agents had accepted the note of the brokers for the amount of the premium payable on demand. A charge in

account on book, with the consent of the party charged, is equivalent to an agreement by him to pay on demand the amount charged. We can hardly believe it will be seriously contended that if these brokers had in fact given their due-bill for the premium when the policy was delivered, an indorsement to that effect on the policy would be necessary to charge the company with liability.

In our opinion the charge on book, under the circumstances, made as it was in the usual course of business according to the custom of the trade, and known and assented to by the officers of the company, is to be treated as the equivalent of payment, and not as the waiver of the condition only. Certainly the acceptance of a note for the amount would have been such an equivalent, and we can see no difference in principle between that case and this. The brokers would be as much liable for the payment of the premium in the one case as in the other. If by any chance the premium could not be collected, ample protection was furnished the company against a continuance of the risk by that clause in the policy which authorizes its termination at the option of the company, on giving notice to that effect. This seems to have been relied upon by the agents as a means of protection against loss, under the practice which prevailed of delivering policies in advance of the payment of premiums, for it is proven to have been a part of the custom to cancel the policies upon notice if payment was not made within a reasonable time.

Let judgment be entered in favor of the plaintiff for.....	$763 13
Less charges for premium and policy unpaid	33 50
	$729 63

And interest from December 17th, 1875.

BANG v. The THEODOR HEINRICH. See Case No. 7,215.

Case No. 839.

BANGS v. LITTLE.

[1 Ware, (506,) 520.] [1]

District Court, D. Maine. Aug. 12, 1839.

SEAMEN—POWER OF MASTER—CORPORAL PUNISHMENT.

1. The master of a vessel has the authority to correct by corporal punishments the negligence or misconduct of any of his crew. But his authority in this respect is not coextensive with that of a parent over his children, or a schoolmaster over his scholars. It extends only to the correction of such negligence or misconduct as relates to their duties as members of the ship's crew, or tends directly to the subversion of the discipline and police of the ship.[2]

[2. Cited in Fuller v. Colby, Case No. 5,149, to the point that a master may punish for disrespect, disobedience, or disorder on board, as far as a parent may a child.]

[3. A ship's master has no authority to inflict corporal punishment upon a seaman for repeating to members of another ship's crew harsh words of their captain, accidentally overheard, nor for falsely and maliciously telling them that their captain used such words, although the action of the seaman tends to create discontent and ill feeling among said crew, against their captain.] [2]

In admiralty. This was a libel for a marine trespass [by Bangs against John L. Little. Decree for libellant.]

The libellant alleged that he shipped at Portland for a voyage in the brig Brutus, John L. Little, master, from this port to one or more ports in the island of Cuba; that he faithfully performed his duty on board said brig, and was obedient to all the lawful orders of the officers; and that while at Matanzas, on the 15th of February last, the said Little, without any just cause, ordered him to be tied up by the hands to the rigging of the vessel, when with a twisted thong, called a cowhide, he struck him a dozen blows on the back, from which he suffered great pain in his body, and great mortification and humiliation in his mind.

The respondent, in his answer, admits the shipping of the libellant as stated in the libel, but denies that he did his duty as a good and faithful seaman, and alleges that he was careless, negligent, and indifferent in the performance of his duty, and not a good seaman in any one particular; "that at Matanzas, in said island of Cuba, the said Bangs, regardless of his duty as a mariner and as a man, and with a view to do mischief and disaffect the crew of the brig Franklin, and to irritate them and induce them to neglect and refuse to perform their duty on board said brig, and to enrage them with the master, George Brazier, did in fact clandestinely, as he himself confessed, listen at the door of the cabin of the said brig Brutus, and pretend that he overheard a conversation between said Captain Brazier and this respondent, in which he said Captain Brazier declared he would flog his whole crew;" the answer then proceeds to allege that this was untrue, and that no such conversation took place, but that the libellant told this story to the crew of the Franklin, by which they were made uneasy and dissatisfied with their captain, and that Capt. Brazier complained to him of this conduct of the libellant. It is further alleged that Bangs, upon being charged with the fact, denied it, "whereupon this respondent having proved the fact, that he had been thus clandestinely listening at the cabin door, and had thus basely lied, this

[1] [Reported by Hon. Ashur Ware, District Judge.]

[2] [Flogging in the navy and merchant service of the United States was abolished by a rider to a naval appropriation bill. Act Sept. 28, 1850; 9 Stat. 515; Rev. St. §§ 1624, 4611.]

respondent without anger, and to prevent such practices in future, did tie up said Bangs as he has stated, and did moderately chastise him by giving him one dozen blows with a small cowhide whip, without doing him any material injury." A number of witnesses were examined on both sides, and the material part of the evidence is stated in the opinion of the court.

Mr. Haines, for libellant.

Fessenden & Deblois, for respondent.

WARE, District Judge. The pleadings and the evidence in this case present a question of considerable delicacy and importance, as it affects the general police of our commercial marine. The libel is for an assault and battery by the master. The master in his answer admits the battery, as charged in the libel, and pleads a special justification. That the master has a general authority to inflict corporal punishment on one of his crew, in a reasonable and moderate manner, for any act of wantonness or carelessness by which the property intrusted to his care is injured or put in jeopardy, or for disobedience, or for riotous, disorderly, or insolent conduct, when it is necessary to maintain the discipline and subordination of the crew, is not denied. If that were the only point involved in the case, the inquiry would simply be whether any such offence has been committed, which the safety of the ship or the maintenance of good order and discipline required to be punished; and if there had been, whether the punishment were greater than the occasion required. That, however, is not the precise question which is presented in this case. It is, whether the master is authorized by the marine law to punish a seaman for any moral delinquency, which does not endanger the ship or cargo, and does not tend directly to the subversion of the discipline or good order of his own crew. For this is the ground on which the master puts his justification. It is, that the libellant "regardless of his duty as a mariner and a man," for the purpose of creating disaffection in the crew of another vessel towards the master, fabricated and told the crew of that vessel the false stories stated in the answer.

It is true that the master in his answer charges the libellant with listening at the cabin door to overhear his private conversation with the captain of the Franklin, who was then in his cabin; and if this fact were satisfactorily proved, it might undoubtedly be relied upon as an offence against the police and good discipline of the ship's crew. For the seamen are not only required to obey the orders of the master in all that relates to the navigation of the vessel and to the services for which they are engaged, but they are bound to observe towards him a decorous and respectful demeanor. Listening at doors and windows, for the purpose of overhearing and prying into the private affairs of another, is in any case a gross impertinence; it is particularly so when practised by a seaman towards the master of a vessel. But if the master relies on this charge of eavesdropping as a justification of the punishment, he must produce satisfactory evidence of the fact. Crimes and faults are never presumed without proof. The evidence in this case is, that the libellant was sent by the second mate to the round-house to get some spun-yarn, and in going for it he passed by the cabin door, so near that he might hear any thing which was spoken in the cabin in the ordinary tone of conversation. On his return he stated to one of the crew that as he was passing the cabin door, he heard Captain Brazier repeat the words alleged in the master's answer. No blame can be attached to him for hearing, while he was in the performance of his duty, what he could not avoid hearing, and there is no direct proof that he stopped to listen at the door. Neither the officer who sent him, nor any of the rest of the crew, saw any thing of the kind; and the manner in which he mentioned the conversation when he returned, rather implies that he had not come to any stop; for he said that he heard it as he was passing the door. The only part of the evidence, from which it is inferred that he stopped to listen, is that of Van Buskirk, one of the crew of the Franklin, to whom he mentioned the conversation. According to his testimony, he said that he listened and heard the conversation. So far as an inference can be drawn against the libellant from this mode of expression, it is met and neutralized, at least, by the form of the expression used when he stated it to one of the crew of the Brutus, immediately after it was heard.

Assuming, then, the allegation of the master in his answer to be true, that the story told to the crew of the Franklin had no foundation in fact, but was fabricated and told for the purpose of producing discord and trouble in that vessel between the master and the men, the whole justification turns upon this point, whether the master is authorized by the maritime law to inflict corporal punishment on one of his crew for general immorality. The counsel of the master have placed his defence on this broad ground. It is contended that his authority to correct and chastise their moral delinquencies is coextensive with that of a parent over his children, and with that of a schoolmaster over his scholars. It is true that the text writers on maritime law, in treating of the authority of the master over his crew, compare it to that of a parent, and of a schoolmaster. But it does not follow, because the authority is similar, that it is identical. The objects and purposes, for which the law allows to one man an authority of control and discipline, over another, must determine the limitation and extent of that authority. The parental power has its foundation in natural relations, and its objects are the protection, the discipline, and instruction of the

child during the period of infantile imbecility and youthful thoughtlessness and improvidence; and it is indispensable to the well-being of the child, through that period in which he is progressively acquiring the bodily strength and moral experience which are necessary for his support and for the government of his own conduct in life. It is a duty imposed by nature on the parent, who is under a natural and moral obligation to train up his child in such habits and in such modes of thinking and acting, as will make him a useful member of the community, and at the same time be a guaranty of his happiness in after-life. The understanding and the will of the parent are substituted for those of the child, until the intellect of the child is sufficiently matured and enlightened by experience to be safely relied upon as his own guide. A preceptor of youth is placed for many purposes in loco parentis, and the authority which he exercises over his pupils is a delegation of the paternal power. But the authority of the master of a vessel over his ship's crew, though it bears a certain analogy to that of a parent and schoolmaster, stands upon very different reasons, and is allowed for different purposes. The service in which he is employed is one of uncommon peril, not only requiring great skill, but often demanding great promptitude of decision and action, and admitting no time of delay for deliberation, reasoning, or expostulation. Upon him the obligation is imposed to meet and provide for these emergencies, and if there is not an instantaneous obedience to his orders, it may involve the loss of the ship and all who are in it. The law invests him, therefore, with the absolute power of command, and clothes him with all the authority which is necessary to enforce the most prompt obedience to his orders. The office of master is also one of great personal responsibility. He is answerable to those who have intrusted their property to his care, for losses and damage, which may happen not only from his own personal faults or neglect, but for such as arise from the negligence or unfaithfulness of the men, whom he employs. The law having rendered him responsible for the negligence and misconduct of his men, has given him a large discretionary authority to correct such misconduct in a summary manner; and as the general security of the vessel and cargo depends upon the general fidelity of the crew and the promptness of their obedience, it authorizes the master to enforce that fidelity and punctuality by the ministration of corporal punishments, when it becomes necessary for the maintenance of good discipline.

If then we measure the authority of the master by the reasons and purposes for which it is granted, we shall find that it is by no means coextensive with the paternal power; and when it is likened to the power of a parent, it is rather with reference to the nature and kind of punishments that may be inflicted, than to the extent of the authority. It extends to the correction of all acts of negligence or misconduct in seamen that are incompatible with the duties of their employment, with a proper care and attention to the safety of the ship and cargo, and with the good order and general discipline of the ship. All this the master has a right to require of them, and for all this they have contracted, but he has a right to require nothing more. The law does not invest him with the authority over his crew of a general praefectus morum, to correct and chastise them for general immoralities, that are not incompatible with a faithful performance of the service for which they engage. For such delinquencies, like all other men, they are responsible only to the law. Such we find to be the limitation of the master's authority, whether we look for the rule in the ancient sea ordinances or in the most approved modern writers on maritime law. In examining the old ordinances we find, in fact, that the authority of the master to inflict corporal punishment on his men, in any case, is rather an inference from the general provisions of those codes, than a right standing on any express text. But there is nothing in any of them that will by the most remote inference justify the master in the exercise of such authority, except in cases of misconduct that relate directly to their duties, or to the general police and good order of the ship. The Ordinance of the Marine of Louis XIV. liv. 2, tit. 1, art. 21, does in its terms authorize the master, with the advice of the mate and pilot, to punish mutinous, drunken, and disobedient seamen, and those who ill-treat their shipmates and commit similar offences. "It is of the last importance," says Valin, "that good order and subordination be preserved on board vessels. It is for this reason that obedience to the master has been perpetually recommended to the crew, with a power in him to inflict certain punishments on the mutinous, the drunken, the quarrelsome, and those who maltreat their companions; in one word, on all those who disturb the order and service, or who commit faults for which they may be expelled from the ship, and discharged without wages." 1 Valin, Comm. 447; Abbott, in his treatise on Shipping, (part 2, c. 3, § 4,) and Chancellor Kent, in his Commentaries, describe the authority of the master in similar terms. "Being responsible over to others," says Kent, "for his conduct as master, the law, as well on that account as from the necessity of the case, has intrusted him with great authority over the mariners on board. Such authority is requisite for the safe navigation of the ship, and the preservation of good order and discipline He may imprison, and also inflict reasonable corporal punishment upon a seaman, for disobedience to his reasonable commands, or for disorderly, riotous, or insolent conduct; his authority in that respect is analogous to that of a master on land over his apprentice

or scholar. The books unite in the lawfulness and necessity of the power. Without it, authority could not be maintained, nor navigation made safe." 3 Kent, Comm. (3d Ed.) 181. The master of a vessel, says Casaregis, has no large jurisdiction in his ship, but only a kind of economical authority and power of discipline, extending to a slight chastisement, pro corrigenda insolentia et male morata vita, seu licentia nautarum et vectorum, such as a father has over his children, a schoolmaster over his scholars, or a master over his servants and domestics. Quoted by Valin, (volume 1, p. 449.)

These authorities are undoubtedly sufficient to justify the master in correcting by reasonable chastisement, administered on the spot, the misconduct of any seaman, which endangers the safety of the ship or cargo, or which tends to the subversion of the good order and discipline of the ship's crew, but they furnish no warrant for his assuming judicial authority, and in the quality of a domestic judge animadverting on the general moral misdemeanors of his men, which are not incompatible with the faithful performance of all those duties for which they engage by their contract. Such an authority is not necessary to the master for the safety of navigation and maritime commerce, and the law, in conferring this extraordinary power upon him, has justly limited the exercise of it to those cases which the exigencies of the service imperiously require. If, then, all the facts are conceded as stated in the master's answer, with the exception of listening at the cabin door, and this is not proved, they will not constitute a justification. Admitting the story told of Capt. Brazier to have been fabricated, though it ought to be observed that this from the evidence is far from being certain, whatever animadversion it may deserve as a breach of moral duty, it was no offence against Captain Little. It neither put in jeopardy property of which he had the care, nor had it any direct tendency to weaken his own authority, or subvert the discipline of his own crew, and therefore it was not within his authority to assume jurisdiction over the offence, whatever it might be. Decree thirty dollars damages and costs.

Case No. 840.

BANGS et al. v. LOWBER et al.

[2 Cliff. 157.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1862.[2]

SHIPPING—CHARTER-PARTY — PROVISION TO PROCEED WITH ALL POSSIBLE DESPATCH.

1. A vessel, while on a voyage to Melbourne, was chartered by the managing owners to defendants, for a voyage from Calcutta to a port in the United States. The charter-party contained a clause that the vessel was to "proceed from Melbourne to Calcutta with all possible despatch." Before the master was advised of this engagement, the vessel had sailed from Melbourne to Manilla, seeking business, and did not arrive at Calcutta as soon as the parties had contemplated. The defendants refused to load the vessel; and upon suit to recover damages for a breach of the charter-party, brought by the managing owners, who were described therein as "owners" of the vessel, it was *held*, that although there were other owners, the suit was rightly brought in the names of those subscribing the charter-party in good faith.

2. It was also *held*, that the clause quoted above was not a condition precedent, but an independent stipulation, which gave the charterers a claim for damages, on failure of performance by the owners, but did not give them the right to avoid the contract, because it appeared that the object of the voyage was not wholly frustrated thereby.

[See note at end of case.]

[See Philadelphia, W. & B. R. Co. v. Howard, 13 How. (54 U. S.) 307; Dermott v. Jones, 23 How. (64 U. S.) 220.]

[At law. Action by Elkanah Bangs and others against William Lowber and others for breach of a charter-party. Judgment for plaintiffs. This was afterwards reversed by the supreme court in Lowber v. Bangs, 2 Wall. (69 U. S.) 728.]

This was an action of assumpsit, and came before the court on an agreed statement of facts, from which it appeared that on the 9th of June, 1858, while the ship Mary Bangs was on a voyage from New York to Melbourne, the plaintiffs, who were managing owners, entered into a charter-party with defendants, in which it was agreed, that the vessel should "proceed from Melbourne to Calcutta with all possible despatch," and there receive a full cargo, to be provided by defendants, and transport the same to a port of discharge in the United States; that, although the plaintiffs used due diligence in informing the master of the ship of this contract, the information, owing to an interruption of the mails, did not reach him until he had left Melbourne and arrived at Manilla with his vessel, in search of business. Upon receipt of this intelligence he sailed for Calcutta; where he arrived the 26th of February, 1859, and reported himself to defendants' agent as ready to receive cargo. Besides the Mary Bangs, the defendants, at about the same time, chartered two other vessels for a voyage from Calcutta to the United States, and placed their agents there in funds to lade them as well as the Mary Bangs. As soon as they learned that the Mary Bangs had sailed from Melbourne to Manilla, they instructed their agents at Calcutta that this deviation nullified the engagement, which they considered a fortunate circumstance, as freights had fallen; and, under their instructions, the agent declined to furnish a cargo for her, but took up another vessel, and loaded her with a cargo purchased after the arrival at Calcutta of the Mary Bangs, with funds originally provided by defendants to freight the latter vessel.

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Reversed in 2 Wall. (69 U. S.) 728.]

The action was brought by the managing owners, who subscribed the charter-party, as "owners," to recover damages for breach of defendants' engagement to lade the vessel; and it was agreed that, if the court were of opinion they could maintain the action, an assessor should be appointed to ascertain the amount of damages they were entitled to recover.

B. R. Curtis and G. O. Shattuck, for plaintiffs.

It has been decided in a large number of English cases, that such clauses as "ship to proceed with all convenient speed," or "in a reasonable time," or "with all possible despatch," and similar clauses, are not, in charter-parties, conditions precedent, but are merely independent stipulations; and, unless the alleged breach goes to the whole root and consideration, it only gives a claim for damages. Clipsham v. Vertue, 5 Adol. & E. (N. S.) 265; Fothergill v. Walton, 8 Taunt. 576; Freeman v. Taylor, 8 Bing. 124; Tarrabochia v. Hickie, 1 Hurl. & N. 183; Hurst v. Usborne, 18 C. B. 144; Seeger v. Duthie, 8 J. Scott, N. S. [8 C. B. N. S.] 45; Dimech v. Corlett, 12 Moore, P. C. 199; Behn v. Burness, 5 Law T. (N. S.) 670.

In some cases, it was held in England, that a stipulation in a charter to sail on or before a day certain was a condition precedent; and such stipulations were distinguished from those containing the words, "all convenient speed," "within a reasonable time," and "with all possible despatch." Glaholm v. Hays, 2 Man. & G. 257; Ollive v. Booker, 1 Exch. 416.

In Boone v. Eyre, 1 H. Bl. 273, note, Lord Mansfield laid down the following rule: "When mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they go only to part, where a breach may be paid for in damages, then the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." See Abb. Shipp. 266; Davidson v. Gwynne, 12 East, 381; Mill-Dam Foundery v. Hovey, 21 Pick. 417, 437; Philadelphia, W. & B. R. Co. v. Howard, 13 How. [54 U. S.] 307.

The burden is on the defendants to show that the object of their voyage was frustrated. Dimech v. Corlett, 12 Moore, P. C. 199; Tarrabochia v. Hickie, 1 Hurl. & N. 183.

The action was properly brought in the name of the part owners, by whom the charter was made. Seeger v. Duthie, 8 J. Scott, N. S. [8 C. B. N. S.] 45.

S. Bartlett, for defendants.

It is clearly settled that having in the contract declared themselves "owners," the plaintiffs are not by law allowed to show that they were "managing owners and the ship's husbands," that is to say, agents of the other owners. Humble v. Hunter, 12 Adol. & E. (N. S.) 310.

It is unnecessary to consider what would have been the rights or form of action in behalf of the other owners, if the defendants had entered into the possession of, and used the vessel for the voyage. The fact that the contract has never been executed, and no change occurred in the position of parties disposes of that question. Rayner v. Grote, 15 Mees. & W. 359–365.

It is a well-established rule of construction, that the words added in writing to the printed formula, are to have a greater effect given to them, than the printed words (in case of any doubt upon the sense or meaning of the whole), as the written words are the immediate language and terms stated by the parties themselves for the expression of their meaning. Arn. Ins. 80; Robertson v. French, 4 East, 130; Coster v. Phoenix Ins. Co., [Case No. 3,264;] Delonguemare v. Tradesmen's Ins. Co., 2 Hall, 589–622; Wallace v. Insurance Co., 4 La. 289; Weisser v. Maitland, 3 Sandf. 318, 322.

In all mercantile contracts, and more especially in contracts of affreightment, time is not merely an essential element, but is of the essence of the contract itself. The merchant has this always in view in planning his voyages, ordering his cargoes, and calculating in regard to the markets of the different countries.

This each party had in view in making the charter, and we accordingly find that they inserted special clauses, in writing on this subject, viz. the words, "ship to proceed from Melbourne to Calcutta with all possible despatch," and "that the owners will use the most direct means to forward instructions to the master with copy of this charter, ordering it to be fulfilled, but should it so happen the ship should arrive at Melbourne before these instructions, and the master should have engaged his ship before receiving them, this charter shall be void."

It is material upon this head, to bear in mind, that this ship at the time of the charter was on a voyage to Melbourne, and that the only instructions which the master had were verbal, "to seek business, and do the best he could in getting freight at Melbourne or elsewhere."

On behalf of the defendants, it is maintained, that upon the true construction of the charter-party, having reference to the purposes and objects of the parties, and considering all its parts and clauses, the finding the vessel at Melbourne upon receipt of such despatches, and disengaged, is to be construed a condition precedent on which the whole contract was to depend.

In other words, that the plaintiffs did in fact warrant, so far as to make it a condition precedent to the vitality of the contract, that such should be the case.

In considering this matter, it is always to

be borne in mind that the contract in suit is executory, and not executed; that the plaintiffs are seeking to recover damages for the breach, and not compensation for performance.

Whether or not a particular stipulation in an agreement shall operate as a warranty or condition precedent, the non-observance or performance of which will dispense with the performance of the contract by the other, or as an independent stipulation or agreement, is to be determined, not by any particular phrases, or any special collocation of words, but from the intent of the parties, to be collected from the language used by them, the subject matter of the contract, and the surrounding circumstances. Havelock v. Geddes, 10 East, 555.

If the non-performance of any particular agreement or covenant goes to the whole root and consideration of the contract, then such covenant or agreement is a condition precedent. Havelock v. Geddes, above cited; Davidson v. Gwynne, 12 East, 381; Stavers v. Curling, 3 Bing. N. C. 355.

In the case at bar, the breach of the agreement or covenant on the part of the plaintiffs did go to the whole root and consideration, and did deprive the defendants of the entire use of the ship. The authorities clearly support the position of the defendants in this matter. Shadforth v. Higgin, 3 Camp. 385; Shubrick v. Salmond, 3 Burrows, 1637; Glaholm v. Hays, 2 Scott, N. R. 471; Ollive v. Booker, 1 Exch. 416; Weisser v. Maitland, 3 Sandf. 318.

The words in the charter-party, "ship to proceed from Melbourne to Calcutta with all possible despatch," constitute a plain and clear warranty that the vessel should so proceed (if the contract attached); and the vessel having gone another voyage to Manilla, the defendants were released from the obligation to load the vessel.

This is manifest from the place which this clause occupies in the agreement, and from its peculiar language.

All the other clauses of the charter-party are found strictly and properly in the language of agreement only; while this is otherwise, showing that a difference was intended, and none can be suggested than that one sounds in agreement, and the other in condition.

The words themselves, "ship to proceed," &c., by common usage import the same as "conditioned to proceed," as the words, "on or before a given day," do by common usage import the same as "conditioned to sail or warranted to sail."

Looking at the subject-matter of the contract, without regarding the precise words, construing the words as a condition precedent, will carry into effect the intention of the parties, with more certainty than holding them to be matter of contract only, and merely the ground of an action for damages.

The defendant's case must not be confounded with the class of cases where the charterer has received the benefit of the charter, or given by his acts a construction to the contract, or waived the performance of the condition precedent. Such are Constable v. Cloberie, Palmer, 397; Bornmann v. Tooke, 1 Camp. 377; Davidson v. Gwynne, 12 East, 381; Havelock v. Geddes, 10 East, 555; Ritchie v. Atkinson, 10 East, 295; Boone v. Eyre, 2 W. Bl. 1312.

If these positions are wrong, still it must have been contemplated by the parties, that the vessel must have been ready to prosecute the adventure in a reasonable time, and the great length of time which elapsed, discharged the defendants from any obligation to load her.

The same doctrine in regard to deviation and delay, as affecting policies of insurance, apply to charter-parties; and whenever the delay or detention is such as would release an underwriter, a charterer will be discharged from his obligations under the charter. Mount v. Larkins, 8 Bing. 108; Freeman v. Taylor, Id. 124; Palmer v. Marshall, Id. 317; Abb. Shipp. (Ed. 1846,) 325.

The provision of the charter-party, that if the master should have engaged his vessel before receiving instructions, the charter should be void, is satisfied, by his having proceeded on another voyage, in search of other business.

The term "engaged" does not here mean merely that the vessel should have been chartered or taken up by freighters, for another business. It has a wide and more comprehensive meaning; that is, that the master of the vessel should not have embarked his vessel upon another voyage, whether a sailing or freighting voyage. This provision was not inserted merely for the benefit of the plaintiffs; it benefits the defendants as well. When, therefore, the vessel finally departed from Melbourne, whether in ballast or otherwise, she was "engaged" in other business. If the master, on arrival at Manilla, had found a freight, the matter would have ended. He went there to seek one, and the defendants' obligations are as well thereby discharged. Soames v. Lonergan, 2 Barn. & C. 564.

CLIFFORD, Circuit Justice. Suit is brought in the name of the managing owners; and it is objected by the defendants, that it cannot be maintained, because the other owners of the vessel are not joined; but the suit is upon the charter, and inasmuch as the other owners are not named in the contract, they could not be joined in the suit; so that, unless the action can be maintained in the present form, the owners are without remedy. Much reliance is placed by the defendants upon the case of Humble v. Hunter, 12 Adol. & E. (N. S.) 310, to sustain the objection; but it does not appear to support the doctrine for which it is cited. The charter-party in that case had been executed in the name of the

son; but the suit was in the name of the mother, who was the sole owner of the vessel. Parol proof was offered at the trial to show that the mother was the real owner of the vessel, and that the son had signed the charter-party as her agent, and not as principal. Objection was duly made to the admissibility of the evidence, because the son was described in the charter-party as the owner of the vessel; but it was admitted, and the jury returned their verdict in favor of the plaintiff. Whereupon the defendant obtained a rule nisi to set the verdict aside; and, after argument, it was made absolute, upon the ground that the parol evidence went to contradict the written contract. Lucas v. De la Cour, 1 Maule & S. 249; Robson v. Drummond, 2 Barn. & Adol. 303. No such question, however, arises in this case, as is obvious from the first reading of the agreed statement. The managing owners and ship's husband executed the charter-party in their own name; and, having brought suit to recover damages for a breach of the contract, the defendants offer to prove that other persons are also part-owners of the vessel. They do not prove, or offer to prove, that the plaintiffs were not fully authorized to make the contract on which the suit is brought, or that the vessel was not rightfully in their possession and under their control. Where the minority in interest refuse to participate in the voyage, vessels are often employed by those owning the majority interest; and, if the latter have the lawful possession and control of the vessel, it has never been held that a charter-party executed by them was invalid; and, if obligatory upon the ship, no reason is perceived why it should not be equally so upon the charterers. Enough is not proved in this case to defeat the right of recovery, even if the objection under other circumstances would be a valid one; and upon that ground alone, it must be overruled; but I am of the opinion that a charter-party, executed in good faith in the name of the managing owners and ship's husband, is a valid instrument, binding upon all concerned, and that a suit for damages founded upon the same is well brought in the names of the owners expressed in the instrument. Seeger v. Duthie, 8 J. Scott, N. S. [8 C. B. N. S.] 55.

Two principal positions are assumed by the defendants to show that the plaintiffs ought not to prevail upon the merits.

They insist, in the first place, that, by the true construction of the charter-party, it was a condition precedent, that the owners should use the most direct means to forward instructions to the master; and that, upon the receipt of the same, the vessel should be found at Melbourne, and disengaged. Proper means, it is admitted, were used by the owners to forward the instructions; but the position is that, inasmuch as the vessel had left Melbourne before they were received, the stipulations of the charter-party did not attach at all, because the parties contemplated that the vessel would be at that port, ready to proceed to Calcutta with all possible despatch.

Secondly, they insist that if, by the true construction of the charter-party, its provisions attached to the ship wherever found, still it must have a reasonable interpretation as to time, and that the long period which elapsed before the vessel arrived at Calcutta discharged the defendants from any obligation to load her. Several other propositions are submitted by the defendants; but those already mentioned embrace the whole substance of the defence, as understood by the court.

Whether a particular covenant is to constitute a condition precedent, depends upon the intention of the parties, as it is to be collected from the instrument in which the covenant is contained. Such was the rule laid down by Lord Ellenborough, in Havelock v. Geddes, 10 East, 563; and it is one often cited and universally approved. Charter-parties are commercial instruments; and their construction should be liberal, agreeable to the intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract relates. Abb. Shipp. 326. Questions of this nature frequently arise; and there are few that are more difficult to solve, or of more practical importance. Intention is the primary rule; and when that is discovered, as was well said in the case of Stavers v. Curling, 3 Bing. N. C. 355, all technical forms of expression must give way. Undoubtedly, a particular covenant by one party may be a condition precedent, so that the breach of it will dispense with the performance of the contract by the other; and whether it is such, or is an independent covenant, is a question to be determined according to the fair intention of the parties, to be collected from the language employed by them; but an intention to make any particular stipulation a condition precedent should be clearly and unambiguously expressed. Where mutual covenants go to the whole of the consideration on both sides, said Lord Ellenborough, in Ritchie v. Atkinson, 10 East, 305, they are mutual conditions, the one precedent to the other; but when the covenants go only to a part, then a remedy lies on the covenant to recover damages for the breach of it; but it is not a condition precedent. Boone v. Eyre, 1 H. Bl. 273. Unless the nonperformance, alleged in breach of the contract, goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages. Davidson v. Gwynne, 12 East, 389; Abb. Shipp. 342; 2 Smith, Lead. Cas. (Ed. 1855,) 26, 27; Seeger v. Duthie, 8 J. Scott, N. S. [8 C. B. N. S.] 45. Accordingly, it has been

held in repeated cases, that such clauses in a charter-party as "ship to proceed with all convenient speed," or "in a reasonable time," or "with all possible despatch," or the like, are not conditions precedent in such instruments, but are clearly independent stipulations, unless it appears that the alleged breach goes to the whole root and consideration of the contract. Take, for example, the case of Clipsham v. Vertue, 5 Adol. & E. (N. S.) 265, where the stipulation in the charter-party was to load, and forthwith proceed to the port of destination. Charterer refused to load; and, upon suit being brought, pleaded to the action, that the vessel did not arrive at the port of lading until after an unreasonable delay. To that plea the plaintiff demurred; and the plea was held bad, because it did not show that the delay frustrated the object of the voyage. Fothergill v. Walton, 8 Taunt. 576. Where the charter-party contained a stipulation to proceed from one port to another "with all convenient speed"; and the master, instead of conforming to the stipulation, willfully deviated, causing a delay of six weeks; and, in consequence of the deviation, the agent of the defendants refused to load the vessel. Tindal, Ch. J., left it to the jury, to determine whether the deviation deprived the freighter of the benefit of the contract. Freeman v. Taylor, 8 Bing. 124.

"Sail with all convenient speed," were the words of the charter-party in Tarrabochia v. Hickie, 1 Hurl. & N. 183; and the jury found, in an action for refusing to load, that the vessel did not sail with all convenient speed; but the court held, that the finding was no answer to the action, unless it also appeared, that the object of the voyage was wholly frustrated by the breach of the stipulation. Hurst v. Usborne, 18 C. B. 144. Similar views were also expressed in Dimech v. Corlett, 12 Moore, P. C. 199, where the stipulation was, that the vessel, being tight, stanch, and strong, and properly manned, and every way fitted for the voyage, should, "with all convenient speed," proceed in ballast to a designated port; and it appeared at the trial that she was not then finished, and did not get ready to sail for more than a month. It was held, that the failure to sail as stipulated was no answer to the action, without proof of other loss than that occasioned by the falling of freights. Defendants suppose that the cases, Glaholm v. Hays, 2 Man. & G. 257, and Olive v. Booker, 1 Exch. 416, assert a different doctrine; but that opinion does not appear to find support in the later cases. Tarrabochia v. Hickie, 1 Hurl. & N. 183; Seeger v. Duthie, 8 J. Scott, N. S. [8 C. B. N. S.] 45; Dimech v. Corlett, 12 Moore, P. C. 199. Perhaps the latest case is that of Behn v. Burness, 5 Law T. (N. S.) 670, where the stipulation was that the ship, "now in the port of Amsterdam, shall, with all possible despatch, proceed to Newport"; and it was distinctly held that the description of the place where the vessel was supposed to be was not a warranty or condition precedent.

Both parties understood that the vessel was at sea, and that she might arrive at Melbourne and be engaged by the master before her instructions would come to hand; and they accordingly stipulated that, in that event, the charter should be void. The engagement of the ship before the instructions were received, was to render the charter void; but, in the view of the court, there is not a word in the instrument to warrant the conclusion, that the parties contemplated that any such consequence should flow from the arrival of the vessel at that port, and her temporary departure seeking business. Parties doubtless expected that the ship would proceed from Melbourne to Calcutta; but, when the provision in that behalf is compared with the one providing for the forwarding of instructions, it is evident that it was not intended as a warranty or condition precedent, as the latter is framed in the most general terms possible, clearly indicating that the parties contemplated that the instrument might reach the master at other ports than the one to which he was immediately destined. All possible despatch was required of the vessel, and the owners were required to use the most direct means to forward instructions to the master; but no provision was inserted to render the charter void, unless the master should have engaged the ship before the instructions came to hand. Support to this view of the case is derived from the fact, that no day is fixed for the departure of the vessel from Melbourne, or for her arrival at Calcutta. Unless the instructions were received by the master before the vessel sailed to seek business, it must have been understood by the defendants, that some delay would necessarily ensue in the departure of the vessel; and if, in that contingency, they had been unwilling to accept the contract, the reasonable presumption is, that they would have insisted that some more specific provision upon the subject should have been inserted in the charter-party. Provision was made to protect the plaintiffs, in case the vessel was engaged; and, as the parties appear to have understood the effect of a condition precedent, it may well be supposed, that, if they had intended that the contract should be null in case the vessel sailed from Melbourne before the master received the instructions, they would have said so in terms as explicit as those employed in respect to the engagement of the vessel.

Nothing of the kind, however, is to be found in the instrument; and I am of the opinion that nothing of the kind was intended.

Delay ensued, beyond question, for a longer time than the parties expected when the charter-party was executed; and the remaining question is, whether it was of a character, and for such a length of time, as to justify the defendants, under the circumstances, in refusing to load the vessel. When a day

is appointed for the payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing, which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied on his remedy, and did not intend to make the performance a condition precedent; and so it is, where no time is fixed for the performance of that which is the consideration or other act. [Clerke v. Pywell,] 1 Wms. Saund. 319b. Moral wrong is not imputed to the plaintiffs in this case, and could not be, if attempted, with any success, as the whole evidence shows that the delay of the vessel was the result of an unforeseen accident, over which the plaintiffs could exercise no control. Under those circumstances, the rule is, that the delay is no answer to the action for a refusal to load the vessel, unless it appear that the effect was to frustrate the voyage. Additional authorities to this point are unnecessary, as those already cited are full to the point. Mill-Dam Foundery v. Hovey, 21 Pick. 439; Stavers v. Curling, 3 Bing. N. C. 355. Applying that rule to the present case, it is quite obvious what the result must be. Sufficient saltpetre, or its equivalent, for ballast, was to be furnished by the defendants; but their agent had not purchased any of the article when he wrote to them on the 27th of November, 1858, that he should consider himself at liberty to throw up the charter. Freight, per charter-party, was $13 for whole packages, and half price for broken storage; but, when the defendants refused to load the vessel, the rate had fallen more than one half; which, taken in connection with the letter of the defendants' agent, affords strong ground to conclude that the market rate of freight had more to do with the refusal to load the vessel than any delay which had ensued on her arrival. Full confirmation of that view of the case, if any be needed, is also derived from the subsequent conduct of the agent of the defendants in chartering another vessel to take the place of the Mary Bangs, and loading her with the funds provided to purchase a cargo for the vessel of the plaintiffs.

In view of the whole case, I am of the opinion that the plaintiffs are entitled to recover; and, according to the agreement of the parties, an assessor must be appointed to report the amount.

[NOTE. This decision was reversed in Lowber v. Bangs, 2 Wall. (69 U. S.) 728. Mr. Justice Swayne, in delivering the opinion of the court, said that the stipulation that the ship should proceed from Melbourne to Calcutta with all possible despatch should be construed to mean that she should proceed directly from one place to the other, and that to this extent, at least, it was intended to be made of the essence of the contract; that the stipulation was a condition precedent, and not a mere representation nor an independent covenant. Mr. Justice Clifford and Mr. Justice Nelson, dissenting.]

Case No. 841.

BANGS et al. v. MAXWELL.

[3 Blatchf. 135.][1]

Circuit Court, S. D. New York. Dec., 1853.

CUSTOMS DUTIES—APPRAISERS—PROTEST.

1. The law does not require merchant appraisers, in reappraising goods, to act in the presence of the importer.

2. General allegations in a protest, that the appraisers were prejudiced or incompetent, need not be regarded by the collector, when the particulars constituting the disqualifications charged are not set forth specifically.

[See Steegman v. Maxwell, Case No. 13,344.]

3. Requisites of a protest against the imposition of duties, stated.

The plaintiffs imported into New York an invoice of books, which was raised in value, on appraisal and reappraisal, more than 10 per cent., and an additional duty or penalty of 20 per cent. was imposed. This was an action against the collector of that port, to recover back the excess of duties, the penalty, and the fees. It was commenced in the supreme court of New York, and was removed, by certiorari, into this court.

A protest in the printed form used in Goddard v. Maxwell, [Case No. 5,492,] was made by the plaintiffs, to which they added, in writing, that "the reappraisement was made in a private room, from which they were excluded."

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. The law does not require the merchant appraisers to act in the presence of importers of goods, their agents, or consignees.

General allegations in a protest, that the appraisers were prejudiced, or incompetent, or not duly qualified, need not be regarded by the collector, when the particulars constituting the disqualifications charged are not set forth specifically. It is not alleged, in the protest, that the plaintiffs are not owners of the goods; nor that the owners are the producers, and not the purchasers of them; nor that the merchant appraiser was sworn by a public appraiser. Accordingly, none of those points can be now considered by the court, on the question of the misconduct of the collector in levying the duties or fees complained of.

Judgment for defendant.

BANK.

[Note. Additional cases cited under this title will be found arranged in alphabetical order under the names of the banks; e. g. "Bank v. Neyhardt. See Fourth Nat. Bank v. Neyhardt, Case No. 4,991."]

BANK, (ANDERSON v.) See Case No. 354.

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

Case No. 842.

BANK v. LABITUT.

[1 Woods, 11.][1]

Circuit Court, D. Louisiana. April Term, 1870.

COURTS — MOTION TO REVIEW JUDGMENT AT SUBSEQUENT TERM — INTERVENTION AND THIRD OPPOSITION.

1. Where the marshal had levied an execution on a crop of sugar and molasses, the intervention and third opposition of parties claiming a superior lien and privilege on the property, asking that the marshal be required to retain sufficient of the proceeds to pay the claim of the interveners and for judgment against the judgment debtor for the amount of said claim, is a proceeding upon the law side of the court, and the interveners are not compelled to resort to a bill in equity for relief.

[See In re Hathorn, Case No. 6,214.]

2. The judgment or order of a court finally disposing of a case, cannot be reviewed at a subsequent term on motion. The only relief for errors in law in such cases is by review, writ of error or appeal, as either may be appropriate.

[Cited in U. S. v. Millinger, 7 Fed. 187; Fischer v. Hayes, 6 Fed. 63; U. S. v. Malone, 9 Fed. 897; Allen v. Wilson, 21 Fed. 884.]

[3. A court has power at a subsequent term to set right mere forms in the judgment, to correct misprision of its clerks, and any merely clerical error, so as to conform the record to the truth.]

[Cited in Maybin v. Raymond, Case No. 9,338.]

At chambers. This cause came up at the April term, 1870, on motion to reinstate interventions and third oppositions which had been dismissed at a previous term. [Dismissed.]

J. Ad. Rosier, for the motion.

Edward Phillips, contra.

WOODS, Circuit Judge. Alex. E. Prewett and the Northern Bank of Kentucky each recovered judgment in this court on the law side against Jules Labitut, the defendant, on which executions were issued and levied on defendant's crop of sugar and molasses, made by him on his plantation in the year 1869. Before the sale under the execution, Octave Hopkins filed his intervention and third opposition in his own behalf, and an intervention and third opposition in behalf of a large number of other persons, of whom he alleges himself to be the agent and attorney in fact. In this intervention he claims that he and the persons whom he represents have a lien and privilege on said crop of sugar and molasses, superior to that of any other creditor of Jules Labitut, and prays that the marshal be directed to retain in his hands the proceeds of the sale of the crop, until the interventions and third oppositions can be heard, and that judgment against Labitut may be rendered in favor of interveners, and the marshal directed to pay first, out of the funds in his hands from the sale of said crop, the judgment in favor of interveners. On the 8th of March, 1870, during the last term of this court, these interventions and third oppositions were dismissed, without prejudice to the right of the parties to file a bill in chancery. On the 26th of April, during the present term of the court, a rule was taken on the plaintiffs in execution to show cause why the interventions and third oppositions dismissed on March 8th should not be reinstated and the order of dismissal rescinded. This is the rule now before the court for decision.

We think the interventions and third oppositions were improperly dismissed. That courts of common law as well as courts of equity and of admiralty possess a controlling power over money brought into these courts respectively by their process, is undeniable. It is every day's practice in the common law courts, upon rules to show cause or upon motion to examine and decide the claims of third persons to money made under execution and paid into court. These interventions and third oppositions, in a more formal and precise way, invoke a power of the law side of the court which in common law states is exercised upon motion or rule. They constitute a convenient and summary method of disposing of the rights of persons to property levied on under execution. And though the forms may differ in different states, the proceedings have always been considered to be on the law side of the court. In some states when property is levied on which is claimed by another, a summary proceeding is instituted by the claimant, called "trial of the right of property." After the property is sold and the money is in the hands of the officer of the court, it is reached by motion, and the rights of the contestants to the fund tried and adjusted by the court. A bill in equity may be filed in a case of equitable jurisdiction. We regard these interventions and third oppositions as proceedings on the common law side of the court. The act of May 19, 1828, provides that the forms and modes of proceedings in suits in the courts of the United States held in those states admitted into the Union since the 29th day of September, in the year 1789, in those of common law, shall be the same in each of said states respectively, as are now used in the highest court of original and general jurisdiction of the same. This is the law of this court to day. Interventions and third oppositions were in use in this state, on and long prior to May 19, 1828, and we think they are authorized by the statute just quoted. These interventions were therefore improperly dismissed. But we are clearly of the opinion that the motion to reinstate them, and to rescind the order dismissing them comes too late. They were dismissed March 8, during the term which commenced on the first Monday of November, 1869, and this motion is made during the term which

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

commenced on the fourth Monday of April, 1870.

Nothing is better settled than this, that after a court has adjourned, it cannot set aside one of its own judgments; the judgment is binding until reversed on error. See Bank of U. S. v. Moss, 6 How. [47 U. S.] 31, where this whole subject is discussed and authorities collated. A mere error in law of any kind, supposed to have been committed in a judgment of a court at a previous term, is never sufficient justification for revising or annulling it at a subsequent term in this summary way on motion. A court has power at a subsequent term to set right mere forms in its judgments, to correct misprisions of its clerks, and to correct any mere clerical errors so as to conform the record to the truth; irregularities also in notices, mandates and similar proceedings, can in some cases be amended at a subsequent term, and in short, all amendments permissible under the statute of jeofails may be made at a subsequent term. But the only relief for errors in law in such cases is by review, writ of error or appeal, as either may be appropriate. The cases in which these interventions were filed, were completely disposed of at the last term of this court. The interventions were dismissed. That is the end of the matter. The cases cannot be heard again at a subsequent term by having them again placed on the docket. They have become res adjudicata, and can only be reached in one of the methods already indicated. Because this motion comes too late, it must be dismissed.

BANK, (SAMPLES v.) See Case No. 12,278.

Case No. 843.

BANK v. SHAW et al.

[2 Wkly. Notes Cas. 542; 1 Law & Eq. Rep. 591.]

Circuit Court, E. D. Pennsylvania. April 6–12, 1876.[1]

NEGOTIABLE INSTRUMENTS—BILL OF LADING—PENNSYLVANIA STATUTES.

[1. Act Pa. Sept. 24, 1866, (1 P. L. 1363,) making bills of lading negotiable, does not enable a wrongful taker of such a bill to pass to an innocent purchaser any better title than he himself has. But if the rightful owner has negligently parted with the bill of lading the wrongful holder may pass a perfect title to an innocent purchaser, who has no notice of such negligence.]

[See note at end of case.]

[See Dows v. Bank, 91 U. S. 618; Pollard v. Vinton, 105 U. S. 7; Henry v. Warehouse Co., 81 Pa. St. 76; Barker v. Dinsmore, 22 P. F. Smith, (72 Pa. St.) 427; Transportation Co. v. Steele, 20 P. F. Smith. (70 Pa. St.) 188; Decan v. Shipper, 11 Casey, (35 Pa. St.) 239.]

[2. Purchasers of a bill of lading, who have any reason to believe that the sellers held it as security for an outstanding draft, take no better title than such sellers had. And the fact that the purchaser telegraphed the carrier, to learn whether the shipment represented by the bill had actually been made, is competent evidence on the question of the indorsee's belief.]

[See note at end of case.]

[At law. Action of replevin by the Merchants' National Bank of St. Louis against Shaw & Esrey for the recovery of certain cotton which had come into defendants' possession by an alleged wrongful transfer of the bill of lading. Judgment was heretofore given for plaintiffs, but a new trial was granted, on the authority of National Bank of Commerce v. Merchants' Nat. Bank, 91 U. S. 92, on the ground that the evidence had not been sufficiently clear that the bill of lading had been held as security for the payment of a certain draft. Verdict and judgment are now given for plaintiffs.

[This decision was subsequently affirmed by the supreme court in Shaw v. Railroad Co., 101 U. S. 557. See note at end of case.]

The Merchants' National Bank of St. Louis agreed with Norvell & Co. of that city and Kuhn & Bro. of Philadelphia to make advances on bills of lading for cotton shipped by Norvell & Co. to Kuhn & Bro., and in accordance with this agreement discounted Norvell & Co.'s draft on Kuhn & Bro. for $11,947 payable 20 days after sight. The Merchants' Bank at the same time received the original bill of lading for 170 bales to the order of Norvell & Co. and indorsed in blank by Norvell & Co. The duplicate bill of lading marked "Not negotiable" was forwarded by Norvell & Co. to Kuhn & Bro. as notice of the shipment. The Merchants' Bank forwarded to its correspondent in Philadelphia, the Bank of North America, for collection, the draft, with the bill of lading attached. Kuhn & Bro. accepted both, as the collector supposed, and they were held by the Bank of North America until maturity. The draft was then protested, and it was found that Kuhn & Bro. had substituted the duplicate for the original bill of lading and kept the latter. The officers and servants of the bank testified that this was without their knowledge or consent. Kuhn & Bro., soon after getting possession of the original bill of lading in this manner, got an advance of $8,500 thereon from Miller & Bro., directing them to sell the cotton as soon as possible. It was accordingly sold by sample and for cash to Shaw & Esrey, who did not see the bill of lading or other written evidence of title. The carrier delivered the cotton to Shaw & Esrey under the orders of Miller & Bro. Whereupon the Merchants' National Bank of St. Louis replevied it.

A short time before Kuhn & Bro. wrongfully got possession of the original bill of lad-

[1] [Affirmed in 101 U. S. 557.]

ing involved in this case, Miller & Bro. had advanced $6,000 to Kuhn & Bro. on an original bill of lading for 143 bales, drawn and endorsed as this one was. On the next day Kuhn & Bro. took back the bill of lading, giving their check for $6,000 in exchange. Later in the same day Miller & Bro. advanced $7,000 to Kuhn & Bro. on the same bill. On the morning of this day Miller & Bro. saw a notice in a newspaper warning the public that a bill of lading for 143 bales had been stolen. Miller & Bro., before making the second advance of $7,000, learned from the officers of the Farmers' & Mechanics' Bank that the bill had been wrongfully taken from the bank, but the matter had been adjusted and advances could now safely be made on it. The bank officers then informed Miller & Bro. that in case of such a wrongful taking they would have a right to seize the cotton wherever found.

After advancing $8,500 on the bill of lading involved in this suit, Miller & Bro. wired the agent of the carrier at St. Louis and learned that the bill was all right. Miller & Bro. had been in the habit of making advances to Kuhn & Bro. on duplicate bills of lading.

There was no testimony as to the good faith of Shaw & Esrey.

R. N. Willson and George Junkin, for plaintiffs.

W. H. Lex and J. E. Gowen, contra.

Before McKENNAN, Circuit Judge, and CADWALADER, District Judge.

CADWALADER, District Judge, [orally charging the jury.] The effect of these transactions and of the letters and other evidence was that the cotton was appropriated for the security of the bank, not merely until acceptance of the bill in exchange, but until actual payment of it. Such a stipulation is proved, and not disputed. Upon the effect then of what has been stated, the plaintiffs had a special property in the cotton in question for the security not only of the acceptance, but the payment of the bill of exchange. Until, therefore, the plaintiffs voluntarily parted, if they ever did so, with the bill of lading, or bill of exchange, or otherwise lost their title to it, they had a special property in this cotton which authorized them to maintain the present action. As this bill of lading was negotiable, it becomes very important to inquire whether the possession of it was wilfully or negligently parted with by the Bank of North America as agent of the plaintiffs, because if the true owner of property, through himself or his agent, wilfully or negligently allows the muniments of title, especially such a muniment as a bill of lading, to get out of his possession and into circulation, so as to enable a wrong-doer to impose himself upon others as the owner, the true owners of the property may be divested of their title, and the wrong-doer able to pass to innocent parties a better title than the rightful owner would then have. It, therefore, becomes very important to inquire whether the Bank of North America wilfully or negligently parted with the possession of the original bill of lading, and as that bank was the agent of the plaintiff, and as the means of knowledge were, we think, peculiarly within their reach, reason and common sense would induce us to expect that the proof of the truth as far as it could be ascertained would come from the party who thus had the means of knowledge. Accordingly, the plaintiffs have undertaken to prove how, as far as they were able to show, this bill of lading got out of their possession, and their proof is very simple, and may probably be very satisfactory to you. In the first place they produce the president and cashier, which is proper if it were a mere formality, and it is a proper formality, to say that there was nothing known to them to authorize any departure from the regular rules of business. They had no right to part with it as between them and the plaintiffs, but, lest innocent persons should suffer, the proof is made that they never authorized nor knew anything about it. Then the subordinates who would have knowledge on the subject are produced, and their testimony is to the same effect.

If the plaintiffs or their agents neither wilfully nor negligently parted with this bill of lading, but it was surreptitiously abstracted, the court is of opinion that Kuhn & Bro. could not transfer to Miller a better title than they themselves had. The facts of the particular case are with the jury; the law, as the court is at present advised, I have stated. A bill of lading is, in certain forms of it, negotiable at common law, and, in other forms of it, is negotiable by a law of Pennsylvania passed in 1866. [Act Sept. 24, 1866; 1 P. L. 1363.] Other states have passed laws which are somewhat different. Louisiana and Missouri have passed laws which use words making a bill of lading negotiable in the same way that a bank note or bill of exchange is negotiable. The Pennsylvania law omits those words, and the court is of opinion that their omission is to be considered in the interpretation of the act, and that while a bill of lading is to certain intents negotiable, so as to pass the legal title among parties rightfully concerned in it, and so as to enable a wrong-doer, under circumstances such as I have explained, to impose himself on the world as owner, yet the rule that applies to a bank note, or bill of exchange, or promissory note is not in Pennsylvania the standard by which to determine the present question. If the true owner through any fault, omission of duty, or carelessness of any kind, to say nothing of what is not, of course, a wilful parting, enables a wrong-doer to impose upon the world, then the true owner ought to suffer; but, where the bill of

lading is merely stolen from him, the law does not shift the title through a mere possession of it alone.

The plaintiffs' case thus far, if we are right in the law as we state it, and in this view of the facts, stands on a very simple footing. The defendants of record—Shaw & Esrey—appear to have bought here through a broker the cotton in controversy, from Miller & Bro. Now it does not appear that, when the defendants bought, a bill of lading or any muniment of title or anything of the kind was exhibited to them. They bought on samples, and, while their purchase was an innocent and ordinary one in the market, there was nothing to show title by documents such as a bill of lading or anything else. Their case, therefore, if there was nothing intervening, is simply that of a party who innocently buys what did not belong to the seller, and every man knows that he can get no better title than the seller, so that, as far as the defendants' personal relations to the property in question are concerned, they could acquire no title as against the present plaintiff; but Shaw & Esrey have the full benefit of whatever title Miller & Bro., from whom they bought, may have had. If, therefore, Miller & Bro. had a better right than the plaintiffs, Shaw & Esrey have the benefit of that right, because whatever right Miller & Bro. had, they sold to Shaw & Esrey.

This brings us to inquire as to the title which Miller & Bro. set up. They allege that they have, by reason of what occurred between them and Kuhn & Bro., a better title than the plaintiffs, and they rest this allegation of title upon the possession by Kuhn & Bro. of the original bill of lading, and the exhibition of it to them, and transfer of it to them, as security for an advance of $8,500. The court is of opinion that if there was no wilful or negligent parting with the bill of lading by the true owners of the cotton, Kuhn & Bro. could transfer no better right than they themselves had. If you should find that there was on the part of the plaintiffs or their agents a negligent, not a wilful parting as alleged, but a negligent, parting with the bill of lading, then the title of Miller & Bro. requires consideration under a different light. Then, if there was nothing more in the case, Miller & Bro. would get a better title than the plaintiffs, and hence, it becomes necessary to consider a question which I will state thus: did Miller & Bro. know any fact or facts from which there was reason to believe that the bill of lading in question was held as a security for an outstanding draft? If they did, they were not innocent takers. I do not mean that they were not innocent, as between them and Kuhn & Bro. I do not mean that there was any moral fraud, but I mean innocent as regards a true owner. It is for you to say how far that transaction with the Farmers' & Mechanics' Bank, and another circumstance which I will mention, may rationally have contributed to induce in the mind of a reasonable person a distrust of the honesty of Kuhn & Bro., in respect of such transactions as that of which you find, in the evidence in question, this is a part. But there is another circumstance, which accordingly as you may view the facts, and they are entirely for you, may or may not induce you to believe not merely that Mr. Miller had reason to distrust, but that he actually did distrust Kuhn, in reference to the very shipment in question, because it appears that when he made the advance of $8,500 on the bill of lading here in question, he telegraphed to a person who represented the carriers to know if all was right. Now, as regards the carrier, a carrier could know nothing except the fact whether the cotton was shipped. I do not want to usurp your privilege: it is for you to say whether you so find, but I suggest for your consideration, that there was distrust on the question whether this cotton, any cotton, or the cotton represented by the bill of lading, had been shipped at all. Would Miller have made this inquiry if he had no distrust of Kuhn & Bro.? Those two circumstances, separately or together as you may think right, are for your consideration, and upon them, and upon the whole facts of the case, you will say whether you will find that Miller knew what gave him reason to believe that Kuhn's title was not all right. If you do so find, then it would be of no importance whether the Bank of North America was negligent or not, because they do not lose their title as between them and Kuhn, and would only lose it as regards an innocent unsuspecting purchaser. If Miller had reason to believe all was not right, then he took the risk; there was no fraud, but he was not a child under age, and he knew the risk that he ran, if he doubted the title. It did not impute any want of integrity in him. In fact, I do not know how it is with you, but I rather think all of us are very much in the habit of running risks of which we know we take the consequences. We take for granted that checks are not forged, and we do it perhaps with people we know nothing about, and we may think ourselves very foolish if we get into difficulty, but it does not affect our moral standing, and I say, I do not see anything in this case to raise a question affecting Mr. Miller morally, but the question is whether he has not taken a risk on himself, of which he ought to take the consequences.

You will find your verdict generally for plaintiffs or for the defendants.

The court requests the jury before their verdict is recorded to answer specially two questions: (1) Whether there was any negligence of the plaintiffs or their agents in parting with possession of the bill of lading. (2) Whether Miller & Bro. knew any fact or facts from which they had rea-

son to believe the bill of lading was held to secure payment of an outstanding draft.

McKENNAN, Circuit Judge, concurred.

Verdict for plaintiffs. Answer to first question: No. Answer to second question: Yes. Thereupon judgment was entered for plaintiffs.

[NOTE. This judgment was affirmed by the supreme court in Shaw v. Railroad Co., 101 U. S. 557. Mr. Justice Strong, in delivering the opinion, said: "Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible, such as the liability of indorsers, the duty of demand ad diem, notice of nondelivery by the carrier. etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it. We think, therefore, that the rule asserted in Goodman v. Harvey, 4 Adol. & E. 870; Goodman v. Simonds, 20 How. (61 U. S.) 343; Murray v. Lardner, 2 Wall. (69 U. S.) 110,—and in Phelan v. Moss, 67 Pa. St. 59, is not applicable to a stolen bill of lading. At least, the purchaser of such a bill, with reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstanding draft, is not a bona fide purchaser. and he is not entitled to hold the merchandise covered by the bill against its true owner. In the present case there was more than mere negligence on the part of Miller & Bro.; more than mere reason for suspicion. There was reason to believe Kuhn & Bro. had no right to negotiate the bill. This falls very little, if any, short of knowledge. It may fairly be assumed that one who has reason to believe a fact exists knows it exists; certainly, if he be a reasonable being."]

BANKER, (WOOLLEN v.) See Case No. 18,030.

BANKERS' & BROKERS' TEL. CO., (DAY v.) See Case No. 3,672.

Case No. 844.

BANK OF ALEXANDRIA v. CLARKE.

[2 Cranch, C. C. 464.] [1]

Circuit Court, District of Columbia. April Term, 1824.

NEGOTIABLE INSTRUMENTS — STATUTE OF LIMITATIONS—NEW PROMISE — INDORSER A COMPETENT WITNESS.

1. In an action by the indorsee of a promissory note against the maker, the indorser is a competent witness for the plaintiff, (without a release,) to prove an acknowledgment of the debt so as to take the case out of the statute of limitations.

[See Mason v. Masi, Case No. 9,244; Gaither v. Lee, Id. 5,182.]

2. The defendant said he thought the plaintiff had charged up the note to his account, if that was not the case he would "attend" to it; this is sufficient to rebut the plea of the statute of limitations.

At law. Assumpsit, by the [Bank of Alexandria] indorsee against [Edward W. Clarke] the maker of a promissory note for $64.25. [Judgment for plaintiff.]

A verdict was taken for the plaintiff subject to the opinion of the court, whether the deposition of C. Neale, the indorser of the note, be admissible as evidence in this cause, without a release from the plaintiff; and, if admissible, whether it be sufficient per se to take the case out of the statute of limitations. Judgment to be rendered for plaintiff or defendant according to the opinion of the court on the above points.

THE COURT, at December term, 1824, (CRANCH, Chief Judge, contra,) gave judgment for the plaintiff. See Barnes v. Ball, 1 Mass. 73, and Rice v. Stearns, 3 Mass. 225; Gaither v. Lee, in this court, at June term, 1820, [Case No. 5,182;] and Knowles v. Stuart, at April term, 1824, [Case No. 7,900.]

Case No. 845.

BANK OF ALEXANDRIA v. DAVIS.

[1 Cranch, C. C. 262.] [1]

Circuit Court, District of Columbia. Nov. Term, 1805.

PRACTICE—BANK OF ALEXANDRIA—CHARTER.

The Bank of Alexandria is, by its charter,[2] entitled to judgment at the first term.

[See Bank of Alexandria v. Henderson, Case No. 848.]

Writ returnable to this term.

THE COURT, some days ago, appointed yesterday for the trial of this cause under the law incorporating the bank.

Mr. C. Lee hoped that judgment would not be rendered by default until a rule had been laid, or notice given to defendant. The appearance-day is the day after the rising of this court.

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] The charter has since been altered in that respect.

The defendant being called, and not appearing, judgment by default was rendered and a writ of inquiry awarded.

Case No. 846.

BANK OF ALEXANDRIA v. DENEALE.

[2 Cranch, C. C. 488.][1]

Circuit Court, District of Columbia. May Term, 1824.

NEGOTIABLE INSTRUMENTS—SPECIAL USAGE OF DISCOUNTING BANK.

1. A party to a note discounted at a bank, is not bound by the special and particular usage of such bank, unless upon his agreement, express or implied.

[See Bank of Columbia v. McKenney, Case No. 874.]

2. Upon a prayer for instruction to the jury, the court, in considering the question whether the jury can, from the evidence, infer the facts necessary to justify the instruction prayed, must decide in the same manner as they would upon a demurrer to evidence, and will consider all those facts as proved which the jury could legally infer from the evidence.

3. But upon the question whether the instruction prayed be justified by the facts stated in the prayer, the court is bound to decide upon those principles which ought to govern them in deciding upon a special verdict. The ultimate facts upon which the party relies must be expressly and absolutely stated. The court can infer nothing.

4. If a case cannot be brought within the special usage of the bank, it must be governed by the general law of the land; and by that law the indorser is not liable, unless demand of payment be made upon the maker of the note.

5. By the law-merchant the rights and obligations of the parties to a negotiable bill or note are as precisely ascertained as if they had been expressed in so many words. The obligation of the indorser is an express, not an implied obligation. It is conditional, not absolute. No parol agreement made at the same time with the written agreement, can alter or control its legal import; nor can evidence of such parol agreement be admitted.

6. In a case stated, the court cannot infer any fact as they may upon a demurrer to evidence.

7. An understanding and expectation of the parties, does not, in a special verdict, or case stated, amount to a finding of an agreement.

At law. Assumpsit [by the Bank of Alexandria] against the executrix of the indorser of a promissory note for $4,000, made by one James Deneale by his attorney in fact, the defendant's testator, George Deneale, payable to the said George Deneale and by him indorsed to the plaintiffs, by whom it was discounted, and the proceeds placed to the credit of the maker, James Deneale. [Verdict and judgment for defendant.]

It was dated at Alexandria, on the 16th of June, 1818, and payable sixty days after date. No place of payment was stated in the note. James Deneale, the maker of the note, resided at Dumfries in Virginia, about twenty-five miles from Alexandria, and had never resided in Alexandria. George Deneale, who was his brother, resided in Alexandria. On the 18th of August, 1818, (being the 3d day of grace,) the notary employed by the bank, put a letter into the post-office at Alexandria directed to the said James Deneale at Dumfries, informing him that the note was due. George Deneale died on or about the 2d of July, 1818, before the note became payable. Notice of non-payment of the note was given to the defendant, his executrix, on the 19th of August, 1818. On the trial, the plaintiffs offered evidence that the bank did not demand payment from the makers of promissory notes, discounted by the bank, if the makers resided out of the town, and not in any town where a bank was established. That when a note is not paid by three o'clock on the last day of grace, it is delivered to a notary public, who, if the maker lives out of town, states that fact in his protest, and gives notice to the indorser, and returns the protest to the bank; and that this practice of the notary, and of the bank, was generally known to the dealers in the Bank of Alexandria. That some of the preceding notes of the same series had been protested in the same manner, and judgments had been confessed by the said James Deneale as maker, and by George Deneale as indorser; and that new notes had been given for the judgments. The power of attorney from James Deneale to George authorized him to sign notes for him to be negotiated in the Bank of Alexandria, and to renew the same from time to time.

Mr. Taylor, for the plaintiffs, prayed the court, in effect, to instruct the jury that if they should believe, from the said evidence, that it was the known and established usage of the banks in Alexandria to make no demand of payment on non-resident drawers of notes discounted in those banks, but to call upon and give notice to the resident indorsers of such notes; and that the note in question was indorsed by the said George Deneale with the understanding and expectation that if not duly paid by the maker, it was to be sent out from the bank to the notary and by him proceeded with conformably to the said usage, and in all respects as it was treated; and with the understanding and expectation that no further or other steps of diligence were, in that case, to be pursued by the bank for making demand of payment of the said note, or giving notice to the indorser of the non-payment of the same, than as aforesaid, then it is not necessary, in order to charge the defendant, as executrix of the said George, in this action, upon his indorsement aforesaid, to prove that any demand of payment of the said note had been made on the said James Deneale.

CRANCH, Chief Judge, delivered the opinion of the court as follows, (THRUSTON, Circuit Judge, absent.) The court refuses to

[1] [Reported by Hon. William Cranch, Chief Judge.]

give the instruction prayed by the plaintiff's counsel.

1st. Because the evidence does not support the hypothesis upon which the instruction is prayed; and

2d. Because the hypothesis, if true, will not justify the instruction.

1. The hypothesis requires a known and established usage of the banks in Alexandria, to make no demand of payment on non-resident drawers of notes discounted in those banks; and a like usage of the banks to call upon and give notice to the resident indorsers of such notes. The evidence is, that it had never been the usage of the banks to demand payment from the non-resident drawers of discounted notes, but "that the universal usage of the banks was to deliver such notes to the notary public, on the day they fell due; if not paid in banking hours, without any special instructions or directions to the notary, expecting him to do his duty." The bank, then, had no usage on the subject of demand and notice in such cases, but depended upon the notary to do his duty according to law; leaving the responsibility with him, and, no doubt, holding him responsible if he did not. There is no evidence of any usage of the bank to call upon and give notice to the resident indorsers of such notes. Whatever may have been the usage of the notary, it was not the usage of the bank.

2. The hypothesis requires that the note should have been indorsed by George Deneale (the defendant's testator) with the understanding and expectation that if not duly paid by the drawer, it was to be sent out from the bank to the notary, and by him proceeded with conformably to the usage before described, and in all respects as it was treated.

Before the court can give the instruction prayed, they must be satisfied that the jury can, from the evidence stated, infer the facts which constitute the hypothesis upon which the instruction is prayed. That question must be decided in the same manner as the court would decide upon a demurrer to evidence, and the court will consider all those facts as proved which the jury could legally infer from the evidence taken altogether; for, in the present case, according to the prayer, the jury is to believe all the evidence to be true. If, then, from the whole evidence stated, the jury cannot infer that the note was indorsed by the defendant's testator, with the understanding and expectation, that if not duly paid by the drawer it was to be sent out from the bank to the notary and by him proceeded with conformably to the usage stated, and in all respects as it was treated, the court cannot give the instruction.

From an attentive consideration of the evidence as stated, the court is of opinion that the jury cannot legally draw the inference required by the hypothesis. For if the jury should draw the inference that the usage existed and was known to the defendant's testator at the time of his indorsing the note, yet from the whole evidence as stated, the jury might and ought to infer that the said note was drawn with the understanding and expectation that payment thereof, when due, should be demanded of the said George as the attorney and agent of the said James; and the circumstances which induce the court to think that such is the inference which the jury ought to draw, are the following:

1st. The power of attorney from James Deneale to George Deneale, dated October 13, 1800, lodged in the Bank of Alexandria before the drawing and indorsing of any of the said notes, by which the said George is authorized to draw notes in the name of the said James, negotiable in the Bank of Alexandria, and to draw and renew them from time to time, for the accommodation of the said James.

2d. That the bank notices which are usually sent by the bank, to the makers of discounted notes, informing them of the time when their respective notes would become payable, were, in regard to the previous notes drawn by the said George as attorney of the said James, and discounted by the said bank, sent to the said George; and that the said George, as agent and attorney of the said James, had usually paid, or provided the means of retiring the same.

3d. That whenever any of the preceding notes were protested, (and it was only in those cases that a formal demand became necessary; for in all other cases the notes were taken up before the expiration of the last day of grace,) payment thereof was first demanded of the said George, as agent of the said James, the drawer thereof; and that the said George never objected to such demand of payment so made upon him as agent of the said James; but in one instance confessed judgment in an action brought against him as indorser of one of the said preceding notes, of which payment had been demanded of him as agent of the said James as aforesaid, and paid, or provided the means of retiring the others.

4th. That evidence was given that it was the invariable custom of the notary in all cases of notes discounted in the banks in Alexandria, to give notice on the last day of grace to the non-resident drawer by the mail of that day if the note came to his hands in time for the mail; if not, by the mail of the succeeding day, that such was due, and in his hands for protest; but that, in regard to such of the said preceding notes as had been protested, no such notice was given, because payment had been demanded of the said George as agent of the said James, the drawer thereof. These circumstances and acts of the parties, are all inconsistent with the usage attempted to be proved in cases of non-resident drawers; and there is no evidence of any act done by any of the parties in reference to such usage, except this, that after the said George's death, the notary put a let-

ter into the post-office at Alexandria, on the 18th of August, after the mail of that day for Dumfries had been closed, addressed to James Deneale, (the maker of the note,) at Dumfries, informing him that the note was due, and in his hands for protest. This act may have been done, by the notary, in compliance with the supposed usage, but is no evidence that the note was indorsed in reference to such usage; and if the note was not indorsed in reference to such usage, the hypothesis is not supported, and the instruction cannot be given.

3. The hypothesis further requires that the note should have been indorsed by the defendant's testator, with the understanding and expectation, that no further or other steps of diligence were, in that case, to be pursued by the said bank for making demand of the said note, or giving notice to the indorser of the non-payment of the same, than those stated in the description of the usage. The argument which shows that the jury cannot infer that the note was indorsed in reference to the usage, shows that they cannot infer that it was indorsed with an understanding and expectation that no further steps of diligence should be pursued by the bank. If the note was indorsed with the understanding that payment thereof, when due, should be demanded of George as agent of James (the maker,) then it could not have been indorsed with an understanding that no further or other steps of diligence should be pursued than those stated in the description of the usage, because such demand is not required by the usage. But it has been said that even if the note was indorsed with an understanding that payment should be required of George as agent of James, yet, as, by the death of George (which was the act of God,) it became impossible to demand payment from George, the bank is justified by its usage in not making any demand of payment from the maker of the note. But it is only by the agreement and consent of the parties that the usage of the bank can have any effect; and no agreement is stated in the hypothesis, or in the evidence, that in case of George's death before the note should become payable, demand of payment from the maker should be dispensed with. If the case cannot be brought within the special usage of the bank, it must be governed by the general law of the land; and by that law the indorser is not liable unless demand of payment be made of the maker of the note. The defendant is not bound by the special usage, unless at the time of indorsing the note, her testator agreed to be so bound; and there is no evidence of a special custom, that if it be agreed at the time of indorsing a note, that payment shall be demanded of the agent of the maker, and if the agent should die, before the day of payment, then no demand of payment should be made from the maker himself. For these reasons we think the hypothesis not justified by the evidence.

2. The second reason for refusing to give the instruction is, that it is not justified by the hypothesis. As, in considering the question whether the hypothesis was justified by the evidence, the court was bound to decide according to the principles which ought to govern them in deciding upon a demurrer to evidence; so, in considering the question whether the instruction is justified by the hypothesis, the court is bound to decide upon those principles which ought to govern them in deciding upon a special verdict. The ultimate facts, upon which the party relies, must be expressly and absolutely stated. The court can infer nothing. Nothing can, by inference, be added to the hypothesis. It is a serious question how far the special customs or usages of a bank or banker can limit, extend, or define the obligations and rights of the respective parties to a negotiable instrument which happens to be, or was originally intended to be, discounted by such bank or banker. We put out of the question all those special contracts which are made in reference to any particular trade, where the contracting parties are supposed to know the course and usage of such trade, and to have contracted in reference thereto; and all those contracts upon the face of which there is an ambiguity; and all contracts not negotiable, in which the assignee takes the paper subject to all its equity. This is the case of an instrument negotiable by the statute, or by the law-merchant; and by that law, which is only a branch of the common law, (Carth. 269; 1 Show. 127, 318; 12 Mod. 15; 1 Ld. Raym. 175; 6 Mod. 29; 2 Burrows, 1226, 1228; 3 Burrows, 1667; Hale, Com. Law, 24, 25; 1 Bl. Comm. 7, Christ. Note;) the rights and obligations of the parties are as precisely ascertained as if they had been expressed in so many words, (Farnum v. Fowle, 12 Mass. 92; 13 Mass. 558; Rowe v. Young, 2 Brod. & B. 184, Judge Best's opinion; and Id. 204, Burrough's opinion in the house of lords.) The obligation of the indorser is, that he will pay the money if the maker do not pay it when due, provided it be duly demanded of the maker, and due notice be given to the indorser of such demand and non-payment. It is an express, not an implied contract. It is conditional, not absolute.

We do not know that it has ever yet been decided that the custom or usage of a bank can convert the conditional obligation of an indorser into an absolute obligation; nor do we know that it has yet been adjudged that parol evidence can be received to contradict the legal import of a written contract. The indorsement is a written contract. Its words are "Pay the contents to A. B. or order." The legal import of that contract is perfectly ascertained, and is, as before stated, a conditional obligation to pay the money. Has any case yet gone the length to say, that parol evidence may be given to show that, at the time of the indorsement, the indorser agreed, by parol, that he would be absolutely bound to

pay the money at all events? Our own decision, in the case of Renner v. Bank of Columbia, [Case No. 11,699,] has been pressed upon us, and it comes with tenfold weight since it has been affirmed by the supreme court, at its last term, (February, 1824.) 9 Wheat. [22 U. S.] 581. But in that case, the evidence of the usage of the banks to demand payment of, and protest, notes, and give notice to indorsers on the day after the last day of grace, was received without objection; and the object of the evidence was not to contradict or to vary the terms, or the legal import of the contract, but to ascertain whether due diligence had been used in making the demand, and giving notice of non-payment. What is due diligence, is a question compounded of fact and law. It depends very much upon the distance of the parties, the course of the mail, the usage of the post-office, and of bankers and mercantile men, and many other circumstances, all of which depend upon evidence. No material part of the contract was to be altered or varied by the evidence offered in that case. It was not, as in the present case, to change entirely the nature of the contract, and make that absolute which was only conditional. If the legal import of the contract of the indorser had been written out verbatim, "I will pay this note, if the maker, upon due demand, do not, and I have due notice," would the court have permitted evidence to be given, that, at the time he wrote and signed the contract, he declared, that, notwithstanding the express words which make the contract conditional, he would absolutely pay the money without any condition? A party may waive a condition inserted for his benefit, but this waiver must be a subsequent act. You may then give evidence of it, because such evidence could not contradict the original written contract; but you cannot give evidence that, at the time of executing the instrument, the contract was different from what it imports to be upon its face. No rule of law is better settled than this.

In all the cases which we have seen, in which the usage of banks has been permitted to be given, in evidence, in actions upon negotiable instruments, the object has been to show, and bring home to the defendants the particular usage of the bank in relation to a matter left undecided by the legal import of the contract, and which depended upon usage, namely, the time and mode of the demand and notice necessary to charge the indorser. The law-merchant, as a general law, only requires that the demand and notice should be in reasonable time. What is a reasonable time has not yet been decided by any rule applicable to all cases. What may be reasonable, in some circumstances, may not be reasonable in others; and it is competent for the parties, at the time of making the written contract, to agree, verbally, respecting those matters which are not provided for by that contract. In the cases to which we allude, the judges have been careful to recognize the rule, that the legal import of a written agreement cannot be contradicted or varied by parol, and say that the admission of the parol evidence offered, does not violate that rule, because it is to prove a parol agreement respecting matters not provided for by the written agreement. In the case of Jones v. Fales, 4 Mass. 251, which is the strongest case cited by the supreme court of the United States, in their opinion, in the case of Renner v. Bank of Columbia, [Case No. 11,699,] the point of law decided was, that, "if the defendant, when he indorsed these notes, agreed that, if the notes should be lodged in any bank in Boston, for collection, and if the bank should, according to its usage, notify the promisor, on the first day of grace, that the notes would be due on the last day of grace, and should request him to make payment, and should, afterwards, on the last day of grace, notify the defendant, the indorser, that the notes were not then paid, that he would be answerable on his indorsement," he was bound by his agreement, and could not require that the demand should be made in any other form, or at any other time.

Here, it will be perceived that the parol agreement was respecting a matter not provided for by the written, namely, the mode and time of the demand. It is intimated, by the court, that the condition of demanding payment of the maker, is a condition implied by law, for the benefit of the indorser. But the condition is no more an implied condition than the obligation of the indorser is an implied obligation; and parol evidence might as well be given to prove that, when he indorsed the note, he denied that he was bound, in any event, to pay the money, as to prove that he waived the condition, which was an original and essential part of the agreement. Mr. C. J. Parsons says, "Evidence of this kind, and for this purpose, is not to establish new law, but to prove that the defendant has waived a condition implied by law for his benefit, and has consented to other terms, to which, without question, he might have expressly agreed." But it does not follow because a man might have expressly agreed to other terms, that you may give parol evidence that he did consent to other terms than those expressed in his written agreement, according to its legal import. If the court meant to say that parol evidence may be given to contradict the legal import of the contract of indorsement of a negotiable instrument, we cannot concur with them; and as the case before them did not require them to go so far as that, we do not think that they intended it. But before we can give the instruction now prayed, we must go to that extent. The usage would convert the conditional into an absolute obligation to pay the money, at all events. The note would, in effect, become joint and several, and the transaction, instead of being a mercantile discount, would be a direct loan, and

the bank, by taking interest in advance, would be chargeable with usury. It is only by maintaining the negotiability of the note, and proving the transaction to be what it purports to be, that the bank can avoid the charge of usury. The usage, of which evidence is offered, contradicts all that part of the transaction which discriminates it from a direct loan, and, therefore, would so materially vary the original written contract, that the admission of such evidence would be inconsistent with the rules of evidence and the principles of law to which we have before adverted. In the case of Lincoln & Kennebeck Bank v. Page, 9 Mass. 159, cited, also, in the opinion of the supreme court, in the case of Renner v. Bank of Columbia, [supra,] the parol evidence offered was not that demand and notice were entirely dispensed with by any usage or stipulation, but "modified as to time and manner." However broadly, therefore, the court has laid down the doctrine upon which they decided the cause, the case itself is within the limit within which we think the doctrine ought to be circumscribed; that is to say, that, although the parties have entered into a written agreement, yet parol evidence may be given of a parol agreement, made at the same time, in relation to circumstances not provided for in the written contract, but not to contradict or vary the terms of the written contract itself. The case of Renner v. Bank of Columbia goes no further. The principal question in that case was, whether demand and notice on the day after the last day of grace, was sufficient to charge the indorser of a promissory note. Evidence of the usage of the banks was received without objection, and, under that usage, the knowledge of which was brought home to the defendant under such circumstances as justified an inference of his assent to it, the verdict and judgment were for the plaintiff. Whatever inferences may be drawn from the reasoning of the court, in that case, we do not think ourselves justified in extending the doctrine further than the case itself will warrant. We are therefore of opinion that no parol agreement, made at the same time with the written agreement, can alter or control its legal import, and that no evidence of such a parol agreement can be admitted. If we do not stop here, we know not to what extent the doctrine contended for may not be carried. If the particular usage of any individual banker, or even of a bank, through whose hands a negotiable paper may have passed, is to control the rights and obligations of the parties, no man can be safe in receiving or passing away such paper. Courts and merchants have been, for ages, endeavoring to ascertain and fix, with precision, the rights and obligations of the parties to negotiable instruments, and it is highly important that they should be settled. But the doctrine contended for, will make every thing depend upon local or individual usage. It will produce a state of uncertainty which will lead to endless litigation. The instruction which the court is required to give to the jury is, that it is not necessary, in order to charge the defendant, as executrix of the said George, in this action, on his indorsement aforesaid, to prove that any demand of payment of the said note, had been made on the said James, provided the jury should believe the evidence stated, and should therefrom draw the inferences stated in the hypothesis.

Prima facie, the bank was bound to make demand of payment from the maker. Nothing could excuse them from making it but the agreement of the indorser to waive it. No direct evidence of such an agreement is stated, nor is the fact stated by way of inference in the hypothesis; but evidence is stated, from which it is supposed, by the plaintiffs, that the jury may, and ought, to infer that fact. Unless the jury find that fact, the instruction cannot be given—yet that fact is not contained in the statement of facts upon which the law is supposed to arise. An understanding and expectation that the note would be treated as it was, is something short of an agreement that it should be so treated. Connected with other circumstances, it may be evidence of such an agreement, but it is not the agreement itself, and the court cannot, upon a case stated, infer any fact as they can on a demurrer to evidence. Every prayer to the court to instruct the jury is grounded upon a supposed finding of facts by the jury; and before the court can say what the law would be upon such a finding, they must consider the facts as found. The same rule, therefore, is to be applied to the hypothetical statement, as to a special verdict. The court can draw no inferences of fact. Every thing relied upon must be explicitly stated. The fact of the agreement to waive the demand not being anywhere stated, and the court being of opinion that the evidence will not warrant the jury in inferring that such an agreement was made by the defendant's testator, we cannot give the instruction prayed. The jury found a verdict for the defendant. The plaintiffs' counsel took a bill of exceptions, but did not prosecute a writ of error.

Case No. 847.

BANK OF ALEXANDRIA v. DYER.

[5 Cranch, C. C. 403.][1]

Circuit Court, District of Columbia. March Term, 1838.[2]

STATUTE OF LIMITATIONS BEYOND SEAS—COUNTIES IN THE DISTRICT OF COLUMBIA.

The county of Alexandria in the District of Columbia, is not beyond seas, as to the county of Washington in the same district.

[See note at end of case.]

At law. Assumpsit [by the Bank of Alexandria] for money had and received by the

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Affirmed in 14 Pet. (39 U. S.) 141.]

defendants [Edward Dyer and Francis C. Dyer] to the plaintiff's use. The defendants pleaded non-assumpsit, and the statute of limitations of Maryland, (1715, c. 23.) The plaintiffs relied, that at the time of making the promise "they were in the county of Alexandria in the District of Columbia, beyond the seas, and so in the county of Alexandria, beyond the seas, remained and continued until the day of the impetration of the original writ aforesaid, to wit, at Washington county aforesaid; and this they are ready to verify," &c. To this replication the defendants demurred. [Demurrer sustained. This judgment was subsequently affirmed by the supreme court in Bank of Alexandria v. Dyer, 14 Pet. (39 U. S.) 141.]

Mr. R. S. Coxe, for the plaintiffs.

Alexandria county and Washington county are governed by different laws; as much so as Virginia and Maryland. This point has always been so decided by this court, in the removal of slaves from one county to the other. When two places are under different sovereignties, they are beyond seas as to each other. The laws of Alexandria and Washington are derived from different sovereignties; and those laws are specially continued in force in the respective counties, by the act of congress of the 27th of February, 1801, (2 Stat. 103.) Shelby v. Guy, 11 Wheat. [24 U. S.] 361.

Mr. W. L. Brent, contra.

The savings in the statute do not apply to a bank; such as non-age, coverture, and imprisonment. A bank has no residence. The replication merely says that the plaintiffs were in Alexandria county when the promise was made.

Mr. Bradley, on the same side.

The judicial jurisdiction of the two counties is the same; and by the act of congress of the 24th of June, 1812, § 5, (2 Stat. 755,) executions may be served in either county. Scotland is not beyond seas in respect to England. Byles, Lim. 193; Le Roy v. Crowninshield, [Case No. 8,269.]

Mr. Coxe, in reply.

If this case had happened before the 27th of February, 1801, the replication would have been good. The act of congress of that date continues the laws of the two counties as they were before; if so, the plaintiffs have the same rights as if the jurisdiction had not been changed. If the replication was good before 1801, it is good now. It is no objection that the bank cannot have the benefit of all the exceptions of the statute; and it is no reason that the bank cannot have the benefit of some, because it cannot have the benefit of all. A corporation has a residence, a commorancy. U. S. v. Amedy, 11 Wheat. [24 U. S.] 392. The lex fori is the rule. If it depend upon the jurisdiction of the country, "beyond seas" could not be pleaded in any of the circuit courts of the United States, when the plaintiff resided in a different state. Upon a cession of territory the laws remain until changed by the new sovereign.

THE COURT (MORSELL, Circuit Judge, contra) sustained the demurrer, being of opinion that the replication was insufficient.

[NOTE. This case arose under the statute of limitations of Maryland, (1715,) which, with other laws, was continued in force when the territory on the north bank of the Potomac was ceded to the United States, and became the county of Washington, in the District of Columbia. Virginia ceded territory on the south bank, which was erected into the county of Alexandria, as to which the Virginia laws were continued in force. The decision in this case was affirmed in Bank of Alexandria v. Dyer, 14 Pet. (39 U. S.) 141. Mr. Chief Justice Taney, in delivering the opinion of the court, said that the words "beyond seas" were manifestly borrowed from the English statute James I. c. 21, which have always been construed to mean "without the jurisdiction," and such should be the construction in this case; that, although the county of Alexandria was unquestionably beyond seas, with respect to the county of Washington, before they were ceded to the United States by Virginia and Maryland, respectively, nevertheless, after the cession, when the District of Columbia was created, the two counties became parts of one political body, united under one government and jurisdiction, their relation being analogous to that of counties in a state, and not to that of states in the Union, and therefore one was no longer beyond seas with respect to the other.

[The county of Alexandria was subsequently ceded back to Virginia by Act July 9, 1846, (9 Stat. 35.)]

Case No. 848.

BANK OF ALEXANDRIA v. HENDERSON.

[1 Cranch, C. C. 167.][1]

Circuit Court, District of Columbia. June Term, 1804.

CHARTER OF THE BANK OF ALEXANDRIA.

The Bank of Alexandria, under its charter, had a right to have its causes tried at the first term to which the writ was returnable, if the note were made negotiable at the bank, and the writ was served ten days before its return day.

[See Bank of Alexandria v. Davis, Case No. 845.]

Motion by Mr. Simms, for the plaintiff, to try the cause at the first term, and that the marshal return the writ.

Mr. Jones, for the defendant. The return day of writs by the rule of this court, is the day after the last day of the term. The cause cannot be tried before the writ is returned.

(The writs are not made returnable to any particular day; but generally to the term.)

Mr. Simms. The intention of the act (the charter of the bank) is to give a speedy rem-

[1] [Reported by Hon. William Cranch, Chief Judge.]

edy. It requires (section 20) that an issue shall be made up and a trial peremptorily had at the first term, to which the writ shall be returnable, provided that the note be made negotiable at the bank; and the writ be served ten days before its return day.

Both motions were granted. THE COURT being of opinion that they have a right to call upon the marshal now to return the writ; it being a necessary means of trying the cause.

Case No. 849.

BANK OF ALEXANDRIA v. McCREA.

[3 Cranch, C. C. 649.][1]

Circuit Court, District of Columbia. Nov. Term, 1829.

BANKS AND BANKING—OVERDRAWAL OF ACCOUNT—EVIDENCE—CASHIER A COMPETENT WITNESS.

1. The cashier of a bank is a competent witness to prove that the defendant has overdrawn his account.

2. Payment of a check is prima facie evidence of funds.

[See Bank of United States v. Washington, Case No. 940.]

Assumpsit [by the Bank of Alexandria against John McCrea] for money overdrawn.

Mr. Swann, for the defendant, objected to the testimony of Mr. McKenna, the cashier of the bank, because he would be liable if he received the money and did not credit it.

THE COURT, however, (nem. con.) overruled the objection; because it was not attempted to be shown that the money was paid to him; and because, if it was paid to him, and he had not credited it, he would be liable to the defendant, or to the bank.

THE COURT also said, that they had decided at Washington, in Bank of United States v. Wilson, [Case No. 943,] that the payment of a check by the bank was prima facie evidence of funds in bank to the amount of the check.

Case No. 850.

BANK OF ALEXANDRIA v. MANDEVILLE.

[1 Cranch, C. C. 552.][1]

Circuit Court, District of Columbia. July Term, 1809.

USURY—DISCOUNT—CORPORATIONS—BANK OF ALEXANDRIA.

1. The statute of usury applies to contracts of corporations, as well as to those of natural persons.

2. The Bank of Alexandria may, upon discounting notes, deduct the whole interest for the whole time they have to run.

[See Bank of Alexandria v. Mandeville, Case No. 851; Union Bank of Georgetown v. Gozler, Id. 14,358.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

[At law. Action by the Bank of Alexandria against Joseph Mandeville to recover on a promissory note. Heard on demurrer to the replication. Judgment for plaintiff.]

This cause was argued at the last term by Mr. Youngs and Mr. C. Lee, for the defendant, and Mr. E. J. Lee and Mr. C. Simms, for the plaintiff; and again at this term by the same counsel for the plaintiff, and Mr. Youngs and Mr. Swann, for the defendant.

CRANCH, Circuit Judge, delivered the following opinion. This is an action of debt brought by the Bank of Alexandria against Mandeville, to charge him as the secret partner of R. B. Jamesson, the maker of a promissory note for eight hundred dollars, payable sixty days after date, to the order of W. Herbert, in the Bank of Alexandria.

The defendant pleads,—

1. That on the 26th of May, 1806, it was corruptly agreed between the plaintiff and R. B. Jamesson, that the plaintiff should advance and lend R. B. Jamesson $791.60, and should give day of payment thereof until 60 days from the 26th of May, 1806, and also 3 days of grace thereafter, and that R. B. J. should give his note therefor with W. Herbert, an indorser, for 800 dollars, dated the 26th of May, 1806, payable 60 days after date, which said sum of $8.40 was for the interest and profit therefor, and for giving day of payment of the said 800 dollars for the said 60 days and the said 3 days of grace, which said sum of $8.40 exceeds the rate of 6 dollars for the interest of 100 dollars for one whole year, contrary to the form and effect of the statute in such case made and provided. The plea then avers that the note was so made and indorsed, and the plaintiffs advanced and paid to R. B. J. the sum of $791.60, by which the note, by force of the statute, is void in law, and this he is ready to verify.

2d plea. That on the 26th of May, 1806, it was corruptly agreed, &c., that R. B. J. should draw his note in the declaration mentioned in favor of W. Herbert, who should indorse the same, dated 26th of May, 1806, at 60 days after date, and the plaintiffs would pay him on the 27th of May, 1806, 800 dollars, upon condition that R. B. J. would, on the 27th of May, 1806, pay the plaintiffs the sum of $8.40, as interest upon the $800 for 63 days from the date of the note, which sum of $8.40 was, on the 27th of May, deducted from the $800, and the balance of $791.60 on that day paid to R. B. J., which sum of $8.40, the interest at 6 per cent. on 800 dollars for 63 days, for the loan of $800 for 62 days exceeds the rate, &c.

3d plea. That it was on the 26th of May, 1806, corruptly agreed that the note should be drawn, &c., and that the plaintiffs would discount 800 dollars on account of said note, which should be held for the payment thereof at the expiration of the 60 days and the

3 days of grace, upon the express condition that the interest upon the 800 dollars for the 63 days, amounting to $8.40, should be deducted from the 800 dollars, leaving the sum of $791.60 to be paid to the said R. B. J., which sum of $791.60 was, on the 27th of May, paid to R. B. J. by the plaintiffs. That only the sum of $791.60 was actually loaned to R. B. J., and for the forbearance of the said $791.60 for the 63 days the plaintiffs charged $8.40, which said sum of $8.40, the interest and profit charged for the loan and advance of $791.60 for 63 days, exceeds the rate, &c.

Replication to the 1st plea. Protesting that it was not corruptly agreed, &c., as stated in the plea, that the plaintiff should advance and lend to R. B. J. the sum of $791.60, and should give day of payment, &c., and that R. B. J. did not in pursuance of such supposed corrupt agreement execute the note, &c., to be held by the plaintiffs for the payment of 800 dollars at the expiration of the said 63 days; and that the plaintiffs did not in prosecution of such supposed corrupt agreement, advance and pay, &c. For replication says that R. B. J. offered the note to the plaintiffs, according to the usage and custom of the said bank, indorsed by W. H., to be discounted by the plaintiffs according to the usage, practice, and custom of the said Bank of Alexandria, and all other banking companies. "And the plaintiffs aver that they did not in pursuit of any corrupt agreement, or of any illegal contract, but in pursuance of the legal custom, practice, and usage of the said bank, discount the said note, and did in pursuance thereof pay over to the said R. B. J. the said sum of $791.60, detaining the sum of $8.40 as the discount for the said sum of $800 for 63 days, being at the rate of 6 per cent. per annum, as they might lawfully do; and this they are ready to verify."

To this replication there is a general demurrer, which admits the facts as stated in the replication, if they are well pleaded. The question then is, whether those facts disclose an usurious transaction?

The facts stated in the replication are in substance: That R. B. Jamesson offered his note for 800 dollars, payable in 60 days after date, to W. Herbert's order, and by him indorsed according to the usage of the bank, to the plaintiffs, to be discounted by them according to their usage, and that of all other banks; and that the plaintiffs discounted it according to their usage, by paying to R. B. J. $791.60, and detaining the sum of $8.40 as the discount for the sum of 800 dollars for 63 days, being as they aver at the rate of 6 per cent. per annum. At the time of the first incorporation of the Bank of Alexandria, the Virginia statute of usury had enacted "that no person shall hereafter, upon any contract, take directly or indirectly, for loan of any money, wares, or merchandise, or other commodity, above the value of £5 for the forbearance of £100 for a year, and after that rate for a greater or lesser sum, or for a longer or a shorter time; and all bonds, contracts, covenants, conveyances, or assurances hereafter to be made for payment or delivery of any money or goods so to be lent, on which a higher interest is reserved or taken than is hereby allowed, shall be utterly void." The 2d section imposes a penalty on any person who shall take, accept, or receive more than the interest thereby allowed. And by the 3d section, any borrower of money may exhibit a bill in chancery against the lender, and compel him to discover on oath, &c. This was the law in the year 1792, when the Bank of Alexandria was incorporated, and although the interest of money generally was then limited by law to five per cent., the bank was authorized "to receive for discounts made at the bank at a rate not exceeding six per cent. per annum." In May, 1797, the lawful rate of interest was raised by act of assembly to six per cent.

It is contended on the part of the bank that the transaction disclosed by the replication is not usurious, upon two grounds.

1. Because the statute of usury does not affect bodies politic and corporate.

2. Because the use, custom, and practice of all banking companies in discounting bills and notes is to take interest upon the nominal amount of such bills and notes, and not upon the sum actually loaned by way of discount; and the word discount in the charter of the bank is to be explained by reference to such usage, and not to the common arithmetical rule of discount. In support of the first ground, that the statute of usury does not bind bodies politic, it is said that the statute is penal, and must be construed strictly. That the word person must be confined to natural persons, and although the act says that all bonds, &c., shall be void, yet it means all bonds, &c., made by such persons. But the court is not of that opinion. The taking of exorbitant interest by great moneyed institutions and corporations, was an evil as much within the mischief intended to be remedied as if the same should be taken by a natural person; and when by the letter of the law all bonds, &c., are made void, we think it as much within the spirit of the act as within its letter.

The second ground on which the plaintiffs rest the legality of the transaction is more substantial. The question which it raises, is, whether the bank, in discounting this note for $800 for sixty-three days, had a right to retain $8.40 as the discount therefor. If the agreement stated in the replication be such as the bank was authorized by its charter to make, the question of usury cannot arise. The preamble of the charter, (or rather of the act of assembly of Virginia, which incorporated the bank, and which has been decided by the supreme court [in Young v. Bank of Alexandria, 4 Cranch, (8 U. S.) 384] to be a public act,) in enumerating the benefits ex-

pected from the establishment of such an institution, and the objects which the legislature had in view, says, "and by discount rendering easy and expeditious the anticipation of funds." That kind of discount, therefore, which would enable a person to anticipate his funds, was a transaction which the legislature intended to authorize. In the body of the act, in section eighth, where certain powers are granted to the bank, it says, "and to receive for discounts made at the said bank, at a rate not exceeding six per cent. per annum." By allowing the bank to take six per cent. for discounts, when only five per cent. could be taken for interest on a loan, without taking notice of any repugnance between the two statutes, a strong presumption arises, that the legislature considered the discount by which funds could be anticipated, as a transaction very distinct from a simple loan of money. But this presumption does not rest alone upon the circumstance that the legislature did not notice a repugnance between the two statutes. The distinction between an anticipation of funds by discount, and a loan of money upon interest, exists in the nature of things. Suppose I ship a cargo of flour to a merchant in Boston, who in payment remits me a bill of exchange at sixty days sight, upon a merchant in Alexandria, who accepts it. I wish to anticipate this fund. I apply to the bank to discount it. Do I ask for a loan? Do I wish to borrow the money? No. I am entitled to receive a sum of money at the end of sixty days, but I wish to anticipate the receipt of it. I wish to receive it now instead of then. The bank discounts this bill. If it were a loan from the bank to me, I should be the principal debtor, and the first person liable to the bank; but in truth by indorsing the bill to the bank, I become only a collateral and conditional debtor. The acceptor is the principal debtor to the bank, and to him must they first apply for payment; if not paid, they must protest, and give notice to me of the non-payment as soon as possible under all the circumstances, and if they neglect to demand payment from the acceptor, or to give me due notice of his non-payment, they have no claim upon me. Can this then be a loan of money from the bank to me? Nothing can be more different. I am only liable as the indorser of a bill. If it were to be considered a loan at all, it should rather be a loan to the acceptor, the principal debtor in the transaction. But it is not a loan to any person; it is a mere accommodation in shortening the time of payment. It was said, in argument, that the transaction must be either a loan of money or a purchase of the note, and that it could not be a purchase, if the vendor guarantied the bill by indorsement, and that the bank was not authorized to trade in the purchase of bills, consequently it must be considered as a loan. This is clearly a petitio principii. It assumes the principle in dispute. There is a transaction which is neither a loan, nor a purchase of the note, and that transaction is discount. If it be not a loan, it cannot be the forbearance of a sum of money lent. If it be neither a loan nor the forbearance of a sum of money lent, it is not a transaction prohibited by the statute of usury.

A clear case, then, of mercantile discount, being the anticipation of funds, and not a loan of money, is not within that statute. Thus stands the case upon general principles of law and reason. Let us see how it stands upon authority. But here let me repel a suggestion that this court can set up the custom and usage of any trade or profession in England, or even in this country, in direct opposition to the express statutes of the land. We disclaim any such power, and we disclaim all discretion in deciding a point of mere law. It has been said that in considering this question, we ought not to regard English authorities—that we are competent to make and expound our own laws. It is true that English authorities, as such, are not binding on the courts in this country. But no prudent man, who is to decide a question, will shut his ears to reason or argument, from whatever part of the world it may come. Upon the present question, I hold it to be not only our right, but our duty, to look into the decisions which have taken place upon questions of usury in England, especially decisions made prior to the date of the statute of usury in Virginia; because that statute is copied almost, if not exactly, verbatim from the English statute; and it is fair to conclude that the Virginia legislature, when they adopted the words of the English statute, meant to use them in the sense in which they were used in England; and as they had been explained and settled by judicial decision in that country, I hold it also fair to conclude that when the legislature of Virginia were passing a law upon the subject of a banking institution, and used technical terms appropriate to the business of banking, they used them in the sense in which those terms were generally used among bankers, not only in this country, but in other parts of the world where that business is carried on. In order to ascertain in what sense such terms have been used, I deem it competent for the court to get information from the general history of a country, and especially from its judicial decisions. In this point of view then, the court feels itself bound to look into the English decisions, to see in what sense certain technical terms have been used in that country—and to see what cases have been considered as out of their statute of usury, from which ours is copied.

Let us then inquire whether a clear mercantile discount, being an anticipation of funds, and not a loan of money, is or is not usury under the English statute.

The first case which I find is that of Barnes v. Worledge, Noy, 41. This case was

under the statute of Elizabeth, allowing ten per cent. The agreement was to pay five pounds for the first six months, and five pounds for the second six months, and it was adjudged no usury. "But by Popham, if the party had retained five pounds of one hundred pounds at the time of the leave, or that that five pounds was to have been paid before the six months, that clearly had been usury."

Worley's Case, Moore, 644. Popham, Gawdy, and Yelverton held, that although the loan was for a year, yet it was no usury to take half the interest at the end of half a year. "But it is otherwise if one deducts the interest out of the principal at first."

Barnes v. Worlich, Cro. Jac. 26. Popham, Gawdy, and Williams, held the principal case no usury: But said "if he had agreed to take his money for the forbearance instantly when he lent it, that had made the assurance void; for then he had not lent the entire sum for one year, and the other had not had the use of his money according to the intention of the law. And Williams said he knew upon this difference it hath been so resolved of late time."

Yel. 30. In Yel. 30, it is said that the court was divided as to the principal case, two of the judges being of opinion that upon a loan for a year one half of the interest could not be received at the end of half a year—but he says, "if one hundred pounds be lent for a year, and the lender within two days following takes back ten pounds, this is usury."

So in Dalton's Case, Noy, 171, it was said by Popham, "If a man lend £100 for a year and to have ten pounds for the use of it; if the obligor pays the ten pounds, twenty days before it is due, that does not make the obligation void, because it was not corrupt. But if upon making the obligation, it had been agreed that the ten pounds should have been paid within the time, that should have been usury; because he had not the one hundred pounds for the whole year, when the ten pounds was to be paid within the year; and verdict was given accordingly."

In Massa v. Dauling, 2 Strange, 1243, a note for two hundred pounds having three months to run was taken upon advancing one hundred and ninety-seven pounds, five per cent. per annum, being the legal interest; and at the end of the third month another note was taken for three months more upon the advance of three pounds for the other three months. Lee, C. J., held it to be usury.

In Fisher v. Beasley, 1 Doug. 235, Grindall borrowed of Beasley £100, and gave bond payable in six months with lawful interest; but he paid down two guineas as premium. There was no doubt that this was usury, but the question was at what time the usury was complete, whether at the payment of the two guineas, or at the expiration of the six months. It was decided that the penalty was not incurred till the end of the six months when the interest was paid.

In the case of Lloyd v. Williams, 2 W. Bl. 792, DeGrey and Blackstone inclined to think, that if a man borrows £100 for three months, and immediately returns to the lender £6 5s. 0d. by way of interest by advance, the offence of taking more than legal interest is complete, and it is not to be considered as a loan of £93 15s. only. This opinion of DeGrey and Blackstone, was against that of Gould. Nares gave no opinion. There is in that case, a dictum of Judge Blackstone, "That interest may as lawfully be received beforehand for forbearing, as after the term is expired, for having forborne. And it shall not be reckoned, as merely a loan of the balance. Else, every banker in London who takes five per cent. for discounting bills, would be guilty of usury. For if upon discounting a £100 note at five per cent. he should be construed to lend only £95, then at the end of the time, he would receive five pounds interest for the loan of £95 principal; which is above the legal rate."

In Gibson v. Fristoe, 1 Call, 73, the court of appeals of Virginia, say, that if it be apparent to the court that the matter is usury, the jury need not find the agreement to be corruptly made; and that an agreement by which a man secures to himself directly or indirectly a higher premium than legal interest for the loan of money, is usury.

In Floyer v. Edwards, Cowp. 112, Lord Mansfield says, "It depends principally upon the contract being a loan, and the statute uses the words 'directly or indirectly'; therefore in all questions in whatever respect, repugnant to the statute, we must get at the nature and substance of the transaction; the view of the parties must be ascertained, to satisfy the court that there is a loan and borrowing; and that the substance was to borrow on the one part and to lend on the other; and where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute. If the substance is a loan of money nothing will protect the taking more than five per cent.; and though the statute mentions only 'for loan of moneys, wares, merchandises, or other commodities,' yet any other contrivance, if the substance of it be a loan, will come under the word 'indirectly.'" Speaking of the practice of the particular trade, to take a half penny an ounce on certain goods if not paid for in a certain time, he says, "It is true the use of this practice will avail nothing, if meant as an evasion of the statute; for usage certainly will not protect usury; but it goes a great way to explain a transaction; and in this case is strong evidence to show that there was no intention to cover a loan of money. Upon a nice calculation it will be found that the practice of the bank in discounting bills exceeds the rate of five per cent., for they take interest upon the whole

sum for the whole time the bills run, but pay only part of the money, namely, by deducting the interest first; yet this is not usury."

These were all cases of loan, and not of mercantile discount. I can find no case in which it was ever made a question whether, in a clear mercantile discount, the taking in advance by way of discount the whole interest, upon the whole sum, for the whole time the bill has to run, was within the statute of usury. The cases which come nearest to that question, are those where the discount had been made in that manner, but the sum advanced was not all paid in cash, but partly in other bills having time to run, or in goods at a high price. The circumstance that although usury was pleaded in those cases, it was not attempted to support it upon the ground that the interest was calculated upon the face of the bill, and not on the sum actually advanced, is good ground to infer that the whole court and bar considered such a transaction alone, not to be usury. This inference is irresistible, when we reflect that as early as the year 1771, Judge Blackstone, uncontradicted by his brethren on the bench, in the case of Lloyd v. Williams, 2 W. Bl. 792, declared his opinion to be that bankers in discounting bills may lawfully receive the interest beforehand upon the whole amount of the bill; and when we find Lord Mansfield in the year 1774, in the case of Floyer v. Edwards, Cowp. 114, declaring from the bench, with the concurrence of the three other judges, that "the practice of the bank in discounting bills exceeds the rate of five per cent. for they take interest upon the whole sum for the whole time the bills run, but pay only part of the money, namely, by deducting the interest first; yet this is not usury."

The cases to which I alluded, as those in which the present ground for the allegation of usury existed, but was not relied upon, are, 1. Benson v. Parry, cited by Judge Buller in Auriol v. Thomas, 2 Term R. 52. The question there was whether country bankers could take more than five per cent. on inland bills payable at another place; and it was decided by the court of king's bench unanimously that they might. No question was made whether it was usury for them to take five per cent.

2. The case of Winch v. Fenn, cited by Buller in the same case; where the same question was decided; and no question made as to the five per cent. deducted.

3. The case of Auriol v. Thomas, 2 Term R. 52, in which the court says, "it is now clearly settled that the party is entitled to take not only £5 per cent. for legal interest, but also a reasonable sum for remitting and other incidental expenses." And Grose, J., says, "The line which has been taken is, that if the sum charged be not a color or a screen for usury, but is only fair and reasonable, it ought to be allowed."

4. The case of Hammett v. Yea, in the court of common pleas, 1 Bos. & P. 144, which was this: Haviland made his promissory note payable to Yea, the defendant, at four months after date, for £3,000, which Yea indorsed and returned to Haviland, who took it to the plaintiffs, who were bankers, to be discounted for the accommodation of Haviland, the maker of the note. The plaintiffs discounted it by deducting £50, being four months' interest on £3,000, and paying £2,950, the balance to Haviland, partly in a draft having thirty days to run, partly by crediting Haviland in account, and the residue in cash; and this mode of payment was directed by Haviland or his agent.

These facts were relied on in the plea of usury. But the judge (Eyre, C. J.,) at the trial, directed the jury that the charge of usury rested wholly on the plaintiffs having made no rebate of interest on the bill at thirty days which was paid to Haviland as cash, at the time of discounting the £3,000 note; and left it to the jury to say whether it was a pretence to evade the statute. The jury found a verdict for the plaintiff; and on motion for a new trial, Eyre, C. J., says, "whether more than five per cent. be intentionally taken upon any contract for forbearance is a question of fact for the consideration of the jury, and must always be collected from the whole of the transaction." Again he says, "what is this case in matter of fact? Haviland applies to have his bills discounted to which the banker agrees, and calculates the interest upon the time the bills have to run, as is usual." "Had the banker told down the money, or tendered banknotes, and had Haviland put them into his pocket, or swept them into his hat, and then said, but I want to send money to London, will you take part of my money back and give me bills? and the banker had accordingly done so and given these bills, I cannot see that there would have been any color for calling it an usurious transaction." He here admits that the mode of calculating the discount and deducting it from the principal, upon discounting a bill or note, is the usual practice, and there is no color of usury in it. Again he says, "If all consideration of a loan were out of the case, a banker may lawfully take as much money as he can get for his bills without the least regard to the time they have to run." And again, "whether more than five per cent. be intentionally taken for the loan and forbearance of money is a question of fact to be decided by the jury." "It is for them to say whether it is a device or a fair agreement on good consideration." Heath, J., was of the same opinion. He says, "This was a transaction which commenced in discount and loan, and terminated in remittance. The subsequent transaction of remittance was no part of the antecedent contract; the bargain for the discount was complete." He considers the discount and loan clearly as a lawful transac-

tion. Rooke, J., concurred. We find the whole court unanimous, not only that the original discount was lawful, but the subsequent payment in bills instead of cash.

5. The case of Maddock v. Hammett, 7 Term R. 184, which was decided in the king's bench about six months before the case of Hammett v. Yea. The facts relied upon to support the usury, were that Haviland made his note to Yea, for £1,000, at four months, who indorsed it. Haviland, the maker, took it to the defendants, Hammett and others, the bankers, to be discounted, who discounted it by paying

In cash	£183	6	8
In bank-notes	300	0	0
Draft on London, at 7 days sight	500	0	0
	£983	6	8
Retained for discount	16	13	4
	£1,000	00	0

The only usury relied on "was stated to consist in calculating the draft of £500 as cash, when it had seven days to run, instead of deducting so much from the discount, as the draft had to run before it became payable." There the original discount of £16. 13s. 4d. was not contended to be usurious, although it was the interest of the whole £1,000 for the whole time the note had to run.

6. The case of Marsh v. Martindale, 3 Bos. & P. 154. The facts of this case upon the plea of usury, were these,—Wood, in consideration of £3,500 paid by Marsh, had granted him an annuity of £500 per annum, redeemable upon certain terms. Wood applied to Marsh to redeem. And it was agreed that Wood should draw a bill of exchange for £5,000 at three years, which Marsh should discount. The £5,000 bill was accordingly drawn and discounted by Marsh as follows:

Original purchase of annuity	£3,500	0	0
Arrears of annuity due	333	6	8
For redeeming without notice, according to original agreement	250	0	0
Cash paid to Wood	116	13	4
	£4,250	00	0
3 years' discount on £5,000, at 5 per cent	750	00	0
	£5,000	00	0

In this case it was contended and decided that the discount of a bill for three years was not a transaction in the usual course of business, and afforded a strong ground, in connection with the circumstance of the annuity and a bond given immediately after the discount of the bill, to presume that the whole transaction was a color for a loan and a cover for usury. And upon that ground the court set aside the verdict for the plaintiff, and ordered a nonsuit to be entered. The principle decided by this case, was not, that in ordinary cases of discount the banker has not the right to deduct interest upon the whole amount of the bill for the time it has to run, but that in extraordinary cases, where the time the bill has to run is unusually long, that circumstance with others may be evidence of a mere contract for a loan, and an evasion of the statute. The general principle is admitted by the counsel on both sides and by the court, that "it is lawful upon the discount of a bill of exchange to take interest upon the whole amount of the bill at the time when the money is advanced," but it was contended that this principle "must be confined to transactions upon bills in the ordinary course of trade." It was said that it "was too much to infer that because bills in the ordinary course of trade may lawfully be discounted in the manner above stated, a bill for any period of time may be discounted in the same manner." Lord Alvanley, C. J., in delivering the opinion of the court, says, "it certainly has been decided that such a transaction on a bill of exchange in the way of trade, for the accommodation of the party desirous of raising money, is not usurious, though more than five per cent. be taken." "If therefore nothing more has been done in this case than has always been done by way of accommodation among merchants, the transaction was not usurious." But he thinks that the discount of such a bill, (for three years) even not coupled with the transaction respecting the annuity, would have been almost sufficient to have afforded a presumption of usury; but coupled with the affair of the annuity and the bond, he thinks it appears to be a mere cloak for an usurious loan. He admits it to be completely established that, on the discount of bills, a banker may deduct more than the legal interest upon the whole sum for the whole time if the excess be only a reasonable compensation for the expenses and trouble of remittance. He concludes by saying that the only question in such cases is, "whether it be a real discount in the way of trade, or a mere loan of money." In the case then before him he is clear that "it was not a discount in the way of trade, but was merely employed as the means of obtaining more than legal interest."

7. In the case of Parr v. Eliason, 1 East, 92, a bill which had thirteen months to run was discounted. The bankers took the full discount, but gave their own acceptance at three months for part, without deducting from the discount the interest for three months upon their own acceptance. This was holden to be usurious, because they did not pay the amount in cash, but gave their own acceptance at a distant day for part; it was not contended to be usurious, because the bankers deducted the interest upon the whole sum in the bill for the whole time it had to run, and no question of usury would

have arisen if the amount had been paid wholly in cash.

8. The case of Barclay v. Walmsley, 4 East, 55, where the acceptor of a bill discounted his own acceptance at eighteen days, deducting at about the rate of sixty per cent. per annum. This was not usury.

These cases satisfy my mind that in England a case of mercantile discount, by way of anticipation of funds, is not a case of loan within their statute; and they are a strong confirmation of the general principles of law and reason which I have before mentioned. Principles in themselves so strong, and so universally adopted as not to have been once questioned in a nation so commercial as that of England, are not to be easily shaken. In a country adopting the same law of usury, and the same principles of commercial law, the same principles of law and reason must equally apply. If then in this country as well as in England, a case of mercantile discount, by way of anticipation of funds, be not within the statute of usury, the question arises, is the case at bar a case of mercantile discount by way of anticipation of funds within the meaning of the charter of the bank? It would be difficult in practice for a bank to know whether a note or a bill offered for discount be a note or bill grounded upon a bona fide mercantile negotiation of sale or contract. If the right of the bank to recover upon a bill or note discounted were to depend upon their being able to prove at the trial that the bill or note was given for a real debt, they would have a very hopeless business. They would be liable to continual impositions, and even although the paper might have been founded upon a real transaction, the parties might so conceal or remove the evidence as to render it impossible for the bank to succeed. Again, if the bank was obliged to investigate nicely every transaction before they could safely discount a note or bill, it would be almost impossible for them to transact any business at all. The burden of proof must in reason rest upon the other party. It is sufficient for the bank that the paper offered bears the form and appearance of a mere mercantile negotiation. Nor do I deem it necessary within the spirit of the charter of the bank that a note to be lawfully discounted by the bank should be a note given in consequence of an actual sale of property. If one merchant chooses to give a credit to another, (whether gratuitously, or in consideration of a commission or other compensation,) by accepting bills, or drawing or indorsing notes payable at a distant day; such credit may strictly, in mercantile language, be called funds; and the discount of such acceptances, or such notes, is as much the anticipation of funds, as if the acceptances or notes were founded upon an actual sale of property. Again, if I have sold property, either verbally or by covenant under seal, the contract is not in such a form as to be the subject of discount. I get a friend who has confidence in that fund to accept my bills, or to indorse my notes, so as to enable me to anticipate that fund. Such acceptances and such notes would be clearly within the spirit of the charter of the bank, and would be fairly within the meaning of a mercantile discount by way of anticipation of funds, and the discount of such acceptances, or notes, could not be considered as a loan from the bank to me. If it can in any way be considered as a loan, it must be a loan from my friend who enables me to get the money on his acceptances.

What then is the case presented to us by the replication? Does it bear the form and appearance of a mercantile negotiation, by way of anticipation of funds? It is simply a note for eight hundred dollars by R. B. J., and indorsed by W. Herbert, payable at sixty days after date. The note in every respect has the usual appearances of a fair transaction, and there is no fact stated to show that it was not. The bank then had a right to presume it was so, and the court must so consider it until the contrary appears. Considering it then as a case of mercantile discount by way of anticipation of funds, I deem it a case clear of the statute of usury, and within the charter of the bank.

But an objection is made and strenuously insisted upon by the counsel of the defendant, that even if the bank has a right to deduct a discount at the rate of six per cent. per annum, upon the face of the note for the whole time it has to run, yet they have agreed by this note to take more than at that rate.

It is said that $8.40 upon $800 is at the rate of six per cent. per annum for sixty-three days and six tenths of a day, and they make it out by saying that sixty-three days is not two months and one tenth of a month, but is sixty-three three hundred and sixty-fifths of a year, that is, they do not allow that a month is to be considered as the twelfth part of a year, nor a day the thirtieth part of a month. The replication avers that $8.40 for the discount of a note of 800 dollars is at the rate of 6 per cent. per annum, and whether it be or not I take to be a matter of fact for the jury, and not for the court. It is for the jury to say what is the usual mode of calculation in such cases, and to calculate accordingly. If, however, it were a matter of law, and not a matter of fact, I should most certainly calculate it according to the mode in which the clerks in the bank calculated it, because I know that to be the general, I may almost say the universal, mode of calculation, not only among bankers and merchants, but in our courts of justice. But if it were an error, I should leave it to the jury to say whether it were not a mistake; and not done with an intent to make more than the lawful discount.

Upon these grounds, I am satisfied that the

transaction in the replication is not usurious, nor the note void. Judgment upon the demurrer for the plaintiff.

Case No. 851.

BANK OF ALEXANDRIA v. MANDEVILLE.

[1 Cranch, C. C. 575.][1]

Circuit Court, District of Columbia. Nov. Term, 1809.

PARTNERSHIP—SECRET PARTNER—LIABILITY—EVIDENCE—COMPETENCY OF WITNESSES.

1. An action of debt, under the Virginia law, may be maintained upon a promissory note, against a secret partner who has not signed it.

2. A creditor of the firm is a competent witness to prove its existence.

3. The wife of one of the defendants is not a competent witness for the plaintiffs, although her husband has been discharged under the insolvent act.

4. A stockholder in a company who own stock in the plaintiffs' bank is a competent witness for the plaintiffs. [Alexandria v. Brockett, Case No. 181, followed.]

5. The record of other suits between the defendant and other plaintiffs cannot be read in evidence by the plaintiffs to show fraud in the dissolution of the partnership.

6. The secret partner is not liable unless the money obtained by the discount of the note came to the use of the secret partnership.

[Cited in Re Munn, Case No. 9,925.]

At law. Debt on a note signed by R. B. Jamesson, charging Mandeville as a secret partner. [See Bank of Alexandria v. Mandeville, Case No. 850.]

1st plea, nil debet. 2d plea, usury, upon which there was a demurrer and judgment at the last term. 3d plea, usury. Replication, it was discounted by the bank according to their usage; general rejoinder and issue. 4th plea, usury; same replication as to 3d plea; rejoinder, did not offer the note for discount according to the usage of the Bank of Alexandria and all other banks in the United States; upon which issue was joined.

Mr. C. Lee, for the defendant, objected to the note going in evidence. The action is debt on the promissory note. Debt does not lie on a promissory note at common law. This action is supposed to be founded on the Virginia statute of December 4, 1786, p. 36, § 3. The declaration upon a note given for account of Jamesson & Mandeville. This note does not state it to be on account of J. & M., and parol evidence cannot be given to prove that fact. The statute of Virginia gives an action of debt only against the person who signed the note. The action ought to have been assumpsit. The first count of the declaration states that R. B. Jamesson for and on account of Jamesson & Mandeville, by their note promised to pay, &c. The second count, that Jamesson & Mandeville, by their note promised to pay.

C. Simms and E. J. Lee, for plaintiffs.

The note is precisely such an one as is declared upon. If it will not support an action against Mandeville, it is a good cause for demurrer—and that is the course they ought to have taken. It is now too late. One partner may bind his copartner by a note. So the acceptance of one partner binds all, if on partnership account. If the note had been signed by one partner only for himself and partners, an action of debt under the statute might have been maintained upon it against all the partners. The statute means that an action of debt may be brought against any person bound by the note. The question is, who signed the note; we say that Mandeville & Jamesson signed it by R. B. Jamesson. The question then arises whether Mandeville & Jamesson traded under the firm of R. B. Jamesson. If you take the statute literally, only one of a mercantile firm (he who signed) is liable to an action of debt. Suppose it had been R. B. Jamesson and Co., we might show who the company was.

Mr. Swann, in reply. We cannot deny the consideration in an action of debt, on the statute. Here is no ambiguity either latent or patent. If the term company had been added, there would have been ambiguity which might have been explained. In assumpsit we can go into the consideration.

THE COURT was of opinion that there was no variance between the note declared upon and that offered in evidence; and that parol evidence was competent to prove the averment of partnership and the averment that the note was given by R. B. Jamesson, for and on account of the copartnership. If an action could not be maintained against Mandeville under the statute, because he had not signed the note, it was a defect apparent on the face of the declaration, and the remedy was by demurrer, or arrest of judgment.

The deposition of one Grogan was offered in evidence by the plaintiffs.

Mr. Youngs, Mr. C. Lee, and Mr. Swann, for the defendant, objected, that Grogan states himself to be a creditor of R. B. Jamesson, and is interested in fixing the partnership upon Mandeville.

THE COURT, without argument, said that it was an objection to the credibility, but not to the competency of the witness; although Jamesson is insolvent, and has been discharged under the insolvent act.

The plaintiffs offered the wife of R. B. Jamesson, one of the defendants, to charge the other defendant as a secret partner of her husband.

Mr. E. J. Lee. R. B. Jamesson himself would be a good witness, having been discharged under the insolvent law. In the case of Mayor, etc., v. Moore. [Case No. 9,359.] Moore was admitted as a witness. In the case of Governor of Virginia v. Evans, [Id.

[1] [Reported by Hon. William Cranch, Chief Judge.]

16,969,] Evans was admitted a witness; and in the case of Riddle v. Welch, [Id. 11,809,] Welch was admitted as a witness. The interest must be direct in the event of the suit in trial. 3 Williams, Cases, 398; Bent v. Baker, 3 Term R. 27. If the verdict or judgment cannot be used in his favor, he is a competent witness. So the wife is a good witness against the husband. Williams v. Johnson, 1 Strange, 504; Anon., Id. 527; Rex v. Azire, Id. 633; Baring v. Reeder, 1 Hen. & M. 154.

THE COURT refused to suffer Mrs. Jamesson to testify; her husband could not be a witness directly to fix a liability upon Mandeville; and she has all his disabilities. In the case of Mayor, etc., v. Moore, [supra,] Moore had been discharged under the bankrupt law, and was not liable. In the case of Governor of Virginia v. Evans, [supra,] Evans was permitted to prove a collateral matter in the issues joined on the pleas of the other defendants. So in Riddle v. Welch, [supra.] Here the evidence is to create the liability itself directly.

Thomas Vowell, Jr., was offered as a witness for the plaintiffs. The defendant objected that he was interested, being a stockholder in the Marine Insurance Company, which company is a stockholder in the Bank of Alexandria.

THE COURT, without argument, overruled the objection, on the authority of Common Council [Alexandria] v. Brockett in this court at November term, 1807, [Case No. 181,] considering it as a doubtful point. The plaintiffs offered to read the records in sundry suits in which Mandeville was a party about the time of the supposed dissolution of the firm of Mandeville & Jamesson, in which Mandeville's discharge under the English bankrupt law was questioned, to show a motive for an ostensible dissolution.

But THE COURT (CRANCH, Chief Judge, doubting) refused.

Mr. C. Lee then moved the court to instruct the jury that the defendant is not liable unless the money obtained by the discount of this note came to the use of the secret partnership,—

Which instruction the court gave.

Mr. R. J. Taylor, for the plaintiffs, prayed the court to instruct the jury that if the note was discounted for the use of the partnership, and received by R. B. Jamesson, one of the partners, the plaintiffs are entitled to recover, although the plaintiffs were at the time ignorant of the existence of the partnership, and discounted it on the credit of R. B. Jamesson and W. Herbert, the indorser, and although the money was applied by R. B. Jamesson to his own individual use, and not to the use of the partnership,—

Which instruction the court refused to give.

Mr. Swann, for the defendant, prayed, and the court instructed the jury that if the partnership was actually dissolved between Mandeville & Jamesson on the 10th of June, 1806, and did not exist on the 21st of July, 1806, (the date of the note) and the dissolution was known to the bank before that day, the defendant is not bound to pay it, although it was given to take up a partnership note.

Case No. 852.

BANK OF ALEXANDRIA v. SAUNDERS.

[2 Cranch, C. C. 183.] [1]

Circuit Court, District of Columbia. Nov. Term, 1819.

NEGOTIABLE INSTRUMENTS—PAYMENT—APPLICATION BY CREDITOR TO SEVERAL NOTES.

If a bank discount a note, knowing that it was the intention of the party offering it, that the proceeds should be applied to discharge a particular note held by the bank, those proceeds cannot be applied by the bank to the discharge of any other note.

At law. Assumpsit [by the Bank of Alexandria] against [Peter Saunders] the indorser of a note made by John McPherson & Son for $3,000, upon which the bank had discounted $2,500 for the accommodation of John McPherson & Son, on the 18th of March, 1817, and which fell due on 20th of May, 1817; on which day the bank discounted a new note of John McPherson & Son, indorsed by the defendant for $2,500, and protested the note for $3,000, and applied the new discount to other claims against John McPherson & Son upon their notes indorsed by the defendant.

THE COURT, (MORSELL, Circuit Judge, contra,) at the prayer of the defendant's counsel, instructed the jury, that if they should be satisfied by the evidence that the note for $2,500, dated on the 20th of May, 1817, was drawn, indorsed, and offered to the bank for discount, with the intent to renew or pay the note for $3,000 falling due on that day, and that the bank discounted it, knowing that it was so offered with that intent, the bank was bound so to apply the proceeds of the new discount, and could not now recover upon the note for $3,000.

Verdict for the defendant.

Case No. 853.

BANK OF ALEXANDRIA v. SWANN.

[4 Cranch, C. C. 136.] [1]

Circuit Court, District of Columbia. April Term, 1831.[2]

NEGOTIABLE INSTRUMENTS—NON-PAYMENT—NOTICE TO INDORSER—SPECIAL VERDICT.

1. Upon a special verdict, the court cannot, from the facts found, infer other facts which the jury might have inferred, but have not found.

[See Barnes v. Williams, 11 Wheat. (24 U. S.) 415.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reversed in 9 Pet. (34 U. S.) 33.]

2. Notice of the non-payment of a note for $1,457, is not notice of the non-payment of a note for $1,400.

[See note at end of case.]

3. Notice of the nonpayment of a note, payable in the Bank of Alexandria, D. C., put into the post-office at Alexandria on the day after the last day of grace, addressed to the indorser in Washington, D. C., was too late, as the bank closed at 3 o'clock, P. M., and the mail for Washington did not close in Alexandria until 9 o'clock, P. M.

[See note at end of case.]

At law. Assumpsit, by [the Bank of Alexandria] the indorsee against [Thomas Swann] the indorser of the note of H. Peake, for $1,400, payable and negotiable in the Bank of Alexandria, dated 23d June, 1829, at sixty days after date.

Special verdict.

The jury find the note for $1,400 in the declaration mentioned, and that the defendant indorsed it for the purpose of having it discounted in the plaintiff's bank, to take up a note for $1,457, indorsed by the defendant, and due on the day of the date of the note in question. They also find that there was no other note drawn by H. Peake and indorsed by the defendant, discounted at the said bank, or in that bank for collection or otherwise. That the plaintiffs transacted their banking business in Alexandria, D. C., and the defendant resided in Washington, D. C., seven miles distant. That the mail for Washington closed in Alexandria at 9 o'clock, P. M., and arrived at Washington on the next day. That the banking hours were from 9 o'clock, A. M., to 3 o'clock, P. M. That notes not paid before 3 o'clock of the day on which they are payable are usually delivered out to the notary at 3 o'clock, and returned with the protest to the bank on the next morning. That on the 25th of August, 1829, being the third day of grace on the note, it was by the teller of the bank presented, at the bank, to the cashier for payment, who examined the books of the bank, and found that the maker had no funds there, and stated that fact to the teller, and that no other person appeared for him, at the bank, to pay the note. That on the closing of the bank on that day, it was taken out by a notary-public for protest, and was, on the morning of the 26th of August, 1829, (being the next day,) returned to the bank with the protest, which was drawn up on the said 26th of August. That on the same 26th of August, the notary, on behalf of the bank, put into the post-office at Alexandria, long before the closing of the mail of that day, a letter written by him, addressed to the defendant at Washington, intending by the said letter, to give him notice of the non-payment of the said note; which letter was post-marked at the post-office in Alexandria, "Alex'a. Ca. Aug. 26," and is in the words and figures following: "Alexandria, August 26, 1829. Sir,—A note drawn by Humphrey Peake, for fourteen hundred and fifty-seven dollars, dated Alexandria, 23d June, 1829, payable to you or your order, at the Bank of Alexandria, sixty days after its date, by you indorsed, and for the payment of which you are held liable, is protested for non-payment, at the request of the president, directors, and company of the said bank. Respectfully, your obedient servant, B. C. Ashton, Notary-Public. Thomas Swann, Esq., Washington City;" which letter was received by the defendant in due course of mail, on the 27th of August, 1829. The jury also find the protest in haec verba; which recites truly the note in the declaration mentioned, which was for $1,400, and not for 1,457 dollars, as stated in the notice, although the figures 1,457 are written on the margin. They also find that no part of the note has been paid.

The cause was argued for the plaintiffs, by Mr. Taylor, who cited Lenox v. Roberts, 2 Wheat. [15 U. S.] 377; Bussard v. Levering, 6 Wheat. [19 U. S.] 102; Lindenberger v. Beall, 6 Wheat. [19 U. S.] 104; Chitty, (Ed. 1822,) p. 402; Langdale v. Trimmer, 15 East, 291; Scott v. Lifford, 9 East, 347; Robson v. Bennett, 2 Taunt. 388; Bank of U. S. v. Carneal, 2 Pet. [27 U. S.] 543.

And by Mr. Swann, pro seipso.

CRANCH, Chief Judge, after stating the substance of the special verdict, delivered the opinion of the court, (THRUSTON, Circuit Judge, absent.) These seem to be all the material facts found by the jury; upon which two questions are made: 1. Had the defendant any notice of the non-payment of the note upon which the suit is brought? 2. If he had, was it due notice?

1. If the same variance had existed in the declaration, it would have been fatal to the plaintiffs' cause; the note could not have been given in evidence. The variance is substantial; a note for $1,400 is not a note for $1,457. The verdict states circumstances from which a jury might infer that the defendant understood it to be the note for $1,400 which he had indorsed, but they do not draw the inference; and the court is not permitted to draw any inference of fact from the facts found by the jury. The court cannot say, therefore, that the defendant had any notice of the non-payment of the note mentioned in the declaration.

2. But if he had any notice, we think it was too late. In Lenox v. Roberts, 2 Wheat. [15 U. S.] 373, it was decided, "that a demand of payment should be made upon the last day of grace, and notice of the default of the maker be put into the post-office early enough to be sent by the mail of the succeeding day. This was not done; and although it is found that it was the usage of the banks in Alexandria "to deliver out to the notary, on each day at 3 o'clock, all bills discounted by or to be paid at such banks, which became due on such day, for

demand and protest; and for the notary to return such notes, with the protests for non-payment, to the said bank, on the morning of the succeeding day, soon after the bank opened," yet it is not stated, as part of the usage, that the notary should not give notice to the parties until after the return of the notes to the bank. The notice, in the present case, was given by the notary; and might as well have been given on the 25th as on the 26th. He knew that the note had been dishonored at 3 o'clock on the 25th, and the mail did not close until 9 o'clock in the same evening. According to the decision in Lenox v. Roberts, [supra,] therefore, we think the notice was too late. [Supra.] Upon both grounds, therefore, we are of opinion that the judgment on the special verdict should be for the defendant. Reversed. [Bank of Alexandria v. Swann,] 9 Pet. [34 U. S.] 33.

[NOTE. This decision was reversed in Bank of Alexandria v. Swann, 9 Pet. (34 U. S.) 33, —Mr. Justice Thompson delivering the opinion,—on the ground that notice of dishonor mailed in Alexandria on the day after the note was protested, being the day after the last day of grace, was given in due time. "The law does not require the utmost possible diligence in the holder, in giving notice of the dishonor of the note. All that is required is ordinary, reasonable diligence. and what shall constitute reasonable diligence ought to be regulated with a view to practical convenience and the usual course of business. * * * The law, generally speaking, does not regard the fractions of a day; and, although a demand of payment at a bank was required to be made during banking hours, it would be unreasonable, and against * * * the usage of the bank at that time, to require notice of non-payment to be sent to the indorser on the same day." Further ground of reversal was that a notice of dishonor, which describes a note as for $1,457, the true amount being $1,400, but the figures "1,457" being set down in the margin of the note, is sufficient, when the description is in other respects correct, and the defendant has indorsed no other note by the same maker, nor has any other such note been discounted by the bank. or placed there for collection or otherwise, since there is no room for any mistake by the indorser as to the identity of the note.]

Case No. 854.

BANK OF ALEXANDRIA v. TAYLOR et al.

[5 Cranch, C. C. 314.][1]

Circuit Court, District of Columbia. May Term, 1837.

JUDICIAL SALE—MOTION TO SET ASIDE—SALE NOT FAIRLY MADE.

The court will set aside a sale made under its decree, if not fairly made.

Upon the return of the report of a sale made under a decree of this court, in this cause.

Mr. Semmes, for the Misses Herbert, heirs at law of the late Thomas Herbert, deceased, moved to set aside the sale of a house and lot at the corner of Cameron and Fairfax streets in Alexandria, on the ground of a misapprehension at the sale by which persons at the sale were induced not to bid for the property; and offered to sustain the motion by parol viva voce evidence.

Mr. Neale, for Mr. Corse, the purchaser, objected; that it was a novel motion in this country; and that according to the English practice, the whole purchase money must be brought in and deposited before the biddings can be opened.

Mr. Semmes, contra, cited Tait v. Lord Northwick, 5 Ves. 655; Anon., Id. 148; Chetham v. Grugeon, Id. 86; Upton v. Lord Ferrers, 4 Ves. 700; Rigby v. McNamara, 6 Ves. 117; West v. Vincent, 12 Ves. 6; Fergus v. Gore, 1 Schoales & L. 350; Wood v. Hudson, 5 Mun. 423; Quarles v. Lacy, 4 Mun. 251.

The evidence was, by consent, given viva voce, and reduced to writing; and showed that the bid of $1,510 made by Mr. John Corse was in his hearing declared to be for the benefit of the Misses Herbert, the heirs at law of the mortgagor, the late Thomas Herbert, deceased; which declaration was not denied by Mr. Corse, whereby the bystanders were induced not to bid against him; and that the property at the time was worth $2,000.

THE COURT (THRUSTON, Circuit Judge, absent) upon this evidence refused to confirm the sale, and ordered it to be set aside.

BANK OF ALEXANDRIA, (UNITED STATES v.) See Case No. 14,514.

Case No. 855.

BANK OF ALEXANDRIA v. WILSON.

[1 Cranch, C. C. 168.][1]

Circuit Court, District of Columbia. June Term, 1804.

NEGOTIABLE INSTRUMENTS—RIGHT OF HOLDER TO SUE INDORSER—CHARTER OF BANK OF ALEXANDRIA.

The Bank of Alexandria, under its first charter, could maintain an action against an indorser of a note made negotiable in that bank, without first bringing suit against the maker.

[See Yeaton v. Bank of Alexandria, 5 Cranch, (9 U. S.) 49.]

At law. [James] Wilson was indorser of the note of Ricketts, Newton & Co. and Alexander Henderson & Co. The note was discounted at the Bank of Alexandria for the benefit of Alexander Henderson & Co.

[1] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

Messrs. Taylor, C. Lee, and Jones, for the defendant, contended, That the provisions of the charter of the bank respecting summary judgments, applied only to the party who was the real debtor. That in Virginia the maker must be sued, &c., before resort can be had to the indorser. The act of assembly does not alter the general law of Virginia respecting promissory notes. If the charter meant that all the parties should be sued at the same time, it would have had words to that effect. In the act giving an action of debt on bills of exchange, such words have been used. The remedy is against the person indebted—the defaulter. The indorser does not become indebted until the insolvency of the maker is made to appear by suit, &c. The indorsement does not create the debt. In a suit upon the indorsement of a bond, the same remedy is given; bonds and notes are put upon the same footing by the act. The statute only provides a new remedy. It does not prescribe a new mode of creating a debt. The indorsement does not of itself make the indorser the debtor. The persons liable to this remedy must be indebted to the bank on bonds, bills or notes given or indorsed by them, with an express consent in writing that they may be negotiable at the said bank, and must have refused to pay the same when due.

Mr. Simms, for the plaintiff. Every contract is to be carried into effect according to the intention of the parties at the time of contracting. That intention is shown by the general understanding and practice of persons dealing with the Bank of Alexandria, and of other banks. The charter is to be construed according to the intent of the legislature, to be collected from the whole act. The intent was to give a speedy remedy against the indorser as well as against the maker. The words of the charter are, "At the time the same may become due." If the indorser does not pay at that time he is liable to the speedy remedy. The debt arises at the time of indorsement. Kyd, Bills, 113, 114. Bonds would be on the same ground under this act of assembly, if the words "negotiable in the Bank of Alexandria," were inserted in them. The intention of the parties to the note and of the legislature in enacting the law, was that all the parties should be liable to the speedy remedy. The construction of the statute ought to be such as to remove the evil, and advance the remedy. A new remedy was not the only object of the legislature. They have prescribed the mode of creating the debt, by requiring the insertion of the words "negotiable at the Bank of Alexandria."

Mr. Swann, on the same side. It is said the law is unconstitutional; that by the bill of rights no exclusive privileges can be granted except for public services. This argument would go to destroy all the corporations in the state of Virginia, and would apply to all the cases of summary remedy given by statute, as in the case of sheriffs, landlords, judgments on motions, securities, fire insurance company, &c. The bank itself is liable to the same short process. The preamble of the act is a key to its construction. The object is punctuality of payment. The words "indebted by bond, bill, or note given or indorsed," show that a person may become indebted by indorsement. If indebted by indorsement, at what time is that debt to be paid? The law says the action shall lie if the money is not paid at the time the same, that is the bond, bill, or note, shall become due.

Mr. C. Lee, in reply. The summary remedy was not necessary. It is a private institution, trading for its own benefit. The statute only provides a remedy; it does not alter the relative liability of the parties. It does not adopt the statute of Anne. It puts bonds, having the words, "negotiable at the Bank of Alexandria," on the same footing as notes. The case of Lee v. Love, 1 Call, 497, decides, that between private persons those words make no difference. As it respects the bank, it only gives the summary remedy, that is, a speedy trial.

THE COURT was of opinion (nem. con.) that it was not necessary to bring suit against the maker of the note in order to create a right of action against the indorser. KILTY, Chief Judge, said, "As it is in other cases."

CRANCH, Circuit Judge, said his opinion was made up on the ground that no case had yet been decided that an indorsed promissory note, payable to order, was not a negotiable note; or a bill of exchange; and that he was of opinion that, upon such a note, no suit was necessary against the maker, in any case, to support an action against the indorser.

Case No. 856.

BANK OF ALEXANDRIA v. WILSON.

[2 Cranch, C. C. 5.][1]

Circuit Court, District of Columbia. July Term, 1810.

NEGOTIABLE INSTRUMENTS — LIABILITY OF INDORSER—PROTEST—TIME OF NOTICE.

1. After an indorser is fixed by proper demand and notice, the neglect of a trustee to sell property conveyed to him as security for the notes, until by depreciation it becomes inadequate security, will not exonerate the indorser.

2. A protest which does not state that the notary-public informed the indorser that payment had been demanded and refused by the maker of the note, is not evidence of sufficient notice to charge the indorser.

[1] [Reported by Hon. William Cranch, Chief Judge.]

3. The day after the expiration of the three days of grace is soon enough to make the demand, and give notice; and it may be made by the notary's clerk who has possession of the note, with the plaintiff's assent.

[See Bank of Metropolis v. Walker, Case No. 903; Brent v. Coyle, Id. 1,837; Hill v. Norvell, Id. 6,497; Lenox v. Wright, Id. 8,249. The usage of the banks in the District of Columbia was changed in 1818 to conform to the general commercial usage. See Cookendorfer v. Preston, 4 How. (45 U. S.) 317; Adams v. Otterback, 15 How. (56 U. S.) 539.]

4. The indorsement of the note is evidence of money had and received by the defendant for the plaintiff's use, although the note was indorsed by the defendant for the accommodation of the maker.

At law. Assumpsit [by Bank of Alexandria] against [W. Wilson] the indorser of A. & W. Ramsay's note.

Mr. E. J. Lee, for the defendant, contended that A. & W. Ramsay, having given a deed of trust to Ludwell Lee, with a power of sale in case of the note laying over for a year, and that the trustee not having sold the property until it depreciated, so as to become inadequate security, the defendant, the indorser, was discharged, although he had regular notice of non-payment.

But THE COURT (FITZHUGH, Circuit Judge, absent) was of opinion that this was no defence.

The plaintiff then offered the protest, which stated that the notary-public had, on the 17th of October, 1805, (the three days grace expired with the 16th,) demanded payment from the maker, who did not pay, and from the indorser, who did not pay; but did not state that he informed the indorser that a demand had been made upon the maker, and payment refused.

THE COURT (THRUSTON, Circuit Judge, absent) decided that the protest was not evidence of a sufficient notice. That the day after the expiration of the three days of grace was soon enough to make the demand and give notice. That a demand made by Alexander Moore, (a clerk of Cleon Moore, the notary-public,) he having possession of the note with a blank indorsement, with the assent of the plaintiff, was by a person sufficiently authorized to make the demand and give notice. That the indorsement of the note was evidence of money had and received by the defendant for the plaintiff's use, although the note was indorsed by the defendant for the accommodation of A. & W. Ramsay, who drew the money.

Verdict for the plaintiff.

Bills of exception were taken, but no writ of error prosecuted.

BANK OF ALEXANDRIA v. YEATON. See Case No. 858.

Case No. 857.

BANK OF ALEXANDRIA v. YOUNG.

SAME v. YEATON.

[1 Cranch, C. C. 458.][1]

Circuit Court, District of Columbia. Nov. Term, 1807.[2]

NEGOTIABLE INSTRUMENTS — CONSOLIDATION OF ACTIONS — BANK OF ALEXANDRIA — DISTRICT OF COLUMBIA — VIRGINIA LAWS.

1. The court will not order a number of actions of debt upon several promissory notes due at several times, to be consolidated, although the parties are the same in all, and each note was payable before any one of the suits was brought.

2. In an action by the Bank of Alexandria, upon a note made negotiable in that bank, the court will rule the defendant to trial at the first term, if the writ be served ten days before the return day.

[See note at end of case.]

3. Virginia had a right to legislate over this part of the district, until the 27th of February, 1801.

4. The charter of the Bank of Alexandria is a public act.

[See note at end of case.]

Mr. Youngs, for the defendant, moved the court to consolidate a number of actions of debt upon promissory notes, all the notes being due at the time of issuing the writs. Cecil v. Brigges, 2 Term R. 639. One action of debt, he said, might have included the whole; it is but one debt. The plaintiffs were not obliged to bring debt, they might have brought assumpsit for money had and received, and given the notes in evidence.

Mr. C. Simms, contra. This is a novel motion; there is no precedent for it in this District, or in Virginia. The English practice is founded upon a rule of their courts. Until this court has made a general rule on the subject, they will not depart from the former practice. The case cited was assumpsit; this is debt. That might have been on two items of one account. The declaration must have as many counts as notes. If the plaintiff should fail of supporting one note, he might fail for the whole, for he could not recover part of the debt. It is no oppression. The defendant ought to have paid the notes as they became due. How can they be consolidated? The defendant has given separate bail in each suit. There must be a new declaration which must conform to the writ, but to which writ? The court will not order these writs to be dismissed, and thereby discharge the bail; where successive actions are brought, the

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Affirmed in 5 Cranch, (9 U. S.) 45; and Id. 49.]

English courts will not consolidate them. Tidd, Pr. 556, c. 25. The notes here became due at different times.

THE COURT refused to order these twenty-eight actions to be consolidated, because they were brought under the old practice, and no general rule had been made by the court on that subject. THE COURT said they would take into consideration the propriety of making such a general rule.

This was an action of debt against the maker of a promissory note, with an express consent in writing, that it should be negotiable in the Bank of Alexandria, according to the 20th section of the charter of the 23d of November, 1792, and the capias ad respondendum was served more than ten days before the return day of the writ; in which case, it is provided by that section, that "the court shall cause an issue to be made up in such suit, and a trial shall be peremptorily had at the first court to which such writ shall be returnable, and judgment rendered accordingly."

Mr. Simms, for the plaintiffs, moved for a rule on the defendant to plead on the next day.

Mr. Youngs, for the defendant, objected—1. That the charter of the bank is a private act, and the printed book of the laws is no evidence of it. 2. That the charter of the bank expired on the first of January, 1803, by its own limitation in the act of 23d of November, 1792, unless extended by the act of Virginia of the 21st of January, 1801, which authorized the stockholders of the bank to hold their elections, and remove and conduct their business out of the District of Columbia, within the county of Fairfax, in Virginia, and extended the charter to the 4th of March, 1811. 3. That the power of Virginia to legislate for this part of the District of Columbia, ceased on the first Monday of December, 1800, when, by law, and in fact, the District became the seat of the government of the United States, and consequently the act of Virginia of the 21st of January, 1801, extending the charter, was not a law in force in this part of the District on the 27th of February, 1801, when congress enacted [2 Stat. 103] that the laws of Virginia, as they then existed, should be and continue in force here. 4. That by the rule of this court, the return day of all writs returnable to this court, is the day next after the close of the session.

Mr. Simms, in reply. By the act of Virginia, of 3d of December, 1789, ceding this territory to the United States, it is expressly provided, "that the jurisdiction of the laws of this commonwealth, over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine until congress, having accepted the said cession, shall by law provide for the government thereof under their jurisdiction, in manner provided by the article of the constitution before recited." And by the act of congress of 6th July, 1790, (1 Stat. 130,) accepting the cession, it is provided, "that the operation of the laws of the state shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until congress shall otherwise by law provide." Congress did not provide for the government of the district under their jurisdiction, until the 27th of February, 1801. Virginia, therefore, had a right to legislate for this district until that day, and the act of Virginia, of 21st of January, 1801, was valid and effectual to extend the charter of the bank, until the 4th of March, 1811.

THE COURT refused, upon this motion, to decide the questions as to the existence of the bank, and as to the admission of the statute-book in evidence of the charter, but laid the rule on the defendant to plead by 10 o'clock, A. M., of the next day.

At the expiration of the rule,—Mr. Youngs and Mr. Jones, for the defendant, made the same objections to pleading which Mr. Youngs had made to the laying of the rule to plead; and, after argument by Mr. Simms and Mr. F. L. Lee, for the plaintiffs, and Mr. Youngs, Mr. Jones, and Mr. E. J. Lee, for the defendant,—

THE COURT was of opinion, that the defendant ought to be ruled into a trial at this term. It is not necessary for this court to decide the question, whether the legislature of Virginia could legislate for the District of Columbia, after the first Monday of December, 1800. Because it is the opinion of the court that the act of congress of 27th of February, 1801, (2 Stat. 103,) adopted and thereby re-enacted all the laws of Virginia, then in force in Virginia, so far as they were applicable to the circumstances, and to the inhabitants of this District.

There is nothing in that act which forbids such a construction. The act of 21st of January, 1801, if sufficiently authenticated, must be admitted to have been a law of Virginia, in force on the 27th of February, 1801, and therefore within the letter of the act of congress passed on that day; and inasmuch as it is a law applicable to the circumstances of this District, it is certainly within the spirit of that act. If the act of Virginia, of January 21st, 1801, be one of the laws of Virginia, adopted by the act of congress of 27th of February, 1801, it is the opinion of the court that it needs no other authentication than the other laws of Virginia adopted by the same act of congress, which in effect has re-enacted it as if in totidem verbis; and being thus re-enacted by a public act, it becomes itself a public act.

[NOTE. These cases were brought before the United States supreme court on writs of error. The state of Virginia, in 1792, had passed an act incorporating the Bank of Alexandria; giving it the privilege of summary process for the recovery of debts, and depriving its debtors of

the right of appeal. This act was to expire by limitation in 1803, but the cession of Virginia territory including the town of Alexandria as a part of the District of Columbia was accepted by the United States, and the seat of the federal government was removed to the District in December, 1800. In January, 1801, Virginia passed an act continuing the charter until March 4, 1811, and authorizing the bank to transact business in the county of Fairfax. Congress, on February 27, 1801, passed an act that the laws of Virginia, as they then existed, should continue in force in the territory ceded by Virginia for the federal district. On a motion to quash the writ of error, (Mr. Chief Justice Marshall delivering the opinion,) the court held that the charter was a public act, and could be proved as such; that Virginia retained the right to legislate over that part of the District ceded by her until congress exercised its legislative power, and therefore that the Virginia act of January, 1801, continued the corporate existence of the Bank of Alexandria in the District of Columbia, which act, with the other laws of Virginia, was continued in force by congress, (Act Feb. 27, 1801.) But the portion of the act of incorporation taking away from debtors of the bank the right of appeal professed to regulate, and could regulate, only those courts which were established under the authority of Virginia. It could not affect the courts of the United States, or of any other state. Such a peculiar privilege, not necessarily belonging to the bank as a corporation, could not exist in the District, unless specially conferred by congress, so that debtors of the bank had the right of appeal from the decision of the circuit court. The motion to quash the writ of error was therefore overruled. Young v. Bank of Alexandria, 4 Cranch, (8 U. S.) 384. When the cases were heard on the merits, the judgment in Young's Case was affirmed. The opinion of the court, delivered by Mr. Chief Justice Marshall, was as follows: "The writ, being returnable to the court, is returnable the first day of the court. It was known to the legislature of Virginia that the appearance day, for all process, was the day after the term. When, therefore, they directed that a trial should be held at the return term, they must have intended that this case should be an exception to the general rule." Young v. Bank of Alexandria, 5 Cranch, (9 U. S.) 45. Mr. Justice Johnson delivered a separate concurring opinion, (page 54.) In Yeaton's Case, also, the judgment of the circuit court was affirmed. Marshall, C. J., in delivering the opinion of the court, said that by the law of Virginia, prior to the cession of the town of Alexandria to the United States, the indorser of a promissory note was liable only on the implied contract that he would pay the debt if, by due diligence, it could not be obtained from the maker; but if a usage by the bank existed, whereby the indorser was liable absolutely, and such was the understanding under which notes were discounted, the contract of indorsement might make the indorser absolutely liable, though the court did not pass upon this point authoritatively. The court held the indorser absolutely liable under section 20 of the bank charter, and that this applied to an accommodation indorser, for "the consideration moving from the bank to the maker of the note, on the credit of the indorser, charges both the maker and the indorser." Mr. Justice Johnson dissented on the ground that the words in the bank charter relied on by the majority of the court as making the indorser absolutely liable were not enacting words, but words of recital; that the courts of Virginia had decided that the bank could not sue the indorser without proving the maker's insolvency; and that the legislature had not intended to change the common law in this respect. Yeaton v. Bank of Alexandria, 5 Cranch, (9 U. S.) 49.]

Case No. 858.

BANK OF ALEXANDRIA v. YOUNG.

[2 Cranch, C. C. 52.][1]

Circuit Court, District of Columbia. July Term, 1812.

NEGOTIABLE INSTRUMENTS—INDORSER'S LIABILITY—NOTICE OF DISHONOR.

1. If the indorser of a note write on the face of it these words, "Credit the drawer," the note and indorsement are not evidence of money had and received by the indorser to the use of the indorsee, who had discounted the note and applied the proceeds to the credit of the maker.

2. The Bank of Alexandria, in 1807, was bound to demand payment of the maker, and give notice to the indorser of the non-payment, before they could maintain an action against him.

[See Magruder v. Union Bank of Georgetown, 3 Pet. (28 U. S.) 87.]

At law. Assumpsit [by Bank of Alexandria] against [Robert Young] the indorser of the note of James and Alexander Smith, dated June 13th, 1807, at fifty-four days, payable on the 6th and 9th of August. Payment was demanded and notice given on the 9th of September. At the bottom of the note was this memorandum, "Credit the drawer."

THE COURT (THRUSTON, Circuit Judge, absent) said that such a note, with such a memorandum on its face, was not evidence of money had and received by the defendant to the use of the plaintiffs, on the count for money had and received.

Mr. C. Simms, for the plaintiffs, contended that it was not necessary, in order to make the indorser liable, that he should have had notice of the non-payment by the makers. By the charter of the bank, (section 20,) the indorser was as much bound to pay the note, at the moment it became payable by the maker, as the maker himself was. The language of Chief Justice Marshall in Yeaton v. Bank of Alexandria, 5 Cranch, [9 U. S.] 49, is very strong to that effect.

Mr. E. J. Lee, contra. The only point decided in that case is, that it is not necessary to sue a solvent maker before suing the indorser. The charter of the Bank of Columbia has the same words as the charter of the Bank of Alexandria, and yet the supreme court, in the case of French v. Bank of Columbia, 4 Cranch, [8 U. S.] 141, have considered it as a case governed by the laws of bills of exchange.

THE COURT (FITZHUGH, Circuit Judge, contra) was of opinion that the bank was bound to demand payment from the maker, and, on his refusal, to give notice thereof to the indorser, before they could maintain an action against him.

[1] [Reported by Hon. William Cranch, Chief Judge.]

BANK OF ARKANSAS, (UNITED STATES v.) See Case No. 14,515.

BANK OF BRITISH COLUMBIA, (SEMPLE v.) See Cases Nos. 12,659 and 12,660.

Case No. 859.

BANK OF BRITISH NORTH AMERICA v. ELLIS et al.

[6 Sawy. 96;[1] 9 Reporter, 204; 8 Amer. Law Rec. 460.]

Circuit Court, D. Oregon. Nov. 12, 1879.

NEGOTIABLE INSTRUMENTS — INDORSEMENT — DEFENCES—DISCHARGE—ATTORNEY'S FEE.

1. The possession of a negotiable instrument imports, prima facie, that the holder acquired it bona fide, for value, in the usual course of business, without notice of any fact impugning its validity; and that he is the owner thereof and entitled to recover the contents from all prior parties thereto.

2. Inquiry into a consideration of a negotiable paper can only be made between privies or the immediate parties thereto,—as the maker and payee or an indorser and his indorsee; all other parties are called remote, and as between them a consideration for making and indorsing the same is conclusively presumed; but a want of consideration may be shown by a defendant against a remote party, if the latter took the paper with the knowledge that such want could be shown against a nearer party.

3. A party who makes or indorses a note without consideration, and for the purpose of thereby lending his credit to another, is an accommodation maker or indorser, and cannot show a want of consideration therefor against any one except the accommodated party.

4. A party to negotiable paper, who seeks to make the want of consideration a defense to an action thereon, must not only allege such want of consideration, but also show how and why he is entitled to make such defense, as against the plaintiff, in any aspect of the case made in the complaint.

5. An indorser's contract and liability is separate and distinct from that of the maker's: he agrees that the instrument will be paid by himself, if not by the maker, and as his own debt, and not that of another.

6. In the absence of anything to the contrary, an indorsement is presumed to have been regularly made after the making of the instrument and the indorsement of the same by the payee and before its maturity, and the indorser thereby becomes liable, as such, to any subsequent holder of the paper, whether he then had any interest in the same or not, unless there was an agreement that he should be liable only as guarantor, which was known to the holder at the time of acquiring the paper.

7. When the holder of a negotiable instrument makes an early blank indorsement payable to himself, he does not thereby discharge subsequent indorsers from their liability as such.

8. A stipulation by the maker of a negotiable instrument for the payment to the holder thereof of an attorney's fee in case the same is not paid without action is a valid promise, and passes with the instrument to each and every holder thereof: and each subsequent party to such instrument becomes thereby responsible in like manner for such fee to each and every subsequent holder thereof.

[Cited in Pacific Rolling-Mill Co. v. Dayton, etc., Ry. Co., 5 Fed. 852; Adams v. Addington, 16 Fed. 89; Burns v. Scoggin, Id. 735.]

[See Howenstein v. Barnes, Case No. 6,786.]

[At law. Action by the Bank of British North America against M. M. Ellis and others on promissory notes. Plaintiff demurs to answer. Demurrer sustained. Defendants subsequently had leave to file an amended answer, to which plaintiff also demurred. Demurrer sustained. 2 Fed. 44.]

Ellis G. Hughes, for plaintiff.

H. Y. Thompson, George H. Durham, and W. M. Gregory, for defendants.

DEADY, District Judge. This action is brought to recover the sum of two thousand and twenty-five dollars, alleged to be due the plaintiff on forty-three promissory notes, with interest, costs of protest, and an attorney's fee.

The complaint alleges that the plaintiff is a corporation organized in the United Kingdom of Great Britain and Ireland, and that the defendants are citizens of Oregon; that all of said notes were made on May 1, 1878, and eight of them are payable on October 1, 1878, and the remaining thirty-five on January 1, 1879; that each of said notes was indorsed by said defendants, and thereafter and prior to their maturity the plaintiff acquired the same in the regular course of business, and is now the owner and holder thereof; and that, "said notes falling due and remaining unpaid," the plaintiff procured the same to be protested.

The answer of the defendants contains sundry denials and three special pleas or defenses.

The first one alleges that the makers of said notes received no consideration for the same, and "these defendants, indorsers of said notes, * * * received no consideration for such indorsement," and that the plaintiff, at the time it acquired said notes, had knowledge of these facts.

The second one alleges that said notes were made in pursuance of an agreement between the makers thereof and the Dayton, Sheridan and Grand Ronde Railway Company, that the latter would construct and put in operation by October 1, 1878, a branch of its railway from a place called Broadmeads to the town of Dallas; and were placed in the hands of the defendants, R. S. Crystal, J. D. Lee, and H. C. Brown, as agents and trustees, to deliver the same to said railway company upon the completion by it of said contract; that afterwards said trustees, with the consent of said makers, delivered said notes to said railway company, upon its promise to perform said contract; but that said company has hitherto wholly failed to perform said contract, and the consideration for said

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. Reporter and Amer. Law Rec. contain partial reports only.]

notes has failed; and that the plaintiff had notice of these facts when it acquired said notes.

The third defense alleges that the defendants did not indorse such notes "until long after they were made;" that the same were made payable to the order of said railway company; that said defendants never had "any interest in said notes," or consideration for indorsing the same; and that the plaintiff, at the time of acquiring the notes, had knowledge of these facts.

The plaintiff demurs to each of these defenses because the same does not state facts sufficient to constitute a defense. Each of these defenses must stand or fall by itself, and without any aid from either of the others. Hall v. Austin, [Case No. 5,925;] Bachman v. Everding, [Id. 708.] The first defense merely alleges that the notes were made by the makers and indorsed by the defendants without consideration,—not that the consideration has failed, but that there never was any.

This is not a shadow of a defense to the action. The mere possession of a negotiable note imports, prima facie, that the holder acquired it bona fide, for value, in the usual course of business, without notice of any circumstance impeaching its validity; and that he is the owner thereof, entitled to recover the contents of the same from all prior parties thereto. 1 Daniel, Neg. Inst. § 812; 1 Pars. Notes & B. 184; Collins v. Gilbert, [94 U. S.] 754. Here, the plaintiff not only alleges that it is the owner and holder of these notes, but that it acquired them before maturity, in due course of business.

An allegation, then, that these notes were made or indorsed by the defendants without consideration, is no defense to its claim to recover. Inquiry into the consideration of negotiable paper can only be made between privies, or immediate parties thereto,—as the maker and payee, an indorser and his indorsee. All other parties to negotiable paper are called remote, and, as between them, a consideration for making or indorsing the same is conclusively presumed. But the defendant may make the defense of a want of consideration against a remote party, if he could have done so against a nearer party, and such remote party took the paper with a knowledge that it was open to this defense. 1 Daniel, Neg. Inst. § 174; 1 Pars. Notes & B. 175, 183. And to this qualification of the rule there is an important exception in the case of accommodation paper. A party who makes or indorses a note without consideration, and for the purpose of thereby lending his credit to another, is an accommodation maker or indorser, and cannot make the defense of a want of consideration against any one except the accommodated party. The note is supposed to be taken by third persons upon the credit given to him, and he is expected to pay it. 1 Daniel, Neg. Inst. § 189; 1 Pars. Notes & B. 183. A party to negotiable paper, who seeks to make the want of consideration a defense to an action thereon, must not only allege such want of consideration, but must go further, and show how and why he is entitled to make such defense, as against the plaintiff, in any aspect of the case made in the complaint. In this case it does not appear from the plea that the defendants are entitled to avail themselves, as against this plaintiff, of the want of consideration for either making or indorsing these notes. The makers are not sued, and the question of their liability in this respect is not in the case. An indorser's contract and liability is separate and distinct from that of the maker's. An indorsement is not merely a transfer of the note, but it is also a fresh and substantive contract, by which the indorser agrees, among other things, that the note will be paid at maturity by himself, if not by the maker, and as his own debt, and not that of another. 1 Daniel, Neg. Inst. § 669; 2 Pars. Notes & B. 23.

For aught that appears here, there is no privity between the plaintiff and the defendants, and therefore it is immaterial, in this action, whether the latter received any consideration for their indorsement or not, unless it further appears that the plaintiff gave no consideration for the notes, and that no holder, intermediate between the plaintiff and defendant, did so. Hoffman v. Bank of Milwaukee, 12 Wall. [79 U. S.] 191. Again, it would not be inconsistent with this defense, if the defendants indorsed these notes without consideration for the accommodation of the makers or payee or its indorsee, and therefore they may be liable thereon, notwithstanding such want of consideration. The plea, to be a good defense, must meet this phase of the case by denying directly that the defendants were accommodation indorsers, or by stating facts inconsistent therewith.

The second plea is still less material than the first. It only alleges, in effect, that the consideration for the making of the notes, to wit, the promise of the railway company to construct and operate a branch road to Dallas by October 1, 1878, has failed. This may be so; but, in an action by a holder of these notes against an indorser, such fact alone is wholly immaterial. Notwithstanding this, even the defendants may have indorsed these notes to the plaintiff, and received from it therefor their full value.

The third defense is also bad. The only fact which it contains, in addition to the others, is that the defendants did not indorse these notes "until long after they were made, and never had any interest in them."

In the absence of anything to the contrary, an indorsement upon negotiable paper is presumed to have been made after the making of the same, and before maturity; and, if such indorsement be made by any one other than the original payee, then after his in-

dorsement. And, as between an indorser after maturity, and a subsequent holder of a negotiable note, the former is held liable as upon a note payable on demand, and even as an original promiser. 2 Pars. Notes & B. 9, 13; 1 Daniel, Neg. Inst. § 928; New Orleans Canal & Banking Co. v. Montgomery, [95 U. S.] 18. This allegation as to the time when the indorsement of the defendant was made only amounts to this, that such indorsement was made after the note was, which fact is consistent with the allegation of the complaint, and the defendant's liability to the plaintiff.

But upon this fact, and the allegation that the defendants never had any interest in the notes, it is argued by counsel that they are not in law indorsers, but guarantors, which is a collateral agreement and void unless made upon a distinct consideration.

What is the nature of the liability which a third person incurs who indorses a note before the payee thereof, has been a vexed question in the law, and has been settled differently in different states. In the supreme court of the United States, the rule is established that such person is either an original promissor, a guarantor, or indorser, according to the nature of the transaction and the intent and purpose with which the indorsement is made; which may be shown by parol, upon the theory that such an indorsement is irregular and ambiguous. Rey v. Simpson, 22 How. [63 U. S.] 350; Good v. Martin, [95 U. S.] 94.

But the allegations that the defendants did not indorse these notes until long after they were made, does not even imply that they indorsed them before the payee did,—before they were put in circulation,—but rather the contrary. Nor is it a sufficient allegation that they were indorsed after maturity.

The presumption is that the defendants indorsed the notes regularly,—after the payee,—and, although they then had no interest in them, they are still liable to the plaintiff as indorsers, unless there was an agreement or understanding at the time that they were to be liable only as guarantors, and that this was known to the plaintiff at the time of acquiring the notes. But in favor of the plaintiff the defendants are presumed to have indorsed as payees; and for the purpose of maintaining this action against them, as such, the plaintiff may write over the indorsement of the original payee, "Pay to the order of the defendants," naming them, or any other contract or direction not inconsistent with what it knew to be the purpose of such indorsement. 2 Pars. Notes & B. 2.

Besides, the defendants may have indorsed these notes for the accommodation of the maker, or the original payee, or its indorsee, and in such case the fact that they had no interest in the notes, and received no consideration for their indorsements thereon, is wholly immaterial, and would be just what every one, at all conversant with the subject, would ordinarily infer from the premises.

In the course of the argument for the defendants, it was suggested that, if their defenses must be considered separately, application would be made to amend the answer so as to state the three in one; and counsel for the plaintiff, as a matter of convenience, has considered this as already done. But such an amendment will make no difference in the result. The plaintiff, being presumed to be the bona fide holder of these notes, for value, before maturity, and such assumption not being negatived or contradicted by these pleas, prima facie, it is entitled to recover their contents from any and all of the prior parties thereto; and no plea is or can be a defense to this action unless it states facts sufficient to negative this conclusion, so far as the defendants are concerned, in any and every phase of the case made in the complaint.

Negotiable paper is the life-blood of commerce and business, and its circulation and usefulness would be seriously impaired if every maker or remote indorser thereof could set up a failure to keep the private understandings or agreements between himself and third persons, upon which he claims to have signed or indorsed the same, to avoid the payment thereof, according to his obligation as shown by the instrument, in the hands of a bona fide holder for value. Parties who put their names to or upon negotiable paper upon the faith of other people's expectations and promises must not expect, if they are thereby deceived or disappointed, to throw the loss upon those who in good faith have taken their paper for what they, or those whom they trusted, gave it out to be.

The demurrer is sustained.

Case No. 860.

BANK OF CIRCLEVILLE v. IGLEHART.

[6 McLean, 568.][1]

Circuit Court, N. D. Illinois. July Term, 1855.

BANKS AND BANKING — SUSPENSION OF SPECIE PAYMENTS— LIQUIDATION — ENFORCING DECREE FOR CONTRIBUTION BY STOCKHOLDERS.

1. On the failure of a bank to pay specie, it may be forced into liquidation under the laws of Ohio, and receivers are appointed to collect the debts and pay the liabilities of the bank.

2. If there be a deficiency of assets and the stockholders are required to contribute pro rata, on the amounts of stock they own, and to pay the whole amount, if necessary, on such a decree, an action of debt cannot be sustained. To maintain an action of debt, the sum decreed, must be certain so as to require no further action of the court.

[Cited in Carrol v. Green, 92 U. S. 509.]

3. In such a case, a mandate from the supreme court of Ohio, to the common pleas, requires it to carry out the decree, and to issue an execution, if necessary, for the whole

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

amount of the stock debt against the stockholders respectively. An order for such an execution being made, the execution being issued and no property found, does not change the nature or effect of the original decree.

4. An action being brought on the decree as originally given, is subject to the condition expressed, and the facts must be shown to authorize an execution for the whole amount.

5. The original decree was not joint, but several, that contribution be made pro rata. In such a case, an action may be sustained against one of the stockholders, on the original decree, who is a citizen of Illinois.

6. A suit, in equity may be brought to give effect to a decree, where the conditions of the original decree are not appropriate to the powers of a court of law.

[In equity. Bill by receivers of the Bank of Circleville, Ohio, against Nicholas P. Iglehart, to enforce a decree of an Ohio state court. On demurrer to the bill. Overruled.]

Mr. Hunter, for complainants.

Arnold, Larned & Lay, for defendant.

OPINION OF THE COURT. This is a bill in chancery to enforce a decree entered against the defendant, in the state of Ohio. The defendant, with others, became a large stockholder in the Bank of Circleville, established at Circleville, in the state of Ohio, which bank, being in embarrassed circumstances, was forced into liquidation under the laws of Ohio, and William B. Thrall and two other persons were appointed receivers, to wind up the bank by collecting its debts, &c. Finding that the assets of the bank were wholly insufficient to pay its debts, a bill was filed against its stockholders to compel them to pay the amount, in full, of their subscriptions of stock. The defendant owed on his stock the sum of twenty-nine thousand seven hundred and fifty dollars. Other stockholders owed large sums on their stock, and the cause being certified to the supreme court in which a decree was entered against the stockholders, requiring them to pay to the receivers the full amount of their subscriptions of stock, with interest thereon from the date of the decree, "if in the process of closing up the affairs of said bank, by the receivers, it should be found necessary to require the full payment thereof." But if the whole amount should not be required, then the said defendants should pay to the receivers, such parts of the amounts due from them collectively, as with the other assets of the bank will be sufficient to pay its debts; the stockholders to pay a just proportion according to their respective balances due. But the decree was not to bind the stockholders to pay any demand against the bank which had not been previously presented, or reduced to judgment, or exhibited within one year after 1848. And the bill states that the demands against the bank amount to twenty-five thousand dollars, and may greatly exceed that sum. And the bill alleges that all the stockholders except the defendant, Baker, Crane, and Renich, are insolvent, and that it is necessary that these persons should pay the full amount of their installment, or at least so much thereof as shall be necessary to enable the receivers of the bank to liquidate its liabilities. The bill states the other stockholders are citizens of Ohio. The first receivers having resigned, others were appointed, who are now prosecuting this suit. The defendant is called to answer, as to the extent of the liabilities of the bank, and how much remains unpaid, and whether any assets belong to the bank except as aforesaid; and the complainants pray that an account may be taken of the amount due and owing by the defendant, and that he be required to pay to the receivers of the bank or their successors, the amount found to be due by said defendant, or such part thereof as may be necessary, with the other available assets of the bank, to enable the receivers to pay the liabilities of the bank, including costs and expenses. The defendant demurs to the bill, and for cause of demurrer says, that the complainants have not in their bill stated such a case as entitles them to any such discovery or relief as is prayed.

It is first objected that there is an adequate remedy at law. That an action of debt may be sustained on a decree for money, is admitted. And it appears from the decree, to enforce which this bill is filed, that the defendant was found to owe to the bank, on account of his stock, twenty-nine thousand, seven hundred and fifty dollars; and to this amount he was held liable to the receivers of the bank. But the decree was not absolutely for this amount. It was that he was liable on his subscription of stock to the above amount, and that he should pay, by way of contribution, with other stockholders, similarly liable, such amount, not exceeding the said sum, as with the other funds, will pay the debts of the bank. It is clear that on such a decree an action at law cannot be sustained. The sum is not certain, nor has a court of law the means of making it certain. The debts of the bank must be ascertained, the amount of the assets and what per cent. on the stock debts will make up the deficiency. And by looking into the bills it appears that these facts are called for in the answer of the defendant, and they must be ascertained, before the relief prayed for can be given. "A bill in equity will lie to carry a former decree into execution, when from neglect of the parties or other cause, subsequent events have intervened, making the further aid of the court necessary." Linton v. Potts, 5 Blackf. 396. It appears that the court of common pleas, of Pickaway county, Ohio, after the cause was remanded to it, by the supreme court, ordered the sheriff to collect the full amount decreed against the stockholders. The complainant claims nothing under that order, but relies upon the equity of the original decree. And we must take the case as made in the bill, and which is presented by the demurrer. The decree was

remanded to the court of common pleas to be carried out, and if found necessary to pay the debts of the bank, it had power to award execution for the full amount of the stock indebtment. The court directed the execution for the full amount, under the authority of the mandate, but this was merely in the execution of the decree. The execution was returned without realizing any fruits of the decree. And the decree is now brought before this court, for execution, the same as it was before the common pleas of Pickaway county.

By the bill the decree is brought before this court for execution, and it becomes necessary that we should give effect to it, according to its terms, and we are not bound by an executing order of the common pleas of Pickaway county. It is no part of the decree, but a mode of giving effect to it, under which no amount was collected. It is urged, that from the bill, the liabilities of the bank do not appear to have been presented within the time limited in the decree. The decree embraced all demands presented before it was entered, and all judgments against the bank and all demands which might be presented within one year from the first day of January, 1848. From the notice of this decree it is seen, that it could not have been entered for a specific sum to be paid absolutely. The complainants allege that the costs chargeable to the bank will not be less than three thousand dollars, and that the liabilities of the bank, exclusive of interest, amount to the sum of $22,640, and that adding thereto the costs and expenses of winding up the affairs of the bank, the liabilities will be above the sum of fifty thousand dollars. Until a full exhibit of the debts of the bank shall be made, it will not be possible to designate, with precision, their amount. The decree entered by the court was the only one which could be given, before the exhibit of the debts was made. It graduated the charge on the stockholders so as to make their contributions equal, pro rata on the amount of the stock debts. We think this part of the bill is sufficient. The courts in Ohio which entered and sanctioned the decree, are courts of general jurisdiction, and this will be recognised by this court, without any allegation to that effect in the bill.

It is also urged that the bill is defective, for want of proper parties. That the other stockholders who were parties to the decree are necessary parties. These individuals in the bill are alleged to be citizens of Ohio, and cannot be made parties. No decree is asked against them, and they can, in no respect be prejudiced by any decision which shall be made in this case. And in addition to this consideration, the liability of the defendants under the decree is distinct and separate; each one being required to contribute pro rata on his debt for stock, so as to pay the liabilities of the bank. Each is liable on his own subscription for stock, and the only inquiry in this case will be how much of the stock must be paid to carry out the decree. If the whole amount shall be required, the other parties to the original decree cannot be injured, nor will they be injured if the court should find that the payment of less than the whole will be sufficient. No decree that this court shall make in this case, can affect injuriously the interests of other parties to the decree. The pro rata contribution by the decree is the rule of action of this court, in giving effect to it, the same as in the court of Ohio. This view is not in conflict with the case of Bargh v. Page, [Case No. 980.] In that case the suit was brought on a joint liability, one of the parties being a citizen of the same state with the plaintiff. But in this case the defendant is a citizen of Illinois, and his brother and partner died some years ago, insolvent; so that the present defendant stands on his individual responsibility, in no respect so connected with others, as to affect the jurisdiction of this court. As regards the question of distribution, the principle being fixed by the Ohio decree, it may as well be made, so far as the defendant is concerned, by this as the Ohio court. The report of a master can lay the facts before us. The act of [February 28,] 1839, [5 Stat. 321, c. 36,] authorizes this court to take jurisdiction on a joint demand, under the statutory provision, that a judgment against a joint obligor shall not prejudice his co-obligor.

Upon the whole, the demurrer is overruled and a rule for answer is entered.

Case No. 861.

BANK OF CLEVELAND v. STURGES et al.

[2 McLean, 341.][1]

Circuit Court, D. Ohio. Dec. Term, 1840.

JUDGMENT LIENS—MORTGAGE—PRIORITY—OHIO STATUTES.

A judgment was entered, 2d July, 1839, against Beebee, Vantine & Co., in this court. On the 28th June, 1839, Vantine executed a mortgage on a certain tract of land to secure the payment of a debt due the complainant. The mortgage was filed with the recorder of the proper county for record the 2d July. *Held* that the judgment lien was paramount, as it took effect, from the first day of the term, which was the first of July.

[See Sturgess v. Bank of Cleveland, Case No. 13,571; Jeffrey v. Moran, 101 U. S. 285.]

[In equity. Bill by the Bank of Cleveland to enjoin Sturges, Roe and Barker from selling on execution the property of Vantine in satisfaction of a judgment obtained against Beebee, Vantine & Co. Decree for respondents. The property was subsequently sold to Sturges, who brought ejectment against the Bank of Cleveland under his marshal's deed. See Sturgess v. Bank of Cleveland, Case No. 13,571.]

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

Mr. Turner, for plaintiff.
Messrs. Swayne and Bates, for defendants.

LEAVITT, District Judge. The object of this bill is to obtain an injunction to stay a sale at law, on an execution issued from this court. The material facts, as stated in the bill, are as follows: On the 2d of July, being the second day of the July term of this court, in the year 1839, Sturges, Roe and Barker obtained a judgment against Beebee, Vantine & Co.; and an execution having issued on this judgment, certain real estate has been levied on, as the property of Vantine, which is about to be offered for sale by the marshal. The bill then asserts, in behalf of the Bank of Cleveland, a preferable lien on this real estate, in virtue of a mortgage, dated the 28th of June, 1839, executed by Vantine and wife, to secure the payment of a debt due to the bank from Vantine. This mortgage was filed for record, with the recorder for the county of Cuyahoga, on the 2d day of July following. It is insisted, by the counsel for the bank, that these facts call for the interposition of the chancery powers of this court, in staying the sale on the judgment, in favor of Sturges, Roe and Barker. The ground on which this position is based is, that a mortgage creates a specific lien on the mortgaged premises, from the date of its execution, and imports a preferable lien to that created by a judgment rendered prior to the filing of the mortgage for record. And a number of cases are referred to, from which it appears that this is the settled law in some of the states of the Union. Chancellor Kent, in laying down the law on this subject, as established in the state of New York, (4 Comm. 166,) says—"A mortgage not registered has preference over a subsequent docketed judgment." And, again; "an unregistered mortgage is still a valid conveyance, and binds the estate, except against subsequent bona fide purchasers and mortgagees, whose conveyances are recorded." But he adds—"the rule in Pennsylvania is different, and the docketed judgment is preferred, and not unreasonably, for there is much good sense, as well as simplicity, in the proposition, that every incumbrance, whether it be a registered deed, or docketed judgment, should, in cases free from fraud, be satisfied according to the priority of lien, upon the record which is open for public inspection." The only exception to the rule, thus approvingly referred to by the learned writer, is furnished in the case of a mortgage executed at the time of a conveyance of real estate to secure the payment of the purchase money. Under such circumstances the mortgage is properly preferred to a prior judgment.

The statutes of Ohio, declaring the effect of judgments, on the real estate of the debtor, and providing for the registry of mortgages, as understood and construed by the supreme court of the state, seem fully to sustain the position, that liens on land, whether by judgment or mortgage, in the absence of fraud, are to be discharged according to the order of time in which they respectively attached. And this time is not left doubtful under the statutory enactments of the state, but is clearly and definitely fixed. The second section of the statute regulating judgments and executions (3 Chase's St. 1709) declares that "the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor, from the first day of the term, at which such judgment shall be rendered." And the amendatory act, concerning the registry of mortgages, passed March 16, 1838, (36 Ohio Laws, p. 62,) provides that "mortgages do and shall take effect, and have preference from the time the same are delivered to the recorder of the proper county, to be by him entered on record." The judgments of this court create a lien on all the lands of the debtor within its territorial jurisdiction; and, under the provision of the statute just referred to, that lien attaches from the first day of the term at which judgment is entered. In the case before the court the judgment became an effective lien on the real estate of Vantine, from the first day of July, 1839, that being the first day of the term at which it was obtained. The mortgage, though executed on the 28th of June, took effect from the 2d of July, the day on which it was deposited for record with the proper officer. The judgment, therefore, in point of time, has priority of the mortgage by the space of one day. And we think the rights of these parties must be determined in accordance with the principle embodied in the maxim, "qui est prior in tempore, potior in jure."

This principle forms the basis of the decision of the supreme court of Ohio in the case of Magee v. Beatty, 8 Ohio, 396. The facts in that case were substantially as follows: Magee had recovered a judgment against Beatty, at a term of the court of common pleas of Guernsey county, commencing on the 24th day of March. On the 27th of February, preceding, Beatty had executed a mortgage of the real estate in question, which was filed for record on the 14th of March, being ten days prior to the taking effect of the judgment. The judgment creditor filed a bill in chancery, asking the decree of the court, postponing the lien of the mortgage, and for the sale of the land to satisfy the judgment. In their opinion, the court say—"It is a case of two creditors contending for the priority of lien; and this priority must depend on the construction of the statutes relative to the subject." And, after an examination of the statutory provisions, the court arrive at the conclusion that the mortgagee has the preferable lien, solely on the ground that his mortgage was filed for record, and, therefore, took effect before the rendition of the judgment. There is no reference to, or recognition of, the doctrine,

that a mortgage imports a superior equity to that created by a judgment; and, therefore, that the latter, though prior in time, must be postponed to the mortgage. We can perceive no reason to doubt the correctness of this conclusion. The application for the injunction is therefore overruled.

Case No. 862.

BANK OF COLUMBIA v. BAKER et al.

[3 Cranch, C. C. 432.] [1]

Circuit Court, District of Columbia. May Term, 1829.

WRITS—ORDER FOR AN EXECUTION—CHARTER OF BANK OF COLUMBIA—POWER OF PRESIDENT.

1. An order for an execution, by the president of the Bank of Columbia, under the fourteenth section of its charter, is not a judgment, and a second execution cannot be issued without a new order.

[Cited in Smith v. Bank of Columbia and Bank of U. S., Case No. 13,011.]

2. The execution is but the commencement of the suit, and, if not prosecuted, it is discontinued.

[See Bank of Columbia v. Bunnel, Case No. 863; Same v. Moore, Id. 875; Smith v. Bank of Columbia, Id. 13,011.]

At law. Scire facias, to show cause why execution should not issue [against Baker and Dawes] on an order of the president of the Bank of Columbia, made in December, 1825, returnable to May term, 1826, which was never delivered to the marshal, but remained in or was returned to the clerk's office, by the cashier of the bank. At May term, 1826, a new fi. fa. was issued, and ordered, by the plaintiffs, "to lie in the office." The present scire facias was issued on the 27th of April, 1829, returnable to this term.

Mr. Redin, for the defendant, moved the court to quash the scire facias. The order of the president of the bank is not a judgment. It is a mere statutory remedy, and a scire facias is not given by the statute. The execution is only the commencement of the suit. The scire facias has not been served. The defendant has had no notice. How can he plead? What can he plead? What would be the effect of an order of this court for an execution? Could the defendant plead to it as he might have pleaded to the first execution? By the fourteenth section of the charter, which authorizes an execution upon the order of the president of the bank, without a previous judgment, the execution must be made returnable to the court which "shall first sit after the issuing thereof." Five years have now elapsed since the order was made. That order was satisfied by the execution issued by the clerk. No new execution can issue without a new order, and upon a new affidavit, stating that the debt is now due. From the neglect to serve the former execution, a presumption arises that the debt has been paid.

Mr. Lear, contra. By the fourteenth section of the charter, (see Laws Md. 1793, c. 30, § 14,) it is enacted that the execution issued upon the order of the president of the bank "shall be as valid, and as effectual in law, to all intents and purposes, as if the same had issued on judgment regularly obtained in the ordinary course of proceeding in the said court." A scire facias is only a notice, or rule to show cause; and, by St. Westm. 2, (13th Edw. I, c. 45,) it is given after the year and day "upon those things which are found enrolled before" the justices, "whether they be contracts, covenants, obligations, services, or customs knowledged, or other things whatsoever enrolled, wherein the king's court, without offence of the law and custom, may execute their authority." The order of the president of the bank is a matter of record, and is to be considered as enrolled; and it is a thing wherein the court, without offence of the law and custom, may execute their authority. It is, therefore, a process lawfully issued, and cannot be quashed on motion.

CRANCH, Chief Judge, delivered the opinion of the court, (THRUSTON, Circuit Judge, absent, but assenting.) The court is of opinion that, under the circumstances of this case, the clerk could not issue a new execution without a new order; which new order must be in writing, and accompanied by the same evidence as the first. The execution is but the commencement of the suit, which, if not prosecuted, is discontinued, and must be commenced afresh. The charter of the bank does not make the order of the president a judgment of the court, nor give it any other quality of a judgment than that it is an authority to the clerk to issue an execution. It does not say that the order of the president shall be as valid and effectual as a judgment of the court; but only that the execution "shall be as valid and effectual" "as if the same had issued on judgment regularly obtained." We are, therefore, of opinion that the scire facias must be quashed. Scire facias quashed, without costs.

Case No. 863.

BANK OF COLUMBIA v. BUNNEL et al.

[2 Cranch, C. C. 306.] [1]

Circuit Court, District of Columbia. April Term, 1822.

WRITS — ORDER FOR EXECUTION WITHOUT JUDGMENT—NOTARY'S AND ATTORNEY'S FEES—CHARTER OF BANK OF COLUMBIA.

1. An execution issued by order of the president of the Bank of Columbia, without judg-

[1] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

ment, ought not to include the notary's fee for a protest, but if the bank releases the fee, the court will not quash the execution.

2. Such an execution may include five dollars for an attorney's fee, and the interest which has accrued upon the debt up to the time of ordering the execution.

[3. An execution issued by order of the president of the Bank of Columbia pursuant to Laws Md. 1793, c. 30, § 14, is the commencement of the action.]

[Cited in Bank of Columbia v. Sweeny, Case No. 881.]

[See Bank of Columbia v. Baker, Case No. 862; Same v. Moore, Id. 875.]

At law. Motion by Mr. Redin, for the defendant, to quash three writs of fieri facias against the defendants [Bunnel and Robertson] as endorsers of Edward Ford's note issued by order of the president of the Bank of Columbia under the 14th section of its charter of 1793, c. 30, which authorizes him, upon non-payment of a note made expressly negotiable at that bank, to order execution, "on which the debt and costs may be levied by selling the property of the defendant for the sum mentioned in the said note," "provided" the president shall "make oath" ascertaining whether the whole or what part of the debt due to the bank "on the said note," "is due." [See note at end of case.]

Mr. Redin made three objections to these executions:

1st. That each execution included five dollars for an attorney's fee;

2nd. That they included not only the debt, but the interest up to the time of ordering the executions; and

3rd. That each execution included $1.75 for cost of protest.

It has been decided by this court, and by the supreme court, that it is not necessary to protest a promissory note; and the notary's fee for protesting is no part of the legal taxable costs. No attorney's fee can be taxed upon an execution.

Mr. Key, contra. Although this is an execution, yet it is the commencement of a suit. Both parties may appear at the return and litigate the case. The bank could only appear by attorney.

THE COURT (nem. con.) decided that the fee for protest ought not to be included; and (Thruston, Circuit Judge, contra) that the attorney's fee might be included. But, upon the bank releasing the cost of protest, THE COURT (nem. con.) refused to quash the executions.

[NOTE. For a record of the levying of the writs of fieri facias on lands belonging to defendants Bunnel and Robertson in the subsequent course of litigation, see Smith v. Bank of Columbia and Bank of U. S., Case 13,011.]

Case No. 864.

BANK OF COLUMBIA v. COOK.

[2 Cranch, C. C. 574.][1]

Circuit Court, District of Columbia. May Term, 1825.

WRITS — ORDER FOR EXECUTION WITHOUT JUDGMENT—OVERDUE NOTE — SUFFICIENCY OF AFFIDAVIT—STATUTE OF LIMITATIONS — CHARTER OF BANK OF COLUMBIA.

1. The affidavit of the president of the Bank of Columbia, made under the 14th section of its charter, stating that "the note was not paid when due, according to the best of his knowledge and belief," and that the sum of ——— remained due upon the note, is sufficiently certain, although he does not state that it remained due from the defendant, nor that the defendant is the person who signed the note.

2. Upon the return of an execution issued by order of the president of the Bank of Columbia, under the 14th section of its charter, the court will not quash the execution because it appears on the face of the note, upon which it was issued, that it had been due more than three years before the issuing of the execution.

3. The court will permit the defendant, upon the return of the execution issued by the president of the Bank of Columbia, to plead the statute of limitations.

At law. Upon the return of an execution issued by order of the president of the Bank of Columbia [against William Cook,] under the 14th section of its charter, (Act Md. 1793, c. 30, § 14,) Mr. Worthington, for the defendant, moved the court to quash the execution; 1st, because the affidavit of the president was too uncertain; and 2nd, because it appears by the face of the note that it is barred by the statute of limitations. The affidavit stated that the note "was not paid when due, according to the best of his knowledge and belief," and that the sum of ——— "remained due on the note," without saying that it was due from the defendant, and without stating that the defendant is the William Cook who signed the note. As the proceeding under the charter is in derogation of common right, it must be strictly pursued, and nothing left uncertain. The documents sent by the president to the clerk must show a prima facie debt; but, upon the face of the note, it is barred by the act of limitations.

THE COURT (nem. con.) stopped Mr. Key, who was about to reply, and refused to quash the execution; being of opinion that the affidavit of the president of the bank is agreeable to the provisions of its charter, and that the note, notwithstanding its date, (January, 1818, at 60 days,) is prima facie evidence of a debt. If the statute of limitations had been pleaded, the plaintiff might have replied a new promise, or some other bar to the statute. See Gould v. Johnson, 2 Ld. Raym. 838, and Puckle v. Moor, 1 Vent. 191.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Mr. Worthington, for the defendant, then offered to plead the statute of limitations.

Mr. Key, for the plaintiff, objected that the defendant had no right to plead the statute of limitations to this summary proceeding. The object of the act was to enable the bank to indulge their debtors, without danger of losing their debts by lapse of time. No laches can be imputed to a plaintiff who holds such a power. The note is equivalent to a judgment. The charter only permits defendant to show payments, or that he does not owe the whole of the debt. The defendant can only plead to the merits; and, before he can plead the statute of limitations, he must satisfy the court that it is necessary to the merits. The bank charter, which gives the remedy, does not limit it to any particular time; and this proceeding is not an action within the meaning of the statute of limitations.

Mr. Key urged the case of Ingle v. Hogan upon the court, decided at October term, 1822, [Case No. 6,583.]

THE COURT (CRANCH, Chief Judge, doubting) permitted the defendant to plead the statute of limitations.

Case No. 865.

BANK OF COLUMBIA v. DAWES.

[See Case No. 862.]

Case No. 866.

BANK OF COLUMBIA v. DUNLOP.

[3 Cranch, C. C. 414.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.

EQUITY—VENDOR AND VENDEE—HE WHO SEEKS EQUITY MUST DO EQUITY.

A vendee coming into equity to obtain the legal title of a lot upon which the purchase-money has been fully paid, must pay the balance due to the vendor upon other lots.

In equity.

CRANCH, Chief Judge, delivered the opinion of the court.

Under the decree of this court for the sale of the real estate of the late James Dunlop, deceased, for the payment of his debts, the trustee sold seventeen feet front on High street, being part of lot No. 88 in H. & B.'s addition to Georgetown. The sales reported by the trustee were all ratified by the court, except this, which was reserved for consideration, upon exceptions to the report filed by the purchaser and by the creditors of Abraham Wingard, who contended that this part of the lot was not the property of the said James Dunlop, but of the said Wingard. The facts were these. In 1803, this part of the lot was sold by the late Mr. James Dunlop to Mr. Abraham Wingard, who paid the whole purchase-money, but did not get a conveyance of the legal title, which remained in Mr. Dunlop, the vendor. In 1814, Mr. Dunlop sold to Mr. Wingard the residue of the lot, being thirty-nine feet front, for $3,000, and received $985 in part payment. In January, 1820, Mr. Wingard died insolvent, not having received the legal title to any part of the lot. Judgments had been recovered against him in his lifetime to a greater amount than the value of all his property. On the 31st of May, 1821, Mr. Dunlop filed a bill against Mr. Wingard's heirs and representatives, for the sale of the thirty-nine feet front, to pay the balance of the purchase-money; and claiming also a lien on the seventeen feet front first sold, in case the other should not be sufficient to pay that balance, which amounted to more than $3,000. A decree was obtained; and, on the 19th of February, 1822, Mr. Dunlop, at the sale under the decree, purchased the thirty-nine feet for $1,350, leaving a large balance of the purchase-money still due to him from Mr. Wingard's estate. On the 10th of October, 1821, Mr. Wingard's creditors obtained a decree for the sale of his real estate, for the payment of his debts; under which decree the trustee offered to sell the seventeen feet, but the sale was forbidden by Mr. Dunlop, on the ground that he had a lien upon it for the balance due upon the other part of the lot, and the sale was not made; but the whole lot, after the death of Mr. Wingard, and after the 19th of February, 1822, remained in the possession of Mr. Dunlop and his heirs. It is agreed, by the trustee for the sale of Mr. Wingard's estate, and by the trustee for the sale of Mr. Dunlop's estate, and by the purchaser, that the sale of the seventeen feet by the latter trustee shall be ratified; and that this court shall decide which of the trustees shall have the purchase-money.

It is one of the plainest rules of equity, that he who seeks equity must do equity. He who comes into a court of equity to redeem, or to obtain the legal title, must pay the defendant all that is justly due to him by the complainant, whether the debt be or be not strictly a lien on the property sought to be redeemed or conveyed; unless the rights of third persons, not having notice of the complainant's equity, shall have intervened. In Shuttleworth v. Laycock, 1 Vern. 245, it was decided, in 1684, that "where there is a debt secured by mortgage, and also a bond debt, when the heir of the mortgagor comes to redeem, he shall not redeem the mortgage without paying the bond debt too, in case the heir be bound. So if there are two mortgages, and one is defective; if he will redeem, he must take both." The same point was decided in Baxter v. Manning, 1 Vern. 244, where the court said:—"Although there is no special agreement proved in this case, that the land should stand as a security for the

[1] [Reported by Hon. William Cranch, Chief Judge.]

bond debt, yet the mortgagor shall not redeem without paying both." So in Purefoy v. Purefoy, 1 Vern. 29, it was said in argument, and not denied, that "where a bill is brought to redeem two mortgages, and there is more money lent upon one of them than the estate is worth, the plaintiff shall not elect one, and leave the heavier mortgage unredeemed, but shall be compelled to take both or none." This point is also expressly decided in Margrave v. Le Hooke, 2 Vern. 207, where the court said:—"He shall redeem both, or neither. And so if one mortgage had been deficient in value, and the other mortgage had been worth more than the money lent upon it, the heir should not be permitted to redeem the one without the other." So in Pope v. Onslow, 2 Vern. 286. The plaintiff, as assignee of a bankrupt, brought his bill to redeem a mortgage of the manor of Newington, made by the bankrupt to the defendant. The defendant, in his answer, stated that he had previously lent the bankrupt £200, on an insufficient mortgage, and, afterwards, £300 on the mortgage of the manor of Newington, which was of better value than the money due upon it. Per curiam:—"If the plaintiff will redeem one, he shall redeem both." See also the cases cited by the master of the rolls, in Jones v. Smith, 2 Ves. Jr. 376, 377, where he says, that "the case of the assignee is not better than that of the original mortgagor." He considered the case before him as a case of pledge, and not of mortgage; and, therefore, permitted the plaintiff to redeem one fund without the other, but his decree was reversed in the house of lords. 1 Madd. p. 528, says:—"Nor, where there are two separate mortgages of different estates to the same person, can the purchaser of the equity of redemption of one of them redeem that mortgage only; if he redeem at all, he must redeem both."

The case of a vendor, who sells two separate parcels of land to the same vendee, and retains the legal title, does not differ in principle from that of a mortgagee who holds two separate mortgages. The vendor has all the rights of a mortgagee. Even if he has parted with the legal title, he has a lien on the land in the hands of the vendee, and all claiming under the vendee, with notice, unless he has waived that lien. In such a case, however, if the vendor comes into a court of equity, to enforce his lien, he cannot, I apprehend, make one parcel of land answer for the debt of the other, if they have got into several hands, even with notice. But when the vendee comes into a court of equity, to get from the vendor the legal title, then he must pay off both debts; not because the vendor has a lien upon one parcel for the debt of the other, but because the court will compel him who seeks equity to do equity. This is the principle which governs all these cases, and to which they are all to be referred. We are, therefore, of opinion that the trustee for the sale of Mr. Dunlop's estate has a right to retain the purchase-money of the seventeen feet of land, for the purposes of his trust.

Case No. 867.

BANK OF COLUMBIA v. FRENCH.

[1 Cranch, C. C. 221.][1]

Circuit Court, District of Columbia. Dec. Term, 1804.[2]

NEGOTIABLE INSTRUMENTS—ACTION ON ACCOMMODATION NOTE — DEFENSES OF INDORSER — WITNESSES — COMPETENCY — PRIVILEGED COMMUNICATIONS.

1. Counsel may testify as to facts not communicated to them in confidence by their clients.

[See Chirac v. Reinicker, 11 Wheat. (24 U. S.) 280.]

2. The maker of a note is a competent witness for an indorser.

[See Knowles v. Parrott, Case No. 7,898; White v. Burns, Id. 17,539.]

3. The grantor, in a deed collaterally introduced as evidence in a cause inter alios, may be a witness to prove that the deed was fraudulently obtained.

4. An indorser, for the accommodation of the maker of a note, is not entitled to strict notice unless he has actually sustained damage by the want of notice.

[See note at end of case.]

5. An indorser, for the accommodation of the maker, cannot object the want of consideration to an action by the holder.

[See note at end of case.]

[See Crosby v. Lane, Case No. 3,423; Fogg v. Stickney, Id. 4,898.]

At law. Assumpsit [by Bank of Columbia against G. French's executrix] on a negotiable promissory note for 1,400 dollars, made October 10, 1798, by W. M. Duncanson, payable to, and indorsed by, G. French, due 9 and 12 December, 1798. On the 15th December, 1798, F. Munroe (a notary public,) demanded payment of Duncanson, and protested the note. The note was made for the accommodation of W. M. Duncanson. G. French died Friday, the 14th December, 1798, and was perfectly in his senses in the morning of that day. All the parties resided in Georgetown and Washington. Mr. Gantt, counsel for the defendant, was examined as a witness for the plaintiffs. He had had a conversation with the president of the bank, which he related to the defendant's agent, and he was requested by the plaintiff's counsel to state the reply of the defendant's agent. This communication was made by the president of the bank to the witness, as counsel for the defendant, and the answer of the defendant's agent to the witness was made to him as counsel, but he did not conceive the answer of the defendant's agent to be made in confidence.

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reversed in 4 Cranch (8 U. S.) 141.]

He did not recollect whether he even communicated the answer to the president of the bank, but did not consider himself as restrained from communicating it.

THE COURT admitted the evidence to be given; not considering it as a case within the rule respecting counsel and client.

W. M. Duncanson, the maker of the note, being called as a witness for the defendant, Mr. Mason, for the plaintiffs, objected, because no party to a negotiable paper is to be allowed to invalidate the instrument. Walton v. Shelley, 1 Term R. 296; Jordaine v. Lashbrooke, 7 Term R. 601; Esp. N. P. 708; Peake, Ev. 128. Mr. Gantt cited Esp. N. P. 708.

THE COURT admitted W. M. Duncanson to be sworn and give evidence, saying that Walton v. Shelley, was overruled by Jordaine v. Lashbrooke.

The plaintiff having introduced a deed from Duncanson to Ray to show the fact of Duncanson's insolvency, the defendant called Duncanson as a witness to prove that that deed was obtained by fraud, and without consideration, and so the inference derived therefrom not correct.

THE COURT admitted W. M. Duncanson to testify as to the grounds upon which that deed was given.

FITZHUGH, Circuit Judge, contra, said: It is a general principle, that a man is estopped to deny his deed. It is also a general rule, that a man shall not be permitted to do that indirectly which he is forbidden to do directly. There is no case in which it has beeen allowed as to a sealed instrument. The case of Jordaine v. Lashbrooke [supra,] was upon an accommodation note.

Mr. Mason prayed the court to instruct the jury, that if they should be satisfied that this note was indorsed by G. French, without any valuable consideration passing from him to any person for the same, merely to accommodate W. M. Duncanson, the maker of the note, and to give him a credit with the plaintiffs for the amount thereof, and that the plaintiffs received the same with a knowledge of its having been so drawn and indorsed; that if they are also satisfied that John Weems was the agent of the defendant, and that he had notice of the dishonor of the note in January, 1799, and then conversed with and endeavored to make arrangements with the plaintiffs for the same, and are also satisfied that G. French, in his lifetime, and his executrix, or his estate since his death, have suffered no loss or injury from the circumstance of this note not having been demanded of the drawer before the 15th December, 1798, or of notice not having been given to the indorser, or his executrix, of the dishonor of the note, other than as above stated, that such laches and neglect of the plaintiffs as to a demand on the maker, and in not giving other notice to the indorser of the said note, does not debar and take away their right to recover upon this note against the present defendant. De Berdt v. Atkinson, 2 H. Bl. 336, and Nicholson v. Gouthit, Id. 609; Chit. Bills, 86, 87, 89, 101. Mr. Mason admitted that the onus probandi of showing that the indorser has sustained no damage by want of notice, lies on the plaintiffs. Nicholson v Gouthit, 2 H. Bl. 609. An indorsed promissory note is a bill of exchange. If the drawer of a bill has no funds in the hands of the drawee, no notice is necessary to the drawer, of the dishonor of the bill. Chit. Bills, 17, 169, 170; Kyd, Bills, 125. The fact of insolvency, in the case of De Berdt v. Atkinson, does not differ it from this case, because the insolvency and knowledge of that insolvency by Atkinson was only a fact to show that he could not suffer by want of notice. In the present case it is expressly proved that the defendant received no injury by want of notice, and therefore is precisely within reason of the case of De Berdt v. Atkinson.

Mr. Mason attempted to reconcile the cases of De Berdt v. Atkinson [2 H. Bl. 336,] and Nicholson v. Gouthit, [Id. 609.] The defendant, Gouthit, actually sustained a loss in consequence of want of notice, because the funds which he held when the note became payable, were withdrawn before the demand was made, and therefore if compelled to pay the note he would be injured. Chit. Bills, p. 87, does not notice the cases as contradictory, although he cited both in the same page, and states the law of De Berdt v. Atkinson as absolutely settled. Christian's Notes to 2 Bl. Comm. 470, note 26.

Mr. Morsell, contra. The indorser is a surety, and liable only in a qualified manner. There is a difference between the acceptor of a bill and the maker of a note, and between the indorser of a note and the drawer of a bill. The indorser indorses on the credit of the maker; and the reason of notice is that the indorser may immediately resort to the maker and get security; but in the case of a drawer of a bill who has no funds in the hands of the drawee, the drawer has no right to expect the bill to be honored or paid. Esp. N. P. 34. In the case of a drawer of a bill without funds, the drawer is the principal debtor, and is not in the nature of surety. Robertson v. Vogle, 1 Dall. [1 U. S.] 252. Although it may be an accommodation note, yet there is the same reason for notice as if it were for a real debt. Tindal v. Brown, 1 Term R. 167.

Mr. Gantt, on the same side. This was an extraordinary transaction of negotiation at the Bank of Columbia. There is a difference between an indorsed promissory note and bill of exchange. Prima facie it is a bona fide transaction. Notice must be waived by some agreement. The maker of a promissory note is absolutely bound to pay. The contract of the indorser is conditional only. The holder undertakes to do certain things, and if he omits these he waives the liability of the in-

dorser. Kyd, Bills, 109, 111, 117; 2 Bl. Comm. 470. In the case of De Berdt v. Atkinson, the decision was upon the ground of the insolvency of the maker being known to Atkinson at the time of the indorsement; so that Atkinson undertook to pay at all events. By not demanding the money of W. M. Duncanson, on the day it became due, the plaintiffs have given credit to W. M. Duncanson. The indorsement is only a conditional contract, and the conditions have not been complied with. To make him liable without demand or notice, is to create a liability on the defendant which he never assumed. The case of De Berdt v. Atkinson [2 H. Bl. 336] is overruled by that of Nicholson v. Gouthit, [Id. 609.] Notice must be stated in the declaration, and it is error if not stated; it must therefore be proved. There was no consideration between the plaintiff and defendant, unless the payment to Duncanson can be considered as a payment to French; and if the money was thus paid to French, and by French to Duncanson, then a consideration passed from French to Duncanson, and Duncanson had funds in his hands, upon which French could draw.

Mr. Mason. Until French repays the money to the bank, he cannot support an action against Duncanson.

THE COURT gave the instruction, as prayed by Mr. Mason.

CRANCH, Circuit Judge, contra, who delivered his opinion to the following effect:

This is undoubtedly a question of great importance as it regards the interests of the commercial part of the community; for it is of vast importance that the several obligations of parties to negotiable paper should be certain and well known; and I therefore regret, extremely, that I am obliged to give an opinion during the trial of the cause, without that degree of examination and reflection which it merits, especially as I am so unfortunate as to differ from my brethren on the bench. In these circumstances, I cannot say that I do not deliver my opinion with some degree of doubt, although the preponderance of my judgment is at present against giving the direction as prayed.

I had, at first, considerable doubt whether the strict rule of notice was not to be considered as summum jus, which could only be required in case of the failure or insolvency or death of the principal debtor, so that the loss must fall upon one of two parties who were contending de damno evitando. Some of the earlier cases seem to have been decided upon this principle, and in the greater number of cases respecting the liability of the drawer of a bill of exchange and indorser of a promissory note, the judges have qualified the rule with the proviso that some of the parties have become insolvent. Mogadara v. Holt, 1 Show. 318; Hart v. King, 12 Mod. 310; Borough v. Perkins, 1 Salk. 131; Tassell v. Lewis, 1 Ld. Raym. 744; Lambert v. Oakes, Id. 443; Gee v. Brown, Strange, 792; Heylin v. Adamson, 2 Burrows, 674. But from the expressions of judges in later cases, I am inclined to think that my first doubts on this subject were groundless, and that the necessity of notice is a part of the law merchant attached to a bill of exchange, or rather is a part of the contract itself. The question, on which side does the justice of this case lie, depends upon the question what was the contract of the indorser; for it is not just that any man (especially a mere surety) should be held liable upon a contract further than he has consented to bind himself. If his contract was conditional, he cannot be absolutely bound until the condition has been performed. What then was the contract which the defendant's testator entered into by indorsing the note? By the law of Maryland, which must decide this case, and which on this subject is precisely the same as the law of England, an exact analogy exists between an indorsed promissory note, and an accepted inland bill of exchange. When a promissory note, payable to order, is indorsed by the payee, it is, in truth, an inland bill of exchange drawn by the payee in favor of the indorsee, upon the maker, (his debtor by the note,) and by him accepted. Hence the law respecting both kinds of paper is the same.

The contract of the first indorser of a promissory note is the same with that of the drawer of a bill of exchange. It is an express, not an implied contract. An implied contract is that which the law (to prevent a failure of justice) presumes the parties to have made, where they have failed to make an express contract for themselves, and courts will vary the terms of such implied contract, according to the principles of natural justice. By writing his name on the back of the note, the indorser entered into an express contract, the terms of which are as well known by reference to the law merchant, as if they had been written at large on the note. He does not thereby bind himself to pay at all events. He only says to the holder, if you use due diligence in demanding the money of the maker and he refuses to pay it, and if you give me reasonable notice thereof, I will pay you. It being then a part of the express contract between the parties, that the holder should, in reasonable time, demand the money of the maker and give notice of non-payment to the indorser, before the latter can be charged, upon what principle can a court of justice dispense with the performance of those precedent conditions? There has been no case on a promissory note cited in which it has been dispensed with, except the case of De Berdt v. Atkinson, 2 H. Bl. 336, and there it was done because the maker of the note was known by all the parties to be insolvent at the time of making and indorsing the note, and therefore the contract of the indorser in that case was not conditional, but absolute. But the

authority of that case although attended by such special circumstances, is shaken, if not overruled, by the case of Nicholson v. Gouthit, in the same book, [2 H. Bl. 609,] where notice to the indorser of a promissory note was held necessary, although the insolvency of the maker was known to the indorser before the note became payable, and although he had indorsed it for the accommodation of the maker, and merely to obtain him a credit. The latter is, in its circumstances, more like the case now before the court, than that of De Berdt v. Atkinson. It has been contended, for the plaintiffs, that the principle decided by that case was, that notice to Atkinson was not necessary, because it could be of no benefit to him, and that the insolvency of the maker was only a circumstance showing that such notice could not have been beneficial. But the court, in giving their opinion relied, not on the actual insolvency, but the knowledge of the insolvency, by all the parties at the time of making and indorsing the note, whereby it appeared that the defendant had not annexed the usual conditions to his contract as indorser, but had waived them, and that the waiver was also known to the plaintiffs.

It has also been contended, by the plaintiff's counsel, that in the case of Nicholson v. Gouthit, [supra,] it appeared that the defendant had suffered injury by the want of notice. The case was that Burton, the other indorser, had put into the defendant's hands funds to meet the payment of the note, but the note not having been demanded when due the defendant had paid away those funds. It may be answered that if the defendant was not entitled to notice, he paid away those funds in his own wrong, and therefore if any damage arose to him in consequence, it could not make notice necessary. It may also be observed, that the court, in giving their opinion did not notice this circumstance as a ground of that opinion, but the chief justice seems to exclude a presumption of that kind, because he says the justice of the case was with the plaintiff, which could not be true if the defendant had suffered a damage imputable to the laches of the plaintiff. The only ground upon which the court rested their opinion was that the form of guaranty which the parties had adopted required due notice to the indorser, and therefore, although the justice of the case was with the plaintiff, they could not dispense with such notice. Upon this ground the opinion is certainly inconsistent with the case of De Berdt v. Atkinson, [2 H. Bl. 336;] for in the latter case the same form of guaranty had been adopted, yet that circumstance was not deemed sufficient to render notice necessary. But in the other circumstances of the two cases there was a material difference. In De Berdt v. Atkinson the insolvency of the maker was known to all the parties at the time of making and indorsing the note; but in the other case it does not appear that the maker was insolvent, but only embarrassed, at the time of making and indorsing the note, although he became insolvent before the note became payable, which was eighteen months after date. It did not appear, therefore, that the indorser had, at the time of indorsing, waived the usual conditions annexed to the liability of an indorser. It may also be observed that in both those cases the question arose upon the insolvency of the makers of the notes. In the present case no such insolvency is stated in the prayer to the court. But if those cases will not support the plaintiff's action, they rely on the cases in which it has been decided that a person drawing a bill of exchange without funds in the hands of the drawee, is not entitled to notice. I admit that an analogy exists between an indorsed promissory note and a bill of exchange; but that analogy is not perfect until the bill of exchange is accepted. No case has been cited in which notice has been deemed unnecessary, if the bill has been accepted, and I recollect but one case of the kind, which is that of Walwyn v. St. Quintin, 1 Bos. & P. 652, which will be noticed presently. In all the prior cases acceptance had been refused.

It is admitted that cases have decided that if the drawer has neither funds in the hands of the drawee before the bill becomes payable, nor a right to draw, he is not entitled to notice; and the reason is because he cannot expect the bill to be accepted and paid, and therefore practises a fraud upon the holder, and because he cannot suffer any injury by the want of notice. These reasons extend simply to the case of a drawer who has no right to draw, and the bill is not accepted. For if the drawee has promised to accept the bill, then the drawer had a right to expect that his bill will be accepted; and he has practised no fraud upon the holder; and notice of non-acceptance, and a fortiori notice of non-payment, if the bill has been accepted, may be very material to the drawer, as he would thereby be liable for damages, interest and costs, which he would have a right to recover over against the drawee, who had thus violated his faith in not honoring the drawer's bill according to promise; and by the want of notice he may lose his remedy against the drawee by his insolvency. This may be the case where the drawer draws the bill for his own accommodation without funds, and the drawee engages to accept it to give the drawer credit. Even in that case then, the reasons given for dispensing with notice, in the cases cited, do not apply. But that is not the present case. It is contended that this is an accommodation note, that the indorser (the defendant's testator) never gave any valuable consideration for it, and therefore he stands on the same ground as a drawer without funds.

Let us then consider it as a bill of exchange. It is a bill drawn by the defend-

ant's testator on W. M. Duncanson (and by him accepted for his own accommodation) in favor of the plaintiffs. It is not like the case of a bill of exchange drawn for the accommodation of the drawer which I have just stated, and if the reasons for dispensing with notice did not apply to that case, much less can they to this. If a bill of exchange be drawn to accommodate the drawee, the drawer has a right to expect it will be accepted, and if accepted has not only a right to expect but to insist, that it shall be paid, precisely in the same manner as if he had drawn upon funds in the regular course of mercantile transactions. He stands precisely in the same situation as if the bill had been so drawn. What is the situation of the drawer in a regular transaction? If his debtor (the drawee) after having agreed to honor the bill refuses acceptance, the holder can immediately call upon the drawer, who, upon taking up the bill, may commence suit against the drawee and recover the principal, interest, damages and costs. So in case of a bill drawn for the accommodation of the drawee; if not accepted, the holder can immediately call upon the drawer, who, upon taking it up, may commence suit against the drawee for the amount of the accommodation he received, with the costs and charges expended by the drawer for his accommodation. Immediate notice of non-acceptance is therefore equally necessary in both cases, a failure of the drawee in either case being equally prejudicial to the drawer. In a regular transaction, if, after acceptance, the acceptor refuse to pay, the drawer, after taking up the bill, may commence suit against the acceptor on the bill and recover the principal, interest, damages and costs. So in the bill drawn to accommodate the drawee, if after acceptance (which is the present case) the acceptor refuse to pay, the drawer, after taking up the bill may commence action against the acceptor and recover the principal, interest, damages and costs. If the acceptor in either case should fail, both drawers would sustain precisely the same injury; the one by being unable to withdraw his funds to get an indemnification for the interest, damages and costs; and the other by being unable to get a reimbursement of the principal as well as interest, damages and costs. No two cases can be more parallel. If, then, notice is necessary to a drawer on funds, it is equally necessary to a drawer for the accommodation of the drawee; for in pari ratione eadem est lex. To show that the indorser of an accommodation note is not entitled to notice the plaintiff's counsel cited Christian's note to 2 Bl. Comm. 470. But the writer of that note refers to no case but De Berdt v. Atkinson, [2 H. Bl. 336.] The principle may be right (considered in analogy to the cases of drawers without funds and without a right to draw,) when applied to the case of a note drawn to accommodate the indorser, because he is the person who is ultimately to pay without retribution; for if he is compelled to pay in the first instance he can never resort to the maker. Such is the case of the drawer without funds. If he is obliged to pay the bill in the first instance he never can come upon the drawee. In these cases the insolvency of the maker or of the drawee can make no difference to the indorser of the note or the drawer of the bill; and as they are the principal debtors on the note and bill, notice to them can be of no use. But if the principle should be applied to the case of a note indorsed for the accommodation of the maker, it will be applied without the support of any of the reasons which have been alleged to justify the want of notice in the case of a drawer without funds. The only case reported, within my recollection, which has decided that the drawer of an accepted bill is not entitled to notice, is that of Walwyn v. St. Quintin, 1 Bos. & P. 652, and in that case the bill was for the accommodation of the payee, and the action was by the indorsee against the drawer. The acceptor had funds of the payee but not of the drawer. I confess it is difficult to understand the reasoning of the chief justice in delivering the opinion of the court, in that case. He says,—"as far as concerns the drawer, it is what has been called, a mere accommodation." This is true, but it was not for his own accommodation, which seems to me to be the only kind of accommodation which will justify the want of notice. He then proceeds,—"and all consideration of effects of the drawer in the hands of the acceptor may be laid aside." This again is strictly and literally true. But the drawer had a fair pretence for drawing, and the acceptance was on the ground of a fair mercantile agreement. For it is stated that the drawee had actually accepted the bill on the faith of funds put into his hands by the payee to meet the payment. And in the next page his lordship says: "But it may be proper to caution bill-holders not to rely on it as a general rule, that if the drawer has no effects in the acceptor's hands, notice is not necessary. The cases of acceptances on the faith of consignments from the drawer not come to hands, and the case of acceptances on the ground of fair mercantile agreements, may be stated as exceptions, and there may be possibly many others." In the next sentence, also, he seems to admit that where the drawer has no effects in the hands of the drawee, yet if he has "a fair pretence for drawing" although it is for the purpose of raising money by discount for himself, yet he is entitled to notice. Here then seems to be a difference between the opinion and the judgment of the court which it is difficult to reconcile. He proceeds: "It seems clear that notice can be of no use to him (the drawer); his situation being this, that if the acceptor does not pay, he must; and may then, and not till then, resort to the acceptor to be reimbursed; notice, therefore, can

amount to nothing, since his situation cannot be changed." So in the case of a real negotiation, the situation of the drawer is, that if the acceptor does not pay, he must, provided he has due notice. If the chief justice meant to say that the defendant, St. Quintin, was absolutely bound to pay if the acceptor did not, it was begging the question. But his argument seems to rest on the ground that the drawer could not resort to the acceptor until he (the drawer) had paid the bill. But notice was necessary to him, that he might know where to apply to take up the bill, before the acceptor shall become insolvent. Notice also might be of use to him, even before payment, as thereby he would take measures to get security from the acceptor, to indemnify himself when the bill should come back to him. His situation would certainly be very much changed by the want of notice, if the acceptor should fail after the bill became payable; for if due notice had been given he might have taken up the bill, and compelled the acceptor to repay him the money.

His lordship says: "Perhaps, indeed, it (notice) ought never to be dispensed with, since it is a part of the same custom of merchants, which creates the duty; especially as the grounds for dispensing with it, are such as cannot influence the conduct of the holder of a bill, at the time when he is to determine whether he will, or will not give notice; for ninety-nine times in a hundred, he cannot know whether the drawer have or have not effects in the hands of the acceptor, or for whose accommodation the bill was drawn. It has, however, been resolved in many cases, where the drawer has had no effects in the hands of the acceptor, that notice might be dispensed with." This last position seems to have been taken for granted; but I can find no such cases. In all the prior cases, the bill had not been accepted. He also says: "Where the drawer has no effects, and has no fair pretence for drawing, or where he draws without having effects intended to be applied in payment, and only for the purpose of raising money by discount for himself, and a fortiori for the acceptor, which is this case, it is fairly deducible from the cases which have been resolved, that notice need not be given." Where the bill is drawn and accepted (without funds) for the accommodation of the drawer, it may be admitted that the drawer is not entitled to notice, without affecting the present case; but it is difficult to conceive why there should be a stronger reason for dispensing with notice to the drawer, where the bill is drawn for the accommodation of the acceptor, than where it is drawn for the accommodation of the drawer. Indeed, in the former case, I can see no reason for dispensing with notice which will not apply to every possible case. But if this is to be taken as a bill of exchange, can it be said that French, the drawer, had not funds in the hands of Duncanson, the acceptor, before the bill became payable? This action is brought by the plaintiffs, the indorsers of the note, or payees of the bill, against their immediate indorser. They can only support their action, by showing the money to be paid to him or to his use. They paid the money to Duncanson, the maker of the note, or acceptor of the bill. Unless this payment can be applied to French, the indorser, there was no consideration between the plaintiffs and defendant. It is only by considering the money as paid by the plaintiffs to French, and by French to Duncanson, that the plaintiffs can maintain their action. The money, then, which was thus paid, was the funds of French in the hands of Duncanson, upon which French had a right to draw this bill in favor of the plaintiffs. The money in Duncanson's hands, was the fund out of which the note was to be paid, and the non-application of that fund to the object for which it was intended, was a sufficient reason why notice ought to have been given to French, in order that he might get the fund into his own hands, or secure himself against his responsibility. But, it is said, that in this case it is stated that French has received no injury, by want of notice. This may be truly said, for French has not yet been compelled to pay the money. It may be answered, that if French was entitled to notice, the fact that he had not received injury by the want of it, would not be sufficient to dispense with it; and such evidence ought not to be received, and if received, ought not to be regarded. Before the plaintiffs can be let in to give such evidence, they must show that French was in the situation of a drawer without funds and without a right to draw, and that notice could not have been of any use to him.

There is another reason why I cannot consent to give the direction as prayed. It appears, by the case stated for our opinion, that the last day of grace on the note was the 12th of December, and that no demand of payment was made upon the maker of the note until the 15th of December. This was giving a new credit to the maker; and although French might be responsible without notice, if due diligence had been used in demanding the money from the maker, yet it is certainly competent for the plaintiffs to release him from that responsibility; and I am not clear that they have not done so by giving this new credit. The case also states a negotiation between the defendant's agent and the plaintiffs for the adjustment of this note. If that is intended to be argued before the jury, or in the court above, as a waiver of the right to notice, I cannot let it go without also instructing the jury that if they should be satisfied that that negotiation was entered into by the agent without a knowledge of the fact of want of notice, and of the law arising upon that fact, it did not amount to a waiver of the right to notice.

Mr. Gantt then prayed the court to instruct the jury, that if the jury should be of opinion, from the evidence, that the plaintiffs neither paid nor gave any valuable consideration to the defendant's testator for the note, they could not recover. Kyd, Bills, p. 277.

THE COURT refused the instruction as prayed, but directed them, that if they should be of opinion that the note was drawn by W. M. Duncanson, and indorsed and delivered by G. French to the plaintiffs, and that thereupon the plaintiffs paid the money to W. M. Duncanson, with the knowledge and assent of G. French, there was a sufficient consideration as between the plaintiffs and G. French.

Mr. Gantt then prayed the court to instruct the jury, (in substance,) that the money so paid to W. M. Duncanson, was such a consideration moving from French to Duncanson, as to entitle French to due notice of the non-payment, and to make the laches of the plaintiffs in not demanding payment of Duncanson until the 15th of December, a discharge of French from his liability; and that such laches and want of notice, if proved, would discharge him accordingly.

But THE COURT refused to give the instruction. CRANCH, Circuit Judge, contra.

Verdict for the plaintiffs, $1,917.

[NOTE. This judgment was reversed by the supreme court in French v. Bank of Columbia, 4 Cranch, (8 U. S.) 141. Marshall, Chief Justice, in delivering the opinion, said: "By the general rule of law the omission to demand payment from the maker when the note becomes payable, and to give notice to the indorser that payment has been refused, discharges the indorser." As applied to bills of exchange, the rule "requires this notice, not merely as an indemnity against actual injury, but as a security against a possible injury which may result from the laches of the holder of the bill. * * * A drawer who has no effects in the hands of the drawee is said to be without the reason of the rule, and therefore to form an exception to it." But this is doubtful, "except in cases where, in point of fact, the drawer had no right to expect that his bill would be honored, and could sustain no injury by the neglect of the holder to give notice of its being dishonored. In reason, it would seem that in such cases only can the exception be admitted, and that the necessity of notice ought to be dispensed with only in those cases where notice must be unnecessary, or immaterial to the drawer." "However * * * the law may be with regard to the drawer of a bill of exchange who from other circumstances may fairly draw, but who has no effects in the hands of the drawer, it seems settled in England, * * * that the law with regard to a promissory note is different, and that if, in any case where the note is made for the benefit of the maker, notice to the indorser can be dispensed with, it is only in the case of an insolvency known at the time of indorsement. In point of reason, justice, and the nature of the undertaking, there is no case in which the indorser is better entitled to demand strict notice than in the case of an indorsement for accommodation, the maker having received the value."]

Case No. 868.

BANK OF COLUMBIA v. GALLOWAY.

[3 Cranch, C. C. 353.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.

LANDLORD AND TENANT—RENT—EVICTION.

1. In an action for use and occupation, if the rent be payable quarterly, the plaintiff may recover rent to the end of the quarter preceding the eviction, but not for the part of the quarter during which the eviction was.

2. The same principle applies when the rent is payable yearly.

At law. Action on the case, for use and occupation.

THE COURT (nem. con.) instructed the jury, that if they should be satisfied by the evidence, that the rent was payable quarterly, the plaintiffs might recover rent to the end of the quarter preceding the eviction, but not for the part of the quarter during which the eviction was. And if the rent was payable yearly, the plaintiffs could not recover in this action for the year during which the eviction occurred; and that the plaintiffs could not recover rent which accrued after their assignment of the lease.

Case No. 869.

BANK OF COLUMBIA v. HYATT et al.

[4 Cranch, C. C. 38.] [1]

Circuit Court, District of Columbia. May Term, 1830.

LIMITATION OF ACTIONS—PLEADING—ASSUMPSIT—JOINT DEFENDANTS — CONTINUANCE — AMENDMENT

1. The defendant will not be permitted to plead the statute of limitations after the expiration of the rule to plead.

2. If one, only, of two joint defendants, be taken, who pleads non assumpsit, and issue be joined thereon, and the defendant taken offers ready for trial, at the trial term, the plaintiff has not a right to continue the cause until the other defendant be taken, but must amend his declaration by suggesting or averring that the other defendant is not yet taken; and upon such amendment the defendant may have leave to plead de novo.

At law. Assumpsit [by Bank of Columbia] against [Alpheus J.] Hyatt and D. Wilson upon their joint indorsement, in the name of the firm, of Harding's note for $172.50. Hyatt only having been taken, pleaded non assumpsit and the statute of limitations on the 4th of December, 1828, the rule to plead having expired on the first Monday of November, 1828.

Mr. Lear, for the plaintiffs, moved the court to reject the plea of limitations because it was too late.

THE COURT (THRUSTON, Circuit Judge, absent) rejected the plea.

The defendant then pleaded non assumpsit,

[1] [Reported by Hon. William Cranch, Chief Judge.]

upon which issue was joined, and offered himself ready for trial.

The declaration was joint, and contained no suggestion that one of the defendants had not been taken.

Mr. Lear declined making the suggestion, and contended that he had a right to continue the cause until the other defendant should be taken, and moved for a continuance on that ground.

But THE COURT refused, and intimated that the plaintiffs were bound now to amend their declaration by adding the suggestion, or to become nonsuit; and that, if the declaration be now so amended, the defendant taken might have leave to plead de novo.

The plaintiffs then had leave to amend their declaration, and the defendant to plead de novo, who thereupon pleaded the statute of limitations; and the plaintiffs, at the next term, entered a non-pros. See Tidd, Pr. 326, 327; Barnes, Notes Cas. 396, 401; Tidd, 125, 362.

Case No. 870.

BANK OF COLUMBIA v. JONES.

[2 Cranch, C. C. 516.][1]

Circuit Court, District of Columbia. Dec. Term, 1824.

LIMITATION OF ACTIONS—PLEADING—MISNOMER OF PLAINTIFFS IN MARGIN.

If the plaintiffs are misnamed, in the title of the cause, in the margin of a plea of limitations, the plea is bad on special demurrer.

[Overruled in Bank of Columbia v. Ott's Adm'rs, Case No. 878.]

At law. The plea of limitations, in this cause, was entitled, in the margin of the paper, "The President and Directors of the Bank of Columbia v. Richard Jones."

The plaintiffs demurred, and assigned for cause, that the plaintiffs, stated in the said plea, and whose declaration the said plea purports to answer, are stated to be "The President and Directors of the Bank of Columbia," whereas the plaintiffs in this suit, and whose declaration the said plea ought to have answered, are, "The President, Directors, and Company of the Bank of Columbia;" so that the said plea does not reply to, and is no answer to, the declaration of the plaintiffs in this cause.

Mr. Key and Mr. Dunlop, for plaintiffs.
Mr. Marbury, for defendant.

THE COURT (CRANCH, Chief Judge, contra) was of opinion that the names of the parties stated in the margin were to be considered as part of the plea, and made important by the special demurrer, and that the titling of the cause in the margin would make a part of the record, and adjudged the plea to be bad.

[1] [Reported by Hon. William Cranch, Chief Judge.]

This decision was, afterwards, at this term, overruled, in the case of Bank of Columbia v. Ott's Adm'rs, [Case No. 878.]

Case No. 871.

BANK OF COLUMBIA v. KING.

[2 Cranch, C. C. 570.][1]

Circuit Court, District of Columbia. May Term, 1825.

NEGOTIABLE INSTRUMENTS—DEATH OF INDORSER—NOTICE OF NON-PAYMENT.

1. If the indorser of a note payable on the 8th–11th of October die intestate on the 9th, notice of non-payment left with his son at the counting-house of the deceased on the 11th is sufficient.

[See Bank of Washington v. Reynolds, Case No. 954.]

2. If the note become payable on the 15th–18th of October, a like notice left on the 18th is sufficient, no administration having been granted before that day.

3. But if the note become payable on the 22d–25th of October, a like notice left at the same place on the 25th is not sufficient, the administrator having a separate place of business in another part of the town.

At law. Assumpsit [by Bank of Columbia] against the administrator of [George King,] the indorser of several promissory notes, made by Wharton & Grindage.

One of the notes became payable on the 11th of October, 1821, for $2,565; that being the last day of grace. George King, the defendant's intestate, died on the 9th, and was buried on the 11th, on which day notice of non-payment was left with a son of George King in the counting-house occupied by him as his place of business up to the day of his death. This was a warehouse in the lower story of the dwelling-house in which George King died, and in which his family continued to reside. The son, with whom the notice was left, was of full age, and had sometimes transacted business for his father in that warehouse.

THE COURT (nem. con.) said the notice was sufficient.

Another note became payable on the 15th–18th of October, 1821, for $1,026. A like notice was left in that manner at the same place, on the 18th and 19th of October. Administration was granted to the defendant on the 18th.

Mr. Marbury objected that this notice was not sufficient to charge the defendant, and cited the case of Bank of Washington v. Reynolds, in this court at April term, 1822, [Case No. 954.]

But THE COURT overruled the objection.

A third note became payable on the 22d–25th of October, 1821, for $950. The administrator kept a counting-house, in which he transacted the business of the estate, at another part of the town, but the notice was left in the same manner as the other notices.

[1] [Reported by Hon. William Cranch, Chief Judge.]

THE COURT (nem. con.) said it was sufficient notice to charge the defendant.

Mr. Marbury again contended, in regard to the note due 15th–18th October, that as a notice on the 19th, (the day after the last day of grace,) would not have been too late, and as administration had been granted on the 18th, notice should have been given to the administrator on the 19th.

But THE COURT (nem. con.) said that the plaintiffs, having done all that they were bound to do on the 18th of October, (the last day of grace,) were not bound to give a notice to the administrator on the 19th.

BANK OF COLUMBIA. (KURTZ v.) See Case No. 7,949.

Case No. 872.

BANK OF COLUMBIA v. LAWRENCE.

[2 Cranch, C. C. 510.][1]

Circuit Court, District of Columbia. Dec. Term, 1824.[2]

NEGOTIABLE INSTRUMENTS—INDORSER—NOTICE OF DISHONOR—PLACE OF BUSINESS—LOCAL USAGE.

1. If the endorser of a note dated at Georgetown, District of Columbia, and held by a bank in that town, resides in the country two or three miles from the bank, but has a house or place of business within half a mile of the bank, where it was generally known, and especially known to the runner of the bank, that he kept his account books and received his ordinary bank notices, newspapers and foreign letters, &c., a notice left for him at the post-office in Georgetown, and directed to him at Georgetown, although that was his nearest post-office, and the one from which he usually received his letters which came by the mail, is not a sufficient notice to charge him as indorser, unless conformable to a well-established usage of the bank known to the defendant at the time of his indorsement.

[See note at end of case.]

2. If, at the time of the indorsement of the note, which was made negotiable at the bank, it was the general usage of the banks and notaries in the District of Columbia to give notice to the indorsers on the day after the last day of grace, and such usage was known to the defendant, at the time of his indorsement, he is bound by such usage, and the notice so given is in due time.

[See Bank of Alexandria v. Wilson, Case No. 856.]

At law. Assumpsit [by the Bank of Columbia] against the indorser [Lawrence] of Joseph Milligan's promissory note for $5,000, at sixty days, negotiable in the bank of Columbia, payable on the 13th–16th of April, 1819, and dated at Georgetown.

By the bill of exceptions in this case, it appears that evidence was offered, that the defendant, who was a morocco leather-dresser, and owned a house in the city of Washington, where he had his shop, removed, in the year 1818, into the country, in the county of Alexandria, where he lived, at the time of indorsing the note, and when it became payable, and that the Georgetown post-office was the post-office nearest to his residence, being two or three miles distant, and the one at which he usually received his letters which came by the mail. That the notice of non-payment was put into the Georgetown post-office, addressed to the defendant "Georgetown," and that such was the generally known usage of the banks when indorsers resided out of the town; and that such usage was known to the defendant. That the defendant continued to own the house in Washington, which was only a quarter of a mile from Georgetown, where the plaintiff's banking-house was situated, and permitted his sister, Mrs. Harbaugh, to occupy it without rent, and came regularly every week, two or three days in each week, to the said house, where he kept his book of accounts, and received his ordinary bank notices, his newspapers, and foreign letters, and where he was employed in winding up his former business and settling his accounts; and that his so coming to town, and so employing himself, at such times, at the said house, was generally known to persons having business with the defendant, and to the runner of the Bank of Columbia.

Whereupon the plaintiffs prayed the court to instruct the jury, that it was not incumbent on the plaintiffs to have left the notice of non-payment at the house occupied by Mrs. Harbaugh, but that it was sufficient to leave it at the post-office in Georgetown; which instruction, the court, being divided, (CRANCH, Chief Judge, absent,) did not give.

And thereupon, the defendant prayed, &c., that the notice so given was not sufficient to charge the defendant; which instruction the court, (being divided,) did not give.

The case was, afterwards, in the same term, brought before a full court, when the following authorities were cited or consulted: Bank of U. S. v. Norwood, 1 Har. & J. 423; Lenox v. Roberts, 2 Wheat. [15 U. S.] 377; Bussard v. Levering, 6 Wheat. [19 U. S.] 102; Lindenberger v. Bell, Id. 104; M'Gruder v. Bank of Washington, 9 Wheat. [22 U. S.] 600. The demand need not be personal; it is sufficient if made at his place of abode, or generally, "at the place where he ought to be found." Ireland v. Kip, 10 Johns. 490, 11 Johns. 231; Chit. Bills, 288; Freeman v. Boynton, 7 Mass. 483.

January 12, 1825, CRANCH, Chief Judge, delivered the opinion of the court, (THRUSTON, Circuit Judge, dissenting.)

The first question is, would the notice, left at the post-office in Georgetown, if it had been left in due time, and if the defendant had not had a place of business or counting-house in Washington, have been sufficient? Upon this point we are referred to the case of the Bank of U. S. v. Norwood, in 1 Har.

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reversed in 1 Pet. (26 U. S.) 578.]

& J. 423, a case which I have not seen lately, but which I believe decided that notice, (to an indorser living in the vicinity of Baltimore, and to whom the post-office at Baltimore was the nearest post-office,) put into the post-office at Baltimore, was good, the indorser having no known place of business or counting-house in Baltimore, or elsewhere, near any other post-office; it having been proved to be the usage of merchants in Baltimore, to give notice in that manner, in like cases; and the knowledge of such usage having been brought home to the indorser, at the time of his indorsement. In general, if the holder and the indorser live in the same town, (and, by parity of reason, I should suppose, within the same post-office district,) notice left at the post-office is not sufficient. The general rule is, that the notice must be personal, or left at the defendant's usual place of abode, or place of transacting his mercantile business, or "the place where he ought to be found." M'Gruder v. Bank of Washington, 9 Wheat. [22 U. S.] 600. In order to justify the leaving of notice at any other place than the usual place of abode, it must be a place which the defendant has agreed to substitute for his place of abode, pro hac vice, or for receiving notices; and his agreement may be inferred from circumstances, such as its being the place where he usually transacts his mercantile business, receives and pays money, keeps his accounts, &c. The post-office is not such a place. For the convenience of trade, his agreement has been presumed, to receive, at the post-office, all communications which come by mail, from a distance; but the same reason does not exist, as to communications from persons residing in the same place or neighborhood; and therefore his assent to receive such communications at the post-office cannot be inferred; and certainly no such inference can be drawn, if the defendant have another known and regular place of transacting such business elsewhere. The strictness with which notice is required by the mercantile world, is evidence of the importance which they attach to it; and if actual notice be important, it is dangerous to multiply constructive or implied notices. But it is important to the indorser to have notice as soon as possible; he is therefore presumed to assent that such notice, if coming from a distance, shall be given by mail, because that is, in general, the most expeditious and convenient mode of giving it; but with respect to notices from his own immediate neighborhood, where no mail runs, information left at the post-office, is not the most expeditious nor the most certain, nor always the most convenient mode of giving notice. In many post-offices the mail is received only once or twice a week, and it is only on mail days that it is expected that anybody will call for letters. A notice might remain uncalled for, in the office, several days, whereas, it might, perhaps, be given by a messenger in an hour.

Upon general reasoning, therefore, I should conclude that when the parties reside in the same place, (meaning thereby a place where the same post-office is the post-office nearest to the residence of both parties, and between whose respective places of residence there is no communication by mail,) it is not sufficient to leave a notice at the post-office. Such, however, is stated to be the usage of the plaintiffs' bank, and the other banks in this district, and the defendant having been a dealer in the plaintiffs' bank, may be presumed it is supposed, to have had a knowledge of such usage at the time of his indorsement of the note, and to have agreed to be bound thereby. But it is not clear that the usage, given in evidence, applies to a case where the indorser has a place of business known to one at least of the officers of the plaintiffs' bank, and generally known to persons having business with the indorser and in the immediate vicinity of the holder of the note. If it does not apply to such a case, then the usage that he assented to, does not embrace his case. It is only the defendant's consent to the usage that can bind him; and it is not material that one of the plaintiffs' officers did not know the fact which would exclude this case from the scope of the usage relied upon. If banks will rely on usages contrary to the general law of the land, they must do it at the risk of clearly establishing such usages, and bringing their cases clearly within them. It would be with extreme reluctance that the court would decide against a claim of such importance upon so nice a point of law. But established principles must be maintained; and we must not, because the debt is large, sanction a looseness of practice that may unsettle the system of mercantile law. Taking the general rule to be, that, when the parties reside in the same place, (understanding thereby the same post-office district, if I may use the expression, where the regular communication from one of the parties to the other cannot be by mail,) the notice must be personal, or left at the dwelling house, or place of business of the party to be charged by the notice. Ireland v. Kip, 10 Johns. 490, 11 Johns. 231; Freeman v. Boynton, 7 Mass. 483. The right of the plaintiffs to give notice through the post-office at Georgetown, must depend upon the agreement, express or implied, of the defendant to receive notice in that way; and

The court is of opinion, that if the jury should be satisfied by the evidence, that the usage of the Bank of Columbia, and of the other banks above referred to, was, at the time of the defendant's indorsing the said note, and for a long time before, such as is above stated in the statement of the evidence, notwithstanding the party to be charged, should have a place of business such as is stated in the said statement of the evidence, generally known as therein stated, and known to one of the plaintiffs' officers as therein stated, then, from the fact that

the defendant was a dealer in the Bank of Columbia in the manner stated in the said statement of evidence, the jury may infer that he had, at the time of endorsing the said note, a knowledge of such usage; and from such knowledge, may, in the absence of contradictory evidence, infer that he assented to be bound by such usage, and to receive notice in that way; and if the jury should so infer, and should believe the other facts stated in the said statement of evidence to be true as therein stated, then the said notice so left at the Georgetown post-office as aforesaid, is sufficient to charge the defendant in this action as indorser of the note. But if, from the said evidence the jury should be satisfied that the said usage did not extend to indorsers having such place of business in the city of Washington, and known as aforesaid, and should believe the other facts to be as stated in the said statement of evidence, then the said notice so left at the Georgetown post-office as aforesaid, is not sufficient to charge the defendant in this action as indorser of the said note.

And the court further instructed the jury, that if they believe from the evidence, (evidence having been offered to that effect,) that it was at the time of the indorsement aforesaid, the general usage of the said banks and notaries, in the District of Columbia, to give notice to indorsers of the non-payment of a note or bill, on the day after the last day of grace, and that the defendant was a dealer in the said banks as aforesaid, then it is competent for them to infer that the defendant knew of, and consented to such usage; and that if the jury should be satisfied by the said evidence that such notice was given to the defendant of the demand and non-payment of the said note on the day next after the said last day of grace, it was given in sufficient time to charge the defendant in this action. To the refusal of the court (upon the division) to give the instructions prayed respectively by the plaintiffs and the defendant, as well as to the first instruction given, both parties excepted.

The verdict and judgment were for the defendant. Judgment reversed by the supreme court. [Bank of Columbia v. Lawrence,] 1 Pet. [26 U. S.] 578.

[NOTE. This decision was reversed, and a venire facias de novo awarded by the United States supreme court. Bank of Columbia v. Lawrence, 1 Pet. (26 U. S.) 578. Mr. Justice Thompson, in delivering the opinion, said: "The evidence does not show that the defendant had a place of business in the city of Washington, according to the usual commercial understanding of a place of business. There was no public notoriety of any description given to it as such. No open or public business of any kind carried on, but merely occasional employment there, two or three times a week, in a house occupied by another person; and the defendant only engaged in settling up his own business. * * * The general rule is that the party whose duty is to give notice in such cases is bound to use due diligence in communicating such notice. * * * When the facts are ascertained and undisputed, what shall constitute due diligence is a question of law. * * * When the party to be affected by the notice resides in a different place from the holder, the notice may be sent by the mail to the post-office nearest to the party entitled to such notice. * * * If he were in the habit of receiving his letters through a more distant post-office, and that circumstance was known to the holder or party giving the notice, that might be the proper channel of communication. * * * In cases where the party entitled to notice resides in the country, unless notice sent by mail is sufficient, a special messenger must be employed for the purpose of serving it. And we think that the present case is clearly one which does not impose upon the plaintiffs such duty."]

BANK OF COLUMBIA, (LEVERING v.)
See Cases Nos. 8,286, and 8,287.

Case No. 873.

BANK OF COLUMBIA v. MACKALL.

[2 Cranch, C. C. 631.] [1]

Circuit Court, District of Columbia. Dec. Term, 1825.

NEGOTIABLE INSTRUMENTS — NON-PAYMENT PROTEST—EVIDENCE OF NOTARY'S DEPUTY—WAIVER OF NOTICE.

1. The declarations of the notary's deputy cannot be given in evidence.

2. The defendant, who was a notary-public, was the indorser of a note for $3,000, made by his son B. F. Mackall, who had conveyed to him, in trust, sufficient property for his indemnity. The note was payable in the plaintiff's bank, but no funds were there to pay it when payable. The note was, on the last day of grace, delivered to the defendant's son Brooke Mackall, who was his deputy-notary, with other notes, for demand and notice, and was returned to the bank with the other notes. The defendant afterwards sold the property, under the deed of trust, for stock in the plaintiff's bank, and offered it to the bank, at par, in payment of the note. But the bank refused to receive it; held that the jury may infer notice, or waiver of notice; but the delivery of the note to the deputy-notary, was not, per se, notice to the defendant.

3. The waiver of objection to the want of notice may be after the laches, as well as before.

At law. Assumpsit [by Bank of Columbia] against [Leonard Mackall] the indorser of B. F. Mackall's note for $3,000, due 31st May, 1821, payable at the Bank of Columbia. The defendant was the notary-public generally employed by the plaintiffs to demand payment of notes and give notice to the indorsers. His son, Brooke Mackall, was his deputy-notary, and transacted most of his notarial business. The defendant's note was delivered to his said deputy on the last day of grace, for demand and notice.

Mr. Key, for the plaintiffs, offered to give in evidence the declarations of the deputy-notary at the time he returned the note to the bank as to his giving notice to the defendant.

[1] [Reported by Hon. William Cranch, Chief Judge.]

But THE COURT (nem. con.) refused to permit them to be given in evidence.

Mr. Jones, for the defendant, prayed the court to instruct the jury, that the plaintiffs could not recover upon the evidence, which consisted of the making and indorsement of the note; the delivery of the note on the third day of grace to the defendant's deputy (who was also his son and lived in his family) for demand and notice; a deed of trust by the maker of the note to the defendant, of sufficient property to indemnify him. The sale of the property by the defendant, for stock in the plaintiff's bank, and his offer to pay the note in the said stock at par, which was not worth 30 per cent.; and the plaintiff's refusal to accept it. When the note became payable, it was in the bank, and the officers of the bank were there ready to receive payment, but there were no funds of the maker there to pay it.

THE COURT (nem. con.) refused to instruct the jury that the plaintiffs could not recover upon that evidence, and instructed them that if they believed the facts to be as stated, no other or further demand of payment was necessary to be made of the maker of the note; and that they might infer that due notice of the nonpayment was given to the defendant, or that he had waived the objection arising from the want of notice.

Mr. Jones, then prayed the court to instruct the jury, that it is necessary for the plaintiffs, in order to entitle themselves to recover in this action, to prove, in addition to the regular demand of payment of the said note at the said bank on the last day of grace, that the defendant was on that day, or the next, duly notified of the dishonor of the said note, and of the intention of the plaintiffs to hold him liable for the same as indorser; and further, that the delivery of the note to the deputy-notary for notice and protest (if such be found by the jury to be the fact,) was not, under the circumstances stated, notice to the defendant; but that it was still necessary, in order to charge the defendant as such indorser, that he should have received from his said deputy actual notice of the dishonor of the said note, and of his being held liable for the same.

Whereupon the court instructed the jury that the said delivery of the said note to the deputy of the notary as aforesaid, and under the circumstances aforesaid, was not per se, notice to the defendant of the non-payment of the said note; and the court refused to give the other part of the instruction.

Mr. Jones then prayed the court to instruct the jury, that in order to enable the plaintiffs to recover in this action, to prove such actual notice to the defendant; or that the defendant should, with a distinct knowledge of his right to require such notice, have at the time of the said note being demanded, or before, waived such notice, and discharged the plaintiffs from the duty of giving the same.

Which instruction the court refused to give; being of opinion, that it is competent for the plaintiffs to show that the defendant waived the objection arising from the want of notice, after laches of the plaintiffs had occurred; and that from the evidence aforesaid, the jury, if they should believe the same, may infer such waiver.

Case No. 874.

BANK OF COLUMBIA v. McKENNY.

[3 Cranch, C. C. 361.][1]

Circuit Court, District of Columbia. Dec. Term, 1828.

NEGOTIABLE INSTRUMENTS — TIME OF PROTEST — USAGE OF BANK — KNOWLEDGE OF INDORSER — BELIEF OF WITNESS—ADMISSIBILITY.

1. The belief of a witness, together with the facts upon which that belief is founded, is admissible evidence to the jury.

2. In June, 1819, the practice of the Bank of Columbia was, not to give out notes for protest until 3 o'clock, P. M., on the third day of grace.

3. The time for demand, notice, and protest of a promissory note discounted at a bank, depends upon the custom of the bank; and a person who indorses such a note, with the knowledge of the custom, is bound thereby.

[See Bank of Alexandria v. Wilson, Case No. 856.]

At law. Assumpsit [by the Bank of Columbia] against [Samuel McKenny,] the indorser of a promissory note, dated June 24, 1819, at 60 days.

Mr. Coxe and Mr. Marbury, for the defendant, objected to the question proposed to the notary who protested the note, whether from his recollection of the practice of the bank in giving out the notes for protest on the third day of grace, the date of the protest as stated in his notarial book was not a mistake, the date being on the second day of grace. The practice of the bank was, not to give out notes for protest until 3 o'clock, P. M., on the third day of grace.

THE COURT (THRUSTON, Circuit Judge, contra) was of opinion that the belief of the witness, accompanied by the facts upon which that belief was founded, was admissible in evidence to the jury.

Mr. Marbury, for the defendant; when a custom is once clearly proved and established, it is not necessary to prove it again in a subsequent suit. Raborg v. Bank of Columbia, 1 Har. & G. 237; Bank of Columbia v. Fitzhugh, Id. 248.

Mr. Coxe, for the defendant, then prayed the court to instruct the jury, that they "must be satisfied by the evidence, that the note was protested and notice given to the indorser on the fourth day of grace."

THE COURT (THRUSTON, Circuit Judge, contra) refused.

THE COURT (THRUSTON, Circuit Judge, doubting or dissenting) instructed the jury,

[1] [Reported by Hon. William Cranch, Chief Judge.]

that if they should be satisfied by the evidence that before and until the June term of this court, 1818, it was the custom of the Bank of Columbia, and the other banks in this district, to demand payment of notes discounted in such banks, not before the fourth day after the day limited for the payment thereof on the face of the notes, and to give notice on the said fourth day, and that such usage was generally known, the jury may infer that this defendant, when he indorsed the note, had reference to such usage, and if they should so infer, then the said demand of payment of the said note by the maker thereof, and notice to the defendant of the nonpayment thereof made and given on the 25th and 26th of August, 1819, were too soon, and did not make the defendant liable in this action as indorser of the said note; unless the jury should be satisfied by the evidence, that the custom and usage of the said bank, after the said June term, 1818, was so changed as to require payment of such notes to be demanded on the third day and notice of nonpayment given to indorsers on the fourth day after the day limited for the payment thereof on the face of the said notes, and that such change of the said custom of the said banks came to the knowledge of the defendant before, and was known to him at the time of his indorsement of the note upon which this suit is brought; in which case he may be presumed to have so indorsed in reference to the said last-mentioned custom; and if the jury should so find, then a demand of payment on the third day, and notice as aforesaid made and given on the fourth day after the day of payment expressed on the face of the note, were not too soon.

Case No. 875.

BANK OF COLUMBIA v. MOORE.

[3 Cranch, C. C. 292.][1]

Circuit Court, District of Columbia. May Term, 1828.

WRITS—EXECUTION WITHOUT JUDGMENT BY BANK OF COLUMBIA—LIMITATION OF ACTIONS—RUNNING OF STATUTE.

The issuing of the execution by the Bank of Columbia, under the act of Maryland of 1793, (chapter 30,) is the commencement of the action in regard to the statute of limitations.

[See Bank of Columbia v. Baker, Case No. 862.]

At law. This was a fieri facias issued [against James Moore] by order of the president of the Bank of Columbia under its charter of 1793, (chapter 30,) without a judgment. The defendant pleaded non assumpsit within three years next before the commencement of this suit.

Mr. Key, for the plaintiff, contended that the demand of payment, which was a necessary preliminary to the issuing of the execution, was the commencement of the suit The demand was made five days before the expiration of the three years, but the bank could not issue the execution until ten days after the demand, which was five days after the expiration of the three years.

THE COURT (nem. con.) said that the issuing of the execution was the commencement of the suit.

Verdict for the defendant.

Motion for new trial, for misdirection of the jury by the court upon this point, overruled, but a new trial was granted upon affidavit of newly-discovered evidence. [See Bank of Columbia v. Moore, Case No. 876.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 876.

BANK OF COLUMBIA v. MOORE.

[3 Cranch, C. C. 663.][1]

Circuit Court, District of Columbia. Dec. Term, 1829.[2]

STATUTE OF LIMITATIONS — ACKNOWLEDGMENT TO A STRANGER.

The court refused to instruct the jury, that the casual acknowledgment of the debt to a stranger is not such an acknowledgment as was sufficient to take the debt out of the statute of limitations.

[See note at end of case.]

At law. Assumpsit upon the defendant's promissory note, payable to G. Docker, or order, and by him indorsed to plaintiffs. [For opinion at prior hearing, see Bank of Columbia v. Moore, Case No. 875.] Upon the plea of limitations, the plaintiffs' witness testified that he overheard the defendant [James Moore] say to his companions, who were no parties to the note, that he owed no debt, excepting one $500 note to the Bank of Columbia.

Whereupon Mr. Jones, for the defendant, prayed the court to instruct the jury, that the evidence aforesaid did not import such an acknowledgment of the debt in question, as was sufficient to take it out of the statute of limitations.

Which instruction THE COURT (CRANCH, Circuit Judge, contra) refused to give, and the jury rendered their verdict for the plaintiffs.

The defendant's counsel moved for a new trial, on the ground of error, in refusing the instruction; but the court, believing that the justice of the case was with the plaintiffs, refused to grant it.

The counsel for the defendant then applied to the chief justice, MARSHALL, and obtained a writ of error to the supreme court, where the judgment was reversed, in 1832. See [Moore v. Bank of Columbia,] 6 Pet. [31 U. S.] 86.

[NOTE. The witness accidentally overheard the defendant say that he was clear of debt,

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reversed in 6 Pet. (31 U. S.) 86.]

"except one damned five hundred in the Bank of Columbia, which I can pay at any time." Mr. Circuit Justice Thompson, in delivering the opinion of the United States supreme court reversing this decision, (Moore v. Bank of Columbia, 6 Pet. [31 U. S.] 86,) said: "The declarations of the defendant below were vague and indeterminate, leading to no certain conclusion, and at best to probable inference only; and, indeed, if unexplained by any other evidence, they were senseless. It is left uncertain even whether the conversation referred to the note in question. The evidence that this was the only five hundred dollar note of his lying over in the bank might afford a plausible conjecture that this was the one alluded to. But that is not enough, according to the rule laid down in Bell v. Morrison, 1 Pet. (26 U. S.) 352, nor is there any direct admission of a present subsisting debt due. The epithet which accompanied the declaration would well admit of a contrary conclusion, and that there were some circumstances attending it that would lead him to resist payment. The assertion of his ability to pay is no promise to pay. The whole declarations, taken together, do not amount either to an explicit promise to pay, made in terms unequivocal and determinate, or disclose circumstances from which an implied promise may fairly be presumed; one or the other of which this court has said is necessary to take the case out of the statute. The court below, therefore, erred in not giving the instructions prayed for by the defendant."]

Case No. 877.

BANK OF COLUMBIA v. OKELEY.

Circuit Court, District of Columbia.

[Cited in Smith v. Bank of Columbia and Bank of U. S., Case No. 13,011. Decree of circuit court nowhere reported; opinion not now accessible. See Bank of Columbia v. Okely, 4 Wheat. (17 U. S.) 235.]

Case No. 878.

BANK OF COLUMBIA v. OTT.

[2 Cranch, C. C. 529.] [1]

Circuit Court, District of Columbia. Dec. Term, 1824.

PLEADING—MISNOMER OF A CAUSE IN MARGIN OF PLEA

The title of the cause written in the margin of a plea is no part of the plea, but is only an intimation to the clerk in what cause he is to enter the plea; and a mistake in the name of one of the parties in the cause, made in the marginal title, is not fatal to the plea, even upon special demurrer.

The defendants pleaded the statute of limitations. [See subsequent hearing in such plea. Bank of Columbia v. Ott, Case No. 879.] The name of the plaintiffs, in the margin, or at the head of the plea, was "The President and Directors of the Bank of Columbia," whereas the corporate name of the plaintiffs was "The President, Directors and Company of the Bank of Columbia." The plaintiffs demurred specially to the plea, and assigned the same cause of demurrer as in the case of the same plaintiffs against Richard Jones, at the present term, [Case No. 870.]

Mr. Marbury, for the defendant, notwithstanding the decision of the court in that case, was permitted to argue the point again. He contended that the names of the parties in the margin do not constitute any part of the plea. 1 Chitty, 528; Dale v. Beer, 7 East, 333; Dyer v. Stevens, 6 Mass. 389.

Messrs. Key & Dunlop, contra, cited 1 Chitty, 527, 528, 645, 656; Roberts v. Moon, 5 Term R. 487.

THE COURT (THRUSTON, Circuit Judge, contra) decided that the plea was good, considering the titling as no part of the plea, but an indication to the clerk in what cause he is to enter the plea; overruling the case of Bank of Columbia v. Jones, [supra,] at this term.

Case No. 879.

BANK OF COLUMBIA v. OTT.

[2 Cranch, C. C. 575.] [1]

Circuit Court, District of Columbia. May Term, 1825.

NEGOTIABLE INSTRUMENTS—ACTION AGAINST INDORSER—PLEADING—LIMITATIONS.

In an action against the indorser of a promissory note, payable sixty days after date, non assumpsit infra tres annos is a bad plea upon general demurrer; it ought to be actio non accrevit.

[See Ferris v. Williams, Case No. 4,750; Union Bank of Georgetown v. Eliason, Id. 14,355.]

At law. Assumpsit against the administrator of [John Ott] the indorser of a promissory note, payable in sixty days after date. The defendant had pleaded "non assumpsit infra tres annos," to which the plaintiff demurred generally. [See this case at last term. Bank of Columbia v. Ott, Case No. 878.]

Mr. J. Dunlop contends that the plea is bad upon general demurrer, because the note, being payable in sixty days after date, the plea ought to have averred that the cause of action did not accrue within three years, whereas it only avers that the defendant did not promise within three years. 2 Saund. 63c, which cites Gould v. Johnson, 2 Salk. 422, 2 Ld. Raym. 838; Puckle v. Moor, 1 Vent. 191; Birks v. Trippet, 1 Saund. 33, note 2; Bull. N. P. 151.

Mr. Marbury, contra. This is an action against the indorser, whose liability did not accrue until after the note became payable; and the declaration avers, that in consideration of that liability the defendant promised to pay. It was not debitum in presenti, solvendum in futuro.

Mr. Key, in reply. The plea does not relate to the implied promise which the law raises, and which is averred in the declaration as arising from the facts previously

[1] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

averred. The indorser makes a conditional promise at the time he indorses. The promise relates back to the time of the indorsement. The promise of the maker is stated in the same way, namely, "by reason whereof, and by force of the statute," &c. The liability of the indorser upon his original undertaking and the plaintiff's right of action did not accrue until sixty days after the promise; so that the promise may have been beyond the time of limitation, and the right of action within it.

THE COURT, after consideration, (THRUSTON, Circuit Judge, contra,) was of opinion that the plea of "non assumpsit infra tres annos," pleaded by the indorser of a promissory note payable sixty days after date, was bad, upon general demurrer. It ought to have been actio non accrevit.

BANK OF COLUMBIA, (RENNER v.) See Case No. 11,699.

Case No. 880.

BANK OF COLUMBIA v. SCOTT.

[1 Cranch, C. C. 134.][1]

Circuit Court, District of Columbia. July Term, 1803.

PLEADING—GENERAL ISSUE—GENERAL DEMURRER—PLEA IN ABATEMENT.

The court will not suffer the general issue to be struck out to give the defendant leave to plead in abatement.

On the day set for trial of this cause, Mr. Caldwell [for G. Scott's administrator] moved for leave to strike out the general issue, and file a general demurrer, on the ground that he is named in the writ and declaration, administrator generally, whereas he is administrator with the will annexed. Non allocat.

MARSHALL, Circuit Judge, absent.

BANK OF COLUMBIA, (SMITH v.) See Case No. 13,011.

Case No. 881.

BANK OF COLUMBIA v. SWEENY.

[2 Cranch, C. C. 704.][1]

Circuit Court, District of Columbia. May Term, 1826.[2]

WRITS—EXECUTION WITHOUT JUDGMENT—PLEA OF LIMITATION—CHARTER OF BANK OF COLUMBIA.

Upon the return of an execution issued by the president of the Bank of Columbia, without a judgment, under the 14th section of its charter of 1793, if the defendant disputes the debt, the court will order an issue to be made up, and will permit the defendant to plead the statute of limitations.

[See Bank of Columbia v. Cook, Case No. 864.]

[See note at end of case.]

At law. Upon the return of a ca. sa. issued by order of the president of the Bank of Columbia, under the 14th section of its charter, of 1793, c. 30, without a previous judgment, the defendant [George Sweeny] having disputed the debt, the court ordered an issue to be made up between the parties, and for that purpose required the plaintiffs to file their declaration within —— days, and the defendant to plead thereto within three days after notice of filing the declaration. Whereupon the plaintiffs filed their declaration in assumpsit as upon a wager that the debt claimed was due; to which the defendant pleaded the general issue, and offered to plead the statute of limitations, namely, that the defendant did not assume at any time "within three years next before the commencement of this suit;" and that the plaintiffs' cause of action "did not accrue at any time within three years next before the commencement of this suit." To the filing of the plea of limitations the plaintiffs objected. [Objection overruled. Plea of limitations subsequently filed. For opinion on hearing of plea, see Bank of Columbia v. Sweeny, Case No. 882.] By the 14th section of the charter of 1793, c. 30, "if the defendant shall dispute the debt, or any part of it," the court is required to "order an issue to be joined and trial had," at the return term of the execution. [See opinion of Chief Justice Marshall on application for a mandamus to compel the court to have issue joined. Bank of Columbia v. Sweeny, 1 Pet. (26 U. S.) 567.]

Mr. Key and Mr. Jones, for the plaintiffs, contended that the charter only allowed the defendant, at the return of the execution, to dispute the debt. The plea of limitations does not dispute the debt; it only goes to bar the remedy by certain forms of action. Pearsall v. Dwight, 2 Mass. 84; Esp. N. P. 563; [Lindo v. Gardner,] 1 Cranch, [5 U. S.] 343, [1 Cranch,] Append. 465. And this is not one of the forms of action to which the statute applies. Indeed, this is not an action; but if it is, it is not one of those enumerated in the statute. The debt remains for every purpose except that of supporting any of the forms of action barred by the statute. This is a new remedy given by the charter, and is obligatory upon those only who have voluntarily subjected themselves to it, by making their notes "negotiable in the Bank of Columbia." If this is to be considered as an action, the plaintiffs' right of action did not accrue until the president of the bank had made a personal demand upon the defendant, according to the forms prescribed in the charter. The charter only al-

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Affirmed in 2 Pet. (27 U. S.) 671.]

lows the defendant to plead to the debt, not to the action. The order of the president of the bank to the clerk of the court to issue the execution is equivalent to a judgment; and the charter declares that it shall be as valid as any execution issued upon a judgment of a court. The statute of limitations applies only to such forms of action as were then in existence; but this is a new remedy, and not within the prohibition of the statute.

Mr. Swann and Mr. Ashton, contra. The charter only meant to give a speedy trial at the first term, and to enable the plaintiffs to obtain security in the first instance, without waiting the slow process of the common law. It did not mean to deprive the defendant of any defence which he might have if sued in any other form. The statute is a bar to the debt. Hellings v. Shaw, 2 Taunt, 237, [7 Taunt. 608.]

CRANCH, Circuit Judge, after stating the case, and the provisions of the 14th section of the charter, delivered the opinion of the court, as follows, (nem. con.:)

The expressions in the 14th section of the charter seem to imply that there should be a declaration in some of the usual forms of action. The plaintiffs, in the present case, have selected the action of assumpsit. So far as regards the trial, it is not important by what sort of process the defendant is brought into court. There is nothing in the act of 1793, c. 30, (the charter of the bank,) which expressly deprives him of any ground of defence which he would have had, if he had been brought in by the ordinary process of capias ad respondendum, instead of that of capias ad satisfaciendum. When brought in he has a right to dispute the debt, and to have a full and fair trial. The object of the summary remedy is to prevent delay, and to enable the bank to obtain security; not to deprive the defendant of the means of defence enjoyed by other debtors. So far as it is summary it is in derogation of common right, and must be construed strictly.

It is true that by the 14th section of the charter, the execution is to be "as valid and effectual in law, to all intents and purposes as if it had issued on a judgment regularly obtained in the ordinary course of proceeding;" and so it is while it exists. But if, upon the trial, it should be found that the plaintiffs ought not to have the execution, the court has the power to quash it. The validity of the execution cannot affect the trial.

But it is said that if this execution be the commencement of an action as seemed to be admitted by Mr. Key, in arguing the case of Bank of Columbia v. Bunnel, in this court at April term, 1822, [Case No. 863,] and the case of Bank of Columbia v. Okely, in the supreme court, and as suggested by Mr. Justice Johnson, in delivering the opinion of the court in the latter case. 4 Wheat. [17 U. S.] 239,[3] it is not within the description of actions limited by the statute of limitations; which statute affects the remedy only; not the right. To this it may be answered, that no man ought to be deprived of a plain, common right, by doubtful implication or remote inference. The statute of limitations is a general statute. Every man has a right to claim the benefit of it; and some of the wisest judges have said it was a beneficial statute. The prohibition to use it in the present case is doubtful. It is supported only by doubtful inference. The issue to be tried is left to the discretion of the judges, who are required to see "that justice be done in the speediest manner." It cannot be just that a man should be deprived of a lawful defence, unless by his own neglect to avail himself of it in proper time. This is the first time the defendant has had an opportunity to plead the statute; and we cannot say that a defence which has been authorized by law, and in common use for more than a century and a half, is an unjust defence. If the plaintiffs had commenced their action by the usual process, which they had a right to do, this defence would have been clearly open to the defendant, and it is not probable that the legislature intended to leave it to the option of the plaintiffs, whether the defendant should or should not be permitted to avail himself of the statute of limitations. We think, therefore, that the defendant has a right to plead the statute, and ought to be permitted now to file the plea.

Verdict and judgment for the defendant.

[NOTE. This decision was affirmed in Bank of Columbia v. Sweeney, 2 Pet. (27 U. S.) 671. Mr. Chief Justice Marshall, in delivering the opinion, quoted the provision of the Maryland act of incorporation at length, and said: "The execution being the first process under this extraordinary act, its emanation must be equivalent, so far as respects the bar created by the act of limitations, to suing out original process in a suit commenced in the usual way. * * * The great object of the incorporating act appears to have been to give the bank the most expeditious remedy possible for the collection of the money due to it. * * * But the law did not intend, by this summary process, to deprive the debtor of all defense. Although all delay was cut off, he was permitted, on the return of the execution, to dispute the whole, or any part of the debt. But while the law allows him to dispute the debt, it still guards against delay. An issue is to be made up immediately, and tried at the same term. While the law thus carefully guards against procrastination, it does not interfere with the defense which the party is at liberty to set up. It does not prescribe the nature of that defense, or deprive him of any which might have been used, had the action been commenced in the ordinary way. Had the Bank of Columbia proceeded in the common course of law, the defendant could have pleaded the act of limitations in bar of the action. If we are correct in saying that the object of the section of the incorporating act which has been recited was expedition,

[3] See, also, 2 Wms. Saund. 6, note 1: "Whenever the defendant may plead to any writ, whether original or judicial, (as this is) it is in law an action."

not the ademption, of legal defenses, we think this a mode of disputing the debt, of which he might still avail himself."]

Case No. 882.

BANK OF COLUMBIA v. SWEENY.

[3 Cranch, C. C. 293.][1]

Circuit Court, District of Columbia. May Term, 1828.

STATUTE OF LIMITATIONS—OFFER TO COMPROMISE.

An offer to compromise a debt by payment of one half without interest, is not sufficient to take the case out of the statute of limitations.

[See Ash v. Hayman, Case No. 572; Neil v. Abbott, Id. 10,088.]

This was an execution against the defendant [George Sweeny] issued by order of the president of the Bank of Columbia, under its charter of 1793, c. 30, without a judgment, the execution being the first process in the suit. The defendant pleaded the act of limitations. [See Bank of Columbia v. Sweeny, Case No. 881.] To rebut this plea the plaintiffs offered evidence that, seven years after the note on which the suit was brought, was barred by the statute, the defendant offered to give his note for one half of the amount of the original note, if the bank would relinquish all claim to the balance and interest, and permit him to pay as he should find it convenient. The bank said they would accept the proposition, but their acceptance was never made known to the defendant, and nothing further passed between the parties, until this suit was commenced by execution under the power given by the charter of the bank.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion, and so instructed the jury, that this evidence was not sufficient to take the case out of the statute of limitations.

Case No. 883.

BANK OF COLUMBIA v. WRIGHT.

[3 Cranch, C. C. 216.][1]

Circuit Court, District of Columbia. Dec. Term, 1827.

WITNESS—OATH AND AFFIRMATION—LAW OF MARYLAND.

By the law of Maryland, witnesses can be permitted to testify upon affirmation, only when they are members of some religious society who profess to be conscientiously scrupulous of taking an oath.

[See King v. Fearson, Case No. 7,790.]

Mr. Daniel Kurtz, being called as a witness for the plaintiffs, objected to taking the usual oath; and said he held the doctrine of the Society of Friends upon that point; but could not say he was a member of that society, but he generally worshipped with them.

The defendant's counsel, Mr. Jones, objected to his giving testimony, otherwise than upon oath. He cannot be permitted to testify upon affirmation, unless he is a member of some society who hold it unlawful to take an oath. Such has been the construction of the law in Maryland. He cited the Bill of Rights of Maryland, § 36, and the Maryland act, 1797, c. 118.

Mr. J. Dunlop, contra. The judiciary act of the United States, § 30, (1 Stat. 73,) authorizes witnesses to be sworn or affirmed. There is no law of the United States, which directs in what cases they shall be sworn, and in what they may affirm.

THE COURT (nem. con.) said they felt bound by the decisions of the Maryland courts upon that statute, (1797, c. 118.) The witness cannot be permitted to testify on affirmation, unless he is a member of a society who profess to be conscientiously scrupulous of taking an oath. The parties agreed to continue the cause, to give time to apply to congress, to amend the law on that subject.

Case No. 884.

BANK OF COMMERCE v. RUSSELL.

[2 Dill. 215.][1]

Circuit Court, W. D. Missouri. 1873.

BANKRUPT ACT — MONEY HELD IN TRUST — EQUITABLE ASSIGNMENT—RIGHTS OF HOLDER OF PROTESTED DRAFTS OF BANKRUPT BANK.

1. A creditor of a bank which collects money and fails to pay it over, has no priority in bankruptcy over the other creditors of the bank.

[Cited in Illinois Trust & Sav. Bank of Chicago v. First Nat. Bank of Buffalo, 15 Fed. 860.]

2. The holder of the protested draft of such a bank is not entitled in bankruptcy to priority over the other creditors of the drawer, merely because the drawee (another bank) may have had funds of the drawer in its hands at the time it refused to accept the draft.

[Cited in Re Smith, Case No. 12,990.]

[See Corser v. Craig, Case No. 3,255.]

[Appeal from the district court of the United States for the western district of Missouri.

[In bankruptcy. From an unreported decree sustaining a demurrer to the bill, plaintiff appeals. Affirmed.]

The only question is as to the sufficiency of the bill of complaint. The allegations in the bill are in substance: That the firm of Leonard, Dunbaugh, & Co. has been duly adjudged bankrupt, and the said Russell duly elected and qualified as the assignee of said firm and of each of its members; that in the

[1] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

months of September and October, 1870, the complainant in the course of its banking business, sent certain notes, amounting in the aggregate to $826.53, to the firm of Leonard, Dunbaugh, & Co., then engaged in the banking business at Pleasant Hill, Missouri, for collection only; that said firm collected the money; that said firm had $2,000 in the Second National Bank in St. Louis, Missouri, on deposit, subject to their draft, and in part payment of the amount collected, sent complainant a draft on the said Second National Bank for $413.16 as a portion of the money collected; and that said draft was presented, payment demanded and refused, and protested; that said assignee has received from the estate of said firm of Leonard, Dunbaugh, & Co. the sum of $82,653, and has the same in possession, and that he has received and has in his possession the said sum of $2,000 so deposited in the said Second National Bank, on which said draft was drawn. It is further averred that the money so collected was collected and received by said firm as the agent of complainant, and in special trust and confidence, and was in no wise a part of the estate of said firm. It is also averred that all the members of said firm, as well as the firm, have been adjudged bankrupt, and that the assets are insufficient to pay the debts, and that complainant is without remedy at law. The prayer is that the said assignee be required to set apart and pay over to complainant the money so collected out of the assets of said firm of Leonard, Dunbaugh, & Co. and for general relief. The plaintiff appeals.

DILLON, Circuit Judge. The bank which files the bill seeks to maintain it on two grounds. The first is that the money collected for it by the bankrupts is money which they held in trust for it, and hence that it did not vest in the assignee.

I am of opinion upon the statements of the bill that this principle does not apply, and that the relation between the bankrupts and the plaintiff at the time of the bankruptcy was simply the relation of debtor and creditor. It does not appear that the identical money collected on the notes was kept by the bankrupts separate and distinct from their other money, and in that shape came into the hands of the assignee. We need not, therefore, consider what would have been the rights of the parties had this been shown.

It is next claimed that the draft drawn by the bankrupts for $413.16 on the Second National Bank, where they had at the time $2,000 on deposit, and which draft was protested, amounted to an equitable assignment of that amount in favor of the plaintiff, and that this equity should be judicially recognized and enforced as against the assignee. If it were assumed or conceded that under any circumstances such a draft can amount to an equitable assignment in favor of the payee of that amount of the drawers' funds in the hands of the drawee, such a principle can not be applied where it would contravene the purpose of the bankrupt act. The plaintiffs, as the holders of the draft drawn by the bankrupts, were simply creditors like other draft-holders, and it would scarcely do to say that when private bankers become insolvent, holders of their bills shall, to the extent of funds in the hands of the drawee, be entitled, as against other creditors, to priority.

Affirmed.

NOTE, [from original report.] An ordinary draft for part of a fund is not an assignment of the fund pro tanto unless assented to, or unless there be an obligation to accept, express or implied. Mandeville v. Welch, 5 Wheat. [18 U. S.] 277, 286. In relation to ordinary checks on bankers, the same doctrine has been frequently held. Bullard v. Randall, 1 Gray, 605; 2 Pars. Notes & B., 61. And this is the doctrine of the supreme court of the United States. Bank of Republic v. Millard, 10 Wall. [77 U. S.] 152. But as to such checks the contrary has been sometimes held: Fogarties v. President, etc., of State Bank, 12 Rich. Law, 518; Munn v. Burch, 25 Ill. 35; Roberts v. Corbin, 26 Iowa, 315; but it is expressly stated in this last case that the doctrine is limited to checks, and does not extend to bills of exchange: Id. 326. The cases on the subject will be found mostly collected in 2 Parsons on Notes and Bills, 61, and referred to in those above cited. The principle cases are also cited by Mr. Justice Davis, in his opinion in Bank of Republic v. Millard, supra.

Case No. 885.

BANK OF CUMBERLAND v. WILLIS.

[3 Sumn. 472.] [1]

Circuit Court, D. Maine. May Term, 1839.

FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—CORPORATIONS.

1. To entitle a corporation to sue in the circuit courts of the United States, all the members of that corporation must be citizens of some state of the United States, other than that state, of which the defendant is a citizen. And the averments must so be made in the declaration, in order to entitle the court to take jurisdiction of the case.

[Cited in Case v. Douglas, Case No. 2,491. Distinguished in Marshall v. Baltimore & O. R. Co., 16 How. (57 U. S.) 349.]

[See, contra,—that the right of a corporation to litigate in the courts of the United States depends on the citizenship of the corporation, and not on that of its members,—Louisville, C. & C. R. Co. v. Letson, 2 How. (43 U. S.) 497; Ohio & M. R. Co. v. Wheeler, 1 Black, (66 U. S.) 286; Greeley v. Smith, Case No. 5,747; Blackburn v. Selma, M. & C. R. Co., Id. 1,467; St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R. Co., Id. 12,237.]

[2. Cited in Burnham v. Rangeley, Case No. 2,177, to the point that no costs are allowed if an action is dismissed for want of jurisdiction.]

At law. Assumpsit [by the president, directors and company of the Bank of Cumber-

[1] [Reported by Hon. Charles Sumner.]

land against Henry Willis] for non-payment of certain bills of exchange, drawn at Portland, by one George Willis; one payable to the order of William Willis, and another to the order of Mason Greenwood, on the defendant, and accepted by him. The declaration alleged that all the members of the corporation were citizens of Maine, and the defendant a citizen of Massachusetts. A plea in abatement was put in by the defendant, that one Charles Brooks, of Boston, and a citizen of Massachusetts, was the owner of ten shares of the capital stock, and a corporator of the said Cumberland Bank, at the time of the commencement of the said suit. Demurrer and joinder. [Judgment for defendant.]

Haines, for plaintiff, cited Strawbridge v. Curtiss, 3 Cranch, [7 U. S.] 267, and Gassies v. Ballon, 6 Pet. [31 U. S.] 761, as showing, that the courts of the United States ought not to limit their jurisdiction by narrow constructions and limitations, beyond the adjudged cases.

William P. Fessenden, for defendant, cited 1 Kent, Comm. (3d Ed.) Lect. 16, pp. 346, 347; and Smith v. Rines, [Case No. 13,100.]

STORY, Circuit Justice. The plea in abatement in this case is certainly good. It has been repeatedly decided in the courts of the United States, that to entitle a corporation to sue in the circuit courts of the United States, all the members of that corporation must be citizens of some state of the United States, other than that state, of which the defendant is a citizen. And the averments must so be made in the declaration, in order to entitle the court to take jurisdiction of the case. The cases of Hope Ins. Co. v. Boardman, 5 Cranch, [9 U. S.] 57; Bank of U. S. v. Deveaux, Id. 61; Breithaupt v. Bank of Georgia, 1 Pet. [26 U. S.] 238; Bingham v. Cabot, 3 Dall. [3 U. S.] 382; Turner v. Enrille, 4 Dall. [4 U. S.] 7; Turner v. Bank of North America, 4 Dall. [4 U. S.] 8; and Strawbridge v. Curtiss, 3 Cranch, [7 U. S.] 267,—are fully in point. Mr. Chancellor Kent, in his learned commentaries, in the passage cited at the bar, (1 Kent, Comm., 3d Ed., Lect. 16, pp. 343–347,) has stated the acknowledged result of the cases in his usual clear and satisfactory manner. It remains, therefore, for this court only to pronounce its judgment, that as it is admitted by the demurrer, that one of the corporators is a citizen of Massachusetts, the same state, of which the defendant is averred to be a citizen, the plea is good in point of law, and the suit must abate for want of jurisdiction.

The district judge concurs in this opinion, and, therefore, there must be a judgment, that the suit be abated, but without costs.

Case No. 886.

BANK OF DANVILLE v. TRAVERS.

[4 Biss. 507.] [1]

Circuit Court, N. D. Illinois. Dec., 1868.

EQUITY—MOTION TO SUPPRESS DEPOSITIONS—WAIVER.

A motion to suppress depositions for irregularity comes too late when they have been on file for three years.

[See Doane v. Glenn, 21 Wall. (88 U. S.) 33.]

In equity. Motion [in a suit by the Bank of Danville against Eliza Travers] to suppress depositions for insufficiency of the notarial certificate, the depositions having been returned and opened in July, 1865.

J. H. Knowlton, for the motion.

DRUMMOND, District Judge. I think after a cause is set down for hearing, and the deposition has been on file for three years, it is too late to move to exclude it on a technical ground. I think the parties have a right to presume that such a delay is a waiver of any objection of that kind.

NOTE, [from original report.] The general rule is that all objections or exceptions to the formality of depositions must be taken before trial. Corgan v. Anderson, 30 Ill. 95; Swift v. Castle, 23 Ill. 209; Frink v. McClung, 4 Gilman, 569; Moshier v. Knox College, 32 Ill. 155. But as to substance it is sufficient to make them on the trial or hearing. Swift v. Castle and Frink v. McClung, supra.

Case No. 887.

BANK OF DOVER v. DODGE.

[The case reported under this title in 25 Int. Rev. Rec. 304, is the same as Case No. 10,053.]

Case No. 888.

BANK OF ILLINOIS v. BRADY.

[3 McLean, 268.] [2]

Circuit Court, D. Michigan. Oct. Term, 1843.

NEGOTIABLE INSTRUMENTS — INDORSEMENT — LEX LOCI CONTRACTUS—PLEADING—DEFECT WAIVED BY PLEADING OVER—DEMURRER.

1. A bill drawn and indorsed in Illinois, payable in New York, derives its character from the law of Illinois.

2. The law of the place of payment will regulate the interest; but the liability of the indorser depends upon the law of the place where the indorsement was made.

[See Boyce v. Edwards, 4 Pet. (29 U. S.) 111.]

3. The indorsement is a new contract, and, like all other contracts, is governed by the lex loci contractus.

[See Burrows v. Hannegan, Case No. 2,205; Lenox v. Wilson, Id. 8,247; Pomery v. Slacum, Id. 11,262. Contra, see, Mott v. Wright, Id. 9,883.]

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

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

4. A defendant may waive a defect in a declaration by pleading, and if an issue be taken on the facts of the plea by the replication, the case must turn upon the issue so made. But, if the plaintiff demur to the plea, the court should look at the first defect in pleading.

[See Blossberg, etc., R. Co., v. Tioga R. Co., Case No. 1,563; Greathouse v. Dunlap, Id. 5,742; Wright v. Johnson, Id. 18,082; U. S. v. Central Nat. Bank, 10 Fed. 612; Clearwater v. Meredith, 1 Wall. (68 U. S.) 25; Aurora City v. West, 7 Wall. (74 U. S.) 82.]

[At law. Action by the Bank of Illinois against S. R. Brady to recover on a bill of exchange. On demurrer to a plea. Sustained.]

Mr. Walker, for plaintiff.

Mr. Talbott, for defendant.

OPINION OF THE COURT. This action is brought on a bill of exchange, drawn by Louis T. Jamison, dated 21st February, 1837, at Chicago, Illinois, on Richard Oakley, of the city of New York, four months after date, for value received, payable to the order of the defendant, at the Phenix Bank in the city of New York, for the sum of twenty-five hundred dollars—which bill was indorsed by the defendant to the plaintiff. The defendant pleaded, first, that suit was not commenced by the plaintiff as assignee against the drawer of the bill, as required by the statute of Illinois, and therefore that the plaintiff cannot sustain this suit. Second, that the time of payment was extended by the plaintiff for a valuable consideration. On the second plea, the plaintiff takes issue, and demurs to the first plea. As cause of demurrer, it is alleged that the bills of exchange set forth in the declaration were payable in the city and state of New York, and the validity, nature, and obligation of the defendant's indorsement thereof must be governed by the law of the state of New York, and not of the state of Illinois.

2d. That this court will take judicial notice of the laws of Illinois, and it appearing on the face of the declaration that the bill of exchange was drawn and indorsed in Illinois, the declaration should have been demurred to. There can be no question that the indorser is liable under the law of the state in which the indorsement is made. He undertakes that the drawer or acceptor of the bill shall pay it, at the time and place designated on the bill, and if he shall fail to do so, the indorser binds himself to pay the bill, with damages, provided the legal steps to make him liable shall have been taken. The indorsement is a new contract, and, like every other contract, is governed by the lex loci. The bill before us was payable in New York, and the law of New York consequently fixes the rate of interest which the holder of the bill may recover against all who are parties to it; but the character of the bill, and the liability of the defendant as indorser, are regulated by the local law. Story, Confl. Laws, § 314. The second section of the act of Illinois [St. Ill. 1834–37, p. 526] in relation to promissory notes, &c. gives the right to an assignee to bring an action in his own name against the indorser, "if he shall have used due diligence by the institution and prosecution of a suit against the maker or makers of such assigned note or other instrument of writing," &c. unless it be shown that such suit would have been unavailing. No such diligence is averred in the declaration, and it is consequently bad. The plaintiff, in the replication to the defendant's first plea, should have set out and averred this diligence.

In regard to the second cause of demurrer, although the declaration was defective, the defendant was not bound to demur to it. By pleading specially, the defendant waived the defect in the declaration; and had the plaintiff replied as above suggested, the case would have turned upon the issue thus joined. But the demurrer to the plea carries the court back to the first defect. The plea in bar is good upon its face. The demurrer is sustained.

BANK OF ILLINOIS, (LAFAYETTE BANK v.) See Case No. 7,987.

BANK OF ILLINOIS, (STICKNEY v.) See Case No. 13,440.

Case No. 889.

BANK OF KENTUCKY v. ADAMS EX. CO.

[1 Flip. 242;[1] 14 Amer. Law Reg. (N. S.) 30; 1 Amer. Law T. Rep. (N. S.) 451; 3 Amer. Law Rec. 148; 1 Cent. Law J. 436.]

Circuit Court, D. Kentucky. Sept. 3, 1872.[2]

LIABILITY OF AN EXPRESS COMPANY FOR MONEY ENTRUSTED TO IT FOR TRANSPORTATION — COMMON CARRIERS, OR ORDINARY BAILEES, FOR HIRE.

1. A common carrier who has not limited his responsibility, is undoubtedly responsible for losses, whether occurring on vehicles controlled by himself exclusively, or belonging to and controlled by others, because he is an insurer for the safe delivery of the article which he has agreed to carry. But when he has limited his liability so as to make himself responsible for ordinary care only; and the shipper, to recover against him, is obliged to aver and prove negligence, it must be his (the carrier's) negligence, or the negligence of his agents, and not the negligence of persons over whom he has no control.

[See note at end of case.]

2. If in his employment he uses the vehicles of others, over which he has no control, and uses reasonable care—that is, such care as ordinarily prudent persons engaged in like business use in selecting the vehicles; and if the loss arises from a cause against which he has stipulated with the shipper, he shall not be liable for the same, unless it arises from his want of care, or the want of care of his employees.

[See note at end of case.]

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[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

[2] [Reversed in 93 U. S. 174.]

3. A common carrier is bound to carry all articles within the line of his business upon the terms and conditions imposed by law, if the shipper shall so demand. He has a right, however, to charge in proportion to the risk assumed by him. But when he has undertaken to carry at a less rate than he would have a right to charge, and would charge, if he undertook to carry only upon the conditions imposed by law, and has by his receipt, delivered to the shipper, stipulated for a reasonable limitation of his responsibility, and the shipper has accepted the receipt without objection, the latter is as much bound by the contract thus made as any other party would be.

[At law. Action by the Bank of Kentucky against the Adams Express Company to recover damages for a package which was destroyed by fire while in possession of the defendant. Verdict and judgment for defendant. Heard on motion for a new trial. Overruled.]

J. M. Harlan and Barr, Goodloe & Humphrey, for plaintiff.

I. & J. Caldwell and G. C. Wharton for defendant.

BALLARD, District Judge. On a former day there was in this case a verdict and judgment for the defendant. At the trial the counsel for the plantiff took several exceptions to the rulings of the court and charge to the jury, and they have now moved for a new trial, assigning for cause that the court erred in refusing to give the instructions asked by them, and in giving the instructions which were given.

The learned counsel have submitted no argument on their motion. They stand on the argument made and the authorities cited at the trial.

As both that argument and these authorities received at the time the fullest consideration, I think I would be justified in overruling the motion, without adding to what was then said; but, as the opinion expressed by me on the main point in the case is apparently opposed to several respectable authorities, and is supposed to present a new and important question, I feel that I ought not to allow this opportunity to pass without attempting a vindication of an opinion, the correctneess of which has been confirmed by subsequent reflection.

The facts in the case are substantially as follows: The Southern Express Company and the Adams Express Company are engaged each in the business of carrying money and other articles from one part of the country to another for hire, at the request of any one who offers such articles to them for carriage. They do not use in their business any vehicles of their own, except such as are required to transport the articles intrusted to them to and from railroad depots, and to and from steamboat landings. They use railroads, steamboats, and other public conveyances of the country. These conveyances are not subject to their control, but are governed entirely by the companies and persons to whom they belong. The packages intrusted to them are at all times, while on these public conveyances, in the care of one of their own messengers or agents. These companies are engaged in carrying by the railroads through Louisiana and Mississippi to Humboldt, Tennessee, and thence over the Louisville and Nashville Railroad to Louisville, Kentucky, under a contract by which they divide the compensation in proportion to the distance the article is transported by the respective companies. Between Humboldt, Tennessee, and Louisville, Kentucky, both companies employ the same messenger, but this messenger, south of the northern boundary of the state of Tennessee, is subject entirely to the orders of the Southern Express Company, and north of that boundary, is subject entirely to the orders of the Adams Express Company.

These express companies are in the habit of charging one price when they undertake to insure the safe delivery of the articles intrusted to them—that is, when they do not modify their ordinary responsibility as common carriers, and of charging another and lower price when their responsibility is limited. The Louisiana National Bank was aware of these regulations, and had in its possession printed blank receipts, or bills of lading, showing in the body the conditions and exceptions upon which the companies would undertake to carry at the lowest rate, and in the margin of the printed blank for the rate at which they would insure. Having received a letter from the plaintiff, directing the forwarding by express of the sum of $13,528.15, the bank, by its teller, filled the blanks in that part of the bill of lading which contained the conditions and exceptions, and presented it to the Southern Express Company for its signature, and delivered the package of money addressed to the plaintiff without stating who was the owner. The bill of lading was signed and re-delivered to the teller of the Louisiana National Bank, and forwarded by him to the plaintiff at Louisville. It does not appear that the receipt was read at the time of its delivery, or that the attention of the officers of the Louisiana National Bank was called specially to the exceptions contained in it, but, as before stated, the bank was aware of these exceptions, and of the stipulations for the lesser rate of compensation.

This package was carried by the Southern Express Company from New Orleans to Humboldt, Tennessee, and there delivered to the joint messenger of the Southern and Adams Express Companies. While it was in the custody of this messenger between Humboldt and the northern line of the state of Tennessee, the car in which the package was contained was precipitated through a trestle-work on the line of the Louisville and Nashville Railroad, at or near Budd's creek, and the car and package were destroyed by fire. This was caused by the fallen locomotive, without any fault or neglect on the part

of the messenger who had charge of the package.

So much of the receipt as is material to the present controversy is as follows:

"Southern Express Company, Express Forwarders. No. 2.—$13,528.15. July 26, 1869. Received from the Louisiana National Bank one package, sealed, and said to contain $13,528.15, addressed 'Bank of Kentucky, Louisville, Kentucky.' Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and there deliver the same to other parties to complete the transaction, such delivery to terminate all liability of this company for such damage; and also, that this company are not to be liable in any manner, or to any extent, for any loss or damage * * * of such package, or of its contents * * * occasioned * * * by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above described property for transportation, and shall define and limit the liability therefor of such other company or person."

Upon these facts the court charged the jury:

1st—That the Southern Express Company and the Adams Express Company are common carriers.

2d—That the Adams Express Company is liable for the loss of packages delivered to the joint messenger of the two companies at Humboldt, Tennessee, although the loss occur south of the northern[3] boundary of the state of Tennessee.

3d—That if the jury believe the facts above detailed in relation to the execution of the receipt, then it, thus signed and delivered, constitutes the contract, and all exceptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not; and the plaintiff is bound by this contract, whether it expressly authorized the Louisiana National Bank to make it or not.

4th—If the bill of lading contained no exception, it is clear that the defendant would not be excused because the accident occurred without its fault. It would be the insurer, and therefore accountable. But the bill of lading among other exceptions contained this: "That the company are not liable in any manner, or to any extent, for any loss or damage * * * of such package or its contents * * * occasioned * * * by fire."

Now, if you believe that the package was destroyed by fire, as above indicated, without any fault or neglect on behalf of the messenger, or the defendant, the defendant has brought itself within the terms of the exception, and it is not liable. It is not material to inquire whether the accident resulted from the want of care, or from the negligence of the Louisville and Nashville Railroad and its agents or not, since the uncontroverted testimony shows that the car and train in which the messenger of the Adams Express Company was transporting the package belonged to the Louisville and Nashville Railroad Company, and were exclusively subject to its control and orders. A common carrier who has not limited his responsibility, is undoubtedly responsible for losses, whether occurring on vehicles controlled by himself exclusively, or belonging to or controlled by others, because he is an insurer, for the safe delivery of the article which he has agreed to carry; but, when he has limited his liability so as to make himself responsible for ordinary care only; and the shipper, to recover against him, is obliged to aver and prove negligence, it must be his negligence or the negligence of his agents, and not the negligence of persons over whom he has no control.

If in his employment he use the vehicles of others over which he has no control, and use reasonable care—that is, such care as ordinarily prudent persons engaged in like business use in selecting the vehicles, and if the loss arises from a cause against which he has stipulated with the shipper—he shall not be liable for the same unless it arises from his want of care, or the want of care of his employees. "Without, therefore, deciding whether or not the evidence adduced in the case tends to establish any want of reasonable or ordinary care on the part of the Louisville and Nashville Railroad Company, I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it—that is, give no more effect to it than if it had not been adduced."

The first and second instructions were not excepted to, but the third and fourth were. At the trial, the plaintiff insisted that it was not bound by the terms of the receipt, because it was not shown that the attention of the Louisiana National Bank was called to them at the time, or that it expressly assented to them, but I am of opinion that there was no error in this portion of the charge. The Louisiana National Bank was aware that the receipt contained some exceptions and conditions. It accepted the receipt without remonstrance or objection, and both authority and reason demonstrate that the receipt must under these circumstances be regarded as constituting the contract of the parties: Dorr v. New Jersey Steam Nav. Co., 1 Kern. [11 N. Y.] 485; Wells v. Steam Nav. Co., 4 Seld. [8 N. Y.] 375, and 2 Comst. [2 N. Y.] 204; Grace v. Adams, 100 Mass. 505; Holford v. Adams, 2 Duer, 480; York Co. v. Central Railroad. 3 Wall. [70 U. S.] 107.

It is now everywhere admitted that a common carrier may limit his responsibility by express contract, and if he may make an express contract with a shipper of goods, I can

[3] [14 Amer. Law Reg. 32, gives "southern."]

not see why the contract may not be shown by the same evidence which would establish a contract between other parties. I can not see why a writing delivered by a common carrier to an owner of goods intended by the former to express the terms and conditions of his contract to carry, and received by the latter as such, should not constitute the contract between them.

A common carrier, it is true, is bound to carry all articles within the line of his business upon the terms and conditions imposed by law, if the shipper shall so demand. He has, however, a right to charge in proportion to the risk assumed by him. It is upon this ground the authorities hold, that unless his responsibility is modified by express contract, his undertaking to carry is upon the terms and conditions which are imposed by law. But when he has undertaken to carry at a less rate than he would have a right to charge, and would charge, if he undertook to carry only upon the conditions imposed by law, and has, by his receipt, delivered to the shipper, stipulated for a reasonable limitation of his responsibility, and the shipper has accepted the receipt without objection, the latter is as much bound by the contract thus made as any other party would be.

The correctness of the propositions contained in the remaining portion of the charge to which exception was taken may, I think, be demonstrated in two ways:

1st—By the contract between the bank and the express company, it was agreed that the company should not be responsible for any loss or damage of the package which should be occasioned by fire. The loss of the package was occasioned by fire; hence the carrier, by the terms of the contract, is not responsible. It is not pretended that the contract was violated by using the cars of the Louisville & Nashville Railroad Company to transport the messenger and the package, or was violated in any other respect. It follows, therefore, that if the company is liable at all, it is not so by virtue of the contract, but in spite of it.

The contract, however, does not attempt to exempt, nor could it have exempted, the express company from loss occasioned by the neglect of itself or its servants; but when it is sought to charge the company with neglect, it must be such neglect as it is responsible for upon the general principles of law.

Now, upon these principles, no one is responsible for damage occasioned by neglect unless it be the neglect of himself or his servants, or agents. But the facts stated show that neither the company nor its servant was guilty of any neglect. It follows that the defendant cannot be charged on this account. Though the defendant used the Louisville & Nashville Railroad to transport its messenger and the package, the railroad company was not, in any legal sense, the servant of the defendant. The defendant had no control over the railroad company, or over its servants. The railroad company was no more the servant of the defendant than it is of any passenger whom it transports. It was no more the servant of the defendant than is the hack or cab the servant of him who hires it to transport him from one part of the city to another.

2d—All the authorities agree that when a common carrier has, by special contract, limited his responsibility, "he becomes, with reference to that particular transaction, an ordinary bailee—a private carrier for hire," or, "reduces his responsibilities to those of an ordinary bailee for hire." York Co. v. Illinois Cent. R. Co., 3 Wall. [70 U. S.] 107; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 382; New York Cent. R. Co. v. Lockwood, 17 Wall. [84 U. S.] 357.

I prefer the latter form of stating the proposition, because it is less misleading. I do not think that a common carrier by entering into a contract limiting his responsibility, changes his character. He still remains a common carrier, with his responsibility limited in respect to the matter embraced in his contract, to that of an ordinary bailee for hire. The authorities are equally clear that an ordinary bailee for hire is bound to only ordinary diligence, and responsible only for losses and injuries occasioned by negligence or want of ordinary care. The defendant did by special contract limit its responsibility, and neither it, nor its servant, the messenger, is chargeable with any neglect or want of care. The loss of the package was occasioned by fire. The contract provides that the defendant should not be liable for a loss so occasioned, and as neither [the defendant nor][1] the defendant's servant was wanting in care, it follows that it is not responsible for the loss.

Suppose the package had been lawfully intrusted by the Louisiana National Bank to a private person to be carried for hire, and delivered to the plaintiff, and it was contemplated by the parties that such person would transport the package and himself by the railroads, which, it was contemplated, the defendant would use, and the package had been lost under the same circumstances that the package delivered to the defendant was lost, would it, for a moment be contended that such private person would be responsible?

Suppose again, that a person should deliver to his friend, who contemplated coming from New Orleans to Louisville by the ordinary modes of travel, a watch, to be carried and delivered at the latter city, and that while such private carrier, without reward, was proceeding on his way in one of the cars of the Louisville & Nashville Railroad Company, the car should by the gross carelessness of those having charge of it, be thrown from the track, and the watch in charge

[1] [From 14 Amer. Law Reg. 34, and 1 Amer. Law T. Rep. 455.]

of the carrier, without any neglect on his part, be destroyed. Is it conceivable that such carrier would be responsible for the loss? To hold that he would be responsible would not only violate the plainest principles of law, but would shock the common sense of mankind, and yet, not only the private carrier for hire, but the private carrier without reward is responsible for the loss of a package intrusted to him, under the circumstances supposed, if the defendant is responsible for the loss of the package claimed in this case.

The private carrier for hire is responsible for losses and injuries occasioned by want of ordinary care on his part, or on the part of his servants; and a private carrier without pay is responsible, if not for want of ordinary care, certainly for gross neglect. It cannot be maintained with the least show of reason that the Louisville & Nashville Railroad was any more the servant of the defendant in transporting the package sued for in this case than it was the servant of the carrier for hire, and the carrier without hire in the cases supposed, and if these last are not responsible for the neglect of the servants of the railroad company, it is impossible to conceive that the defendant is responsible for such neglect.

The counsel for the plaintiff attempt to escape this conclusion by insisting that, though the defendant limited its responsibility, it still remains a common carrier, and that such carrier is responsible not only for any want of negligence of himself and his servants, but for the negligence of any agency which he may employ in his business.

This proposition is misleading. It is not strictly correct to say that a common carrier is responsible for the negligence of any agency in his business, or even for his own negligence or that of his servants, in the sense in which his responsibility is distinguished from the responsibility of another person. A common carrier is bound to deliver goods intrusted to him, unless prevented by the owner, the act of God, or the public enemy. He is, as the law terms him, an insurer for the safe carriage and delivery of goods, subject only to the exceptions above mentioned. If he does not deliver goods intrusted to him, he is responsible, not because the goods were lost by his neglect, or the neglect of a servant, or by the neglect of some agency which he employed, but because he insured their delivery. His responsibility is wholly independent of the neglect of any one. If goods delivered to him to be carried are lost while in his or his servant's custody, or while in the custody of some other person who is not his servant, he is equally responsible, not because he is liable upon any principle of law for the negligence of any person who is not his servant, but because he is bound by law to carry and deliver safe all goods delivered to him unless prevented, as before stated, by the owner, the act of God, or the public enemy. If he has limited his responsibility by special contract, and the loss has been occasioned by the cause excepted in the contract, then the owner in order to charge him must show that, though the loss arose directly from the cause excepted, that cause itself was occasioned by the neglect of the carrier. But, when a public or private carrier is sought to be charged with a loss occasioned by his neglect, when neglect is the foundation of the plaintiff's claim, I am not aware that he is liable for any negligence except upon the same principles and under the same circumstances that any other person is liable. I am not aware that he, more than any one else, can be made responsible for the negligence of persons who are not his servants.

Undoubtedly the defendant did, notwithstanding its contract, continue to be a common carrier, but its responsibility was limited to that of an ordinary bailee for hire. Now, an ordinary bailee for hire is responsible for only ordinary care, and liable for the neglect of himself or his own servants, and not for the neglect of persons over whom he has no control. Consequently, he is not responsible for a loss occurring under the circumstances presented in this case. If it be admitted that the common carrier has by his contract limited his responsibility to that of an ordinary bailee for hire, then it cannot be consistently insisted upon that he shall be held liable as a common carrier who has made no express contract. To admit the contract, and to deny any effect to it, is too much for one proposition. The proposition of counsel, reduced to its essence, is simply this: that, though the defendant has, by special contract, limited its responsibility to that of a private bailee for hire, it is still responsible as a common carrier. A proposition involving so obvious a contradiction cannot require further exposure.

But obvious as the fallacy and error contained in the counsels' proposition appear to me, the proposition itself seems to be supported by the decision of the supreme court of California, in the case of Hooper v. Wells, Fargo & Co., 27 Cal. 11; by the supreme court of Minnesota, in the case of Christenson v. American Exp. Co., 15 Minn. 270, (Gil. 208;) and by the learned editor of the American Law Register, in his note to the former case, Amer. Law Reg. Nov., 1865, p. 30.

In the first case, the carrier made a contract stipulating that he would not be responsible except as forwarder. The court construed the contract as limiting the responsibility of the carrier to that of forwarder —that is, of an ordinary bailee for hire—but they held the carrier responsible for a loss occurring on a tug or lighter which plied between the shore and an ocean steamer, occasioned by the negligence of the managers of the tug, although they were not subject to the control or orders of the express company.

In respect to the responsibility of forwarders, the court say: "They are not insurers like carriers, but they are liable for losses of goods while in their custody, resulting from negligence of themselves and those they employ in their business of forwarders."

The correctness of the first part of this proposition cannot be disputed, nor do I question the correctness of the latter part, if by "those whom they employ in their business of forwarding," the court mean those who are the forwarders' servants, and subject to their control and orders. The court further say, the responsibility of a forwarder is the same as that of a warehouseman, and "if a warehouseman, instead of using his own warehouse and employing his own subordinates, should, for a stipulated sum paid to the owner, use in his business the warehouse of another person who employs and controls the subordinates, there can be no doubt that he would be liable for a loss of the goods intrusted to his care, occurring while in his possession, and resulting from the negligence of such subordinates, although not under his control."

If, by the words "intrusted to his care," the court mean to suggest a case where the warehouseman has a contract to keep the goods in his own warehouse, I entirely concur in the proposition stated. But if they mean that a warehouseman who violates no contract by removing the goods of his customer from his own warehouse into that of another prudent warehouseman is responsible for a loss of the goods resulting from the negligence of the subordinates of such other warehouseman, I cannot assent to it.

Suppose a warehouseman's warehouse should be destroyed by fire, it would be his duty to remove such of the goods of his customers as were saved, to the warehouse of some other prudent person, and it cannot be insisted that he would be responsible for the loss of goods occurring there, resulting from the negligence of servants of the latter warehouseman.

If a warehouseman contract to keep goods in his own warehouse, and he should remove them—in violation of his contract—to another warehouse, I suppose he would be liable for all losses there occurring, just as a bailee who hires a horse to go to a particular place is responsible for loss or injury to the horse, should he ride or drive him to a different place, and the horse be lost or injured in the prosecution of such other journey.

Again, the court say: "The fact that the defendants made use of various public conveyances, their messenger with the treasure traveling a part of the way by stage, a part by steam tug and lighters, and a part by ocean steamers, makes no difference as to their liability. For defendants' purposes, the managers of these various conveyances were their agents and employees."

If, as seems to be conceded, it was contemplated by both the plaintiff and defendants that the defendants would not use in their business their own vehicles, but the conveyances of others, not at all subject to their control or management, and that in the use of those other conveyances the defendants did not violate their contract, I can not admit that the defendants, who, by the admissions of the court, were liable only as ordinary bailees for hire, were responsible for losses occasioned by the negligence of the managers of those conveyances. I cannot admit that the managers of those other conveyances were, in any legal sense, their agents and employees. The relation of master and servant, principal and agent, does not and cannot exist where the master has no control over the servant, and the principal no control over the agent.

The court further say: "The defendants had the means of holding the proprietors of those various vehicles used in their business of expressmen responsible to them, had they chosen to do so. If they did not take the proper means to secure themselves, it was their own fault."

But I cannot see how any argument can be drawn from this to show that the defendants were responsible. Every bailee or depositary may hold any one responsible for destroying or injuring goods in his possession, but it cannot be maintained that he is responsible for such destruction or injury unless he, by his negligence, contribute to the same. Besides, the plaintiff had his remedy against the proprietors of those other conveyances, which occasioned the loss—see the New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 382—and it might be retorted "that if he did not take the proper means to secure himself, it was his own fault."

In the Minnesota case, it was stipulated, that the carrier "was not to be held liable for any loss or damage, except as forwarder only, or for any loss occasioned by the perils of navigation and transportation." The goods were received at New York, and were to be delivered to Christenson & Brother, Mankato, Minnesota. When the goods reached St. Paul, they were placed by the carrier on board the steamboat "Julia," a boat belonging to the Northwestern Union Pacific Company, and managed entirely by its officers and servants, to be transported to Mankato. The goods remained in charge of the carrier's messenger. The boat at the time of the accident was strong, and in good condition. The carrier was guilty of no want of care in selecting the Julia to transport the goods, but, on the way, the Julia was, through the carelessness of its officers and managers, run against a snag and sunk, whereby the goods were damaged.

The court say, that the carrier is not exempt from the loss by reason of the stipulation in the bill of lading that "it was not to be held liable for any loss or damage except as forwarder," because, they say: "In our

opinion * * * the effect claimed for this clause of the receipt by the defendants is inconsistent with and repugnant to the scope and intent of the result, viewed as a whole, and in connection with the fact showing the defendants' real character and mode of doing business."

In other words, the court held that the defendants were common carriers, and that this clause of their receipt did not modify their liability at all. If the court was correct in this, it is indisputable that this clause did not exempt the carrier from responsibility for the loss claimed.

In respect to the other exception, "perils of navigation and transportation," the court say: "The exception does not excuse the carrier for negligently running into perils of the kind mentioned. The proper constructions of such words is analogous to that which is put upon the words 'perils of the sea' in bills of lading. While thus it would seem very proper to hold that a snag in one of our western rivers is a peril of navigation, as appears to have been done in Tennessee, if a vessel is wrecked upon one through the negligence of the carrier or of those whom he employs * * * the carrier is not absolved. Under such circumstances the loss is properly attributed to the agency of man, not to a peril of navigation."

Here again, we have the same fallacies and misleading proposition which have been exposed in a former part of this opinion. The sinking of a boat by running on a snag in one of our western rivers is undoubtedly a "peril of navigation." It is none the less a peril of navigation though it occur by the fault of the person navigating the boat. It is wholly misleading to say that it is a peril of navigation when it results from accident and without fault, and that it is not a peril of navigation when it results from negligence. When goods are lost by reason of such peril, occasioned by the negligence of the carrier, the carrier is responsible, not because the goods were not lost by an accepted peril, but because he has brought about the peril through his own carelessness or negligence. He is made responsible for his negligence, not because he is a common carrier, but because he is guilty of negligence, and has occasioned loss thereby.

In the books which treat of common carriers, only those carriers are treated of who use their own conveyances; hence, it is we often find it stated that the exception, "perils of the sea," or "perils of the river," included in the carrier's bill of lading, does not include the losses arising from what would be generally understood to be "perils of the sea" when occasioned by the negligence of the servants of the carrier. In such case, the carrier being the owner of the vessel in which the goods are carried, and being responsible for its careful navigation, it is not material in effect whether it is held that a loss arising from an excepted peril, brought about by his negligence, is not a peril of navigation within the meaning of the bill of lading, or that the carrier is responsible for a loss occasioned by the negligence of his servants, but it is better and more correct to place the liability in such a case on the latter ground, because to place it on the former is misleading.

Certainly, as the court say: "The exception does not excuse the carrier for negligently running into perils, * * * nor shall he be heard to set up his own negligence to excuse him from responsibility." But, in the case before the court, no negligence was imputed to the carrier. He did not attempt to set up his own negligence to excuse himself from responsibility. He set up that by the contract he was not to be liable for losses arising from the perils of navigation, and he showed that the loss did arise from a peril of navigation without any fault on his part. He was not responsible for the negligence of the managers of the boat, as I have before shown, because he had no control or authority over them, and as he could be held responsible in the case only for negligence, it would seem he was not liable at all. I think that the court was misled by the definition of "perils of navigation" which it found in the books.

Clearly, that is none the less a "peril of navigation" or a "peril of the sea," because it is attributable to the agency of man. The very case which is generally used to define and explain what is a "peril of the sea," is that of a collision brought about by negligence. If a carrier's vessel should collide on the sea with another vessel, through the fault wholly of the latter, it is everywhere admitted that he would not be responsible for a loss arising from such a collision of goods which he was carrying under a bill of lading that exempted him from responsibility for loss arising from "perils of navigation" or "perils of the sea," and yet undoubtedly, the collision in such case is attributable to the agency—nay, to the negligence—of man.

I have a profound respect for the opinion of the learned courts which I have here noticed, but I think they are opposed to the general current of authorities; that they are founded on fallacious and misleading propositions, and that they disregard the well-settled principles of law.

The motion for a new trial is overruled.

[NOTE. This decision was reversed by the supreme court in Planters' Nat. Bank v. Adams Exp. Co., 93 U. S. 174. Mr. Justice Strong, in delivering the opinion, said:

["The railroad company, in transporting the messenger of the defendants and the express matter in his charge, was the agent of somebody,—either of the express company or of the shippers or consignees of the property. That it was the agent of the defendants is quite clear. * * * It is true the defendants had * * * no control over the company or its servants, but they were its employers. Presumably they paid for its service, and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for the consequences of that

conduct. * * * It is quite as important to the consignor and to the public that the subordinate agency, though not a servant under immediate control, should be held to the strictest care, as it is that the carrier himself and the servants under his orders should be. For these reasons, we think it is not admissible to construe the exception in the defendants' bills of lading as excusing them from liability for the loss of the packages by fire, if caused by the negligence of the railroad company, to which they confided a part of the duty they had assumed. * * * The defendants had an arrangement with the railroad company under which the packages of money, inclosed in an iron safe, were put into an apartment of a car set apart for the use of the express company. Yet the safe containing the packages continued in the custody of the messenger. Therefore, as between the defendants and the railroad company, it may be doubted whether the relation was that of a common carrier to his consignor, because the company had not the packages in charge. Had the packages been delivered to the charge of the railroad company, without any stipulation for exemption from the ordinary liability of carriers, it would have been an insurer both to the express company and to the plaintiffs. But, as they were not so delivered, the right of the plaintiffs to the extremest constant vigilance during all stages of the carriage is lost, if the defendants are not answerable for the negligence of the railroad company, notwithstanding the exception in their bills of lading. We cannot close our eyes to the well-known course of business in the country. Over very many of our railroads the contracts for transportation of goods are made, not with the owners of the roads, nor with the railroad companies themselves, but with transportation agencies or companies, which have arrangement with the railroad companies for the carriage. In this manner some of the responsibilities of common carriage are often sought to be evaded, but in vain. Public policy demands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing the carrier's duty, shall not be taken away by any reservation in the carrier's receipt, or by any arrangement between him and the performing company.

["Again, it is urged that, though the defendants remained common carriers, notwithstanding their contract, their responsibility was limited by their receipt to that of an ordinary bailee for hire; and, as such a bailee is not held liable for the neglect of persons over whom he has no control, it is argued that these defendants are not liable for the negligence of the railroad company. This also assumes what cannot be admitted. Although we are told all the authorities agree that, when a common carrier has by special contract limited his liability, he becomes, with reference to that particular transaction, an ordinary bailee, a private carrier for hire, or reduces his responsibilities to those of an ordinary bailee for hire, yet we do not find that the authorities assert that doctrine, if by the phrase 'that particular transaction' is meant the undertaking to carry. Certainly, those to which we have been referred do not. We do not deny that a contract may be made which will put a common carrier on the same level with a private carrier for hire, as respects his liability for loss caused by the acts or omissions of others. The consignor may, by contract, restrain him; may direct how and by what agencies he shall carry. Under such an arrangement, he may become a mere forwarder, and cease to be a carrier. But what we have to do with in these cases is whether the contract proved has that operation. We have already said we think it has not. The exception in the bills of lading has sufficient to operate upon, without being a cover for negligence on the part of any persons engaged in the service undertaken by the carriers. It exempts the defendants from responsibility for loss by fire, caused by the acts or omissions of all persons who are not agents or agencies for the transportation. That is a large restriction, and beyond that, in our judgment, the exception in the present case does not extend."]

BANK OF LOUISIANA, (THORNHILL v.) See Cases Nos. 13,990–13,992.

Case No. 890.

In re BANK OF MADISON.

[5 Biss. 515;[1] 9 N. B. R. 184.]

District Court. W. D. Wisconsin. Jan., 1874.

RELATION OF BANK TO CUSTOMERS — COLLECTIONS —BURDEN OF PROOF—COSTS.

1. The relation between a bank and its customers is that of simple debtor and creditor—not principal and agent—and does not partake of a fiduciary character.

[Cited in Re Smith, Case No. 12,990.]

2. A note deposited for collection, and passed to the credit of the depositor, becomes the property of the bank, and on the bankruptcy of the bank, the proceeds go to the general creditors. The fact that the account was made good before the collection of the note does not make the bank a trustee as to the proceeds.

[See Bank of Commerce v. Russell, Case No. 884.]

3. A customer of an insolvent bank must make out a very clear case, before the court will allow payment of his claim in full.

4. Where a petition to establish a right to payment in full has assumed the form of a regular suit, costs and a docket fee may be taxed against the petitioner.

In bankruptcy. This was a petition by the Madison Manufacturing Company, praying that the assignee may be ordered to pay over five hundred and seventeen dollars and forty cents, claimed to belong to said company. On the 18th day of August, 1873, the said company took a note of E. W. Skinner, for five hundred dollars, due in September, to the bank for collection and got it discounted, and the proceeds passed to its credit on the bank books. The company's account was then overdrawn to an amount exceeding the avails of the note thus passed to its credit. The company indorsed the note in the usual form, and the bank transmitted it to its correspondent in Sioux City, Ia., for collection. Not being paid at maturity, it was protested. It was, however, finally paid in installments, and the proceeds transmitted, as paid, by drafts on the Third National Bank of Chicago, which were received after the bank had virtually suspended payment. The Manufacturing Company, before the commencement of proceedings in bankruptcy, demanded the drafts, but the bank declined to give them up, and they were delivered up to the assignee after his appointment. Without the credit of the note the company's account remained overdrawn until the 6th of Septem-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

ber. Deposits were made from other collections from time to time thereafter, so that when the drafts for this note were received the bank, exclusive of this credit, was indebted to the company. On the part of the company, it was shown, on the hearing, that the note was taken there for collection, and that the transaction took the form of a transfer, for the purpose of facilitating the collection, and that it was agreed or understood that the company was not to draw against the credit until it was collected. [This is sworn to by Mr. Hudson, the general superintendent of the company, and Mr. Webster, the cashier of the bank.][3]

Smith & Lamb, for petitioner.

H. S. Orton and Wm. F. Vilas, for assignee.

HOPKINS, District Judge. Notwithstanding the special circumstances shown by the petitioner, the fact, nevertheless, remains, that the note was credited to the company in the ordinary way, and subject to its order, like any other deposit, and the company had the benefit of it in the payment of its overdrawn account at the bank from the 18th of August to the 6th of September. The note and the avails belonged to the bank, during that period, at least, and if the note had been collected during that time the company would not have been entitled to these drafts, or the avails of the note. That being so, has the company, by making good its account on [after][3] the 6th of September, in the ordinary way of depositing, without any special agreement to that effect, changed its relation or condition so as to be entitled to the drafts as the proceeds of the note? And, further, does this case fall within the law governing or relating to principal and agent, so as to authorize the company, as principal, to follow the proceeds and reclaim them from the hands of the assignee in this manner? In case of the insolvency or bankruptcy of an agent, property consigned to him to sell, and notes left with him to collect, and the proceeds of such, whether in notes or money, so long as the same can be distinguished from the mass of the agent's or factor's property, do not pass to the assignee in bankruptcy, and if received by them may be recovered by the principal at law, or, in other words, the right of the principal thereto ceases only when the means of ascertainment or identification fail.

The petitioner's counsel contended for the application of this doctrine to this case, and claimed that no property or choses in action held by the bankrupt in a fiduciary capacity passed to the assignee, citing, in support thereof, Price v. Ralston, 2 Dall. [2 U. S.] 60; Denston v. Perkins, 2 Pick. 86; Taylor v. Plumer, 3 Maule & S. 562; 3 Pars. Cont. 478 et seq.; Rodriguez v. Heffernan, 5 Johns. Ch. 417.

As to the correctness of these general principles there can be no question. But for the decision of this case it becomes necessary to ascertain the nature of the business between bankers and their customers, and to see whether such business comes within these principles; if not, then we must look in some other rule for its determination.

In deciding this case, it must be borne in mind that the petitioner was a customer of this bank, and that the relation of banker and customer existed between him and the bank, and as a regular dealer with the bank, he had an open and running account, in which he was credited with all sums paid into the bank, and with the proceeds of all notes and bills discounted or collected, and was charged with all checks drawn on the institution. In Re Franklin Bank, 1 Paige, 249, 254, the chancellor says, Whenever money [or notes are][4] is specially deposited in a bank for safe keeping, it is at the risk of the depositor. If the same is stolen, lost or destroyed without the fault of the bank or its officers, the depositor sustains the loss. Not so with a general depositor. The money, checks, or bills which he deposits become the property of the bank, and he becomes a creditor; he has no claims upon the money or bills deposited. The officers may use them as they please, and he is to all intents a general creditor of the bank, and the bank may use them as it sees fit, and there is an implied assent to such use by the depositor. According to that doctrine, the relation of a bank with its dealers and depositors is that of an ordinary debtor, and must be governed by the law relating to transactions between debtor and creditor.

In Smedes v. Bank of Utica, 20 Johns. 372, which was an action for damages against the bank for omitting to duly present and protest a note left with it for collection, the bank set up a want of consideration for its undertaking to collect the bill. Woodworth, J., who delivered the opinion of the court, page 379, says: "It will be conceded that had this been an undertaking by an individual to demand payment and give notice, it would be a nudum pactum; * * * but the case of banking institutions is widely different. They are established to aid the commerce of the country, by giving facilities to the moneyed corporations of the community, * * * to enlarge the amount of actual capital. * * * The operations of a bank principally consist in loaning money and discounting notes, which are direct and immediate sources of profit. Incident to the business of a bank is the receiving of notes from their customers for collection; when paid, the money is placed to the credit of the depositor, and remains in bank until called for." And as profits might arise from such a transaction and deposit, it was held a sufficient consideration for the defendant's undertaking to

[3] [From 9 N. B. R. 185.]

[4] [From 9 N. B. R. 186.]

collect the note. I cite this to show the great dissimilarity between the way an agent transacts the business of his principal, and the duties and obligations assumed by an agent towards his principal, and the way a banker deals with his customers, and the duties of such banker, in reference to the money collected for or deposited by his customers. It is the duty of an agent to pay over the money received or collected by him to his principal, not to use it for his individual benefit; whereas, there is an implied understanding that a banker may use and loan for the benefit of the bank the money of his customers, including that collected for them as well as that deposited.

That case shows, further, that there is an implied understanding that the money to be received from collections is to go on deposit in the bank, and in the absence of proof of an agreement that it was not to be passed to the account of the dealer, courts should give to such understanding the force of a contract that it was to be deposited in the ordinary way, and to be drawn out by checks as other money. Indeed the proof here is that the proceeds were to be deposited. The relation between bankers and their customers is most clearly laid down and defined in the case of Foley v. Hill, 2 H. L. Cas. 28, (decided in July, 1848.) It is there held to be the ordinary relation between debtor and creditor, with a superadded obligation to pay the customer's checks on demand, and it is there further held that it does not bear any analogy to the relation between principal and agent or factor, and does not partake of a fiduciary character. It is there said, that "money, when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him, when he is asked for it. * * * He is guilty of no breach of trust in employing it; * * * he is not bound to keep it or deal with it employing it as the property of his principal; * * * he is simply required to refund an equivalent sum."

That case distinguishes the relation of bankers and their customers from that of principal and agent, and shows that the obligation incurred by a banker, in the ordinary course of his business as such, with his customers, is not fiduciary in its nature, but, on the contrary, the liability is that of an ordinary debtor.

The case of Smedes v. Bank of Utica, supra, holds what we all know to be the fact, that the collection of notes is, in this country at least, a part of the ordinary business of a banker. Hence it follows that a banker, in receiving a note for collection from one of his customers, does not act as an agent, but is presumed to have undertaken the collection for the profit that might result to it from the deposit and use of the money as a banker. So that when a banker collects money for his dealers it is regarded as deposited and in the light of any other deposit, not as the money of the customer, nor is the customer entitled to it, but only to its equivalent as any other deposit.

This, it seems to me, is an answer to the claim of the petitioner in this case. These authorities show that the principle upon which the counsel rested the claim upon the hearing is not applicable, and cannot be invoked to authorize a recovery of this claim. But as hereinbefore stated the testimony does not sustain the position insisted upon, to wit: that the note was taken simply for collection. I think the transaction in its legal aspect widely different from such a case.

The note was, in fact, discounted, and the proceeds deposited and credited to the petitioner, and up to the time that its account was made good, belonged to the bank, and I cannot believe that the making good of the account afterwards changed the relation between the parties in contemplation of law. To grant the relief asked would be, in fact and in legal effect, paying the subsequent deposits of the petitioner in full. To do this under so thin a disguise as that put forth, to wit: that the petitioner was not to draw from the funds until after the collection of the note, when at the time the account was overdrawn to an amount exceeding the proceeds, would be sacrificing the substance to preserve the shadow.

One of the cardinal doctrines of a court of equity is that equality is justice, and in all cases in bankruptcy, whether heard in this court sitting in bankruptcy, or a court of equity, a creditor who claims a preference must show a clear legal right to it. Cases of extreme hardship cannot but exist in all cases of bank failures. In such failures the loss generally falls upon those least able to bear it—upon the poorer classes and laborers, the aged and dependent, the friendless and unprotected, whose little all has been left on deposit without the thought of the possibility of losing it, and who are wholly unprepared for such an event.

And it is not exacting too much to require that a party dealing with the insolvent bank in the ordinary way, as the case shows the petitioner was, should make out a very clear case before a court should sustain a preference in favor of such parties over the other creditors.

The petitioner, in order to avoid the effect of the overdraft, proved by Mr. Hudson, the superintendent, that he had, standing in his individual name and as his own money, more than enough to balance the deficiency in the company's account, and that he had previously told the bank officers that his account should stand as a guaranty for any amount due from the company. This I have disregarded altogether, for the reason that, if he had so stated, it would be void

under the statute as being a promise to pay the debt of another, and not in writing. The bank charged the company with the money, and his undertaking, if made as he said, would be collateral and void under the statute, for the reason above stated. I therefore deny the prayer of the petition, and, as this matter has assumed the form of a regular suit or proceeding, and testimony been introduced as upon an ordinary trial, I think it just and proper that the petitioner should pay the costs to be taxed, including a docket fee of twenty dollars, to the attorneys of the assignee.

Many of these principles apply to the case of J. H. Rountree, who has filed and submitted a petition praying that the assignee be ordered to refund to him the amount of a draft drawn by J. Hodges & Co. upon the Second National Bank of Chicago, for forty-two dollars and forty cents, made payable to H. H. Rountree, his son, a minor, then a student in the University at Madison. The draft was dated on the 20th of September, 1873, and was presented to the bank to be cashed, and, as alleged in the petition, was not cashed, but was taken to be collected.

The bank received it to collect, and sent it forward, and the amount thereof, instead of being returned, was credited to the Bank of Madison by the Second National Bank, which was then a creditor of the Bank of Madison to quite a large amount, so, in point of fact, neither the bank nor assignee ever received the money upon it. The Second National paid it by crediting the overdrawn account of the Bank of Madison with the amount.

The officers of the bank must have known such would be the result when they received it to collect, and their conduct in so doing is deserving of the severest censure.

These facts are a sufficient answer to the petition of Mr. Rountree, and the prayer of his petition is therefore denied. But as no counsel were employed, or argument had by either party, no costs are charged to either party in his case.

BANK OF MOBILE, (ESLAVA v.) See Case No. 4,526.

BANK OF MONTREAL, (ESSEX COUNTY NAT. BANK v.) See Case No. 4,532.

Case No. 891.

BANK OF MOUNT PLEASANT v. SPRIGG.

[1 McLean, 178.][1]

Circuit Court, D. Ohio. July Term, 1832.[2]

PRINCIPAL AND SURETY — CONTRACT UNDER SEAL —ESTOPPEL—DISCHARGE OF SURETY.

1. In an instrument under seal, where the parties bind themselves as principals, they are estopped, at law, from showing that they were only bound as securities.

[See Sprigg v. Bank of Mt. Pleasant, Case No. 13,257.]

[See note at end of case.]

2. In ordinary cases of security, extending the time or varying the obligation, without the consent of the securities, will discharge them.

[See note at end of case.]

3. But principals are not bound to use active diligence, unless called on to do so, by the securities, through a court of chancery, or otherwise.

4. The doctrine of estoppel is founded on reason and justice.

5. A deed absolute upon its face, in equity, is often considered a mortgage, to prevent the perpetration of a fraud.

6. A penal bond is considered in the light of a security, and is not enforced beyond the indemnity.

[See Massey v. Schott, Case No. 9,262.]

[At law. Action of debt on a bond by the Bank of Mount Pleasant against Samuel Sprigg. On demurrer to the pleas. Judgment for plaintiff. Affirmed by supreme court in Sprigg v. Bank of Mt. Pleasant, 10 Pet. (35 U. S.) 257.]

This case was argued by Mr. Tappan for the plaintiff, and by Mr. Goodenow for the defendant.

OPINION OF THE COURT. This is an action of debt brought on the following instrument: "Know all men by these presents, we, Peter Yarnall & Co., Samuel Sprigg, Richard Symms, Alexander Mitchell and Z. Jacobs, as principals, are jointly and severally held and firmly bound to the President, Directors and Company of the Bank of Mount Pleasant, for the use of the said Bank of Mount Pleasant, in the just and full sum of twenty-one hundred dollars, lawful money of the United States; to the payment of which sum, well and truly to be made to the said President, Directors and Company, for the use aforesaid, within sixty days from the date hereof, we jointly and severally bind ourselves, our heirs, &c., firmly by these presents. Signed with our hands, and sealed with our seals, this 20th of February, A. D. 1826. Peter Yarnall & Co., [Seal.] Samuel Sprigg, [Seal.] Richard Symms, [Seal.] Alexander Mitchell, [Seal.] Z. Jacobs, [Seal.] The declaration is in the usual form and the defendant filed the general issue and six special pleas. And the questions now for consideration arise on the second and sixth pleas.

The second plea states that the plaintiff is an incorporated bank, and that the above sum was loaned in the ordinary way, for the accommodation of Peter Yarnall and Co., that the above instrument was given to secure the payment of said loan in sixty days, and that Sprigg, Symms, Mitchell and Jacobs were securities and executed the instrument as such, which was fully understood by the directors of the bank. That Peter Yarnall & Co. for their exclusive bene-

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

[2] [Affirmed in 10 Pet. (35 U. S.) 257.]

fit, received the proceeds of the above bond; and the entry was so made on the books of the bank. That when the debt became due, the accommodation, on the payment of interest, was continued sixty days, without the knowledge or consent of the securities; and that when the debt again became due, on the payment of the discount it was again extended sixty days without the knowledge or consent of the securities, by reason of which the said Samuel Sprigg says that he is discharged from all liability, &c.

The sixth plea states, substantially, the second plea, alleging that the discounts of twenty-two dollars and forty cents were paid at each renewal, and that the said Peter Yarnall & Co. on or about the 24th March, 1829, failed in business, became insolvent and unable to pay their just debts. And that the securities had no notice of the non-payment of the said loan, or of the outstanding of the obligation from the time it became due until the bankruptcy of the said Yarnall & Co. To the second and sixth plea the plaintiff replied, that the said Samuel Sprigg together with Peter Yarnall & Co., Richard Symms, Alexander Mitchell and Z. Jacobs, acknowledged themselves to be jointly and severally held and firmly bound, as principals to the said President, directors and company of the Bank of Mount Pleasant in the sum of twenty-one hundred dollars as aforesaid. To this replication the defendant demurred. To the third, fourth and fifth pleas, the plaintiff demurred, but as the questions in the case arise fully on the second and sixth pleas it is not material to notice the other pleas.

It is not necessary to enquire whether the replication is not defective, for if this be admitted, the demurrer brings up the sufficiency of the second and sixth pleas. The defence in these pleas is, that when the writing obligatory became payable, the bank without the knowledge or consent of the securities or either of them continued the loan on the payment of the discount, from time to time, until the principals, Peter Yarnall & Co., became insolvent, and that the securities by reason thereof are discharged. It is a well settled principle, that where time is given to the maker of the note by the holder, after the note becomes due, which shall deprive the holder from, at any time, demanding and suing for the amount, the indorser is discharged. Tindal v. Brown, 1 Term R. 169; English v. Darley, 2 Bos. & P. 61; Clark v. Devlin, 3 Bos. & P. 365; Gould v. R[illegible]on, 8 East, 576; McLemore v. Powell, 12 Wheat. [25 U. S.] 554; Barn. & C. 14; Walwyn v. St. Quintin, 1 Bos. & P. 654; [Bank of U. S. v. Hatch,] 6 Pet. [31 U. S.] 252. And there are cases where ordinary sureties in a bond or other instruments, have a right to call upon the obligee in a court of chancery or otherwise, to bring suit against the principal. Hayes v. Ward, 4 Johns. Ch. 123, 131, 132; King v. Baldwin, 2 Johns. Ch. 554, 17 Johns. 384; 6 Ves. 734. But, in ordinary cases, the obligee is not bound to active diligence unless hastened by some act of the sureties. There are some cases of gross negligence on the part of the obligee, in using proper means to recover the money from the principal until he shall become insolvent, where the securities have been discharged. The renewal of the above loan, by receiving the discount and continuing the original obligation, seems to be the mode of doing business in the bank. And in order to bring up in all its force the principle relied on as a discharge, it may be admitted that in common cases of security the bank, by giving the extensions to the loan, as in this case, would exonerate the securities, yet the question arises whether in this case the securities, from the indulgence given, are exonerated. The facts set up in the pleas, and which if proved must be proved by parol, go directly to contradict the writing obligatory. In the writing the defendants, and the other securities, bind themselves as principals, yet they say they are not so bound, and did not bind themselves as principals, but as securities; and they must be permitted, if the plea be sustained, to introduce parol proof of the fact thus alleged. And we are now to inquire whether this may be done at law, not in chancery.

Without undertaking to decide whether equity can give relief or not, there seems to be no principle better established than that, at law, parol evidence cannot be received to contradict or vary a written agreement. Indeed the general rule is the same in equity; but parol evidence is sometimes admitted in equity to prevent the specific execution of a written agreement, where it has been rescinded, or executed, as varied by consent of the party. Paine v. McIntier, 1 Mass. 69; 10 Mass. 244; Snowden v. Hemming, 1 Dall. [1 U. S.] 83, 11 Mass. 27. It is said that under the statute of Ohio, which authorizes the court, on the rendition of judgment, to designate the principal and the securities, so that the property of the principal may first be taken to satisfy the judgment before the property of the securities is liable, the courts of Ohio hear parol proof, as to who is principal and who are securities. And that under this rule the Ohio courts would be bound, on rendering judgment, in this case, to make the enquiry. And that if they would be bound to do this, it follows, as a matter of course, that the matters alleged in these pleas might be heard and acted on. Such may be the rule under the above statute, and it may be a proper one; but it applies to instruments where upon the face of the obligation it does not appear who are principals or securities. To give effect to the statute this enquiry must be made, and it is not in contradiction to the instrument, but in explanation of its legal effect; an effect, known to the parties at the time they executed the contract. But in this instrument the parties have bound themselves as principals. Is not

the defendant, therefore, and all the other parties to the instrument estopped from denying this fact which they have solemnly admitted under their seals? Hunt v. U. S., [Case No. 6,900;] 1 Chit. Pl. 634; Will. (Mass.) 9; 1 Saund. Pl. & Ev. 316, 325, note 4; [Conway v. Alexander,] 7 Cranch, [11 U. S.] 223; 2 Strange, 817; 7 Term R. 537; 2 Taunt. 278; Co. Litt. 252a; Com. Dig. Estop. This being the form of such instruments adopted by the bank, it was in its effect not a matter of form but of substance. Under this obligation the bank was not bound to give notice, nor was it bound to use active diligence. And it was under this view of the legal effect of this obligation and others, of a similar form, that the bank felt itself authorized to protract the period of payment from time to time, on the payment of the discount, without a renewal of the instrument.

If the defendant had bound himself as a security and not as principal; or had bound himself generally, without specifying in what capacity, he might show that he was security; and then the contract for extending his liability beyond the period contemplated in the contract, without his knowledge or consent, would, no doubt, discharge him. But all being principals, no extension of time for payment, or any other indulgence could operate to discharge any of the parties. It would indeed, be a singular rule of law, short of the statute of limitations, or lapse of time which raises a presumption of payment, which should discharge a principal from his bond. If the defendant were really a principal in the writing, the counsel would hardly contend for his discharge. The rigid technical rule is complained of, and the court are called on, in the spirit of modern reform and advancement, to give liberal views to the case. In short, that they should disregard the technical rule, which does not permit parol evidence, in contradiction to a written instrument, and which, it is contended is often the means of great injustice. Principles of law are adopted not with reference to particular cases, but with the view of preserving the rights of parties, and promoting the great ends of justice. And it is not improbable, that the most salutary rule may, under the peculiar circumstances of a particular case, fail to attain this end. But this rule has become an axiom in the law. It has stood the test of time and experience, and cannot be abandoned, without inconceivable danger. Now it does not appear to be unreasonable or unjust to hold an individual to his solemn contract. If this rule shall be relaxed, how shall he be bound. What certainty will there be in contracts. The rule is well settled, and we think wisely settled, that a man shall be estopped, unless fraud be shown, to deny that which he has admitted by an instrument of the highest dignity. The doctrine of estoppel is founded on reason and justice, and is abundantly sustained by authority. 1 Saund. Pl. & Ev. 316; [Conway v. Alexander,] 7 Cranch, [11 U. S.] 223; Chit. Eq. Dig. 393; 2 Ves. Jr. 542.

In cases of trust, equity will sometimes treat a deed absolute upon its face as a mortgage, but in doing this, parol proof is not heard in contradiction of the instrument, but in explanation of the transaction, to prevent a perpetration of a fraud by the mortgagee. The penalty in a bond is remitted, because it was intended by the parties, and such is the legal effect of the instrument, to operate as a security. And the penalty will have secured the object for which it was introduced, on the recovery of the indemnity. It is believed that no case can be found, where a party has been permitted, in the absence of fraud, to disregard his solemn obligation, or deny a material fact, admitted in it. If the bank had practiced a fraud in the instrument, the court on this ground, either at law or equity, might enquire into the facts establishing the fraud; and as in the case of an absolute deed, prevent the consummation of the fraud. But no such allegation is here made, and the facts in the case do not warrant such a presumption.

Upon the whole we are clearly of the opinion that the special pleas do not set up matter in defence, of which the defendant can avail himself in this form of action, and consequently the demurrers must be sustained to the third, fourth, and fifth pleas, and the court think the second and sixth pleas, under the demurrer to the replication must be held bad. And unless the defendant wishes a trial on the general issue, a judgment must be entered. The case was submitted to the court, and judgment was entered.

This case was removed to the supreme court, by a writ of error, and the judgment of the circuit court was affirmed. [Sprigg v. Bank of Mt. Pleasant,] 10 Pet. [35 U. S.] 257.

[NOTE. This decision was affirmed by the supreme court in Sprigg v. Bank of Mt. Pleasant, 10 Pet. (35 U. S.) 257. Mr. Justice Thompson, in delivering the opinion, said: "It falls within the settled rule of law in relation to sureties, that extending to the principal further time of payment, by a new agreement, will discharge the surety. This, indeed, has not been denied on the argument. It has been contended that it appearing expressly on the face of the bond that the defendant acknowledged himself as principal, did not vary the question; for that all joint and several obligors in a bond are, in a judgment of law, considered principals. That is true, as a prima facie presumption of law, but is not conclusive upon a party when drawn in question before a proper tribunal. But, as matter of estoppel at law, it may stand on a different footing, and is, at all events, as matter of fact more conclusive. * * * In ordinary cases, when sureties sign an instrument without any designation of the character in which they become bound, it may be reasonable to conclude that they understood that their liability was conditional, and attached only in default of payment by the principal. And hence the reasonableness of the rule of law which requires of the creditor that his conduct with respect to his debtor should be such as not to enlarge the liability of the

surety, and make him responsible beyond what he understood he had bound himself. But when one who is in reality only surety is willing to place himself in the situation of a principal by expressly declaring upon his contract that he binds himself as such, there cannot be any hardship in holding him to the character in which he assumes to place himself. As to that particular contract, he undertakes as a partner with the debtor, and has no more right to disclaim the character of principal than the creditor would have to treat him as principal if he had set out in the obligation that he was only surety."

[The defendant in this case then filed a bill in equity to enjoin the bank from further proceedings on the judgment. This bill was dismissed. Sprigg v. Bank of Mt. Pleasant, Case No. 13,257. Sprigg then appealed to the supreme court, which affirmed the decree. 14 Pet. (39 U. S.) 201.]

Case No. 892.

BANK OF NEWBURY v. BALDWIN.

[1 Cliff. 519.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1860.[2]

BANKS AND BANKING—NOTE PAYABLE TO CASHIER — PAROL EVIDENCE TO EXPLAIN — PRINCIPAL AND AGENT.

1. Where a cashier of a bank took a note running to him as "cashier," without specifying of what bank, *held*, that evidence was admissible to show that, in taking the note, the cashier was acting as agent of a certain bank.

[See Bank of U. S. v. Lyman, Case No. 924.]

[See note at end of case.]

2. Between the original parties to a bill or note the general rule appears to be, that the facts are open to inquiry; and that an agent is not liable to be sued upon contracts made by him in behalf of his principal, if the name of the principal is disclosed to the person contracted with at the time of entering into the contract.

3. Where on the face of the note the person to whom it was given was designated "cashier," and it was furthermore agreed in the case that such person was in fact cashier of Newbury Bank, *held*, that the case must be viewed as if the words "Cashier of Newbury Bank" had been written on the note.

[See Bank of U. S. v. Davis, Case No. 915; Blair v. First Nat. Bank, Id. 1,485.]

[See note at end of case.]

At law. This case was in some respects similar to the preceding, [Hale v. Baldwin, Case No. 5,913,] being an action of assumpsit upon a promissory note signed by James W. Baldwin. [Judgment for plaintiff.]

The note was in the following terms:—"$3,500. Five months after date I promise to pay to the order of O. C. Hale, Esq., cashier, thirty-five hundred dollars at either bank in Boston, value received." The plaintiff bank was a corporation of Vermont, and the defendant, at the time of making the note and when the suit was brought, was a citizen of Massachusetts. As stated in the previous case, the defendant had, before the commencement of the suit, obtained a certificate of discharge from his debts in the insolvency court of Massachusetts, but the plaintiff in this case took no part in the insolvent proceedings. Defendant pleaded the general issue, and also the certificate of discharge in bar of the suit. It was agreed that O. C. Hale was the cashier of the Bank of Newbury at the time of the making of the note. The court said: "Two questions are presented for decision, but one of them is the same as that decided in the preceding case, and must be ruled in the same way;" and it was held, "first, that the power given to the United States to pass bankrupt laws is not exclusive; second, that the fair and ordinary exercise of that power by states does not necessarily involve a violation of the obligation of contracts; third, but where, in the exercise of that power, the states pass beyond their own limits and the rights of their own citizens, and act upon the rights of citizens of other states, there arises a conflict of sovereign power and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other states. Ogden v. Saunders, 12 Wheat. [25 U. S.] 213; Boyle v. Zacharie, 6 Pet. [31 U. S.] 635."

H. C. Hutchins, for plaintiff.
F. A. Brooks, for defendant.

CLIFFORD, Circuit Justice. Another question, however, is presented in this case which deserves to be very carefully considered. It is insisted by the defendant that, inasmuch as the promise is expressed to O. C. Hale, cashier, without any designation of the plaintiff corporation, that the law applicable to negotiable paper deems the promise to be made to O. C. Hale as the payee of the note, and that no one else can have the legal title without indorsement; and consequently it is immaterial in whom the equitable interest may be. Mere abstract propositions are of little utility in the determination of a case, unless they are based upon the actual facts, as proved or admitted by the parties. Hale was in fact the cashier of the plaintiff bank at the time the note was given, and that fact appears by the unconditional admission of the parties; and the defendant also admits, if the evidence is admissible, that, in taking the note, he was acting as the cashier and agent of the plaintiff corporation. It is clear, therefore, that the only question presented is, whether the corporation plaintiffs can be permitted to introduce evidence to show that the person named in the note in taking it acted on

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirmed in 1 Wall. (68 U. S.) 234.]

their account, and not in his private capacity. Under recent decisions in this country it cannot be doubted that if the payee had been described in the note as cashier of the Newbury Bank, the suit in this case would have been well brought in the name of the corporation. Assuming the fact to be so, the case would then fall directly within the decision in the case of the Commercial Bank v. French, 21 Pick. 486, and several other cases therein cited. Now it seems to me that the agreement made by the parties supplies the omission in the note, and brings the case within the principle of that decision.

Reference is made by the defendant to the case of Bank of U. S. v. Lyman, 20 Vt. 666, as asserting a contrary doctrine. But it should be observed that there was no agreement in that case showing that the person named as payee in the note was the cashier of the plaintiff corporation. On the face of the note in this case it appears that O. C. Hale was cashier, and with the agreement superadded to what is written, I am of the opinion that the case must be viewed precisely as it would be if the words "Cashier of the Bank of Newbury" had been written in the note, and on that state of the case no doubt is entertained that it would be competent for the plaintiffs to prove by parol evidence that the cashier, in taking the note, was acting as cashier and agent of the corporation. Banking corporations necessarily act by some agent, and according to the uniform usage the principal portion of their business is transacted through their cashier. There is some conflict in the authorities applicable to the particular question under consideration, and it may well be admitted that it is not easy to reconcile them, or to deduce from them a rule of universal application. Between the original parties to a note or bill of exchange, the general rule appears to be that the facts are open to inquiry, and consequently that an agent is not liable to be sued upon contracts made by him in behalf of his principal if the name of the principal is disclosed and made known to the person contracted with at the time of entering into the contract. Accordingly it was held in the case of Watervliet Bank v. White, 1 Denio, 608, that the indorsement of a note to "E. Olcott, Esq., cashier, or order," made upon it at the time of the purchase of the note by the bank of which the indorsee was the cashier, had the effect to transfer the same to the corporation, it appearing from the pleadings and proof that such was the design of the transaction. Folger v. Chase, 18 Pick. 63; Hartford Bank v. Barry, 17 Mass. 94. Where individuals subscribe their proper names to a promissory note, prima facie they are personally liable, although they add a description of the character in which the note is given; but it was held in the case of Brockway v. Allen, 17 Wend. 40, that such presumption of liability might be rebutted by proof that the note was in fact given by the makers as the agent of the corporation for a debt of the corporation due to the payee, and that they were duly authorized to make such a note as the agents of the corporation; and the court say that such facts may be pleaded in bar of an action against the makers averring knowledge on the part of the payee. Numerous other cases have been decided in this and other states which must have proceeded upon the same ground as that last cited, else the principle on which they rest cannot be sustained. Long v. Colburn, 11 Mass. 97; Mann v. Chandler, 9 Mass. 335; Episcopal Charitable Soc. v. Episcopal Church in Dedham, 1 Pick. 372; Emerson v. Providence Hat Manuf'g Co., 12 Mass. 237; Ballou v. Talbot, 16 Mass. 461; Rice v. Gove, 22 Pick. 158; Shaw v. Nudd, 8 Pick. 9; New England Marine Ins. Co. v. De Wolf, Id. 56; Medway Cotton M. Co. v. Adams, 10 Mass. 360; Thacher v. Winslow, [Case No. 13,863;] Taunton & S. B. Turnpike v. Whiting, 10 Mass. 327; Gilmore v. Pope, 5 Mass. 491; Inhabitants of Garland v. Reynolds, 20 Me. 45; Varner v. Nobleborough, 2 Me. 121; Irish v. Webster, 5 Me. 171. Morton, J., says in Commercial Bank v. French, 21 Pick. 490: "The principle is that the promise must be understood according to the intention of the parties. If in truth it be an undertaking to the corporation whether a right or wrong name, whether the name of the corporation or some of its officers be used, it should be declared on and treated as a promise to the corporation. Where the instrument appears to be executed in the name of the principal, the form of the words is not material." Wilks v. Back, 2 East, 142; Spittle v. Lavender, 5 Moore, 270; Pigott v. Thompson, 3 Bos. & P. 147; Combes' Case, 9 Coke, 77a; Frontin v. Small, 2 Ld. Raym. 1418; Taylor v. Dobbins, 1 Strange, 399; Mott v. Hicks, 1 Cow. 513. So also where a check was drawn by a person who was a cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument whether it was an official or private act, parol evidence was held to be admissible to show that it was an official act. Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat. [18 U. S.] 326. That case is a much stronger one than the case at bar, because the promisor had signed his name to the check without any designation of his official character, and in disposing of the case Mr. Justice Johnson says, it is by no means true, as was contended in argument, that the acts of agents derived their validity from professing on the face of them to have been done in the exercise of their agency. In the more solemn exercise of derivative powers, as applied to the execution of instruments known to the common law, rules of form have been prescribed; but in the diversified duties of a general agent the liability of the principal

depends upon the facts, that the act was done in the exercise and within the limits of the powers delegated. These facts, says the learned judge, are necessarily inquirable into by a court and jury. See, also, Hodgson v. Dexter, 1 Cranch, [5 U. S.] 345. Although it is stated that the defendant objects to the admission of the note in evidence, still it is evident that the question is not broadly presented for decision independently of the agreed statement, because the admitted fact that the payee of the note was the cashier of the Bank of Newbury at the time of the making of the note, is as much a part of the agreed case as the note itself; so that in determining the question, that fact must be superadded to the note, else the decision of the court would turn upon something less than the whole case; and indeed the agreed statement proceeds throughout upon the ground that nothing is wanting to make out the plaintiff's case under the general issue, except proof of the fact that, in taking the note, O. C. Hale was acting as cashier and agent of the plaintiff corporation; whether that evidence is admissible or not is the question submitted to the determination of the court, and nothing else is submitted under the plea of the general issue. Under the special circumstances of this case, I am of the opinion that the evidence is admissible, and, according to the agreement of the parties, the defendant must be defaulted.

[NOTE. This case was afterwards affirmed by the supreme court. In delivering the opinion of the court, Mr. Justice Clifford said: "The promise, as appears by the terms of the note, was to O. C. Hale, cashier, and the question is whether parol evidence is admissible to show that he was cashier of the plaintiff bank, and that in taking the note he acted as cashier of the corporation. Contract of the parties shows that he was cashier, and that the promise was to him in that character. Banking corporations necessarily act by some agent, and it is a matter of common knowledge that such institutions usually have an officer known as their cashier. In general, he is the officer who superintends the books and transactions of the bank, under the orders of the directors. His acts within the sphere of his duty are in behalf of the bank, and to that extent he is the agent of the corporation. Viewed in the light of these well-known facts, it is clear that evidence may be received to show that a note given to the cashier of a bank was intended as a promise to the corporation, and that such evidence has no tendency whatever to contradict the terms of the instrument. * * * Doubt cannot arise in this case that the person named in the note was in fact the cashier of the plaintiff bank, because the fact is admitted; and it is also admitted that the plaintiff can prove that in taking the note he acted as the cashier and agent of the corporation, provided the evidence is legally admissible. Our conclusion is that the evidence is admissible, and that the suit was properly brought in the name of the bank." Baldwin v. Bank of Newbury, 1 Wall. (68 U. S.) 234.]

BANK OF NORTH AMERICA, (LEMOINE v.) See Case No. 8,240.

Case No. 893.

BANK OF NORTH AMERICA v. MEREDITH.

[2 Wash. C. C. 47.][1]

Circuit Court, D. Pennsylvania. April Term, 1807.

NEGOTIABLE INSTRUMENTS—LIABILITY OF INDORSERS—APPLICATION OF SECURITY BY CREDITOR.

M. and R. had become, by separate engagements, liable to make up any deficiency of the proceeds of property assigned to the plaintiffs to pay the debts of another, for equal portions of which they were also liable as endorsers. After the deficiency was ascertained, an account was rendered, in which the proceeds of the sale were credited to both M. and R. R. having become insolvent, the court refused to permit the plaintiffs to apply the proceeds of the property to discharge the whole of R.'s engagement, and to claim the whole deficiency from M.; the plaintiffs having applied the proceeds, in the first instance, to the discharge of both debts.

[See Cremer v. Higginson, Case No. 3,383.]

This was a case stated for the opinion of the court. The Schuylkill and Susquehannah Canal Company drew a bill for 7,000 dollars on their treasurer in favour of Ruston, and another in favour of the defendant for 10,000 dollars, which they endorsed, and got discounted at the Bank of North America. These drafts were protested, and the canal company conveyed to the bank considerable property, with a declaration of trust, that if the above debt of 17,000 dollars was not paid in a certain time, the property should be sold to discharge it. Ruston and the defendant entered into separate engagements, to continue responsible for what might not be raised by this property. The bank sold the property, and rendered two accounts at different times, in which the canal company is charged with the 17,000 dollars, and interest, and credited with the sale of the above property as the money was received. Ruston having become insolvent before those accounts were rendered, the question reserved is, whether the proceeds of the property sold shall be applied first, to discharge Ruston's bill, and the residue to be applied to the defendant's; or whether they shall be applied to both, in proportion to their amount.

Lewis and Gibson, for the plaintiff, contended that the bank had a right to make the application; which was denied by Read, for defendant, and he cited 1 Vern. 34.

WASHINGTON, Circuit Justice. Both law and equity are against the plaintiffs. Upon the strictest principles of law, the plaintiffs have lost their election. The deed from the canal company made a specific application of these funds to both debts; and the bank, by the two accounts, understood it in this way,

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

and applied the proceeds to the two bills. To attempt to vary this application, after the failure of Ruston, cannot now be permitted. Those payments, therefore, must be applied to both, in proportion to their amounts.

Case No. 894.

In re BANK OF NORTH CAROLINA.

Ex parte WILSON et al.

[2 Hughes, 369; 10 N. B. R. 289, 290.]

District Court, E. D. North Carolina. 1874.[1]

BANKRUPTCY—STATE BANKS—RIGHT TO INTEREST ON BANK BILLS.

[A creditor holding bank bills of a state bank adjudged a bankrupt is entitled to interest thereon only from the time of filing proofs in bankruptcy, where no demand for payment has been made by him, and there is no evidence of when the bank bills came into his possession.]

In bankruptcy. The register (A. W. Shaffer) reported as follows: Question First. Are the creditors who have proved their claims against the foregoing estate, the principal of which has been paid in full, entitled to interest upon said proofs until the same were paid in full? Second. If the creditors are so entitled, shall the same be computed from the date of suspension of specie payment by the bank? Or, from the actual date of possession and ownership of the bills? Or, from the date of commencement of proceedings in bankruptcy? Or, from the date of filing the bills and proof of the debt before the register, and at what rate? And the said parties requested that the same should be certified to the district judge for his opinion thereon, and I do so certify the same. Inclosed herewith is a tabular statement, showing the dates and amounts of the proofs and nature of debt, by Wilson & Shober, and the dates and amounts of the respective dividends thereon, together with the briefs and authorities cited upon the subject of this claim.

Data: On the 31st day of October, 1868, was filed the petition upon which the Bank of North Carolina was, on the 5th day of November, 1868, duly adjudicated bankrupt. On the 7th day of December, 1868, was held the first meeting of creditors, whereat was proven debts amounting to two hundred and nine thousand two hundred and twenty-two dollars and fifteen cents, and Charles Dewey chosen assignee, and received assignment of the bankrupt's estate. Four several dividends have been declared on said estate, the fourth and last of which was made February 3d, 1874, and on all the debts proven up to this date, amounting in the aggregate to three hundred and twelve thousand one hundred and eighty dollars and eighty-four cents, there has been paid one hundred per cent., and there still remains in the hands of the assignee a surplus of about thirty thousand dollars, together with various suits pending and undetermined upon claims due to the assignee, for upward of forty thousand dollars more. No limitation has been set to the proof of debt, and small amounts of the bills of the corporation come in for proof at intervals. All which is respectfully submitted, this 4th of February, 1874.

Thomas B. Keogh, for Wilson & Shober.
B. F. Moore, for the assignee therein.

BROOKS, District Judge. Wilson & Shober, the creditors at whose instance this question was certified, were, as they allege, holders of a large amount in the bills of the bankrupt corporation, which were in the usual form of bank notes. The corporation was duly declared bankrupt on its own petition, on the 5th day of November, 1868. The first meeting of creditors was held on the 7th day of December, 1868, at which meeting Charles Dewey was chosen assignee, to whom a proper assignment was duly made. At said meeting, debts were proved against the estate amounting to the sum of two hundred and nine thousand two hundred and twenty-two dollars and fifteen cents, and the evidences of debt filed, much the largest portion of which consisted in the circulating notes of the bank, payable on demand. The complaining creditors filed proofs of debt at various times, the first, on the 5th of December, 1868, for two hundred dollars, the second, on the 31st of January, 1870, for thirty-eight thousand eight hundred dollars, more than twelve months after the filing of the first proof. More than twelve months after the filing of the second proof, a third proof was filed, amounting to three thousand eight hundred dollars; amounting altogether to the sum of forty-six thousand four hundred and sixty dollars. From these proofs and the notes filed therewith it appears affirmatively that this entire indebtedness of the bank was for the notes or circulating medium of the bank, payable as before stated. It appears further, that three several dividends were declared and paid to creditors: the first on the 24th of February, 1870, of fifty-five per cent.; the second, on the 19th of January, 1871, of thirty-five per cent.; and the third, on the 9th day of April, 1872, of ten per cent., amounting in all to the sum of three hundred and twelve thousand one hundred and eighty dollars and eighty-four cents. It is thus shown that these complaining creditors have received the full face value, or one hundred cents for every dollar, of the bills of the bank proved by them. Rare as this result is in the practical working of any bankrupt law, American or foreign, fortunate as all the creditors have been, these creditors are not yet satisfied, but they complain that they have not been paid interest on the forty-six thousand four hundred and sixty dollars, from some day in the year 1861, when, they say, the Bank of North

[1] [Reversed in Case No. 895.]

Carolina refused to pay specie in the redemption of its notes. They allege that there is still a large surplus in the hands of the assignee, out of which they are entitled by law to be paid interest from some day in 1861 to the date of the last dividend on this debt. They say, secondly, that if they are not so entitled, they are yet entitled to interest from the date of the commencement of proceedings in bankruptcy. Thirdly. If this be not correct, they are entitled to interest from the day of the order of adjudication of bankruptcy; and finally, otherwise failing, they claim interest from the date of actual proof and filing before the register.

As to the first position taken by the complaining creditors, it needs only to be stated, and the absurdity of the claim sufficiently appears. If Shylock would have his pound of flesh, he should know that it must only be in strict fulfilment of the contract. What, then, was the obligation of the bank in regard to the payment or redemption of the bills proved by these creditors? It was simply this, that the bills or notes should be paid whenever presented or demanded at its office, at a place designated on the face of each note, and to such person as may make such demand. Was any demand ever made by any holder of the notes proved by these creditors? There is no evidence, nor even allegation, that any demand was ever made. We have the right, and indeed it is our duty, to presume that they held but two hundred dollars of these bills on the 5th of December, 1868, for why should they prove and file but two hundred dollars, if at that time they were the holders of forty-six thousand dollars of the bills of the bank? Whenever they may have become possessed of any of the bills of the bank, could they not have presented the same and demanded payment? Certainly they could; and if the notes so presented had not been then and there paid, it would have been the privilege of such holder to cause the same to be protested; and immediately such notes would not only become interest-bearing obligations of the bank, but such holder would have acquired the right to sue, and recover from the bank the amount of the bills so presented, and the interest from the date of such demand. And moreover, damages, provided expressly in the charter of the banks. What were these bank bills in the hands of these money-dealers? They were money in the sense in which bank notes payable to bearer are distinguishable from property. They bought them as money, and if they held them all before they filed them with their proofs of debt, they held them as money. It was their business to deal in money, current and uncurrent, and especially the uncurrent. It is not necessary for me to say whether the obligation of the holder to present for and demand payment at the place designated in the bills would be necessary, if at the time the corporation had ceased to do business at the place so designated; if it had closed its office and ceased to redeem on any terms its notes, for it is not my duty to decide hypothetical questions.

If bank bills be presented and payment demanded and refused, then, as before stated, the holder may cause protest to be made. Such demand and non-payment entitles such holder to sue for the amount of the bills and damages. The right to sue thus acquired is personal, and belongs exclusively to such holder. He may sell or pass to another the bills so protested, but so soon as he does so they become again a circulating medium, and the person who so receives them acquires no right by virtue of the previous demand and protest, but only such right as belongs to any ordinary holder. I do not mean to say that the holder of any interest-bearing obligation has not the same right to require payment of principal and interest from an estate of a bankrupt, if there should be sufficient to pay principal and interest, as such holder would have against an individual or corporation not in bankruptcy; but in neither case would the holder of non-interest-bearing notes be entitled to any sum beyond the face value of the bill until a demand, or refusal, or omission to pay by the debtor. In case of bank notes, it is especially required, to constitute a sufficient demand, that the person demanding payment should show at the place that he is prepared to surrender the bills or evidences of debt. I hold that the proofs in this case, as they are filed, as regards the time and amount, are equivalent to a demand, to the extent of entitling each creditor so proving to the full sum so proved, and interest at the rate of six per cent. per annum from the date of filing such proofs to the date of declaring the first dividend, then at the same rate on the balance of the principal sum to the date of declaring the second dividend, and in the same way until the principal and interest is paid.

And it is referred to A. W. Shaffer, Esq., register, to compute the interest due upon each proof according to the rule here prescribed. And if, upon such computation being made, it shall appear that the fund now in the hands of the assignee is insufficient to pay the whole sum to the creditors for interest, then such creditors shall be entitled to and paid such interest pro rata.

[NOTE. For opinions in subsequent course of same litigation, see In re Bank of North Carolina, Cases Nos. 895–897.]

Case No. 895.

In re BANK OF NORTH CAROLINA.

[12 N. B. R. 130; 1 N. Y. Wkly. Dig. 127.]

Circuit Court, W. D. North Carolina. 1875.[1]

BANKRUPTCY—STATE BANK — RIGHT TO INTEREST ON BANK BILLS.

[Creditors holding bank bills of a state bank adjudged a bankrupt are entitled to interest

[1] [Reversing Case No. 894.]

thereon from the date of the adjudication in bankruptcy, there being a surplus fund after payment in full of all debts.]

[In bankruptcy. Appeal from an order of the district court for the eastern district of North Carolina. Reversed.

[The Bank of North Carolina filed its petition in bankruptcy October 31, 1868, and November 5, 1868, was adjudged a bankrupt. Debts were proven, amounting to $312,180.-84, on which dividends amounting in all to 100 per cent. were declared, leaving a surplus in the hands of the assignee of about $30,000. The question as to interest on the amount of the bank bills held by certain creditors was certified by the register to the district judge. and. on his deciding (Case No. 894) against the contention of the creditors, was appealed to this court.]

Thomas B. Keogh, for creditors.

A. S. Merrimon, for assignee.

BOND, Circuit Judge, delivered the following opinion, reversing the decision of the district judge:

This is a petition on the part of certain creditors of the Bank of North Carolina, an adjudged bankrupt, to be allowed interest on their claims from the date of the adjudication in bankruptcy, there being a surplus fund after payment of all the debts of the bank in full. The creditors who petition are the bill-holders of the bank. I can see no just reason why this claim should not be allowed; and a complete answer may be found to all objections made at bar to the allowance of interest, in the very able and elaborate opinion of Chief Justice Shaw in the case of Williams v. President & Directors of American Bank, 4 Metc. (Mass,) 317, and in the equally clear opinion of Judge Hubbard in the case of Brown v. Lamb, 6 Metc. (Mass.) 203, which exhausts the subject. The case will be sent to the district court with directions to proceed accordingly.

[NOTE. For subsequent opinions in course of same litigation, see In re Bank of North Carolina, Cases Nos. 896 and 897.]

Case No. 896.

In re BANK OF NORTH CAROLINA.

[19 N. B. R. 164.]

District Court, E. D. North Carolina. June 8, 1879.

BANKRUPTCY—POWERS OF REGISTER.

[1. The bankruptcy act of March 2, 1867, (14 Stat. 519, § 4,) confers power upon the register to make all such orders as are proper to be made in any bankruptcy proceedings, except only such as the law provides in express terms, he shall not make, and such others as the law provides that the judge of the bankruptcy court shall make.]

[2. With these exceptions, wherever it is provided in the law that the court may exercise a power, the register to whom a case in bankruptcy has been referred may exercise that power, unless some person having some interest in the estate of the bankrupt shall make some objection to the exercise thereof.]

[3. The register in bankruptcy has power to direct a sale of debts or choses in action belonging to or being a part of the bankrupt's estate, upon a proper application, if there be no objection made by a person or party having some interest in the proper distribution of the bankrupt estate.]

[4. On a charge that an application to the register for an order of sale of the bankrupt's estate was caused by an improper solicitation or interference of the register, the strict rules of evidence applicable to the trial of causes should not be applied; and, if the party making the charge examines the register, he is not bound by the register's answers, so as to be precluded from offering other evidence, though such evidence may be offered to impair the force of his testimony, or even to contradict him.]

[5. The register to whom a case has been referred may, in case of delay in winding up the bankrupt estate, properly inquire why a settlement has not been made, suggest the propriety of making progress, and indicate what steps the assignee should take.]

[In bankruptcy. The assignee of the Bank of North Carolina, having applied for and obtained from the register an order for a sale of certain choses in action belonging to the estate of the bankrupt, which "could not be collected without inconvenient delay or expenses," now moves to expunge the order from the records on the ground that the register had no power to make such order. Denied.]

Merrimon, Fuller & Ashe, for assignee.

Tourgee, Reade & Battle, for respondents, (purchasers at sale.)

BROOKS, District Judge. There is but a single question presented by this motion, made by the solicitors for the assignee. They ask that the order heretofore granted upon the petition of the assignee for the sale of choses in action, belonging to the estate of the bankrupt corporation, be rescinded or revoked. This motion is made and filed, in writing, in conformity with the practice of the court, in which is set forth the reasons for which they ask that the order of sale shall be revoked. Whether the order the assignee now asks should be granted, depends upon the power vested by law in the register, to whom this case had been referred, to make the order which they now say should be annulled. It is insisted, in support of this motion, that Mr. Register Shaffer had no power to consider the application of the assignee or to make the order referred to. This question has been fully and ably argued by counsel, and carefully considered.

I conclude that the register in bankruptcy has power to direct a sale of debts or choses in action belonging to or being a part of the bankrupt's estate, upon a proper application, if there be no objection made by a person or party having some interest in the proper distribution of the bankrupt estate. It does not appear that any opposition was offered or expressed by any party to the entry of the or-

der complained of. I have so concluded, for the following reasons:

First.—It has been the practice in this district for the register to hear these petitions and make such orders,—a practice so invariable as to be almost without exception; for, of the thousands of such orders as have been entered in bankruptcy proceedings in the district under the existing law, probably not more than eight or ten were ever considered or signed by me; and these were only so considered because I was, at the time, more accessible than the register to the assignee or their counsel, who desired such orders, and only for their convenience.

Second.—I am persuaded that such has not only been the practice in this district, but that it has been the almost invariable practice in every other district in the United States.

Third.—It is clear, I think, that the power is intended to be conferred (and in fact is conferred) by the law upon the register to make all such orders as are proper to be made in any bankruptcy proceedings, except only such as the law provides in express terms he shall not make, and such others as the law provides that the judge of the bankruptcy court shall make. Keeping these exceptions in view, wherever it is provided in the law that the court may exercise a power, the register to whom a case in bankruptcy has been referred may exercise that power, unless some person, having some interest in the proper distribution of the estate of the bankrupt, shall make some objection to the exercise thereof.

That a register in bankruptcy is not such a mere clerk, or servant, of the district judge as the counsel for the assignee insists he is, may be (at least) inferred from one of the qualifications required. I refer to the provisions of section 4994 of the Revised Statutes, which declares that "no person shall be eligible for appointment as register in bankruptcy unless he is a counsellor of the district court for which he is appointed, or of some one of the courts of record of the state in which he resides." Now if it was intended that the register should perform the duties of a clerk, merely, and had no power to do more than make calculations, and write that which the judge may direct, it would strike every lawyer at once that the requirement, that the register should be a lawyer, was not only useless and senseless, but one positively detrimental to the prompt progress of the business of the court (and I might add) to the comfort of the district judge. If a clerk only was required to write and compute figures quickly and correctly, I am sure that no judge of my experience would be apt to prefer lawyers as a class for that service, for we all know that lawyers, as such, are not distinguished for the legibility of their penmanship. What, then, was the object of the requirement, if it was not that the register is designed (as I hold the law declares he is) an assistant of the district judge? If the power was not with the register to examine such an application when filed in a cause pending before him, and to grant the order in any case in which there is no objection made, I can scarcely see what a register may properly do that may not be as well done, and perhaps better, by others than lawyers as a class.

I will remark here that the charge made by the counsel for the assignee, that the application for the order of sale was caused by any improper solicitation or interference of the register, I do not regard as sustained by the record, and certainly is not sustained by the testimony offered in support of this motion. The counsel for the assignee, when they offered to examine the register, stated that they were conscious that they would be bound by his answers as a witness tendered by them. If it had become pertinent as a question in this proceeding, I would not have agreed with the counsel in that opinion. Certainly they would be bound by his answers if that was the only evidence offered; but in my opinion they would not, in this case, have been so bound by his answers as to be precluded from offering other evidence, though such evidence may be offered to impair the force of his testimony, or even to contradict it. The strict rule applicable to the trial of cases generally, I think, should not be observed in cases of this nature; and if I should confine myself to the record evidence, and the testimony offered in this case (as I believe I must do if I perform my duty properly), then I must say that I see nothing which I believe would justify me in declaring that the assignee had been improperly influenced to file his application. It is a grave charge to make against any public officer that he has acted corruptly in the performance of, or when pretending to perform any official duty. Certainly no court should so declare unless such charge should be fairly shown to be true. The Bank of North Carolina was declared bankrupt in 1868, and the case was, by order of this court, referred to this register. Soon thereafter the meetings of the creditors, provided by law, were held, and Chas. Dewey was duly chosen assignee. Distinguished and able counsel of his own choice were assigned him by the court. Then nine years passed by. At the end of that time the estate was not settled; the assets are not fully distributed. It appears to me that it was quite time that some one should inquire why a final settlement had not been made. Must the district judge make that inquiry? I think he might do so without violating any rule of propriety. Could the register, to whose supervision the case had been referred, make this inquiry and even suggest the propriety of some progress—more than that, make some suggestion as to what the assignee should do? I hold that he may properly do all this. Has he done more? If so, it has not been shown. The motion to ex-

punge the order of sale made by the register in this case is denied.

[NOTE. For other opinions in cases involving the same bankrupt estate, see In re Bank of North Carolina, Cases Nos. 894, 895, and 897.]

Case No. 897.

BANK OF NORTH CAROLINA v. DEWEY.

[19 N. B. R. 314.]

District Court, E. D. North Carolina. June 10, 1879.

BANKRUPTCY—VALIDITY OF COMPROMISE.

[If a debtor tenders to his creditor, and the creditor accepts, a sum smaller in amount than the debt as and for satisfaction in full, the debt is discharged.]

[See Henderson v. Moore, 5 Cranch, (9 U. S.) 11; Memphis v. Brown, Case No. 9,415.]

[In bankruptcy.] Application for re-examination of proof of claim. [Refused.]

A. W. Tourgee, for creditor.

Merrimon, Fuller & Ashe, for assignee.

Opinion of Register:

This is a proof of debt by Harriet J. Foy, daughter and administratrix de bonis non of Elizabeth Smith, deceased, of Newbern, N. C., for the sum of two thousand two hundred and seventy dollars, the consideration of which was money deposited with the bank in 1861–'62, being the balance to her credit therein since June, 1862, evidenced by the deposit or to the petition thereof in bankruptcy. This claim as proven was formally audited, passed, and allowed by the register and assignee, under their respective hands, after the withdrawal of exceptions to the form and sufficiency of proof, to wit: August 13, 1875, and the debt was entered by the register upon the dividend list for payment. On the 18th of August, 1875, the assignee informed the register that he had found upon the daily cash-book of the bank an entry purporting to be a settlement, compromise, and discharge of said debt, to wit: the check of Mrs. Smith to the bank for two thousand two hundred and seventy dollars, and the payment by the bank to Mrs. Smith therefor of the sum of seven hundred and twenty-six dollars and forty cents, or thirty-two cents on the dollar of said debt. This entry bears date June 4, 1866, and has never been posted or transferred from the daily cash to the deposit ledger of the bank, and the last-named book, together with the sworn schedules in bankruptcy, still show due to Elizabeth Smith the sum of two thousand two hundred and seventy dollars, without payment, compromise, set-off, or counter-claim. The assignee insists that the entry in the daily cash-book balances this account, and that the proof must be expunged.

To this demand the claimant answers as set forth in the annexed certificate.

Mr. Chas. Dewey, the assignee in bankruptcy of the bank, was cashier of the bank throughout the entire period of this transaction, and familiar with all its details. When this entry was exhibited by the assignee to the register, and while inspecting it, the register interrogated Mr. Dewey, as to how such a compromise, so favorable to the bank, was effected. Mr. Dewey replied: "The bank prepared a statement showing that it was able to pay only thirty-two cents, and exhibited it to the creditors, whereby the compromise was effected." "Did the officers of the bank regard it as insolvent at that time?" "No; but the stay laws were in force, and we could not collect." "Did your statement exhibited to the creditors set forth these facts as a reason why you were only able to pay thirty-two per cent.?" "No; it just stated that the bank was only able to pay thirty-two cents on the dollar of its debt." The deposit ledger of the bank shows that many persons having balances due them on deposits made in 1861–'62, including the highest officers and directors of the bank, checked them out, dollar for dollar, before and after this alleged "settlement," (June 4, 1866), and if any discount or compromise was obtained thereon the books of the bank do not show it as in this case. A schedule of the names of some of these is hereto appended, marked "B," showing date of drawing out, and the amount of balance so withdrawn.

At the same period of this alleged compromise certain persons, having intimate relations with the bank, and facilities for knowing its financial condition, purchased large quantities of its bills, and presented them for payment. They received fifty-five cents on the dollar, conditioned in writing between the bank and them that the bank would pay to them such additional sum or sums as it might from time to time pay to any of its most favored creditors, together with interest from date. These certificates or agreements covered one hundred and nine thousand dollars, composed of bills purchased, and in part of ante-war deposits, and they have, since bankruptcy, been paid in full, with stipulated interest. A statement of these, showing names of the creditors, the amount, and, so far as is possible, the date of the stipulations, is hereto appended, marked "A." Mrs. Smith was an aged widow lady, residing at a point remote from the bank, to which she could have no access for information, the books and financial condition of which she was supremely ignorant, leaving her to depend solely upon the representations of its officers. The statement exhibited to her was an official statement prepared, says Mr. Dewey, the cashier, in effect, for the purpose of promoting compromises with its creditors. Mr. Dewey says, under oath: "The bank concluded they were solvent," but, they said in their "statement" to the creditors, "we can only pay thirty-two cents on the dollar of debt!" If that meant only for the present time, while the disability to sue and collect

the assets existed, then an acceptance of the thirty-two cents could not be construed into a compromise of the whole; it only meant: "We will pay you the balance when we are able; when the disability to sue ceases." But the bank did not inform their creditors that they were solvent, but in plain terms intimated the contrary in the "statement," the exhibition of which induced Mrs. Smith to accept a less sum of money for her debt than the debt amounted to. Such settlement between the bank and Mrs. Smith was obtained by misrepresentation, and was fraudulent, and void for want of consideration.

But the courts of North Carolina have gone beyond this, and held that the bare receipt of or agreement to receive a part of a debt in discharge of the whole is void for want of consideration. Bryan v. Foy, 69 N. C. 45; McKenzie v. Culbreth, 66 N. C. 534; Warren v. Skinner, 20 Com. 559; Hayes v. Davidson, 70 N. C. 573; Mitchell v. Sawyer, 71 N. C. 70; Wooten v. Sherrard, Id. 374; Love v. Johnston, 72 N. C. 415. Again, the check of Mrs. Foy on the bank was for two thousand two hundred and seventy dollars. The bank only paid seven hundred and twenty-six dollars and forty cents upon it, as admitted by all; therefore there remains due and unpaid upon her check the sum of one thousand five hundred and forty-three dollars and sixty cents. Since the date of this transaction the bank has been adjudicated bankrupt; paid all its known proven debt, amounting to upward of three hundred and seventy thousand dollars, with interest on the certificates heretofore described; all the costs of bankruptcy, including costs of collections, attorneys' fees, commissions, etc., amounting to several thousand dollars. It has compromised and compounded claims due the bank to a very large amount; has some thirty thousand dollars pending undetermined in the courts; a cash surplus of over thirty thousand dollars in the hands of the assignee, liable to two or three claims of this nature aggregating about eight hundred dollars, and to a claim for interest from adjudication of bankruptcy to final payment in full on debts proven. I am of the opinion that the alleged "compromise," if any, was fraudulent and void for want of consideration, and that the assignee should pay to the claimant the said sum of one thousand five hundred and forty-three dollars and sixty cents and interest from the time which all other creditors have received interest upon their claims allowed; the said sum of one thousand five hundred and forty-three dollars and sixty cents being the amount of said proven debt after deducting the sum actually paid upon her check, or order to the bank to pay the whole of said sum of two thousand two hundred and seventy dollars, together with ten dollars costs of this certificate. All of which is respectfully submitted.

A. W. Shaffer, Register.

BROOKS, District Judge. The deposition, or proof of debt, was filed in this case by Harriet J. Foy, as administratrix of Elizabeth Smith, on the 4th day of May, 1875, which was examined and approved as sufficient in form by the register. Subsequently, on the application of the assignee and certain creditors of the bank, the register reviewed his proceedings on said claim, under the provisions of the 34th rule, as amended, and again determined that the proofs were sufficient in form, and ordered that the claim be placed upon the dividend list for pro rata payment. To which ruling and order of the register the assignee and creditors excepted, and demanded that the questions arising on the exceptions, and the evidence taken, be certified to the district court. The certificate of the register and the evidence taken by him is before me, and other witnesses have been examined in behalf of each of the parties to this controversy. And I have been aided by able arguments of the counsel, and have now given the facts and the law involved in the case full consideration.

The facts are as follows: Elizabeth Smith, the intestate of the plaintiff, deposited with the bankrupt corporation—at a branch of that bank at Newbern—on the 14th of January, 1862, two thousand and ninety dollars, and on the 5th day of March following one hundred and eighty dollars, making two thousand two hundred and seventy dollars. That these amounts were entered to her credit by deposit, on the deposit ledger (a book kept by the bank), and also on the teller's journal (another book kept by the bank). That schedule A, No. 3, filed with the petition of the bankrupt corporation in this case, was made out from the deposit ledger, and upon that the only entries in Mrs. Smith's account were the credits before mentioned. On that book there was no charge or entry of payment made to her. Accordingly the sum so deposited was scheduled and reported as a debt due and owing by the bank; that on the teller's journal Mrs. Smith's account was balanced by a charge of her check on the 6th day of June, 1866, for the entire sum to her credit. The check so charged was produced on the trial, and the execution of it, by Mrs. Smith, was proved by the assignee in bankruptcy.

Mr. Dewey, the assignee, and Mr. Jones, were examined as witnesses. The former had been the cashier of the Bank of North Carolina, at the principal office at Raleigh, from a date anterior to the dates of the deposits mentioned, and Mr. Jones had been, from its origin, the cashier of the branch bank at Newbern. By Mr. Dewey it was shown that during the year 1866 the bank, not being able to redeem its circulation and pay other creditors by paying the full sums demanded, and as they were demanded, was then paying its debts by compromise, when demands were made, at the rate of twenty-five per cent. in gold—or its equivalent in the

then currency of the country. That, in the month of June, 1866, the equivalent of twenty-five cents in gold was thirty-two cents in national currency. That Mrs. Smith's check for two thousand two hundred and seventy dollars was sent to the principal bank at Raleigh (the branch at Newbern having been discontinued in 1862), through Mr. Jones, who had been the agent of the bank at Newbern since the discontinuance of the branch. That a check of the bank on a bank in New York for thirty-two per cent. of the deposit debt to the credit of Mrs. Smith was forwarded to Mr. Jones for Mrs. Smith, and that the balance, say one thousand five hundred and forty-three dollars and sixty cents, was charged to profit and loss, and the check charged to Mrs. Smith for the full sum on the teller's journal, which balanced her account, and through inadvertence no entry was made of this transaction in the deposit ledger. That a large amount of the bills of the bank was redeemed at that rate, and some of the depositors were settled with at the same rate. That when creditors of the bank applied for information they were informed that the bank was settling with its creditors at that rate. By the evidence of Mr. Jones it was shown that he was the agent and confidential friend of Mrs. Smith—who was considerably advanced in years; that at her request he drew the check and witnessed the execution of it by her, forwarded the same, and received the check for thirty-two per cent., mentioned by Mr. Dewey; that amount, in money, he paid to Mrs. Smith in satisfaction of her claim, at which settlement she appeared to be and expressed herself as satisfied. Mrs. Foy was examined in her behalf, and other witnesses were examined, by whom it was shown that, after the payment to Mrs. Smith, other claims against the bank were compromised and settled by the payment of higher proportions of the debt than thirty-two per cent.; that other creditors of the bank, who refused to accept the compromise offered, subsequently received the full amount of principal of their claims from the assets of the bank.

The questions of fact, to be determined in this case, are these: First. Whether the payment of thirty-two per cent. of the sum deposited by Mrs. Smith was tendered by the bank and received by her as and for payment and satisfaction of her entire claim, or was that sum tendered and accepted only as a partial or pro tanto payment on that debt? Secondly. If the sum paid was offered and accepted as a compromise and full settlement of the debt, then was the creditor induced to accept, as full payment, a sum so materially less than her demand, by reason of any fraud or deception practised on the part of the agents of the bank? I hold it to be clear that the whole sum due Mrs. Smith was not satisfied and discharged upon the payment to her of less than the amount due, unless the sum paid was both tendered and accepted as and for payment and satisfaction in full of her demands, and was so understood by both debtor and creditor at the time of this transaction. Referring to the testimony of Mr. Dewey and Mr. Jones, I am well satisfied that the payment made was offered and accepted as a compromise and full settlement of Mrs. Smith's claim against the bank, and that it was so understood at the time by both parties. There can be no doubt as to the purpose of the bank; and as to Mrs. Smith, her confidential friend, her agent, that one with whom she had trusted, for years, her money, says that the information upon which she acted came to her through him; that he received for and paid to her the sum paid, and that she appeared to be, and expressed satisfaction at the settlement. The opinion of the supreme court of North Carolina in the case of McKenzie v. Culbreth, 66 N. C. 534, and, following that, the case of Witherington v. Phillips, 70 N. C. 444, are relied upon by the creditor to show that any payment of a less sum in money than the whole sum due will not discharge the debtor. If that court intended to declare that when the amount paid by the debtor was tendered by him for compromise, payment, and for full satisfaction of the debt, and the same was accepted by the creditor without fraud on the part of the debtor, then I do not concur in that opinion.

We may be able to discover some reason in a requirement that an obligation evidenced by a writing under seal shall only be released or discharged by an instrument under seal. And, again, that obligations of a certain character shall only be binding upon the parties when the same shall be reduced to writing. In this age of progress, of the wonderfully increased as well as changed dealings between men, arising from trade and commerce, accelerated and multiplied as these have been by the wonderfully increased facilities for intercourse and trade, which were never enjoyed until within the last half century, it must appear as strange as it would seem to be hard upon the commercial man if the courts shall hold that he must pay, under all circumstances, to the last dollar, all his obligations, and even with the consent of his creditor, obtained without fraud on his part, he cannot obtain a discharge by paying less than the whole sum due. It should be remembered that this is no construction of any statutory provision of the law, but the declaration by a high court of a principle of the common law. An accepted construction of a statute law must and will stand until its force is lost by its own limitation, or the same shall be altered or repealed. Not so, however, with the common law, which is only common custom as applied to any given transaction not provided for by special legislation. These customs or laws are not applicable to changed customs or to obligations contracted under altogether different circumstan-

ces. It should be remembered, too, that this is a bankruptcy court, charged with the duty and vested with the power of administering justice upon the principles of equity between creditor and debtor whose interests may be brought within the jurisdiction of the court. The late bankrupt law [Act March 2, 1867; 14 Stat. 517] was said by some to be a system of itself. If so, it was a system of compromises and discharges, many of the provisions of which are of much more doubtful propriety and justice than a rule can be which will discharge a debtor from his obligation when he shall tender a part, less than the whole sum due, as full payment, and the creditor accepts such sum offered as full payment, without being induced to do so by any fraudulent act or declaration of the debtor.

But for the clear statement of the learned judge who delivered the opinion in the case of McKenzie v. Culbreth, supra, it would not be seen that the question now being considered was presented in that case, for the positions stated in the syllabus of that case will scarcely be denied. The statement of that case is concise, and as follows: The plaintiff claimed on a single bill. The defendant answered accord, etc., and, in support of this defence, offered a receipt given by the obligee for a less sum than the note called for. His honor instructed the jury that the legal effect of the receipt was only a payment to the amount specified in it, and operated only as a discharge of the note pro tanto. It is not strange that his honor, the presiding judge, upon such facts appearing, should have instructed the jury as he did. It is not stated that the sum paid by the debtor was tendered, by him or accepted by the creditor in compromise, settlement, and full payment of the obligation; and surely, unless such fact was found or admitted, there could be no presumption that the payment was so tendered and accepted, but rather the contrary. Upon that statement of the case it would appear strange if his honor had not so instructed the jury. His honor, in delivering the opinion of the appellate court, says: "The question presented is, whether a payment by the debtor and acceptance by the creditor of a less sum than is due upon a bond, as a payment of the whole, is a discharge of the obligation, so as to preclude the creditor from recovering the remainder of the bond." The difference between the case stated as reported and the statement of the question by his honor, it will be seen, is essential. Those who have had the acquaintance with that learned justice that it has been my privilege to enjoy will readily conclude that he was correct in his statement of the question presented, and will not, without hesitancy and regret, withhold their assent to the conclusion to which he arrived.

Nor was the question now being considered distinctly presented in the case of Hayes v. Davidson, 70 N. C. 573, for in that case there had been no acceptance by the creditor of a less sum than the whole sum due. But it was only averred in the defendant's plea that the plaintiff had agreed with and promised the debtor that he would compromise the claim and take in full settlement a less sum than the whole amount due. The agreement was not one entered into with other creditors of the debtor; there was nothing whatever in this promise which distinguished it from a mere promise without any consideration whatever, either good or valuable. In the opinion of his honor, so manifestly correct, upon the question there presented, I only cannot concur in the approval given of the opinion in the case of McKenzie v. Culbreth, [66 N. C. 534.] The case of Bryan v. Foy, [69 N. C. 45] is not authority for the creditor in this case, for it is not only not alleged that there was any acceptance by the creditor; but, on the contrary, that the creditor refused to accept a sum less than the whole sum then due when tendered. The promise to accept, being nudum pactum, could not be enforced. Whether the motive prompting the creditor to refuse to comply with his promise is good or bad, in a moral sense, is not a question for the court. That will not alter the law applicable to a promise void for want of some good or valuable consideration. It is altogether a different principle that will control the conduct of a creditor when he agrees to accept, and does accept (without fraud, by word or in the conduct of the debtor), a less sum than the whole sum due, and then seeks to avoid both his agreement and results of his voluntary act.

It is seen that I do not rely upon any retrospective effect that may be claimed for the act passed by the legislature of North Carolina, Acts 1874–'75, c. 178. Nor, indeed, upon any force that may be attributed to that act. But it will appear by no means clear to the careful reader that the legislature did not intend by it to alter a well-established principle of the common law, by giving validity to and rendering binding upon a creditor a mere agreement with his debtor, to accept from him any part less than the whole of his debt in compromise, payment, and satisfaction of the debt. But when a creditor has not only agreed with his debtor to accept (with all his rights to seek and acquire information), but has received from him a less sum in full payment of his debt—and all this without fraud committed by the debtor—that such creditor should be bound by such agreement and acceptance is so manifestly supported by common sense, justice, and reason, that no statute is required to make it the law. It is but a principle of the common law. The learned counsel for the creditor, in their argument, laid much stress upon the authorities cited. Yet, in the carefully prepared brief filed by them,

these cases are not even referred to. But they rest their case almost entirely upon the evidence, which they insist establishes fraud on the part of the agents of the bankrupt corporation, whereby, they say, the creditor was induced to receive the sum paid for the whole debt.

In my view of the testimony no fraud, by word or act, on the part of any agents of the bank, was committed which induced Mrs. Smith to accept the compromise offered; and while it is probably true that if she had correctly anticipated the ultimate results as to the assets of the bank, she would not then have sought or accepted such a settlement of her claim, the binding force of the settlement does not depend upon ultimate results or the correctness of the judgment exercised by her in that transaction. The fact is that the ultimate ability of the bank to pay a larger proportion, and, finally, to some creditors who "held off," the principal of their debts, was entirely due to compromises accepted by other creditors, as this was by Mrs. Smith—the results of suits against and in favor of the bank then pending, and collections about which, at the time of this settlement of this claim, no human foresight could be regarded as infallible. No understanding of the condition of the bank, however thorough, could enable any officer to say with reasonable certainty the proportion it would be able to pay. Nor would any desire to be truthful and correct on the part of these officers have exempted them from liability to err in any opinion they expressed. This claim is disallowed, and the register is directed to certify this order to the assignee.

BANK OF PASSAMAQUODDY, (WILD v.) See Case No. 17,646.

BANK OF PENNSYLVANIA, (BULLET v.) See Case No. 2.125.

BANK OF PITTSBURG, (CROMWELL v.) See Case No. 3,409.

BANK OF RIVER RAISIN, (DAVIS v.) See Case No. 3,626.

Case No. 898.

BANK OF SOUTH CAROLINA v. BICKNELL et al.

[1 Cliff. 85;[1] 43 Hunt, Mer. Mag. 586; (2d case;) 17 Lawy. Ed. U. S. Sup. Ct. Rep. 241.]

Circuit Court, D. Rhode Island. June Term, 1858.[2]

MARINE INSURANCE—CONSIGNEE TO SELL ON COMMISSION—AUTHORITY TO INSURE FOR PRINCIPAL.

1. Where goods are shipped to consignees, to be sold on commission, and the consignees, for their own benefit, insure their interest to an amount equal to the value of the goods, and the goods are lost, there is no privity of contract between the consignor and the insurance company on which a right of action against the company could be founded.

[Cited in The Sidney, 23 Fed. 95.]

[See note at end of case.]

2. Consignees of goods for sale on commission, being in advance to the consignors, or under acceptances for them, as in this case, may insure in their own name and on their own account to the full value of the goods, and apply the proceeds to their own benefit to the extent of their claims in respect of such advances and acceptances, and perhaps of their commissions. But though they have this insurable interest, they are not, merely in their character as such consignees, vested with any authority to effect insurance for their principal on the consignment while it is in transit.

[See Henshaw v. Mutual Safety Ins. Co., Case No. 6,387.]

[See note at end of case.]

[In equity. Bill by the Bank of South Carolina against Bicknell and Skinner and the Commercial Insurance Company on a policy of insurance. Bill dismissed. Reversed by supreme court in Bank of South Carolina v. Commercial Ins. Co., 17 Lawy. Ed. U. S. Sup. Ct. Rep. 241.]

Bill in equity praying, among other things, that the corporation complainant might be declared entitled to recover the amount of a certain policy of insurance from the corporation defendants, on a quantity of cotton, in the same manner as if the insurance had been effected in their name; that the insurance company might be ordered to pay the same accordingly; and that the other defendants might be enjoined from commencing any proceedings to collect the insurance money, except at the request and for the benefit of the complainants.

Most of the facts were either admitted by the pleadings or not made a subject of controversy.

Michael Lazarus of Charleston, South Carolina, purchased and owned forty-two bales of cotton, which he shipped from that port on the 1st of August, 1857, in the Emily Ward, to the first-named respondents, to be sold by them, as his agents, on commission. At the time of shipment he took a bill of lading from the agent of the vessel, and on the same day drew a bill of exchange on the respondents against the shipment for two thousand four hundred dollars, payable to his own order sixty days after sight, which sum was less than the value of the consignment. Immediately on drawing the bill of exchange, being otherwise unable to pay for the cotton, he indorsed the bill of exchange, presented it at the bank for payment, and, upon indorsing the bill of lading as security, obtained the money. The bill was forwarded to the drawees, and by them accepted on the 25th of the same month. On the same day the drawees insured the cotton in their own name for the sum of three thousand five

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Reversed in 17 Lawy. Ed. U. S. Sup. Ct. Rep. 241.]

hundred dollars in an open policy then held by them, executed by the corporation defendants, which policy bore date the 9th of January, 1857, and was taken out on that day. [By the terms of the policy the first-named respondents were insured "on all merchandise shipped by or to them at and from port or ports to port or ports of destination on the Atlantic ocean, and upon the waters connected therewith, including the North sea, to continue the same until notice is given by either party in writing to cancel this policy; the insured to give notice of all shipments on receipt of information, each ten bales of cotton, in successive numbers, subject to their own average. Rates of premium as per memorandum, on file of this date, against loss or damage on the high seas and elsewhere, as mentioned in the respective indorsements, * * * and to the amounts and in the manner therein set forth." Their proposal to enter the risk is as follows: "Forty-two bales cotton on board the tern Emily Ward, at and from Charleston to New York, and while there and from thence to this port as customary value, at thirty-five hundred dollars." And on the same day the insurance company made the following indorsement: "Under this policy we entered insurance for thirty-five hundred dollars on forty-two bales of cotton on board the tern Emily Ward, at and from Charleston to Providence via New York as customary, one-half per cent. less one and one-half per cent., $17.25."][3] Both vessel and cargo were lost by the perils of the sea. Before the maturity of the bill of exchange the first-named respondents became insolvent, and refused to pay. Demand was made upon the respondents, the bill of exchange and the amount of the premium being first tendered to them. The complainant alleged that the first-named respondents had endeavored to collect the policy in order to deprive the bank of all benefit from the insurance; that the bank had the right to collect and receive the money in the same manner as it would have been entitled to stop the cotton in transitu, or as it might, if the loss had not occurred, have recovered possession of the cotton upon returning the acceptance, and paying the charges and expenses of the consignment.

It was alleged in the answer, that the contract of insurance was made solely between the first-named respondents and the insurance company, without any instructions, express or implied, from the complainants; that the premium is a charge against the insurers, and must be paid out of their estate; that the insurance was effected upon their own interest in the cotton, growing out of their acceptance of the bill of exchange; and that complainant had no interest in the contract either at law or in equity.

[3] [From 17 Lawy. Ed. U. S. Sup. Ct. Rep. 243.]

T. A. Jenckes, for complainant.

The plaintiff, being a principal, may follow his property or the substitute, if it can be identified, into the hands of the defendants, Bicknell and Skinner, as they are agents, subject only to advance, commissions, and expenses. 2 Story, Eq. Jur. § 1258, note 2; Story, Ag. §§ 229–231; Veil v. Mitchell, Adm'r, [Case No. 16,908;] 1 Amer. Lead. Cas. 674; Thompson v. Perkins, [Case No. 13,972;] Yates v. Curtis, [Id. 18,127.]

The insurance money is the substitute of the plaintiff's property, insurance being a contract of indemnity or security. Ang. Ins. 1; 3 Kent, Comm. 320.

Bicknell and Skinner's only insurable interest in plaintiff's cotton being their liability to pay his draft against them, they are mere trustees of the insurance money, in case of loss, for this purpose; and if they are released from all liability on the draft, and their expenses are all paid, they are the unconditional trustees of the insurance money for his use. Lazarus v. Commonwealth Ins. Co., 2 Amer. Lead. Cas. 845, and note.

F. E. Hoppin and C. S. Bradley, for respondents Bicknell and Skinner.

A consignee, factor, or agent, having accepted bills of exchange upon certain goods (like these defendants), stands in the same situation as a mortgagee, and has an insurable interest in the goods entirely distinct from that of his consignor. 1 Phil. Ins. p. 166, §§ 289, 309; 2 Phil. Ins. § 1243; Wolff v. Horncastle, 1 Bos. & P. 316; Godin v. London Assurance Co., 1 Burrows, 490.

This policy, having been obtained by the defendants, as consignees, upon their interest, and with their money, and without the privity or direction of the consignor, belongs to the defendants only, and the proceeds of it, representing only the interest of the defendants, cannot be taken by the consignor or his assigns. Neale v. Reid, 1 Barn. & C. 657; 1 Ang. Ins. §§ 60a, 60b, 73; King v. State Mutual Fire Ins. Co., 7 Cush. 1; Dobson v. Land, 8 Hare, 216; White v. Brown, 2 Cush. 412, 417.

There is no analogy between this case and the right of stoppage in transitu as claimed by complainant's bill; and if there be any, it is fatal to the claim of the consignors if pretended to be exercised.

A court of equity has no jurisdiction in this case.

CLIFFORD, Circuit Justice. Marine insurance is a contract whereby one party, for a stipulated sum, undertakes to indemnify the other against loss or damage arising from certain perils or sea-risks to which his ship, merchandise, or other interest may be exposed during a certain voyage or for a certain period of time. 1 Arn. Ins. p. 2. Like other valid engagements between business men, it requires two parties to make the contract; and as a general rule no person can

maintain a suit on the policy against the insurers, unless he is named in the instrument, or unless there is some privity of contract, express or implied, by assignment or otherwise, between himself and the other contracting party. Were there no other difficulty in the way of the complainant than the entire absence of all privity of contract between himself and the insurance company, that alone would be sufficient to defeat the right of recovery. Insurance on the goods in question was effected by the first-named respondents without instructions either from the consignor or the complainant, and without their knowledge or consent. They so allege in the answer, and every fact and circumstance disclosed in the record touching the transaction, goes to confirm the truth of the allegation. Neither the consignor nor the bank requested the cotton to be insured, or knew that the policy was in existence, until after the loss; and the whole record shows that, in point of fact, the insurance was effected for the sole and exclusive benefit of the first-named respondents. Their policy bears date more than seven months before the bill of exchange was passed to the bank, and the terms of the indorsement on the policy furnish no grounds to infer that any other interest in the cotton was included in the insurance than that held by the consignees. Whether we look, therefore, at the terms of the policy, or of the indorsement on the same, or at the entire circumstances of the transaction, there is an utter failure of proof to establish any privity of contract between the complainant or the consignor and the insurance company, or to furnish any ground of inference in that direction. Both the consignor and the complainant corporation respectively had an insurable interest in the cotton, and either or both might have protected that interest against the perils of the voyage. Having chosen to do otherwise, and to remain their own insurers to the extent of their respective interests, they must stand the consequences of their own election. King v. State Mutual Fire Ins. Co., 7 Cush. 5.

But another answer may be given to the claim of the complainant in its present form, which is equally decisive against it. When the first-named respondents received notice of the consignment and had accepted the bill of exchange drawn against it, they thereby acquired an insurable interest in the cotton, which they might properly insure for their own security. They accordingly proposed to enter the risk under their open policy, with the corporation respondents; and the answer alleges that the insurance was effected by them upon their interest in the cotton, and that the complainant has no interest in the proceeds of the insurance, either at law or in equity. Consignees who have a mere naked right to take possession of the goods consigned, without being either intrusted to sell the goods on commission, or having a lien upon them for their advances, cannot make a valid insurance of the same in their own names for their own benefit, for the reason that they have no legal property in the subject-matter of the consignment, and therefore can only effect insurance on account of those who are so interested, and must aver the interest in those on whose account the insurance was made. Wolff v. Horncastle, 1 Bos. & P. 316; 1 Arn. Ins. p. 246. But consignees who have a lien or claim on the property, in respect of advances, or as commission agents, to whom it is intrusted for the purposes of sale, or as indorsees of the bill of lading, to whom a general balance is due, may effect an insurance on the property in their own names and on their own account, to its whole value, and recover thereon, at least to the amount of their lien, claim, or balance, although they have received no previous instructions from the consignor to insure, nor any subsequent ratification of the insurance. Where goods were consigned by a merchant to his factor, to whom a general balance was due, it was held by Lord Mansfield, in Godin v. London Assurance Co., 1 Burrows, 489, that such factor had an insurable interest in the goods so consigned, to the extent of his general balance, and might recover thereon, averring the interest to be in himself; and this, though the bill of lading had been indorsed to another party. In the same case, the party to whom the bill of lading had been indorsed, and to whom the merchant was also indebted for advances to a greater amount than the value of the cargo, was held clearly to have an insurable interest, and to be entitled to recover, under a policy effected on his own account, the full value of the insurance. As a general principle, there can be no doubt that consignees of goods being in advance to the consignors, or under acceptances for them, as in this case, may insure in their own name and on their own account, to the full value of the goods, and apply the proceeds to their own benefit, to the extent of their claims in respect of such advances and acceptances. But a consignee to whom property is consigned to be sold by him merely as factor of the consignor, or other party, though he has himself an insurable interest of his own to the amount of his advances, and perhaps of his commissions, is not merely, in his character as such consignee, vested with any authority to effect insurance on the consignment for his principal, while it is in transit. Any insurance so made by him, without instructions, will therefore be a voluntary insurance, so far as the principal is concerned, and its validity will depend upon its being ratified by the party for whose benefit it was made. 2 Phil. Ins. (4th Ed.) § 1858. From the general principle, that any executor[4] having a claim on

[4] [17 Lawy. Ed. U. S. Sup. Ct. Rep. 244, gives "creditor."]

property has an insurable interest to the extent of his claim, it follows, says Mr. Arnould, that a mortgagee of a ship or goods has a distinct insurable interest in the mortgaged property, and may recover, in an action upon a policy effected for his benefit, averring the interest to be in himself, to the full amount of the debt, to secure which the mortgage was made. Mr. Phillips says that a consignee, factor, or agent, having a lien on goods to the amount of his advances, acceptances, and liabilities, stands in this respect precisely in the situation of a mortgagee; and as a general proposition we think his view of the subject is correct. 1 Phil. Ins. (4th Ed.) § 309. Applying these principles to the present case, it is clear that the first-named respondents had an insurable interest in the cotton to the amount of the acceptances they had made in that behalf, and, perhaps, also for such commissions as they would have been entitled to receive for the sale of the same in case it had not been lost on the voyage. According to the decision in Putnam v. Mercantile Marine Ins. Co., 5 Metc. [Mass.] 386, a commission merchant, to whom goods are consigned for sale, has an insurable interest in the goods, to the amount of his commissions on the sale, from the time the goods were shipped under the consignment; and the same court held, that he might make a valid insurance in anticipation of the consignment, and that the contract would take effect on the consignment being made, and the goods becoming subject to the risks insured against in the policy. Be that as it may, all the well-considered cases agree that a commission merchant or factor has a lien on the goods, to the amount of his advances, or acceptances, and that is sufficient to dispose of the case made in the bill of complaint. Courts of justice are not quite agreed whether the factor, in case the insurance exceeds the amount of his claim, may retain the excess to his own use, or whether he must be regarded as holding such residue in trust for the consignor. Some remarks of Mr. Justice Story, in the case of Carpenter v. Providence Wash. Ins. Co., 16 Pet. [41 U. S.] 507, indicate that his opinion was in favor of the latter theory. That case arose on a policy of insurance against loss by fire. He admits, however, that both mortgagor and mortgagee may each separately insure his own distinct interest in the property; and that where the mortgagee insures solely on his own account, if his debt be paid, the policy ceases to have any operation from that time; and if the premises be subsequently consumed, the mortgagor can take no advantage of the policy, for the reason that he has no interest in it. Remarks are also to be found in the opinion of the court in Robertson v. Hamilton, 14 East, 522, favoring the same theory. On the other hand, the supreme court of Massachusetts, in the case of King v. State Mutual Fire Ins. Co., 7 Cush. 1, held, in an elaborate opinion upon the question, that a mortgagee, who, at his own expense, insured his interest in the property mortgaged against loss by fire, without particularly describing the nature of his interest in case of a loss by fire before payment of the mortgage debt, has a right to recover the amount of the loss to his own use, without first assigning his mortgage or any part thereof to the insurers. To the same effect, also, are the remarks of Bayley, J., in Neale v. Reid, 1 Barn. & C. 657. He says it has never been decided that a person not bound to insure, but who elects to insure in order to cover payments if the goods do not arrive, may not apply the proceeds of the policy to his own use. The premium for the insurance comes out of the general means of the party effecting it, and diminishes the fund applicable to the claims of general creditors. As between them and the seller of the particular goods, they certainly would be entitled to the money secured by the policy. It is not the produce of the goods, but is a substitute for it, and not liable to the same burdens. Dobson v. Land, 8 Hare, 216. Policies of insurance often contain clauses indicating the intention of the parties to include within the benefits of the contract other interests than those of the party therein named; and whenever such a clause appears in the instrument, courts of justice are always inclined to give it an equitable and liberal construction. Such was the case of De Forest v. Fulton Fire Ins. Co., 1 Hall, 84, where the policy was effected "on goods as well the property of the assured as held by them in trust, or on commission." Advances had been made by the commission merchant to only part of the amount insured, and the question was, whether they had an insurable interest to the whole amount of the policy. On this state of the case the court held that the consignees had an insurable interest in the goods, on account of their own interest and as trustees, to their full value, which was covered by a policy in this form: they being liable to account to their principals for the excess of the insurance over the amount of their own claims. Carruthers v. Sheddon, 6 Taunt. 14. None of these cases, however, decide that where the insurance was effected solely on account of the interest of the factor, and where the pleadings and proof show an entire want of privity of contract between the party complainant and the insurers, that the former can in any manner derive any benefit from the insurance. But that question, in the judgment of this court, does not arise in this case, on the present state of the pleadings; and for that reason we forbear to express any decisive opinion upon the subject. Bill dismissed with costs.

[NOTE. On appeal to the supreme court the decree of the circuit court was reversed. Mr. Justice Swayne delivered the opinion of the supreme court, Mr. Justice Clifford dissenting. The opinion is nowhere reported, and not now accessible, but the following is the order which

was entered: "This cause came on to be heard on the transcript of record from the circuit court of the United States for the district of Rhode Island, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, remanded to the said circuit court for further proceedings to be had therein in conformity to the opinion of this court, and as to the law and justice may appertain." Bank of South Carolina v. Commercial Ins. Co., 17 Lawy. Ed. U. S. Sup. Ct. Rep. 245.]

BANK OF STOCKTON, (PENDERGAST v.) See Case No. 10,918.

Case No. 899.

BANK OF TENNESSEE v. UNION BANK OF LOUISIANA.

[2 Amer. Law Rev. (1868,) 346.]

Circuit Court, D. Louisiana.

BANKS AND BANKING— COLLECTING AGENT—CONFEDERATE TREASURY NOTES — BILLS OF CREDIT —CONTRACTS—COERCED PAYMENTS.

[1. Treasury notes issued by the Confederate government, and circulated as money, are bills of credit, within the meaning of the constitution, and cannot be a legal consideration to support a contract.]

[Disapproved in Bailey v. Milner, Case No. 740.]

[See, contra, Planters' Bank of Tennessee v. Union Bank of Louisiana, 16 Wall. (83 U. S.) 483.]

[2. A balance of account arising on dealings in such notes, both parties consenting thereto, cannot be recovered.]

[See Nordlinger v. Vaiden, Case No. 10,296.]

[3. A collecting agent, who, without authority from his principal, received Confederate notes, is liable to his principal for the amount which should have been collected; and the fact that such principal had himself collected such notes for such agent, and knew that such notes were largely circulated in New Orleans, where such agent lived, is not proof of authority to such agent to make collections in Confederate currency.]

[See, contra, Planters' Bank of Tennessee v. Union Bank of Louisiana, 16 Wall. (83 U. S.) 483.]

[4. While the Union troops occupied New Orleans, circulation of Confederate notes was prohibited, and thereafter banks having in their possession funds belonging to enemies were ordered to turn them over to the military authorities. *Held*, that a payment so made under coercion was valid, and released the bank from all claims by the owner of such funds, but a payment in Confederate notes, unless such notes were the funds standing on the bank books to the credit of such enemy, was invalid.]

[See, contra, Planters' Bank of Tennessee v. Union Bank of Louisiana, 16 Wall. (83 U. S.) 483.]

[5. When a deposit is received or a collection is made in Confederate notes with the knowledge and approval of the principal, express or implied, and the military authorities decided that the payment to them (the principal being an enemy) should be made in Confederate notes, such payment released the bank from all claims arising on account of the amount so paid.]

[See, contra, Planters' Bank of Tennessee v. Union Bank of Louisiana, 16 Wall. (83 U. S.) 483.]

At law. This was an action to recover a balance of $22,739, due the plaintiffs at the time of the occupation of New Orleans by the United States forces in 1862. General Butler prohibited the circulation of Confederate notes, and required the banks, including the defendants, to pay their depositors in United States legal-tender notes or specie, or in their own notes, redeemable in legal-tender notes. In 1863, by general order No. 202, General Banks directed the banks having in their possession funds belonging to enemies, &c., to turn over the same to the chief quartermaster of the department. The amount due the plaintiffs was so transferred by the defendants, together with funds of the same description belonging to other parties. All these funds were in Confederate notes.

DURELL, District Judge, charged the jury in substance as follows:—

"If the defendants saw fit, without authority from the plaintiffs, to receive in payment of drafts and notes forwarded by the plaintiffs for collection, Confederate notes or any other notes, the illegality or nullity of such notes does not discharge the defendants for their liability as bankers charged with the business of collection.

"Even if the jury should find that the plaintiffs had collected notes in Confederate currency, that they had forwarded Confederate notes to defendants, and that they knew that Confederate notes were largely circulated in New Orleans, these facts would not constitute proof of authority from the plaintiffs to the defendants to collect in Confederate currency.

"That the delivery by defendants to the military authorities of Confederate notes to the amount of their indebtedness to plaintiffs from general funds of the bank would not discharge the defendants, if the jury were of the opinion that the Confederate notes so delivered were not the moneys or funds standing on their books to the credit of the plaintiffs.

"If the jury should be of opinion, from the evidence, that the defendants paid over the amount which they held to the credit of plaintiffs to the officers of the quartermaster's department, in obedience to special order No. 202, and under coercion, then and in that case such payment was valid, and released defendants from all further claims of the plaintiffs on that account.

"If the jury should find, from the evidence, that the amount claimed by the plaintiffs in this suit was received by the defendants in Confederate treasury notes, issued by the so-called Confederate government, then in rebellion and at war with the United States, and that Confederate notes were so received by the defendants as a direct remittance from the plaintiffs, or in payment of assets belonging to the plaintiffs and collected by the defendants, with their knowledge and approval, express or implied, in the notes afore-

said, and the officers of the quartermaster's department therefore decided that the payment under special order No. 202 should be made in Confederate treasury notes, and that it was so made accordingly, then such payment was valid, and released the defendants from all further claims of the plaintiffs on account of the amount so paid over.

"That, under the constitution of the United States, no state can enter into any treaty, alliance, or confederation, or emit bills of credit; that the formation of the government of the so-called Confederate States was unlawful, and the emission of bills of credit by such government was unlawful; that the Confederate treasury notes issued by said government and circulated as money were bills of credit within the meaning of the constitution, and therefore an unlawful issue; and that by the law of Louisiana and under the constitution of the United States, all dealing in such notes was unlawful, and all obligations arising therefrom or founded thereon, are also unlawful and without legal consideration.

"If the jury find that the balance of account claimed by plaintiffs arose from dealings in such Confederate treasury notes, remitted by plaintiffs to defendants, or received by defendants for the account of plaintiffs, with their consent and approval, then the claim of the plaintiffs is without lawful consideration, and the jury should find their verdict for the defendants."

The jury returned a verdict for the defendants.

Case No. 900.

BANK OF THE METROPOLIS v. BRENT.

[2 Cranch, C. C. 530.] [1]

Circuit Court, District of Columbia. Dec. Term, 1824.[2]

NEGOTIABLE INSTRUMENTS—PLACE OF PAYMENT—DEMAND.

If a note be payable at a certain bank, and payment be there demanded, it is not necessary to make a personal demand upon the maker, in order to charge the indorser.

[See note at end of case.]

At law. Assumpsit against the executors of the indorser of George A. Carroll's note for $1,100. After verdict for the plaintiffs, as stated in [Brent v. Bank of the Metropolis] 1 Pet. [26 U. S.] 89, the defendants moved in arrest of judgment because it did not appear by the declaration that demand had been made upon the maker. The declaration stated that the note was negotiable at the Bank of the Metropolis, and that it was demanded at that bank, "where it was payable."

THE COURT (THRUSTON, Circuit Judge, absent) overruled the motion, and judgment was rendered for the plaintiffs, which was affirmed by the supreme court of the United States. 1 Pet. [26 U. S.] 89. [For opinion rendered in action on defendants' appeal bond, see Bank of the Metropolis v. Swann, Case No. 902.]

[NOTE. This decision was affirmed by the supreme court in Brent v. Bank of the Metropolis, 1 Pet. (26 U. S.) 89. Mr. Justice Marshall, in delivering the opinion, said: "The circumstances that the indorsers were themselves active in procuring the accommodation for the maker of the note; that the accommodation had been continued for years without a demand on the person of the maker; that it was the invariable usage of the bank, when the maker of an accommodation note resided out of the city, to require, as a condition of the loan, a stipulation that a demand at the bank should be sufficient; that this accommodation would not have been continued, after the removal of the maker out of the city, but on this condition; that the note purports, on its face, to be negotiable at the Bank of the Metropolis,—are facts from which the jury might justifiably infer the agreement of the parties to dispense with a demand on the person of the maker. A verdict having been rendered for the bank, the defendants in the court below filed errors in arrest of judgment. The error alleged is that the first count in the declaration neither charges a personal demand on the maker of the note, nor excuses the omission to make such demand. The declaration certainly does not charge a demand on the person of the maker; but this was not necessary, if the parties had agreed that a demand at the bank should be substituted for a demand on the maker. The plaintiffs in error contend that the agreement is not alleged in the declaration, and we admit that the omission to make this averment would be fatal. In that event, the plaintiff below would have shown no cause of action. But the declaration avers a demand of the note 'at the Bank of the Metropolis,' where the said note was payable. The note is set out in the declaration, and does not purport, on its face, to be made payable at the bank. But the averment in the declaration that it was payable there cannot be true, unless there was an agreement of the parties to that effect. It is an averment which must have been proved at the trial, or the plaintiff below could not have obtained a verdict and judgment. After a verdict, it is, we think, sufficient to sustain the judgment."]

BANK OF THE METROPOLIS, (GUTTSCHLICK v.) See Case No. 5,880.

Case No. 901.

BANK OF THE METROPOLIS v. MOORE.

[5 Cranch, C. C. 518.] [1]

Circuit Court, District of Columbia. Nov. Term, 1838.[2]

NEGOTIABLE INSTRUMENTS—POWER OF ATTORNEY FOR RENEWAL — ACTS BEYOND AUTHORITY — USURY.

1. Under a power of attorney from several persons to sign a joint promissory note, the at-

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Affirmed in 1 Pet. (26 U. S.) 89.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Affirmed in 13 Pet. (38 U. S.) 302.]

torney may make a joint and several promissory note, the purpose of the parties being to renew a joint and several note which had been discounted by the plaintiff; or if the power was defective, the note was only void to the extent to which the attorney exceeded his authority; that is, as a several note, but was valid as a joint note.

[See note at end of case.]

2. This discount, by a bank, of a note made payable directly to itself, is not usurious; such being the usage of the banks.

[See Bradley v. McKee, Case No. 1,784.]

[At law. Action upon a promissory note by the Bank of the Metropolis against Thomas P. Moore. Judgment for plaintiff. This was subsequently affirmed by the supreme court in Moore v. Bank of the Metropolis, 13 Pet. (38 U. S.) 302.]

Assumpsit upon the following promissory note: "$5,000. Washington, 16th February, 1837. Sixty days after date, we jointly and severally promise to pay the president and directors of the bank of the Metropolis, or order, at the said bank, five thousand dollars, for value received. Richard M. Johnson, Thomas P. Moore, P. H. Pope, by their attorney, George Thomas." The first count of the declaration states, that on the 16th of February, 1837, the defendant and one Richard M. Johnson, and one P. H. Pope, by George Thomas, their attorney, at Washington county, made their note, &c., and thereby, sixty days after the date thereof, jointly and severally promised to pay, &c. The second count avers, that the defendant, on the 16th of February, 1837, by George Thomas, his attorney, at the county aforesaid, made his certain note, &c., and thereby, sixty days after the date thereof, promised to pay, &c. To these were added the common money counts, one of which was for money had and received to the plaintiff's use. The cause came to trial upon the general issue.

Mr. Coxe, for the plaintiffs, offered in evidence the note of the 16th of February, 1837, and the following power of attorney to Mr. Thomas, who was also cashier of the plaintiff's bank. "Whereas we have a joint and several note of hand, discounted in the Bank of the Metropolis: Now, know all men by these presents, That we, Richard M. Johnson, Thomas P. Moore, and P. H. Pope, all of the state of Kentucky, do hereby nominate, constitute, and appoint, George Thomas, of the city of Washington, our true and lawful attorney in fact, and by these presents do authorize and empower him, for us and in our names, to sign our joint note to the president and directors of the Bank of the Metropolis, for five thousand dollars, for our accommodation, and the same to renew from time to time as it may become due, for the whole or any part thereof. Hereby ratifying and confirming all and every the act and acts of our said attorney, in and about the premises, so long as the bank shall continue the accommodation to us. In witness whereof, we have hereunto set our hands and seals, at the city of Washington, the 29th day of February, 1836. Richard M. Johnson, (Seal.) P. H. Pope, (Seal.) T. P. Moore, (Seal.) Witness, Samuel Stettinius."

Brent & Brent, for the defendant, objected to the plaintiff's counsel reading the note in evidence, because it appeared to be a joint and several note, whereas the power of attorney only authorized Mr. Thomas to sign a joint note. Every power must be strictly pursued. Bank of Columbia v. Patterson, 7 Cranch, [11 U. S.] 299.

Mr. Coxe, contra. The power of attorney recites that they had a joint and several note discounted by the bank, and the presumption is that the note which they authorized Mr. Thomas to sign was intended to renew that joint and several note, and was to be such a note as would effect that object; but a joint note would not have been satisfactory to the bank; they would not have received it in lieu of the former note. But the plaintiffs may recover upon the common counts. The only difference is in the form of the action. If the note is a joint note only, the defendant cannot object to reading of it in evidence. He can only plead the non-joinder of the other parties to the note in abatement.

The plaintiff also offered evidence to prove that on the 27th of March, 1834, the defendant, with Richard M. Johnson and P. H. Pope obtained a discount of their joint and several note payable directly to the bank by its corporate name for $5,000 at four months, and drew the proceeds by their joint check, amounting to $4,896.67; which note was not paid at maturity, but laid over until the 30th of January, 1836, when it was cancelled, the arrears of interest paid up and a new joint and several note given by the same parties for $5,000, payable to the bank or order six months after date, which was also discounted by the bank, and the proceeds, (namely, $4,836.67,) carried to the credit of the makers. That Mr. Thomas, professing to act under and by virtue of the power of attorney aforesaid, made the note upon which the suit was brought, which was also discounted by the plaintiffs, and the proceeds, ($4,946.67,) carried to the credit of the makers, and the arrears of interest being paid up, the note of the 30th of January, 1836, was cancelled; to the admissibility of all which evidence, the defendant, by his counsel, objected; but

THE COURT, (CRANCH, Circuit Judge, contra) overruled the objection and admitted the whole of the evidence (including the note upon which the suit was brought,) to be given in evidence; and the defendant took his bill of exceptions.

THRUSTON, Circuit Judge, was understood as being of opinion that it appeared to be the intent of the parties to authorize Mr. Thomas to make such a note as would be received by the bank in lieu of the old joint and several note; and that the bank

would not have received a mere joint note in the place of a joint and several note; and that the power should be construed according to such intent.

MORSELL, Circuit Judge, was understood as being of opinion that if the power was defective, the note was only void to the extent in which the attorney exceeded his authority, and that it was good as a joint note, if not as a joint and several note.

CRANCH, Circuit Judge, was of opinion that the attorney, having exceeded his authority in making the note joint and several, it was altogether void, and was inadmissible upon the counts upon the note, if not upon all the counts; and that the court ought to reject it.

After the court had thus admitted the note in evidence, the plaintiff offered evidence, by the testimony of Mr. Thomas, the cashier, "that the money would not have been loaned but upon the joint and several note of the parties;" and that "the power of attorney was given for the single purpose of acting for said parties in relation to said last-mentioned note, and the renewal thereof," that is, the note of the 30th of January, 1836.[3]

The defendant's counsel, in addition to the evidence already stated, offered evidence tending to prove that the banks in Washington county in the District of Columbia, have been in the practice (some banks for less, and some for more than twenty years,) of taking and discounting notes in the form of the one now in suit, made directly to the banks or some of their officers for their use, whenever offered, and that the banks preferred to loan upon such paper; that the reason of this practice has been one of mutual convenience to the borrower and to the banks; the first being saved from the costs of protest; and the last being saved the risk of a failure to give notice to the indorser; and that it was very usual for the banks to lend money on a pledge of stock, taking in return the single note of the borrower payable to the banks or some of their officers without indorsement. That it had been the practice and usage of the said banks in this county, to discount, indiscriminately, paper on which there was an indorser or indorsers, or in which all the parties were drawers, and the paper drawn directly to the bank itself or some of its officers acting in its behalf; that both were considered equally the subjects of such discount, but that in all of the said banks the major part of the accommodation paper discounted was in the form of notes drawn by one party in favor of another person who indorsed it to the bank; and that the note in suit was discounted in the usual manner. The defendant then offered evidence that on the 27th of March, 1834, the plaintiffs discounted the joint and several note of R. M. Johnson, P. H. Pope, and the defendant, for the amount of $5,000, and reserved out of the proceeds thereof $103.33 as interest or discount upon the same for four months and four days; that the said note laid over unpaid, until the 30th of January, 1836, when the sum of $450 was paid on the same as interest in arrear; and that on the same day a second note was given by the same parties to the plaintiffs in renewal of the first described note, payable in six months after its date, which was discounted by the plaintiffs, who at the time of discounting the same received the sum of $153.33 as interest on the same for six months and four days. That this note also laid over until the 16th of February, 1837, when the sum of $166.67 was paid on it as interest in arrear from the 30th of July, 1836, to the 16th of February, 1837, on which day the note in suit was given in renewal of the last described note, and was on the same day discounted by the plaintiffs, who then received the sum of $53.33 as the interest in advance for sixty-four days.

Whereupon the defendant's counsel prayed the court to instruct the jury, as follows:

1. That if they should believe, from the evidence, that the note in suit was given in renewal of other notes previously given by the same parties to the plaintiffs, who received or reserved in advance, as discount, the interest at the rate of six per cent. per annum on the amount of the debt mentioned in said notes or any of them, for the times they or any of them had to run, then the receipt or reservation of said interest in advance, is evidence of usury, and the jury may infer usury from the same.

2. That if the jury believe, from the evidence, that the note in suit was given in renewal of other notes successively given by the same parties to the plaintiffs for the amount of $5,000 loaned to the said parties by the plaintiffs, and that at the time of the original loan the plaintiffs reserved the interest on the said sum of $5,000, at the rate of six per centum per annum for the time the original note had to run; or that at the time of renewing or discounting the note in suit the plaintiffs received of the makers thereof, or any one for them, the interest in advance for the period of sixty-four days, then said facts are evidence of usury in the transaction, and the jury may infer usury from said facts, in said note in suit.

3. That if the jury believe from the evidence, that the note in suit was given to the plaintiffs in renewal of a note, for the same amount, drawn by the same parties directly to the plaintiffs as payees, payable six months after date, which had been previously discounted by the plaintiffs for the accommodation of the said parties; and that, on said note

[3] Upon this evidence being given, Cranch, C. J., made the following memorandum in his note-book: "This evidence was given after the court had decided that the note should be read in evidence; and perhaps decides the case in favor of the plaintiffs upon error in the supreme court; but although the intent may have been so, yet the means are not sufficient in law to execute that intent. W. Cr."

drawn at six months, the plaintiff received, at the time of discounting it, the interest in advance, for six months and four days, at the rate of six per cent. per annum, on the amount of said note; the said facts are evidence of usury; and it is competent for the jury to infer usury in the note in suit.

4. That if the jury believe from the evidence, that the plaintiffs received, on the day of the date of the note in suit, the sum of $166.67 as and for interest alleged to be due from the 30th of July, 1836, to the 16th of February, 1837, (six months and seventeen days,) on a prior note for $5,000 given by the same parties to the plaintiffs, falling due on the said 30th of July, 1836, and that the note in suit was given in renewal of the said note falling due on the 30th of July, 1836, then the plaintiffs have taken illegal interest, and it is competent for the jury to infer that the note in suit was given in pursuance of an usurious agreement.

5. That the written power of attorney executed to George Thomas by the defendant, together with R. M. Johnson and P. H. Pope, gives no authority to said Thomas to execute a joint and several note in behalf of the said parties, and that the defendant cannot be charged in this action, by reason of any joint and several note purporting to be executed by the said R. M. Johnson, P. H. Pope, and this defendant, by the said Thomas, as their attorney under said written power.

But THE COURT (CRANCH, Circuit Judge, contra) refused to give any of the said instructions; and the defendant took his bill of exceptions.

CRANCH, Circuit Judge, dissented, because the transaction seemed to him,—from the evidence as stated in the prayer for the instructions,—to be a direct loan of the sum of $4,896.67, to be repaid at the end of the four months and four days, with the sum of $103.33 for the forbearance of the said sum of $4,896.67, for the said four months and four days, which was three dollars and thirteen cents more than at the rate of six per centum per annum, in direct violation of the statute of usury; and a practice in violation of the law cannot justify an illegal transaction. Interest in advance can only be justified in a regular mercantile discount of negotiable paper.

NOTE. [from original report.] The defendant carried the cause, by writ of error, to the supreme court, where the judgment was affirmed upon the money counts, without giving any opinion as to the admissibility of the note of the 16th of February, 1837. Upon the question of usury they would not permit the counsel for the plaintiff in error to argue; "the point being considered as settled;" but they did not say in what case. [Moore v. Bank of the Metropolis,] 13 Pet. [38 U. S.] 302.

BANK OF THE METROPOLIS, (NEW ENGLAND BANK v.) See Case No. 10,152.

Case No. 902.

BANK OF THE METROPOLIS v. SWANN.

[4 Cranch, C. C. 139.][1]

Circuit Court, District of Columbia. May Term, 1831.

APPEAL BOND — ACTION ON — MEASURE OF DAMAGES.

1. In an action upon an appeal-bond to the supreme court of the United States, in setting forth the breach of the condition, it must be averred that the plaintiff has sustained damages to a certain amount, by the defendant's not making his plea good.

2. The defendant is not bound by the condition of the bond, absolutely to pay the amount of the original judgment, nor even the damages and costs that may be awarded by the appellate court for the delay; but only to answer such damages and costs as the appellee shall sustain by the appellant's failure to make his plea good.

At law. Debt upon a bond given upon appeal to the supreme court of the United States, executed by Robert Y. Brent, Joseph Pierson, and the defendant, Thomas Swann, to the plaintiff, [the Bank of the Metropolis,] in the penalty of $2,500. dated 14th February, 1825, with the following condition: "Whereas lately, at a circuit court of the United States, for the District of Columbia, in the county of Washington, in a suit depending in the said court, wherein the Bank of the Metropolis was plaintiff, against Joseph Pierson and Robert Y. Brent, executors of Robert Brent, [Case No. 900,] a final decree was passed against the said Joseph Pierson and Robert Y. Brent, executors of Robert Brent, and the said Joseph Pierson and Robert Y. Brent, executors of Robert Brent, having entered an appeal from the said decree of the said circuit court to the supreme court of the United States, and obtained a citation," &c.; "Now the condition," &c., "is that if the said Joseph Pierson and Robert Y. Brent, executors of Robert Brent, shall prosecute their appeal to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and virtue." The declaration, after setting forth the bond, (with profert,) and the condition, says: "Nevertheless, the said plaintiffs, in fact, say, that after the making of the said writing obligatory, to wit, at the term of January, 1828, the said cause came on to be heard before the said supreme court of the United States, and the said decree of the said circuit court was thereupon affirmed, with costs, to wit, on the 11th of February, 1828, at the county aforesaid, of which the defendant then and there had notice, whereby the said Joseph Pierson and Robert Y. Brent, executors of Robert Brent, did not prosecute their appeal to effect. And the said plaintiffs, for assigning a further breach of the said condition of the said writing obligatory, according to the form of the statute in such case made

[1] [Reported by Hon. William Cranch, Chief Judge.]

and provided, further say, that the said Joseph Pierson and Robert Y. Brent, executors of Robert Brent, did not, after making the said writing obligatory, namely, on the said 11th of February, 1828, or on any other day between that day and the day of the impetration of this writ, namely, at the county aforesaid, answer the damages and costs, if they should fail to make their plea good, but suffered and permitted the same, to a large amount, (namely, the sum of eleven hundred and one dollars and 75-100, with interest from the 29th day of July, (18—,) as also the sum of —— by the court adjudged to the said plaintiffs, for their costs and charges by them, about their suit, in that behalf laid out and expended; and also the further sum of thirty-two dollars and ninety-four cents, by the said supreme court likewise adjudged to the said plaintiffs for their costs and charges by them, about their suit, in that behalf expended,) to be, and remain due, and in arrear, and unpaid, whereby an action hath accrued to the said plaintiffs to have and demand of and from the said defendant, the said sum of two thousand five hundred dollars, above demanded; yet the said defendant, although often requested so to do, hath not yet paid the said sum of two thousand five hundred dollars, above demanded, or any part thereof, to the said plaintiffs, but the same to pay hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiffs, one thousand dollars, and therefore they bring suit," &c.

To this declaration, the defendant, after oyer, demurred, and assigned the following causes of demurrer: 1st. Because the decree of the circuit court, referred to in the declaration, is not set forth. 2d. Because the judgment of the supreme court is not particularly set forth. 3d. Because the bond only binds the assets of Robert Brent, deceased, and it does not appear, in and by the declaration, that there are assets wherewith the said judgment could be paid. 4th. Because it does not appear, by the declaration, that the defendants are, at this time, liable, personally, to the payment of the moneys claimed by the said declaration. 5th. Because the whole proceedings are erroneous and illegal.

Mr. R. S. Coxe, for plaintiffs, contended that the executors had, by this bond, bound themselves, personally, to pay the penalty of the bond; that it must be presumed that the judgment below was a judgment against them, personally, and for which they were personally liable, because, under the testamentary system of Maryland, (in force here,) no other judgment could be final, and no appeal lies, but from a final judgment or decree; that the defendant is bound to pay, not only the amount of the judgment below, but the costs in the supreme court, and the damages in that court, adjudged for the delay; and he cited 2 Tidd, Pr. 1082; and Laserre v. Johnson, 2 Strange, 745; 2 Ld. Raym. 1459; 16 & 17 Car. II. c. 8, § 3; 3 Jac. c. 8, as to Bail in Error; Act Md. 1789, § 22; Act Md. 1796, §§ 1, 2; 1 Hans. Ent. 22, 549; 2 Hans. Ent. 315; Smoot v. Lee, in this court, [Case No. 13,133.] See, also, Catlett v. Brodie, 9 Wheat. [22 U. S.] 553; Baits v. Peters, Id. 556; 1 Saund. 117, and Tucker v. Lee, in this court, [Case No. 14,221.]

Mr. Swann cited 1 Hans. Ent. 20, and 2 Hans. Ent. 315.

CRANCH, Chief Judge, after stating the case, as aforesaid, delivered the opinion of the court, (THRUSTON, Circuit Judge, absent.)

This is a bond with a collateral condition. The obligors are not bound as they were in the recognizance of bail in error, required in England, by the statutes of 3 Jac. c. 8, and 16 & 17 Car. II. c. 8, and in the appeal-bond required by the Maryland statute of 1713, c. 4, "to satisfy and pay, (if the judgment be affirmed,) all and singular the debts, damages, and costs adjudged upon the former judgment, and all costs and damages to be also awarded for the same delaying of execution;" but the condition of this bond is simply to prosecute the appeal to effect, and answer all damages and costs, if the appellants shall fail to make their plea good. To prosecute their appeal to effect, and to make their plea good, are equivalent expressions. If the appellants fail to prosecute the appeal to effect, they fail to make their plea good, and vice versa. The obligation, then, is simply to answer all damages and costs, if the appellants shall fail to make their plea good. They are not to pay any specified sum—they are not absolutely bound, as under the English and the Maryland law, to pay and satisfy the original judgment, or even the damages and costs that may be awarded by the appellate court for the delay, but to answer such damages and costs as the appellee shall sustain or incur by their failing to make their plea good. Before the obligee can have a cause of action upon the bond against the obligors, by reason of the appellant's not answering all damages and costs for failing to make their plea good, damages and costs must have been sustained and incurred, and must be ascertained and averred in the assignment of the breach of the condition of the bond; for, in contemplation of law, that which is not averred, does not exist. In this declaration, no damages are averred to have been sustained by the obligees in consequence of the failure of the appellants to make their plea good, or to prosecute their appeal to effect. In the case of Tucker v. Lee, in this court, at May [December] term, 1829, [Case No. 14,221,] this objection, after argument and great deliberation, was adjudged to be fatal in that cause. In the present case, the judgment is not set forth, either directly, or by reference to any record, so that the court can see what was the nature of that

judgment, and whether it was a judgment at law or a decree in equity. It is, indeed, called a "decree," which in general, implies that it was in a suit in equity or admiralty; but whether it was a decree for the specific execution of an agreement, or for a perpetual injunction, or whether it was against the appellants in their representative character, or personally, merely describing them as executors, does not appear; so that it is impossible for the court to ascertain, judicially, that the obligees have sustained any damages.

Nor does the declaration aver that the original decree in the court below, has not been performed and satisfied by the appellants; nor does it state what was the decree or judgment of the supreme court. These appear to the court to be fatal objections to the declaration, and therefore it is not necessary to notice another objection stated as a particular cause of demurrer; namely, that the bond binds only the assets of the testator, Robert Brent.

The judgment upon the demurrer must be for the defendant. The plaintiffs had leave to amend on payment of the costs of the amendment. This cause was afterwards settled by the parties.

Case No. 903.

BANK OF THE METROPOLIS v. WALKER.

[2 Cranch, C. C. 294.][1]

Circuit Court, District of Columbia. April Term, 1822.

NEGOTIABLE INSTRUMENTS—TIME OF DEMAND—NOTICE TO INDORSER.

If payment of a promissory note be demanded of the maker on the third day of grace, after banking hours, and notice of the non-payment be given to the indorser on the next day, the demand is not too soon, nor the notice too late.

[See Bank of Alexandria v. Wilson, Case No. 856; Lenox v. Wright, Id. 8,249; Read v. Carberry, Id. 11,604.]

[At law. Action upon a contract of indorsement by the Bank of the Metropolis against Joseph Walker. Verdict was given for plaintiff, subject to the opinion of the court upon a case stated. Judgment is now given for plaintiff. Thereafter a rule upon the marshal to show cause why certain moneys levied by him upon the defendant's land in another action should not be paid in satisfaction of the judgment in this case was discharged in Bank of the Metropolis v. Walker, Case No. 904.]

Assumpsit against the last indorser of Toppan Webster's note for $1,000, due 10th, 13th January, 1819. All the parties lived near the Bank of the Metropolis, in the city of Washington. Payment was demanded of the maker, by a notary public, on the 13th of January, the last day of grace, after 3 o'clock P. M., and notice of non-payment was given to the defendant on the next day, viz: on the 14th of January. A verdict for the plaintiff was taken subject to the opinion of the court, upon the said facts, whether the demand and notice were competent and sufficient in law to charge the defendant in this action with the payment of the said sum of $1,000, in the said note mentioned. The note was not made payable at any bank, and it was proved to be the practice of some of the notaries in this district to give notice on the day of the demand of payment, and of others to give notice on the next day.

Mr. Jones, for the defendant, cited Chitty on Bills, 318, &c. The note must be paid on the three days of grace, when demanded. If not then paid it is dishonored, and notice should be given immediately. All the parties lived within a few minutes' walk of each other. Notice should be given on the same day. Tassell v. Lewis, 1 Ld. Raym. 743. In Lenox v. Roberts, 2 Wheat. [15 U. S.] 373, the supreme court of the United States said, that notice must be given by mail on the third day of grace. See, also, 6 East, 3; 15 East, 291; and Chit. Bills, (Ed. 1821, by Cary,) 401.

THE COURT stopped Mr. Lear, in reply, and said that the demand and notice were sufficient.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 904.

BANK OF THE METROPOLIS v. WALKER.

[2 Cranch, C. C. 361.][1]

Circuit Court, District of Columbia. Dec. Term, 1822.

JUDGMENT LIEN—PRIORITIES — SPECIAL VERDICT.

A judgment upon a special verdict, or upon a verdict subject to the opinion of the court upon a case stated, does not relate back to the date of the verdict, [rendered at a preceding term,] so as to overreach an intermediate judgment against the same defendant in another cause.

[At law. Action upon a contract of indorsement by the Bank of the Metropolis against Joseph Walker. Verdict was given for plaintiff, subject to the opinion of the court upon a case stated. Thereafter judgment was given for plaintiff. Bank of the Metropolis v. Walker, Case No. 903. The hearing is now upon a rule that the marshal show cause why he should not satisfy the judgment out of funds obtained by him by a levy upon another judgment against defendant's lands in favor of King and Langley. Rule discharged.]

The plaintiffs (the Bank of the Metropolis) obtained a verdict against the defendant

[1] [Reported by Hon. William Cranch, Chief Judge.]

at October term, 1821, subject to the opinion of the court upon a case stated. Before any argument upon the points reserved, the cause was continued to April term, 1822, and argued on the 2d of May. and also on a subsequent day. The court, on the 7th of June, 1822, rendered judgment for the plaintiff upon the case stated.

In the intermediate time, viz. on the 24th of April, 1822, King and Langley recovered a judgment against the same defendant, (Joseph Walker,) and the marshal levied the fieri facias upon the defendant's land, and made the money. The Bank of the Metropolis obtained a rule upon the marshal to show cause why he should not pay over to that bank the money which he had thus made out of the defendant's real estate upon the fieri facias in favor of King and Langley, and upon the ground that the judgment in favor of the bank, upon the case stated, related back to the time of the finding of the verdict at October term, 1821, and overreached the judgment in favor of King and Langley, rendered on the 24th of April, 1822.

In support of this idea, Mr. Ashton, for the bank, cited the case of Perry v. Wilson, 7 Mass. 395, where a case was ordered by the court to stand over for advisement, and the defendant died. The court said that they would take care that the plaintiff should not suffer by the delay of the court, and ordered the judgment to be entered as of the preceding term.

Mr. Morfit, contra, cited Taylor v. Harris, 3 Bos. & P. 549, and Welsh v. Murray, 4 Dall. [4 U. S.] 320.

THE COURT discharged the rule, being of opinion that the judgment did not relate back to the verdict; no argument having been had upon the case stated, nor had it been submitted to the court before the cause was continued, by consent from October term, 1821, to April term, 1822. It was not continued under cur. ad. vult.

Case No. 905.

BANK OF THE STATE OF SOUTH CAROLINA v. BICKNALL et al.

[43 Hunt, Mer. Mag. 586.]

Circuit Court, D. Rhode Island. June Term, 1858.

EQUITY — BILL TO COMPEL DELIVERY OF COTTON.

This was a suit in equity brought to compel the defendants [Bicknall and Skinner] to deliver up a quantity of cotton shipped to them for sale by Michael Lazarus, of Charleston, under whom the bank claimed, the complainants offering to deliver up to the defendants the bills accepted by them which had been drawn against the shipment. The bill sustained as to a portion of the specific cotton admitted to have been in the hands of the defendants at the date of the commencement of the suit; and decree for the plaintiffs accordingly.

[NOTE. The facts of this case were similar to those in Bank of South Carolina v. Bicknell, Case No. 898, except that the bill in that case was brought to recover upon a policy of insurance upon certain cotton lost by perils of the sea, while in this case the bill is brought to recover possession of the cotton itself. Nowhere more fully reported; opinion not now accessible.]

Case No. 906.

BANK OF THE UNITED STATES v. ABBOTT.

[3 Cranch, C. C. 94.][1]

Circuit Court, District of Columbia. May Term, 1827.

NEGOTIABLE INSTRUMENTS—EXTENSION OF TIME—DISCHARGE OF INDORSER—EVIDENCE — DEMAND AND NOTICE.

1. After demand and notice to the indorser, the plaintiff may agree to give time to the maker of the note, without discharging the indorser.

[Cited in Bank of U. S. v. Macdonald, Case No. 925.]

2. The testimony of the notary, that he demanded of the maker payment of the note on the third day of grace, and gave notice to the indorser of the non-payment on the third and also on the fourth day, is competent evidence of demand and notice, although the witness does not recollect the day of the month on which such demand was made and such notice given.

[See Coyle v. Gozzler, Case No. 3,312; M'Lemore v. Powell, 12 Wheat. (25 U. S.) 557.]

At law. Assumpsit against the indorser of Rind's promissory note.

J. Dunlop, for the defendant, prayed the court to instruct the jury, that if they should find, from the evidence, that the bank, after the demand and notice to the defendant, agreed to give time to the maker, who had previously given a deed of trust to secure the bank, the defendant was discharged from his liability; which instruction THE COURT (THRUSTON, Circuit Judge, contra) refused to give.

The witness, Brooke Mackall, the notary, testified that he made the demand on the third day of grace, and gave notice to the indorser on the third, and also on the next day thereafter; but on cross-examination said he could not recollect the days of the month and year, without reference to his notarial book, which was in the hands of the plaintiffs, and was not in court, or to certain copies from that book, which were in the hands of the plaintiff's counsel; but he testified positively that he had a distinct recollection, independently of his book, that it was on the third and fourth days of grace.

Mr. Dunlop moved the court to instruct the jury, that the testimony of Mr. Mackall was not competent evidence of demand and notice; which instruction THE COURT (THRUSTON, Circuit Judge, contra) refused to give.

Verdict for plaintiff, $2,563.

[1] [Reported by Hon. William Cranch, Chief Judge.]

BANK OF THE UNITED STATES, (BANK OF WASHINGTON v.) See Case No. 947.

Case No. 907.

BANK OF THE UNITED STATES v. BARRY.

[2 Cranch, C. C. 307.][1]

Circuit Court, District of Columbia. April Term, 1822.

NEGOTIABLE INSTRUMENTS—DEMAND—INDORSER'S LIABILITY.

A verbal notice to the indorser on the 18th, (being the day after the last day of grace,) that payment had been demanded of the maker on the 17th, and that the note would be protested if not paid on that day, (the 18th,) is not a sufficient notice to charge the indorser.

At law. Assumpsit against [James D. Barry] the indorser of Thomas Foyle's note due 14th-17th of October, 1820. Payment was demanded of the maker on the 17th; and the notary on the 18th gave verbal notice to the defendant that the note was due and would be protested for non-payment, unless paid on that day; and that he had demanded payment of the maker of the note on the 17th.

A verdict was taken for the plaintiffs, subject to the opinion of the court upon the sufficiency of the notice to the defendant. The maker and defendant both resided in the city of Washington.

THE COURT (nem. con.) was of opinion that the notice was not sufficient. Non-pros.

Case No. 908.

BANK OF THE UNITED STATES v. BENNING.

[4 Cranch, C. C. 81.][1]

Circuit Court, District of Columbia. May Term, 1830.

EVIDENCE—DEFECTIVE RECORDS—ESTOPPEL BY DEED—CONVEYANCES.

1. If the proceedings in equity have not been recorded at full length, the original papers, documents, and docket-entries may be adduced and used in court as constituting the record of the case.

[Cited in Bruce v. Manchester & K. R. R., 19 Fed. 346.]

2. An original deed, which has been recorded in the land-records under a decree in chancery in conformity with the act of the legislature of Maryland, 1792, c. 41, § 3, may be adduced in a subsequent action of ejectment, and identified as the deed thus ordered to be recorded, although it did not continue to remain on file in the suit in which it was ordered to be recorded.

3. The record copies in the books of land-records may be read in evidence without proving the execution or loss of the original deeds.

[See Peltz v. Clarke, Case No. 10,914; same case, on appeal, 5 Pet. (30 U. S.) 481; Beall v. Dick, Case No. 1,162; Thomas v. Magruder, Id. 13,904.]

4. Parol evidence may be given that the persons who took and certified the acknowledgment of a deed of real estate were, at the time of taking and certifying the same, justices of the peace; and it is not necessary that their official character should appear on the face of their certificate of acknowledgment.

[See Van Ness v. Bank of U. S., 13 Pet. (38 U. S.) 17; Shults v. Moore, Case No. 12,824; Willink v. Miles, Id. 17,768.]

5. The parties to deeds are estopped to deny the truth of the recitals therein; and if the deeds are offered only to show the transmission of the legal title, the truth of the recitals need not be proved aliunde.

6. If a deed of bargain and sale be made by a trustee, the legal estate passes whether the terms of the trust are complied with, or not; for if the bargainee takes with notice, he himself stands as trustee in place of the bargainor; if without notice and for valuable consideration, he takes an absolute title; for a trustee conveys by virtue of the legal estate vested in him, and not by virtue of a power.

7. A deed of bargain and sale by a person not in possession is void.

8. When the plea is not guilty, or defence on title, the defendant may give evidence of possession without warrant and location.

At law. Ejectment for the western moiety of lot No. 2, in the square No. 348, in the city of Washington.

It was agreed that the plaintiffs need not trace their title farther back than to the commissioners of the city of Washington. The plaintiffs claimed title by a deed from those commissioners to John Murdoch, December 19, 1801; from Murdoch to Walter Smith, April 5, 1805; and from Charles Lowndes to the said Smith, May 3, 1803; from the said Smith to Benjamin Stoddert, March 5, 1807; from Stoddert to T. G. Slye, March 5, 1807; and from Slye to the lessors of the plaintiffs, July 10, 1828.

Upon the trial, Mr. Key, for the plaintiff, offered to read these deeds from the copies in the land-record books of this county; except the deed from Stoddert to Slye, the original of which he produced, dated March 5, 1807, but not recorded until July 27, 1826, when it was recorded under a decree of this court as a court of chancery, in pursuance of the provisions of the Maryland act of assembly of 1792, c. 41, § 3, upon a petition by the Bank of Columbia, who then claimed under the deed. The record of that case not having been made out in full by the clerk, the plaintiffs' counsel offered to read to the court the original papers, docket-entries, and minutes of the proceedings and decree in that case; but the original deed, which had been filed with the petition and continued on the files in that cause until the passing of the decree for recording, had been taken from the files to be recorded in the book of land-records, with the decree, and after being recorded, was delivered to petitioners, who kept it till it was now produced here in court. No other evidence was offered of its execution, but the clerk had by an indorsement upon it certified that it was recorded by virtue of the decree of the court.

[1] [Reported by Hon. William Cranch, Chief Judge.]

It appeared by the recitals in some of the deeds, that the deed from Murdoch to Walter Smith was a trust-deed, and the defendants contended that the plaintiffs must show that the deed from W. Smith to Stoddert was in pursuance of, or in conformity with, the terms of the trust; and that the facts stated in the recitals must be proved aliunde, as the defendant not being a party to nor claiming under these deeds, is not bound by those recitals.

The defendant's counsel, Mr. Coxe and Mr. Jones, objected, that it did not appear by the certificate of the persons who took and certified the acknowledgment of the deed from W. Smith to B. Stoddert that they were then justices of the peace.

The plaintiffs' counsel then offered parol evidence of that fact, and that they were then known and acting as such, and also the record of their qualification as such by taking the oaths of office.

To all the evidence so offered on the part of the plaintiff the defendant's counsel objected.

But THE COURT (THRUSTON, Circuit Judge, absent) overruled all the objections, and permitted the evidence to go to the jury; (the defendant not having shown any title or color of title in himself;) CRANCH, Chief Judge, however, doubting whether the record-copies of deeds can be read in evidence without showing the loss of the original.

THE COURT also held and decided,

1. That the deed from Lowndes to Smith may be given in evidence without showing what sort of interest the grantor had, because the legal estate is not claimed through him.

2. That it was not necessary, in order to admit the deed from Smith to Stoddert to be recorded, that the certificate of acknowledgment should state upon its face, that Thomas Corcoran and Richard Parrott, who took and certified the acknowledgment, were justices of the peace at the time of that acknowledgment.

3. That the recitals in the deeds, are evidence as between the parties to those deeds, of the facts therein stated; that those parties are estopped to deny the truth of those facts; and that, as the purpose of offering those deeds on the part of the plaintiff is only to show the transmission of the legal title from the bargainors to the bargainees, it is not necessary for the plaintiff to prove the truth of those recitals.

4. That it is not necessary for the plaintiff to show, that W. Smith, the trustee, had precisely followed the terms of the trust; but that the legal estate would pass to the bargainee, whether the terms of the trust were complied with or not. If the bargainee took with notice of the trust, he would stand as trustee in the place of W. Smith; if without notice and for valuable consideration, then he took an absolute title; so that, in either event, the legal title would pass, and the cestui que trusts only could complain; and that, in a court of equity. W. Smith did not convey by virtue of a power; but by virtue of the legal title vested in him.

The defendant then offered evidence that he and those under whom he claimed, were in possession, under an adverse claim of title from the year 1816 up to, and at the date of the deed from Slye to the Bank of the United States.

Mr. Key, for the plaintiff, objected to evidence of possession without a warrant and location.

THE COURT overruled the objection; the plea being not guilty or defence on title.

THE COURT (nem. con.) was of opinion that as Slye was not seized of the lot at the date of his deed of bargain and sale to the Bank of the United States, the plaintiff could not recover in this action.

Verdict for the defendant. The plaintiff took a bill of exceptions, but no writ of error was issued.

Case No. 909.

BANK OF THE UNITED STATES v. BOMFORD.

[1 Hayw. & H. 256.][1]

Circuit Court, District of Columbia. April 19, 1847.

TRUSTEES—POWERS—VARYING TERMS OF TRUST.

The Bank of the United States made several partial assignments of assets to different bodies of trustees, assigning to each a different class of assets and specifying the objects for which each assignment was made. In one class of these assignments it included the judgment in this case. The defendant tendered payment of this judgment in a manner not contemplated by the terms of the assignment, which embraced this judgment, to wit, payment in the paper of the bank which he had purchased at a large discount. *Held*, that the trustees could not vary the terms of this trust, and must accept payments as designated in the assignments of the assets to them.

At law. Scire facias to revive a judgment [against George Bomford.]

The following statement of facts was submitted to the court for its decision: The Bank of the United States, the above legal plaintiff, made several partial assignments of assets to different sets of trustees for different objects, and among them: (These assignments not to be considered by the court unless admissible in evidence in this cause.) 1st. To James Dundas et al., May 1st, 1841, to secure certain assets, including above debt. 2d. To James Robertson et al., of June, 1841, for other assets, to secure the holders of the bank's paper circulation, &c. Richard Smith was appointed agent for each set of trustees, and as such, on the application of defendant, agreed to receive payment of the above debt in paper of the bank, supposing at the time

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

that the debt was included in the second assignment above, under which the trustees had authorized such payments to be received. Under this agreement the defendant purchased paper at a heavy discount and offered to pay with it; but Mr. Smith, having then discovered that the debt was included in the first assignment, under which such payments were not sanctioned, declined to receive payment in the paper, and thereupon the defendant sold the paper at an advance on the cost. The defendant now claims that he has still the right to pay in such funds, which is denied by the plaintiff. It is admitted that the assignment of the above judgment has not been entered on the docket, and that no notice of the assignment first mentioned was given to defendant by plaintiff until after said tender, and that when Mr. Smith agreed as aforesaid to receive payment in the bank's paper, his motive, as stated before, was not explained to the defendant. If on the foregoing statement the court shall be of the opinion that the plaintiff was not bound to receive payment in the bank's paper so tendered by the defendant under said agreement with said Smith, or in consequence of the subsequent sale of said bank paper by said defendant was relieved from the obligation to receive payment in like paper, as aforesaid, then judgment to be entered generally for plaintiff. If the court shall be of the opinion that under the circumstances the defendant was entitled to pay in such bank paper and has not lost the right in the sale thereof as aforesaid, then he shall have the like benefit of such opinion as he could have by bill in chancery, and judgment shall be entered for plaintiff on the terms that he shall be allowed to pay the same in paper as aforesaid, provided that such paper shall be tendered by such certain day, to be named by the court, as a court of chancery would in such case allow for such tender; and it is agreed that this cause shall be considered by the court as though the several pleas of payment tender and set off, were formally entered, &c.

Clement Cox, for plaintiff.
W. L. H. Smith, for defendant.

THE COURT (DUNLOP, Circuit Judge, not sitting) having considered this case, is of opinion that the plaintiff was not bound to receive payment in the bank paper tendered under the said agreement.

The following endorsement appears on the written opinion: "Mr. Smith desires this case should be considered by the court as if at the time of the submission and decision the defendant had purchased other bank paper, which he had in court to the amount of the plaintiff's judgment ready to be applied thereto; to which desire the plaintiff's attorney answered, 'I have no objection to this.'" THE COURT to this said, "It makes no difference."

Case No. 910.

BANK OF THE UNITED STATES v. BRENT.

[2 Cranch, C. C. 696.][1]

Circuit Court, District of Columbia. May Term, 1826.

BANKS—OFFICIAL BOND—EXECUTED AFTER SERVICE BEGINS—VALIDITY.

1. In an official bond, the words "well and faithfully executed the office, and in all things relating to the same, well and faithfully behave," mean the same as the words "faithfully perform the trust reposed in them." [and do not render the surety liable for want of skill on the part of the principal.]

[See Union Bank of Georgetown v. Forrest, Case No. 14,356.]

2. Quaere, whether the official bond of the teller of a branch bank of the United States, is void because not taken conformably with the 6th article of the rules and regulations for the government of the officers or discount and deposit of the Bank of the United States."

3. It was not void because executed fourteen days after the teller had entered upon the duties of his office.

At law. Debt [by the Bank of the United States against William Brent, surety] upon the official bond of Richmond Johnson, a teller of the office of discount and deposit of the Bank of the United States, at Washington, dated 21st September, 1819, in the penalty of $20,000, the condition of which was, that he should "well and faithfully execute the said office, and in all things relating to the same, should well and faithfully behave." [Heard on demurrer to pleas and demurrer to rejoinder. Judgment for defendant. Recovery was thereafter had by the bank in an action of assumpsit against the teller. See Bank of U. S. v. Johnson, Case No. 919.]

By the 14th article of the constitution of the bank, which is contained in the 11th section of the act of incorporation, the directors are authorized to establish offices of discount and deposit in the several states and territories, "and to commit the management of the said offices and the business thereof, respectively, to such persons and under such regulations as they shall think proper." Under that power the directors established "rules and regulations for the government of the offices of discount and deposit of the Bank of the United States," consisting of thirty-one articles, the sixth of which is in these words: "The tellers, clerks, and servants of the offices shall be appointed by their directors, and before they enter on the duties of their respective offices, bonds shall be given, with sufficient surety, (to be approved by the directors,) for the faithful performance of the trust reposed in them." The breach of the condition of the bond, alleged in the declaration was, "that the said R. J. did not well and faithfully execute the said office, and in all things relating to the same, well and faithfully behave," but at divers

[1] [Reported by Hon. William Cranch, Chief Judge.]

times, by virtue of his appointment of teller, received divers sums of money, amounting to $7,000, &c., "and hath not rendered nor paid to the plaintiffs the said sum of money, nor any part thereof, nor any just, true, or fair account thereof, or of any part thereof," but refused so to do, "contrary to the faithful execution of the said office, and to faithful behavior in relation to the same, and contrary to the form and effect of the said condition."

The defendant pleaded six special pleas; the pleadings upon which resulted in general demurrers, except the third and fifth pleas, upon which issues were joined. The demurrer to the first plea raised the question whether the bond was void because executed fourteen days after the teller had entered upon the duties of his office. The demurrer to the second plea raised the question whether an official bond, with a condition that the officer "shall well and faithfully execute his office, and in all things relating to the same, well and faithfully behave," be a valid bond, if required and taken under a color, and by pretence of a rule, regulation, or by-law which requires that bonds shall be given by the officers "for the faithful performance of the trust reposed in them." The demurrer to the fourth plea raised the question whether, under the condition of a bond "well and faithfully to execute the office, and in all things relating to the same, well and faithfully to behave," the defendant (a surety,) is liable for mistakes made by the officer, in his office, not through want of fidelity or honesty on the part of the officer. The demurrer to the rejoinder to the sixth plea raised the question whether the defendant, under the condition of this bond, (which was required and taken by the plaintiffs, in fulfilment and supposed pursuance of the sixth article of the rules and regulations for the government of the offices of discount and deposit of the Bank of the United States,) was liable for the casual, involuntary, and honest mistakes of the officer, in keeping his accounts, although the condition of the bond be that he shall well and faithfully execute the office. These questions may be reduced to two, namely: 1. Do the words "well and faithfully execute the office, and in all things relating to the same, well and faithfully behave," mean the same as the words "faithfully perform the trust reposed in them?" 2. If they do not, then, whether the bond is void because not conformable to the sixth rule.

Mr. Jones and Mr. Wallach, for the defendant, to show that the bond, if not taken agreeably to the by-law, is void, cited the case of Bank of U. S. v. Dandridge, [Case No. 914,] decided by Marshall, Circuit Justice, in Richmond.

They contended, also, that "well and faithfully," in the condition of this bond, refer only to his fidelity, not to his skill in executing the duties of his office. Such is evidently the intent of the by-law, and the condition ought to be construed in reference to the by-law. President, etc., of Union Bank v. Clossy, 10 Johns. 271; Miller v. Stewart, 9 Wheat. [22 U. S.] 702, Mr. Justice Story's opinion.

Mr. Lear and Mr. Swann, contra.

The directors had a right to take such a bond, and therefore, whether it conforms to the rule or not, it is a valid bond. The case in Johnson was decided upon the particular words of the condition, and not upon any general principle. "Well" refers to skill, "faithfully" to honesty. The two words cover mistakes and fraud.

Mr. Jones, in reply.

The rule is equivalent to a statute, and, within its sphere of action, is as effectual; and the law is clear that a bond taken under a statute must conform to it. See Barton v. Webb, 8 Term R. 459; Shum v. Farrington, 1 Bos. & P. 640; 2 Chit. Pl. 633; Harris v. Mantle, 3 Term R. 307; Foster v. Pierson, 4 Term R. 617.

Mr. Lear cited Rhodes v. Vaughan, 2 Hawks, 167; Hughes v. Smith, 5 Johns. 168; Clap v. Cofran, 7 Mass. 98; Freeman v. Davis, Id. 200; Morse v. Hodsdon, 5 Mass. 314; Stevens v. Boyce, 9 Johns. 292.

November 28, 1826. THE COURT (THRUSTON, Circuit Judge, contra) rendered judgment, upon the demurrers, for the defendant; being of opinion that the words, (in the condition of the bonds) "well and faithfully executed the office, and in all things, relating to the same, well and faithfully behave," substantially mean the same as the words in the sixth article of the rules and regulations, "faithfully perform the trust reposed in them," and the defendant was bound only for the teller's fidelity, not his skill. President, etc., of Union Bank v. Clossy, 10 Johns. 271. The court gave no opinion upon the question whether a bond taken under color of the sixth article of the rules and regulations, &c., be void if it do not substantially pursue the requisition of the article. But upon this point see the cases cited in the argument, and Inhabitants of Nottingham v. Giles, 1 Penn. [2 N. J. Law,] 120; Speake v. U. S., 9 Cranch, [13 U. S.] 28; U. S. v. Sawyer, [Case No. 16,227;] The Struggle, [Id. 13,550;] U. S. v. Morgan, MS. in the circuit court of the United States for the district of Pennsylvania, in 1811, [Id. 15,809;] Armstrong v. U. S., in the circuit court of the United States for district of New Jersey, in 1811, [Id. 549;] U. S. v. Hipkins, in the district court at Norfolk, in December, 1808, [Id. 15,371;] U. S. v. Smith, in the district court for New York, in 1809, [Id. 16,334.]

Case No. 911.

BANK OF THE UNITED STATES v. BUSSARD.

[3 Cranch, C. C. 173.][1]

Circuit Court, District of Columbia. May Term, 1827.

NEGOTIABLE INSTRUMENTS—DEMAND AT PLACE OF PAYMENT.

In an action against the maker of a promissory note, it is not necessary to show a demand of payment at the bank in which it is made payable.

[See Wallace v. McConnell, 13 Pet. (38 U. S.) 136; Covington v. Comstock, 14 Pet. (39 U. S.) 43; Brabston v. Gibson, 9 How. (50 U. S.) 263; Chillicothe Branch of State Bank of Ohio v. Fox, Case No. 2,683; Kendall v. Badger, Id. 7,691.]

At law. Assumpsit against [Daniel Bussard] the maker of a promissory note, to the order of William King, for $10,255, for value received, "negotiable and payable at the Bank of Columbia."

Judgment was confessed, subject to the opinion of the court, whether the plaintiffs could maintain the action without averring and proving demand of payment at the Bank of Columbia.

Mr. Lear, for plaintiffs, cited President, etc., of Bank of U. S. v. Smith, 11 Wheat. [24 U. S.] 171.

Mr. C. C. Lee, for the defendant, cited Beverley v. Beverley, in this court, at Alexandria, [Case No. 1,376,] not then decided, and Rowe v. Young, 2 Brod. & B. 165, 2 Bligh, 391.

THE COURT (CRANCH, Chief Judge, doubting) decided that it was not necessary for the plaintiffs to aver or prove a demand of payment at the Bank of Columbia, in this action against the maker.

BANK OF THE UNITED STATES, (COOTE v.) See Cases Nos. 3,203 and 3,204.

Case No. 912.

BANK OF THE UNITED STATES v. CORCORAN.

[3 Cranch, C. C. 46.][1]

Circuit Court, District of Columbia. Dec. Term, 1826.[2]

NEGOTIABLE INSTRUMENTS — NOTICE TO INDORSER — EVIDENCE — AGREEMENT NOT TO PLEAD LIMITATIONS.

1. Notice left at the shop of the indorser's son, is not sufficient to charge him, although the shop was in a room of the house in which the indorser resided; the entrance into the shop being separate from that into the dwelling-house; the indorser having no concern in his son's business, and, being postmaster, and having a separate office in which he transacted his public and private business, and the son having a separate dwelling-house.

[See note at end of case.]

2. An agreement by the indorser not to take advantage of the statute of limitations, and to authorize an attorney to agree to docket a suit upon the note, is not evidence from which the jury can infer that the indorser received due notice.

[See note at end of case.]

At law. Assumpsit against [Thomas Corcoran] the defendant as indorser of Daniel Reintzel's note, for $3,700. [Judgment for defendant. This was subsequently affirmed by the supreme court in Bank of U. S. v. Corcoran, 2 Pet. (27 U. S.) 121.]

The notice for the defendant was left at the shop of the defendant's son, kept in the dwelling-house of the defendant, but having a separate entrance, and unconnected with the part occupied by the defendant.

The defendant had no concern with the shop, and the son had a separate dwelling-house. The defendant was postmaster, and kept an office in which he transacted his private business as well as his public. The notary had been in the habit of leaving notices for the defendant at the shop of the defendant's son; but there was no evidence that the defendant had authorized, or acquiesced in, such notices so to be left.

THE COURT (THRUSTON, Circuit Judge, contra) instructed the jury that such notice, so left, was not sufficient to charge the defendant.

Mr. Key, for the plaintiff, then prayed the court to instruct the jury in effect, that if they should be satisfied by the evidence that notice had been duly received by the defendant, although it was so left, the notice was sufficient; and that the two papers (hereafter mentioned), were evidence from which the jury might infer such notice. The papers were, first, an agreement not to take advantage of the statute of limitations; and, second, a promise to authorize counsel to docket a suit upon the note.

But THE COURT (THRUSTON, Circuit Judge, contra) refused to give the instruction, because they thought the papers did not warrant such an inference.

Bills of exception were taken, and upon the writ of error, the judgment was affirmed by the supreme court of the United States upon both points. 2 Pet. [27 U. S.] 121.

[NOTE. Mr. Justice Washington, in delivering the affirming opinion,—Bank of U. S. v. Corcoran, 2 Pet. (27 U. S.) 121,—said:

["It seems from the evidence that the store never was, at any period, the place appointed for the delivery of notices or any other communications to the defendant. But, if it had been, the note in question came to maturity some time in the month of July, 1819, and the proof was, that the defendant took charge of the postoffice some time in the year of 1818, after which that became the place at which notices and other communications to him were usually left, and where he transacted both his private and public business. Were it to be admitted that the service of a notice at a place not appointed by the defendant as the one at which

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Affirmed in 2 Pet. (27 U. S.) 121.]

notices to him were to be delivered would be sufficient in law to charge him, upon the ground that other notices had been previously left at the same place, it would surely be too extravagant to contend that a service at the same place would be legal, after another place had been appointed for that purpose, and where they had in point of fact been usually left.

["Let us now see what were the papers which the plaintiffs had given in evidence, which the court were called upon to declare to the jury were competent evidence from which the jury might make the inference insisted upon: The first is the letter of the defendant, dated the 8th of May, 1822, and addressed to the cashier of the Bank of Columbia, in which he declares that he will not take any advantage of the limitation act for his indorsement on this and another note; the blank authority sent to the defendant by the cashier of the Bank of the United States on the 14th of December, 1824, for the signatures of the defendant and of the maker of the notes, purporting to empower some attorney to docket suits against them on these notes, with a declaration indorsed thereon by the defendant that if the maker of the notes should not be able to satisfy the bank before court, and they should determine to bring suit, he would instruct a particular person to docket the case for him. Let it be admitted that these papers bound the defendant to abstain from making a particular defense to which the law entitled him, and to cause the action intended to be commenced against him to be docketed, so as not to delay the plaintiffs, could the jury from thence infer, with any legal propriety, either that the necessity of proving notice of the nonpayment of the notes would be dispensed with, or the fact that the notice left at the store of James Corcoran was received by the defendant at any time, much less in due time? If this was a question of inference fit to be submitted to the discretion of the jury, it seems to the court that the rules respecting this subject which have been laid down with so much care would no longer be fixed and certain, but would change with the varying conclusions which a jury might draw of the fact from evidence, however slight, given to prove it. What, for example, does the rule that notice must in certain cases be served personally upon the indorser, or be left at his dwelling house or place of business, signify, if a jury may from any evidence, however remote from the fact, presume that the notice, though left at any other place, might have found its way to the hands of the person whom it was intended to charge?"]

Case No. 913.

BANK OF THE UNITED STATES v. CRABB.

[2 Cranch, C. C. 299.][1]

Circuit Court, District of Columbia. April Term, 1822.

NEGOTIABLE INSTRUMENTS—DISCOUNT—USURY.

Taking sixty-four days' discount, upon discounting a note, payable at sixty days, is not usury.

At law. Assumpsit upon a note payable sixty days after date, discounted by the plaintiffs, reserving sixty-four days' discount. Defence, usury.

THE COURT (nem. con.) was of opinion that it was not usury. The argument of counsel was very slight; and after the court intimated its opinion, the defendant withdrew the defence.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 914.

BANK OF THE UNITED STATES v. DANDRIDGE et al.

Circuit Court, E. D. Virginia. 1824.

CORPORATIONS—OFFICERS—APPOINTMENT—EVIDENCE.

[This was an action of debt on an official bond, and was brought by the Bank of the United States against Dandridge as principal, and Carter B. Page, Wilson Allen, James Brown, Jr., Thomas Taylor, Harry Heth, and Andrew Stevenson as sureties. The bond was conditioned to be void if Dandridge should well, truly, and faithfully discharge the duties and trust reposed in him as cashier of the office of discount and deposit of the Bank of the United States at Richmond. The court (by Marshall, Circuit Justice) *held* that, although the bond was duly executed by the defendants, and Dandridge was appointed and continued as cashier, yet there had been no approval and acceptance of the bond as provided by the charter of the bank, and therefore the defendants were not bound thereby. The court also excluded evidence offered to prove the acceptance of the bond, on the ground that the record of the proceedings of the board of directors, or a copy of it, showing the assent of the directors to the bond, was necessary, and if such assent had not been entered on the records the bond was void. This was not because the record was primary evidence, which the plaintiff had it in his power to produce, but rather because a corporation aggregate can act only by writing, or by its duly-appointed officers, and such officers could be appointed only by writing.]

[Cited in Bank of U. S. v. Brent, Case No. 910.]

[NOTE. The foregoing statement of the facts and decision was taken from the report of the case as determined by the supreme court. Bank of U. S. v. Dandridge, 12 Wheat. (25 U. S.) 64. See the dissenting opinion of Mr. Chief Justice Marshall. The opinion of the circuit court is nowhere reported, and is not now accessible.

[On writ of error the judgment of the circuit court was reversed by the supreme court (Mr. Justice Story delivering the opinion) on the ground that the acts of artificial persons afford the same presumptions as the acts of natural persons. "If a person acts notoriously as cashier of a bank, and is recognized by the directors or by the corporation as an existing officer, a regular appointment will be presumed; and his acts as cashier will bind the corporation, although no written proof is or can be adduced of his appointment." Mr Chief Justice Marshall delivered a dissenting opinion, giving the reasons for the decision below. Bank of U. S. v. Dandridge, 12 Wheat. (25 U. S.) 64.]

Case No. 915.

BANK OF THE UNITED STATES v. DAVIS.

[4 Cranch, C. C. 533.][1]

Circuit Court, District of Columbia. March Term, 1835.

NEGOTIABLE INSTRUMENTS—INDORSEMENT TO CASHIER—EVIDENCE OF NOTICE.

1. An indorsement to the cashier of a bank is virtually an indorsement to the bank, and may be so declared upon.

[See Bank of Newbury v. Baldwin, Case No. 892; Blair v. First Nat. Bank, Id. 1,485; Bank of U. S. v. Lyman, Id. 924.]

2. A memorandum in the handwriting of a deceased note-clerk of a bank, that he had delivered a certain notice, may be read in evidence in favor of the bank.

At law. Assumpsit [by the Bank of the United States] upon R. Wright's draft on Jenkins, of Baltimore, in favor of the defendant, Richard Davis, by him indorsed in blank, and by Richard Smith, cashier of the office of the Bank of the United States in Washington, to —— White, cashier of the office of the Bank of the United States in Baltimore.

The declaration stated that Richard Smith indorsed the bill to the plaintiffs, (the Bank of the United States,) without noticing White, to whom the said R. Smith had indorsed it.

Mr. Redin, for the defendant, objected that there was no indorsement. But, it having been proved that Mr. Smith was merely the cashier of the plaintiffs' office here, and Mr. White the cashier of the plaintiffs' office in Baltimore,

THE COURT (nem. con.) was of opinion that the indorsement was virtually to the plaintiffs.

The plaintiffs then offered in evidence a notice signed by the Baltimore notary-public addressed to Mr. Richard Smith, the last indorser, upon the back of which was an indorsement to this effect: "A similar notice delivered to Richard Davis by me, John S. Nevius, January 2d, 1833," and proved that Nevius is dead. That on the said 2d of January, 1833, he was what is called a note-clerk in the bank, and occasionally delivered notices of this kind; but they were more generally given by other officers, called messengers.

The defendant's counsel objected that such memorandums are not evidence unless made by a person whose usual business is to do what he certifies he has done.

But THE COURT (nem. con.) permitted it to be read in evidence to the jury.

Verdict for the plaintiffs, $2,298.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 916.

BANK OF THE UNITED STATES v. DEVEAUX et al.

[1 Hall, Law J. 263.]

Circuit Court, D. Georgia. May Term, 1808.[1]

FEDERAL COURTS—JURISDICTION—CORPORATIONS—BANK OF THE UNITED STATES.

1. The president, directors and company of the bank of the United States, although citizens of the state of Pennsylvania, cannot communicate their right of suing to a corporate body of which they are exclusively members, so as to maintain action in the circuit court of Georgia.

[See note at end of case.]

2. The constitution takes no notice of corporate bodies in enumerating the cases in which the circuit courts have jurisdiction upon circumstances of the persons. Const. U. S. art. 3, § 2.

[See note at end of case.]

[3. Act Feb. 25, 1791, (1 Stat. 191, c. 10,) incorporating the first Bank of the United States, does not confer the right to sue in federal courts.]

[See note at end of case.]

[4. With the exception of imposts or duties on exports and imports, the several states retain all rights of taxing individual property held within their respective jurisdictions, including that of the Bank of the United States.]

[See note at end of case.]

At law. This was an action brought by the president, directors and company of the Bank of the United States (established, as they averred, under an act of congress, entitled, an act to incorporate the subscribers to the Bank of the United States, passed the 26th of February, 1791, [1 Stat. 191, c. 10,]) [against Peter Deveaux, tax collector, and Thomas Robertson, sheriff] for the purpose of trying the right of the state of Georgia to impose a tax on the branch of the said bank established at Savannah. [Heard on demurrer to plea to the jurisdiction. Demurrer overruled. Judgment for defendants. This was afterwards reversed by the supreme court in Bank of U. S. v. Deveaux, 5 Cranch, (9 U. S.) 61. See note at end of case.]

Woodruff & Harris, for plaintiffs.

Leake, Sol. Gen.

Mitchell & Bullock, for defendants.

Before JOHNSON, [Circuit Justice,] and STEPHENS, [District Judge.]

PER CURIAM. The action in this case is trespass. The defendants plead to the jurisdiction of this court, the plaintiffs demur generally, and the case presents, for the consideration of the court, the single question of jurisdiction.

It is incumbent on the plaintiffs to give jurisdiction to this court by proper averments on the record; that jurisdiction must be founded on circumstances of the persons, parties to the action or circumstances of the case. The averments intended to give jurisdiction are, "that the president, directors and company are citizens of the

[1] [Reversed in 5 Cranch, (9 U. S.) 61.]

state of Pennsylvania, and that the bank was incorporated or established by a law of the United States." Upon the first of these averments it is to be observed, that this action must be instituted by the plaintiffs either in their individual or corporate capacity. In the former, it could not be maintained, or if at all, they must have sued by their baptismal names. In the latter, the individual is so totally sunk in their corporate state of existence, that though it were true in fact, that the president, directors and company were all citizens of the state of Pennsylvania, still they could not communicate their right of suing in this court to the corporate body of which they are members. The constitution takes no notice of corporate bodies in enumerating the cases in which this court shall exercise jurisdiction upon circumstances of the persons. A corporation cannot with propriety be denominated a citizen of any state, so that the right to sue in this court under the constitution can only be extended to corporate bodies by a liberality of construction, which we do not feel ourselves at liberty to exercise. As a suit in right of a corporation can never be maintained by the individuals who compose it, either in their individual capacity or by their individual names, how is the citizenship of the individuals of the corporate body ever to be brought into question by the pleadings? With regard to the jurisdiction of this court, as founded upon circumstances of the action, it is necessary, in order to vest that jurisdiction, that the case should be brought within the description of actions arising under the constitution or laws of the United States. The general principle is, that the states retain all the powers of sovereignty, not expressly relinquished to the United States. The states have relinquished the right of taxing individual property held within their jurisdiction, under no possible circumstance, except where such a tax may come within the description of imposts or duties on exports and imports.

There is no question raised under the constitution; neither is it a question arising under the laws of the United States. No privilege or right created by the laws of congress is violated. The legal validity of the bank charter is not denied, nor any difference of opinion entertained of its effects. The act incorporating the bank contains no clause exempting the property of the bank from taxation, neither the construction nor constitutionality of any law of congress, arising under the law of the state of Georgia, in which we can see no clashing or interference with the laws or constitution of the United States. Counsel have argued, that it is a case arising under the laws and constitution of the United States, because we must look into the constitution and bank charter, to determine the question of jurisdiction; but if this prove any thing, it proves a great deal too much. For it would go to give this court jurisdiction in every possible case whatever. There would exist the same necessity of looking into the constitution and laws of the United States, in a case between citizen and citizen of the same state, or in the most ordinary question of state jurisdiction.

It is true, that this view of the subject may expose this valuable institution to some embarrassment; and it is to be regretted, that it cannot be better guarded, but it is to be hoped, that a just and temperate idea of the true policy of the individual states, with its real and extensive importance to the union, will always afford it ample protection; and if their rights are violated, the state courts are open to them.

It is also true, that there have been cases before the supreme court, in which corporate bodies were parties, that have undergone the review of that court, without any notice being taken of this question; but the answer is, that there were no pleas to the jurisdiction in those cases, and any objections that may have been raised upon the face of the record appear to have escaped the attention of the court and counsel. We are happy in understanding that this decision is to be reviewed in the supreme court; its importance in every point of view entitles it to the notice of the highest court in which it can be considered. Plea to jurisdiction sustained, demurrer overruled, and judgment for defendants.

[NOTE.

[This judgment was reversed by the supreme court in Bank of U. S. v. Deveaux, 5 Cranch, (9 U. S.) 61. Mr. Chief Justice Marshall, in delivering the opinion, said:

["The plaintiffs contend that the incorporating act confers this jurisdiction. That act creates the corporation, gives it a capacity to make contracts and to acquire property, and enables it 'to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record or any other place whatsoever.' This power, if not incident to a corporation, is conferred by every incorporating act. * * * The court, then, is of the opinion, that no right is conferred on the bank, by the act of incorporation, to sue in the federal courts. * * *

["The jurisdiction of this court being limited, so far as respects the character of the parties in this particular case, 'to controversies between citizens of different states,' both parties must be citizens, to come within the description. * * * A corporation aggregate is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. * * * Substantially and essentially, the parties, in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals. * * * If, then, the congress of the United States had, in terms, enacted that incorporated aliens might sue a citizen, or that the incorporated citizens of one state might sue a citizen of another state, in the federal courts, by its corporate name,

this court would not have felt itself justified in declaring that such a law transcended the constitution. * * * If a corporation may sue in the courts of the Union, the court is of opinion that the averment in this case is sufficient. Being authorized to sue in their corporate name, they could make the averment, and it must apply to the plaintiffs as individuals, because it could not be true as applied to the corporation."

[FEDERAL CORPORATIONS—RIGHT TO SUE IN FEDERAL COURTS.

[In Osborn v. Bank of U. S., 9 Wheat. (22 U. S.) 738, the decision of the supreme court in the principal case was cited by counsel to show that federal courts had no jurisdiction of suits against the second Bank of the United States. The act of congress incorporating this institution provided that it should have power to sue and be sued in state courts, and in any circuit court of the United States. The supreme court, per Mr. Chief Justice Marshall, held that the incorporating act was a law of the United States, so that the judicial power granted to the United States by the constitution extended to cases arising thereunder, and that the clause conferring such jurisdiction on federal circuit courts was a valid exercise of that power, and applied to all cases in which the bank was a party. The power has been exercised from time to time by congress in respect to particular corporations or classes of corporations. Federal circuit courts now have jurisdiction of all suits by or against a corporation created by congress by virtue of Act March 3, 1875, § 2, (18 Stat. 470,) as suits "arising under the laws of the United States." Union Pac. R. Co. v. Myers, (Pacific Railroad Removal Cases,) 115 U. S. 1, 5 Sup. Ct. 1113.

[FEDERAL COURTS—JURISDICTION—CITIZENSHIP OF CORPORATIONS.

[The decision of the supreme court reversing the judgment in the principal case might be strictly construed as holding that a corporation whereof all the members were citizens of Pennsylvania could sue a citizen of Georgia in a federal court. But the language of Mr. Chief Justice Marshall was construed to mean that federal jurisdiction did not exist unless diversity of citizenship existed as between the defendant and all the members of the corporation. This construction was generally acquiesced in by the circuit courts, and followed by the supreme court in Commercial Bank of Vicksburg v. Slocomb, 14 Pet. (39 U. S.) 60. It was, however, overruled in Louisville, etc., R. Co. v. Letson, 2 How. (43 U. S.) 497. That was a suit by a citizen of New York against a corporation created by the laws of South Carolina, but two of the members were citizens of North Carolina. The jurisdiction rested on the clause of the judiciary act of September 24, 1789, (1 Stat. 73,) conferring it when the suit is between a citizen of the state where it is brought and a citizen of another state. The jurisdiction was held to exist under that act and under Act Feb. 28, 1839, conferring on circuit courts jurisdiction of cases where there are several defendants, some of whom are not found within the district where the suit is brought. The court also took the broader ground that a corporation "is, substantially, within the meaning of the law, a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued." The members of a corporation suing in its corporate name are now, for purposes of jurisdiction, conclusively presumed to be citizens of the state which created it. National S. S. Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58.

[FEDERAL CORPORATIONS—TAXATION BY STATES.

[The remarks of the learned justice in the principal case, concerning the right of a state to tax the property of the Bank of the United States, should be taken with the limitation that this power of the state cannot be exercised to harass or control the lawful action of a corporation constitutionally created by congress. M'Culloch v. Maryland, 4 Wheat. (17 U. S.) 316. In that case a peculiarly burdensome tax laid by the state of Maryland upon banks not incorporated by the state legislature was declared unconstitutional and inoperative with respect to a branch of the second Bank of the United States, doing business in that state.]

BANK OF THE UNITED STATES, (FINDLAY'S EX'RS v.) See Case No. 4,791.

BANK OF THE UNITED STATES, (GEORGETOWN v.) See Case No. 5,343.

Case No. 917.

BANK OF THE UNITED STATES v. GODDARD.

[5 Mason, 366.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1829.

NEGOTIABLE INSTRUMENTS — NOTICE OF NON-PAYMENT — NOTICE FROM ONE INDORSER TO ANOTHER.

1. Where a note is made payable at a particular place, and the indorser resides there; if the holder remits it to his agent at such place for payment, and it is dishonoured; the agent is not bound to give notice of the dishonour to the indorser; but his duty is to give notice to his principal; who may then give notice to the indorser, and if given in due time after the principal has received notice, the indorser is bound.

[Followed in Codrington v. Adams, Case No. 2,937.]

2. If due notice is given by a holder to his immediate indorser, of the dishonour of a note, and the latter gives due notice to a prior indorser, the holder may recover against the latter, although he has never given him any notice; for due notice given by any party on the bill, is notice to charge in favour of all subsequent parties.

[3. The relation of a branch of the Bank of the United States to another branch, or to the parent bank, which has forwarded paper for collection, is simply that of principal and agent.]

At law. Assumpsit by the plaintiffs [the president, directors, and company of the Bank of the United States] as indorsers of a note, signed by one J. K. Pickering, and indorsed by the defendant [Samuel Goddard] dated at Portsmouth (N. H.), on the 1st of January, 1829, for the sum of 1,005 dollars, payable to the defendant or order, at the United States Branch Bank in Boston, in sixty days and grace. Plea, the general issue. [Verdict and judgment for plaintiffs.]

At the trial the material facts were as follows: In the winter of 1828–9, John K. Pickering, of Portsmouth, being deeply insolvent, owed the United States Branch Bank at Portsmouth a certain amount, for which they agreed to accept his note for $1,000, endorsed by the defendant. A note, of which the following is a copy, was accordingly given to the bank. "Portsmouth, Jan. 1st, 1829. Value received, I promise to pay Samuel Goddard or order, one thousand dollars, at the United States Branch Bank in Boston, in

[1] [Reported by William P. Mason, Esq.]

sixty days and grace." Endorsed, "Samuel Goddard." Mr. Wentworth, the cashier of the Portsmouth Branch, enclosed this note to Mr. Frothingham, the cashier of the Boston Branch, in a letter dated March 2nd, in which he says, "I enclose for collection J. K. Pickering's note for $1,000. P. S. I have notified J. K. Pickering here, of his note being at your bank." He afterwards, at the request of Pickering, wrote another letter to the cashier of the Boston Branch, under date of March 3d, which was received the 4th, in which he says, "I'll thank you to inform Mr. Samuel Goddard that J. K. Pickering's note is at your office, as I think he will pay it without protest." It also appeared from the evidence, that Pickering's insolvency was known to Goddard when the note was endorsed; that Pickering never expected to pay it, and that the note was made payable in Boston, where Goddard resided, for that reason. Pickering, about the time of making the note, put into Goddard's hands funds, which Pickering thought sufficient to pay this note and some other liabilities; but from the depreciation of property, and other causes, these funds proved to be wholly insufficient. Goddard had done business in Boston, without having a counting-room, during the last two or three years, though he resided principally in Brookline; but in November, 1828, he took a house in Boston, which, with his family, he has since occupied. It was shown, that William Stevenson, a notary public, who noted the protest on the note in the case, had also presented to Goddard, in February last, a draft or bill, directed to "Samuel Goddard, Merchant, Boston." It was also shown, on the part of the plaintiffs, that Goddard's name was not in the directory, and that his residence was not in fact known to the officers of the Branch Bank in Boston, but might have been ascertained by reasonable inquiry. And on the part of the defendant it was shown, that Nathaniel Goddard, Esq., a merchant in Boston, who was in the habit of doing business at the Branch Bank, was the uncle of the defendant. The note was not paid at maturity, and the question in the case was, as to the sufficiency of the notice of nonpayment to the defendant. The facts in regard to this question were these. On the 5th of March, the grace on the note expired. On the afternoon of the same day the protest and notices were put into the mail, which closed at Boston that evening, and should have arrived at Portsmouth the next morning. But owing to a severe snow-storm, the mail from Boston did not arrive at Portsmouth until late in the afternoon, and some hours after the mail had gone from Portsmouth to Boston. On the next day, that is, the 6th of March, Wentworth wrote to the defendant a letter, which was put into and sent by the mail of the same day, and which he received on the 8th, stating the non-payment of the note, and requesting him to pay it. No inquiry was made for the defendant by the officers of the Branch Bank at Boston, for the purpose of giving him notice of the nonpayment of the note. And no notice was in fact given, except as above mentioned.

Theophilus Parsons, for defendant.

Injury to the defendant is to be presumed from laches on the part of those, who should notify him. The endorser is entitled to notice, although perfectly conusant of the insolvency of the maker, and although he puts his name on the paper merely to give it a credit. Smith v. Becket, 13 East, 187. This case is confirmed and the principle established in its full extent, in Brown v. Maffey, 15 East, 216. The cases, which show this principle to be adopted in this country, are very numerous. There is a very full collection of them in a note to the 211th page of the last American edition of Chitty, on Bills. If the endorser has taken all the property and assets of the maker, or if he has received full indemnity for his indorsement, he loses his right to notice. But though he has at any time effects in his hands as indemnity, if they are afterwards withdrawn or disposed of, he has full right to claim notice; and this is our case. See Chitty, 206, and Clegg v. Cotton, 3 Bos. & P. 239. The defendant, then, being entitled to notice, the question comes up, whether the notice in the present case was sufficient. The law is now settled, that the holder of a note may have all of the day succeeding its dishonour, wherein to notify the endorser; but he can have no more. In this case the notice was insufficient, unless the agent or banker may always send his notices back to the holder, from whom they may go to the endorser. But this principle cannot possibly be adopted without qualification. It cannot be supposed, that a banker may always send notice of non-payment to the holder, however near to him the endorser may reside, however well he may know the domicil of the endorser, and however far from them the holder may live. No case whatever can be found to justify such a principle. The cases relied on by the plaintiffs go upon very different grounds. In the case in 5 Mass. 167, the court say, the agent of the holder is justified in sending him the notices, because "he may not have known the domicil of the defendant." In 3 Pick. 180, (Eagle Bank v. Chapin,) the court say, the notary did "the best thing for the defendant he could do." In the leading English cases, as in 9 East, 347, the agent and the plaintiff, who was principal, lived in London, and the endorser at a distance. Here the case is just the reverse. It is now perfectly well settled, that a question of this kind is a question of law; that the court must take into consideration all the facts, and determine, whether, on the whole, reasonable diligence was used in informing the endorser of non-payment. Here, it is not enough to say, that the Boston Branch Bank must have learnt at once, by the slightest inquiry, the residence of the

defendant. The case goes much farther. The cashier of the Boston Branch was actually informed of it. Mr. Wentworth, living in Portsmouth, says to Mr. Frothingham, living in Boston, on the 2d of March, "I have informed Mr. Pickering here, that the note is with you," and on the 3d of March, "I will thank you to inform Mr. Goddard." Mr. Wentworth would have added nothing to the plain and unavoidable meaning of the letters, had he said, "I have notified Mr. Pickering here, because he lives here, and will thank you to inform Mr. Goddard, because he lives in Boston." Mr. Frothingham, then, was informed, that Mr. Goddard lived in Boston, and that the note was sent to him in Boston to be there paid by Mr. Goddard; and certainly, he cannot be justified by any reported case, or by any reason or principle, in sending the notices of non-payment, under these circumstances, to Portsmouth, that they might come back again to Boston.

Webster in reply.

The different branches of the Bank of the United States, have no connexion with each other; but treat each other as different institutions. The note was sent for collection. It was not the fund of the general parent bank, but of the Portsmouth Branch, and constituted part of specific funds of the latter. There was no request by Wentworth, in his letter to the cashier at Boston, to give notice of the dishonour of the bill to the defendant, after it was dishonoured; but only antecedently to its becoming due. Nor does it appear, by the letter containing the request, whether the notice was to be given to the defendant as indorser, or as having funds of Pickering in his hands. If the cashier at Boston had been requested to give notice of the dishonour, and his residence was pointed out, still the plaintiffs are entitled to recover. It is no part of the contract with the indorser, that he shall receive notice of the dishonour, at the place, where the note is made payable, or from the holder or his agent there. It is res inter alios acta. The agent is in no case bound to give notice to the indorser. He may contract so to do; and if he then neglects, he may be responsible to his principal; but the indorser has no rights from such a contract. The practice, in all cases of this sort, is, for the bank to return the note protested to the holder, and not to give notice to the indorser. (This was admitted on the other side.) If the indorser receives notice from the holder within the time required by law, he has no right to say, that an agent might have given earlier notice. The note here was returned according to the course of business; and it is admitted that the notice was in due time, if the agent was not bound to give notice.

The cases in Bayley, Bills, 173, 5 Mass. 167, and 2 Johns. Cas. 1, are in point. The cases, too, of the bankers in 3 Bos. & P. 599, 9 East, 347, and 15 East, 291, are decisive in our favour. The principle is quite as strong, where the agent, and holder, and indorser live in the same place, as if they live in different places.

STORY, Circuit Justice. I lay out of the case all consideration of the fact, that the note belonged to the Branch Bank at Portsmouth, and was remitted to the Branch Bank at Boston for collection, both these branches being but the agents of the Bank of the United States, the real holder of the note. In the first place, it is admitted, that the known course of business in each of the branches is, in respect to all notes transmitted from another branch, to deal with them in the same manner as if transmitted by a stranger bank, and to return their notes back, upon their dishonour, to the branch, from which they have been received. In the next place, the branches being established by the parent bank for its own particular purposes, their agency may be limited and controlled according to the pleasure of the parent bank. So that the present case does not at all differ from that of a private principal, who employs different agents in different cities to transact business, or negotiate, and discount, and collect, notes there upon his account. No distinction was pointed out at the argument, as growing out of this circumstance, differing the case from the common case of holder and agent, or holder and banker; and none is believed to exist. The case may, therefore, for all the purposes of this suit, be considered as if the Portsmouth Branch were the real holder of the note, and wholly unconnected with the Branch in Boston, and employing the latter as its agent to collect the note when due. The question, then, is, whether notice of the dishonour ought to have been given by the Branch Bank at Boston to the defendant, or whether the notice sent by the Branch Bank at Portsmouth to the defendant was in due time, and sufficient in point of law. It is admitted, that there is no objection to the notice on the account of the delay of its arrival to the defendant until the 8th of March, when it ought regularly to have arrived on the 7th. The snow-storm sufficiently accounts for that; and the notice was given as early by the holder, as, under the circumstances, it could or ought to be.

The case is narrowed down, then, to the consideration, whether by law the defendant was entitled to notice directly from the agent in Boston, which, by due inquiry and diligence, he might have given on the 6th of March; or whether a circuitous notice through the holder was sufficient. The argument of the defendant's counsel is this. The agent is bound to give notice of the dishonour, to a prior indorser, who is intend-

ed to be charged, if his residence is known to him, or if, upon reasonable inquiry, it can be ascertained, and it is in fact nearer to his own, than that of the indorser, and a notice will thereby reach him earlier than from the principal holder. Reasonable diligence is in all cases sufficient in giving notice; but what is such must be judged of by all the circumstances of each case. If the agent may in all cases omit to give notice to the indorser, then, although he resides in the same city with the indorser, and the principal holder resides at a great distance, the indorser would be held, although a circuitous notice from the holder might not reach him for a week or a month, which would be unreasonable. And it is said, that there is no case, which justifies such a doctrine. If there be no such case, then the question must be considered upon principle. Now it is very clear, that if the Boston Branch had been the holders of the note, they would, under the circumstances, have been entitled to recover against the defendant, since he received due notice from the prior holders, to whom due notice was sent by them, and to whom, upon payment of the note, the defendant would have been answerable over. It is laid down in Bayley, Bills, (4th Ed.) 163, and better authority can scarcely be, that "though a holder or any other party gives no notice but to the person, of whom he took the bill; yet if notice is communicated without laches to the prior parties, he may avail himself of such communication, and sue any of such prior parties. It is no objection, in such case, that there was no notice immediately from the plaintiff to the defendant." And this doctrine is fully supported by decided cases. Jameson v. Swinton, 2 Camp. 373; Wilson v. Swabey, 1 Starkie, 34; Stanton v. Blossom, 14 Mass. 116; and Stafford v. Yates, 18 Johns. 327,—are in point. The reason seems to be, that as the notice is sufficient to charge the defendant with the payment in favour of the person who gives it, it ought to charge him in favour of all subsequent parties, because he sustains no injury from want of notice. It is, as to him, due notice. If, then, as holders, they might affect the defendant with responsibility by such circuity of notice, what is the reason, why, as agents, they may not give their principal the same right? If there be any, it must be upon the ground, that the agent is in all cases bound to give direct notice to the indorser intended to be charged, in the same way, and within the same time, and in the same manner, as his principal ought, if there were no agency, and the bill remained in his hands. Such a proposition has never yet been maintained, as far as I know, by any court of justice. And in the argument it was admitted, that if the domicil of the party, to whom notice is to be given, be unknown to the agent, he is not bound to give any notice. And it has been decided, that when a holder transmits a note for payment to his agent, he is not bound to inform the latter where the prior parties live, so as to enable the agent to give them notice.

But how is it established, that in any case an agent to receive payment of a note is bound to give notice to any person, but his principal, of the dishonour? The nature of the transaction does not necessarily imply it. The authority to receive payment may be complete, without any incidental authority to give such notice. It is certainly competent for the holder to authorize his agent to do no more than to demand payment, and give him notice of the dishonour. If the agent actually gives notice in due time to the antecedent parties, that may be good in favour of his principal. If the latter requires his agent to give such notice, and he neglects to do it, he may be chargeable with any loss sustained by such neglect. But the question is not, what the agent may do, or ought to do, as between himself and his principal; but whether the other parties, to be charged upon notice, have any right to such notice from him, so as to be discharged by his neglect. As I understand the doctrine of law upon this subject, it is, that an agent, upon the dishonour of a note remitted to him to procure payment, is bound to give notice of the dishonour to his principal, and transmit to him the proper evidence of it; but he is not bound to give any notice to other parties on the note. That was manifestly the doctrine of the court in Haynes v. Birks, 3 Bos. & P. 599, 601, where a bill had been remitted to bankers, as agents of the holder, to procure payment; and the argument there was, that in such a case the bankers, being agents of the holder, the defendant (the indorser) was entitled to the same notice, as if the bill had remained in the plaintiff's hands. But the court overruled the objection; and said that it was the banker's business only to acquaint his principal of the dishonour. The same doctrine was held in Tunno v. Lague, 2 Johns. Cas. 1. That case is very strong, for the defendant, who was sought to be charged, lived in the city of New-York, the bill being drawn by him at Jeremie (N. J.) in favour of the plaintiffs, upon a house in New-York, and dishonoured by the latter. The notice was not sufficient in the opinion of the court, having been given at New-York, long after the dishonour, if the party giving the notice had been the holder; but being an agent only, it was held, that the notice was sufficient, because it was earlier than the defendant would have had it, if the bill had been sent back to the plaintiffs, and notice had been sent directly by them. And the court said, that the duty of the agent extended no farther than to give notice to his principal. The same doctrine is also asserted in Colt v. Noble, 5 Mass. 167. The bill was drawn in New South Wales, in favour of the defendant, and by him indorsed at Madras to the plaintiffs, who sent it to their agent in London, where

it was dishonoured by the drawees. The defendant resided in Portsmouth, N. H. and the agent might have sent notice to the defendant at Portsmouth in three months; but he merely transmitted the bill and protests to his principal at Madras, who sent notice from thence to the defendant, who did not receive it until more than a year after the dishonour. The court held the notice sufficient. And Mr. Chief Justice Parsons, in delivering the opinion of the court, said, "A person appointed a factor to cause a bill to be presented is entrusted with no other powers, and it is his duty to notify his principal." It is true, that in that case it did not appear, that the agent knew the defendant's domicil; but that consideration was not relied on. And the court decided generally, that the holder was not bound to give information of the domicil of the indorser to his agent; nor was the latter bound to give notice to the indorser of the dishonour; and that it made no difference, whether the bill was remitted to the factor to procure acceptance, or in payment of a debt due to him. The case would seem, therefore, to travel on all-fours with the present.

It appears to me, also, that the cases, in which it has been holden, that a banker, who as agent receives the bill of a customer, is only bound to give notice of its dishonour to his customer, in like manner as if he were himself the holder, and his customer were the party next entitled to notice, confirm the doctrine. The legal effect of these cases is, that the customer has the like time to communicate such notice. as if he had received it from a holder; and therefore by placing a bill or note in the hands of a banker, the number of persons, from whom notice must pass, is increased by one. So it is laid down in Bayley, Bills, (4th Ed.) 173, and the cases of Haynes v. Birks, 3 Bos. & P. 599; Scott v. Lifford, 9 East, 347; and Langdale v. Trimmer, 15 East, 291,—fully support the position; and it has also been recognized in the recent case of Firth v. Thrush, 8 Barn. & C. 387. In all these cases, the bankers were agents; and if they were bound to give notice at all, they might have given it a day earlier than it was received from their principals. But the court treated the cases exactly as if the agents were holders, and necessarily repudiated the notion, that either as holders or as agents, they were bound to give notice to any other person than their principal. But it is said, that in neither of these cases did it appear, that the bankers knew the residence of the parties, to be charged by notice; or that the banker's residence was nearer to the parties, than that of the principals. If that be admitted, it is still a sufficient answer, that neither of these facts was treated as material; and the judgment of the court proceeded upon a principle, which comprehended all such cases. If the sufficiency of the notice depended upon the fact, whether the agent had no knowledge of the residence of the parties, or lived farther from them than his principal, that fact ought to have come from the plaintiff as part of his case; for the onus was upon him to show due notice. I am not satisfied, however, that the case in 3 Bos. & P. 599, was not a case, where the banker lived nearer to the indorser than to the holder. The latter lived at Knightsbridge, and both of the former lived in London. But it seems to me, that there is a far stronger reason for requiring that the banker should give notice, where he and the principal live in the same town, or at least that notice in such cases should be given as early, as the principal might give it, if the note were in his own hands, than where the principal resides in a different town, since the communication between them is so much more easy.

It appears to me, that the question now before the court has been closed by authorities; if not by direct adjudication, at least by necessary inference. The doctrine is laid down, without any exception, that the agent is not bound to give notice; and if any exception had existed, it could not for so long a period have been overlooked. But if it were otherwise, and there were no authority in point, my own judgment would be the same. It appears to me, that an agent is not bound to give notice to the indorser of the dishonour of any note; and that his agency does not naturally include such a duty. If he contracts with his principal to give such notice, that is a mere private contract between the parties, with which the indorser has nothing to do. It neither enlarges, nor limits his rights. It may be inconvenient for him to receive a circuitous notice; but that is not sufficient to change the law. I think it would be far more inconvenient to establish the doctrine now contended for in the defence. All that is required by law, is, that the holder should give notice to the indorser in a reasonable time after he has knowledge of the dishonour, and that there should be no laches in getting that knowledge, if an agent has been employed.

This view of the case renders it unnecessary to consider the point, whether, under all the circumstances, the defendant was entitled to notice, he having received security, originally supposed to be sufficient to meet the payment; as well as some other points suggested in the argument at the bar. Judgment must therefore be entered for the plaintiffs, according to the verdict. Judgment accordingly.

Case No. 918.

BANK OF THE UNITED STATES v. HATCH.

[1 McLean, 90.][1]

Circuit Court, D. Ohio. July Term, 1830.[2]

NEGOTIABLE INSTRUMENTS—NOTICE OF DISHONOR—DISCHARGE OF ENDORSER—EXTENSION OF TIME.

1. A notice to the endorser of the dishonor of the bill, left with a boarder at the same house with the endorser, with a request to hand it to him, is sufficient.

[See McMurtrie v. Jones, Case No. 8,905.]

[See note at end of case.]

2. Any agreement made between the holder of the bill and the drawer, which shall suspend the right of the holder to prosecute on the bill, will discharge the endorser.

[Followed in Dennis v. Rider, Case No. 3,797. Distinguished in Varnum v. Bellamy, Id. 16,886. Cited in Tiernan v. Woodruff, Id. 14,028.]

[See McLemore v. Powell, 12 Wheat. (25 U. S.) 554; Seventh Ward Bank v. Hanrick, Case No. 12,678; Varnum v. Milford, Id. 16,890; Morgan v. Tipton, Id. 9,809; Low v. Underhill, Id. 8,561; Cooper v. Gibbs, Id. 3,194; Valley Nat. Bank v. Meyers, Id. 16,821.]

[See note at end of case.]

3. Such an agreement also suspends the right of the endorser, to pay the bill and enforce payment from the drawer.

[See note at end of case.]

At law. This action [by the Bank of the United States] is a scire facias to make the defendant a party to a judgment, which was obtained by the plaintiff against Elijah Pearson. The writ was issued against Pearson and [William S.] Hatch, and being non est as to Hatch, a judgment was entered against Pearson. [Judgment for defendant. This was afterwards affirmed by the supreme court. Bank of U. S. v. Hatch, 6 Pet. (31 U. S.) 250. See note at end of case.]

Mr. Worthington, for plaintiffs.

Mr. Hammond, for defendants.

OPINION OF THE COURT. This proceeding is authorized by a statute of Ohio, and the defendant is permitted to make any defence which he could have made to the original action.

The jury found a special verdict, which states the facts of the case as follows: "E. Pearson made the bill of exchange, a copy of which is attached to the declaration of the said plaintiff in the original suit against Pearson, the drawer of said bill, and that the said bill was regularly endorsed by the present defendant, Hatch." "They also find that on the 25th day of July, in the year 1820, said bill of exchange was duly protested for non-payment; and that on said day last mentioned, and on the succeeding day, the said defendant, Hatch, was boarding at the house of Henry Bainbridge, in the city of Cincinnati; that on the 26th day of July, in the year 1820, the notary public, by whom said bill was protested, called at the house of said Bainbridge and enquired for said Hatch, and was informed by a Mr. Young that said Hatch was not within; the said notary then left a written notice of said protest with said Young, who was at that time in the house aforesaid, and requested him to deliver said notice to said Hatch; and that in the summer of said year 1820, said Young was a boarder at said house. They also find that a suit was commenced against said Pearson, the drawer of said bill of exchange, which suit stood for trial at the September term, in the year 1822, of the circuit court of the United States for the district of Ohio. They also find, that previous to the year 1822, one Griffin Yeatman was confined in the jail limits of Hamilton county, in said state, on a ca. sa., issued at the instance of, and on a judgment in favor of said Pearson. That said Yeatman was a material witness for the plaintiff in a number of suits then pending in said court; that one George W. Jones, who was then agent for plaintiffs, and one William M. Worthington, the then attorney for the plaintiffs, agreed with the said Pearson, that in consideration, he, the said Pearson, would permit the said Yeatman to leave the jail limits and attend said court during the term aforesaid, then the suit then pending in said court against said Pearson on said bill of exchange, should be continued without judgment until the term of said court next ensuing said September term, 1822. That in pursuance of this agreement, the said Pearson permitted the said Yeatman to leave said jail limits and attend said court; and that said suit against said Pearson was continued agreeably to said agreement."

On these facts two questions arise. 1. Whether the notice of the dishonor of the bill to Hatch was sufficient. 2. Whether the agreement to continue the cause of the Bank v. Pearson, under the circumstances, discharged the endorser.

The rule is well established, that a notice left at the usual place of abode of the endorser, is sufficient to charge him. The notice may be handed to a servant of the house, or to the landlord, if the endorser be a lodger. Or the notice may be left at his office where his principal business is transacted. In this case, the notice was not handed to a servant, or the landlord of the house where Hatch boarded, but to a boarder at the same house, with a request to hand it to Hatch. The boarder, it would seem, would be at least as likely to deliver the notice, as a servant or the landlord. And if the service of the notice come within the reason of the rule established as to other means of conveying it, it must be held sufficient. The very highest degree of diligence in conveying the notice is not required. Such steps must be taken to convey it, as in the

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

[2] [Affirmed in 6 Pet. (31 U. S.) 250.]

ordinary course of things, will place it in the hands of the endorser. And we think, in the present case, that the notice being left with a fellow boarder, affords a reasonable presumption that it was delivered to Hatch, and, therefore, it was sufficient.

The discharge of the endorser depends upon the extent of the agreement between the agents of the bank and Pearson. Did it suspend the rights of the bank, to prosecute the suit against Pearson? Would it have been a violation of the agreement, if the bank had discontinued the suit and brought another action? The agreement was that "the suit should be continued without judgment until the term of said court next ensuing said September term, 1822." And as a consideration on which this continuance was agreed upon, Pearson discharged Yeatman, the witness desired by the bank, from an execution. By this discharge, Pearson gave up what in law was a satisfaction of his judgment, and in all probability lost all further recourse against Yeatman for his debt. And this was done to benefit the bank. This constitutes a good consideration for the agreement. The agreement unquestionably suspended all right in the bank to prosecute the suit for the time specified, and also, as we think, all right to take any other step to enforce the payment of the note. An endorser has a right at any time to pay the bill and to be subrogated to all the rights of the holder. And if the holder enter into any agreement, which may be enforced, that shall suspend his recourse against the drawer, the endorser is discharged. He is discharged because his right, by paying the bill, to prosecute the drawer is also suspended. In the present case had the bank attempted to prosecute the suit, in violation of the agreement, there can be no doubt that a court of equity would have enjoined it; or, perhaps, on motion the court at law would have ordered the proceeding to be suspended. Here then was an agreement which suspended all right in the bank against Pearson on the bill, for a certain period; and this agreement could have been inforced at law, or in a court of equity. And as by this arrangement the right of Hatch to prosecute Pearson was also suspended, he is discharged from his indorsement. This principle is decided, substantially, in the case of McLemore v. Powell, 12 Wheat. [25 U. S.] 554. In that case, however, the agreement between the holder and drawer of the bill to give time was voluntary and without consideration, which did not legally bind the parties; and therefore the court held, the indorser was not discharged. But if the agreement had been made on a valuable consideration, the court would have held, as appears from the opinion, that the indorser was discharged. This doctrine is clearly stated in the elementary writers, Bayley, Bills, 234, and others, as established by adjudged cases. 8 East, 576; 1 Bay, 177; [Robertson v. Vogle,] 1 Dall. [1 U. S.] 252; 1 Johns. Cas. 107, 131; 3 Taunt. 130.

[NOTE. On writ of error, this judgment was affirmed by the supreme court. Mr. Justice Story, in delivering the opinion of the court, said:

"In cases of this nature, the law does not require the highest and strictest degree of diligence in giving notice, but such a degree of reasonable diligence as will ordinarily bring home notice to the party. It is a rule founded upon public convenience and the general course of business, and only requires that in common intendment and presumption the notice is by such means as will be effectual. In the present case the notice was left at a private boarding house, where Hatch lodged, which must be considered, to all intents and purposes, his dwelling house. It was left, then, at the proper place; and if the delivery had been to the master of the house, or to a servant of the house, there could be no doubt that it would have been sufficient. Stedman v. Gooch, 1 Esp. 4. The notary called at the house, and, upon inquiry of a fellow boarder and inmate of the house, he was informed that Hatch was not within. He then left the notice with the fellow boarder, requesting him to deliver it to Hatch. The latter must necessarily be understood, by receiving the notice under such circumstances, impliedly to engage to make the delivery. The question, then, is whether such a notice, so delivered, does not afford as reasonable a presumption of its being received as if delivered to a tenant of the house. * * * Boarders at the same house may be presumed to meet daily, and to feel some interest in the concerns of each other, and to perform punctually such common duties of civility as this. In our large cities, many persons engaged in business live at boarding houses, in this manner. It is not always easy to obtain access to the master of the house, or to servants who may be safely intrusted with the delivery of notices of this sort. A person who resides in the house upon a footing of equality with all the guests may well be supposed to feel a deeper interest in such matters than a mere servant, whose occupations are pressing and various, and whose pursuits do not lead him to place so high a value upon a scrupulous discharge of duty. * * *

"The other question is one of more nicety, and not less important. * * * The true inquiry is whether the parties did or did not intend a surceasing of all legal proceedings during the period. We think that the just and natural exposition of the contract is that they did. * * * If the bank could not have any remedy on the bill to recover payments, but was bound to wait until the next term of the circuit court, the defendant Hatch, as indorser, could not, by paying the bill, place himself in a better situation. He would be liable to the same equities, under the agreement suspending the remedy, as the bank. * * * Upon the whole, we are of opinion, upon the ground of the agreement stated in the special verdict being a virtual discharge of the indorser, that the judgment of the circuit court ought to be affirmed, with costs." Bank of U. S. v. Hatch, 6 Pet. (31 U. S.) 250.]

BANK OF THE UNITED STATES, (HUBBARD v.) See Case No. 6,815.

BANK OF THE UNITED STATES. (JACKSON v.) See Case No. 7,131.

Case No. 919.

BANK OF THE UNITED STATES v. JOHNSON.

[3 Cranch, C. C. 228.][1]

Circuit Court, District of Columbia. Dec. Term, 1827.

ACCOUNTS—REFERENCE TO AUDITOR—EVIDENCE—BANK OFFICER'S BOND.

1. Upon trial before a jury in an action at law, the report of the auditor to whom the cause had been referred, under the Maryland act of 1785, c. 80, § 12, to state the accounts of the parties, is prima facie evidence of the balance due, if the principles upon which the account is stated are correct, and the evidence properly received by the auditor. An account rendered by the defendant to the plaintiff is proper evidence for the plaintiff before the auditor. A teller of a bank is not liable for losses incurred during his absence from the bank.

[Followed in Bank of U. S. v. Williams, Case No. 942.]

[See Barry v. Barry, Case No. 1,060.]

2. Although the bank took bond and security from their teller for the faithful performance of the duties of his office, yet they may recover, in an action for money had and received, any balance of money remaining in his hands unaccounted for.

3. A judgment against the bank, in a suit upon the teller's bond, is not a bar to an action for money had and received by him for the use of the bank.

4. If evidence be given to the jury, without objection, which the court afterwards decides to be inadmissible, the court will instruct the jury that it is not evidence properly before them.

At law. Assumpsit [by the Bank of the United States against Richmond Johnson] for money had and received, being the balance of money in the defendant's hands as second teller, not accounted for. [Judgment for plaintiff. A former action of debt against the surety on the teller's official bond resulted in judgment for defendant. Bank of U. S. v. Brent, Case No. 910.]

This cause was referred to an auditor (Mr. Redin,) to state the account, under the Maryland act of 1785, c. 80, § 12. The auditor reported the evidence on which his statement of the account was founded, and the objections made to it before him, and the principles upon which he found the balance due. The report states that certain parts of the evidence were objected to by the defendant, and states the objections made.

Mr. Jones, for the defendant, contended that the whole account is to be proved now before the jury, in the same manner as before the auditor, and referred to the opinion of this court in the case of Barry v. Barry, at December term, 1827, [Case No. 1,060.]

But THE COURT (nem. con.) said that the exceptions to the proceedings of the auditor appearing, upon the report, to be confined to the admissibility of the evidence, and to the principles upon which the auditor acted in ascertaining the balance, and no exception having been taken to that balance, or to any item of the account, of which it is stated to be the balance, if the court should be of opinion that the auditor was right in receiving that evidence, and in the principles upon which he made up the account, his report of the balance is prima facie evidence that so much was due from the defendant to the plaintiff.

The next question was as to the admissibility of a paper, marked AA, which was a statement, made by the defendant, of his account as second teller, with the bank, and taken from one of the bank-books and presented to the board of directors by the defendant, as an account showing the deficit in his accounts. The fact that it was in the handwriting of the defendant, and was offered by him to the directors of the bank as a true statement of his account, was stated, in the report, to have been proved by the deposition of Mr. R. Smith, taken before the auditor, and which did not appear to be objected to.

THE COURT (nem. con.) decided that the paper AA was properly admitted by the auditor; and also that the defendant was not liable for losses which were incurred in his absence from the bank. The court, therefore, permitted the plaintiff to read to the jury so much of the auditor's report as shows the balance due from the defendant upon that principle; the auditor having stated the account in different ways, so as to meet any opinion of the court upon the question of his liability for losses during his absence.

Mr. Jones then contended, that the plaintiffs, by taking a bond with surety for the faithful performance of the duties of his office as teller, had thereby made an express contract upon the subject of his liability as teller, and therefore the law will not imply any other on that subject. In a suit on that bond the defendant pleaded that, although he had not accounted for all the money which came to his hands as teller, yet such default did not arise from want of fidelity; and upon demurrer to that plea, the court decided in favor of the defendant, being of opinion that the bond only required fidelity. It is agreed that this matter may be considered by the court as if it were a demurrer to a plea of a former judgment upon the same cause of action.

Mr. Swann and Mr. Lear, contra. This suit is not for the same cause of action. That was for a breach of the condition of the bond; this is upon the general liability, which the law raises, to repay money received by the defendant for the plaintiffs' use. The evidence to support this action would not have supported that; nor would the evidence in that support this.

THE COURT (MORSELL, [Circuit Judge,] contra) was of opinion that it was not the same cause of action. The bond, plea, and judgment of the court having been read to the jury by Mr. Jones, without objection, before the court had given that opinion.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Mr. Swann, for the plaintiffs, moved the court to instruct the jury that the papers so read to them were not evidence properly before them; and

THE COURT (MORSELL, [Circuit Judge,] contra) so instructed them.

Verdict for plaintiffs, $5,743.26, with interest from 19th December, 1825.

Bills of exception were taken, but no writ of error was prosecuted.

BANK OF THE UNITED STATES, (KEY v.) See Case No. 7,746.

Case No. 920.

BANK OF THE UNITED STATES v. KURTZ.

[2 Cranch, C. C. 342.] [1]

Circuit Court, District of Columbia. Oct. Term, 1822.

PRACTICE—PRODUCTION OF PAPERS — PROCEDURE.

The plaintiff cannot be nonsuited, for not producing books and papers, upon a mere notice by the defendant to produce them at the trial. There must be a motion to the court, for an order to produce them; and notice of such a motion; and an order of the court, and if the motion be not made until the cause is called for trial at the last calling of the docket, the court will continue the cause until the next term.

[Cited in Gregory v. Chicago, etc., R. R., 10 Fed. 529.]

[See Thompson v. Selden, 20 How. (61 U. S.) 194; Macomber v. Clark, Case No. 8,918; Dunham v. Riley, Id. 4,155; Bas v. Steele, Id. 1,088; Maye v. Carberry, Id. 9,339.]

The plaintiff having been served with notice to produce the plaintiff's books, the defendant's counsel moved the court, just as the cause was called for trial, for judgment of nonsuit, under the fifteenth section of the judiciary act of [September 24th,] 1779, (1 Stat. 73,) for not producing the books.

Mr. Lear, for the plaintiff, objected that there had been no order of the court to produce them; nor any motion to the court for such an order.

Mr. Key, for the defendant, contended that he was yet in time to make the motion for an order to produce the books; and that notice of the motion was not necessary, as there had been a notice served on the plaintiff to produce them at the last term; he accordingly now made the motion; but it being the last time of calling the docket, and the cause being called for trial, the court continued it to the next term.

Case No. 921.

BANK OF THE UNITED STATES v. LEE.

[3 Cranch, C. C. 288.] [1]

Circuit Court, District of Columbia. April Term, 1828.

NEGOTIABLE INSTRUMENTS—DISCHARGE OF INDORSER—EXTENSION OF TIME.

The indorser of a promissory note is discharged from his liability by the holder taking new security, and giving time to the maker without the consent of the indorser.

[See White v. Burns, Case No. 17,539; Cope v. Huntt, Id. 3,206; Varnum v. Milford, Id. 16,890; Morgan v. Tipton, Id. 9,809.]

The defendant [E. J. Lee] was the indorser of R. B. Lee's note discounted by the plaintiffs.

THE COURT, (nem. con.) on the motion of Mr. Taylor, the defendant's counsel, instructed the jury, in effect, that if they should find from the evidence that the plaintiffs, in consideration of new security given by the maker of the note, agreed with him, without the defendant's consent, to extend the time of payment of the debt for one year or more, the defendant was thereby discharged from his liability as indorser of the note.

Mr. Taylor cited the following authorities: 7 Bac. Abr. 507; Nisbit v. Smith, 2 Brown, Ch. 579; Baird v. Rice, 1 Call, 18; Rees v. Berrington, 2 Ves. Jr. 540; Ward v. Johnson, 6 Munf. 6; Ellis v. Galindo, 1 Doug. 250, note; Hill v. Bull, Gilmer, 149; English v. Darley, 2 Bos. & P. 61; People v. Jansen, 7 Johns. 332; Bull, N. P. 275; Wilson v. Lenox, 1 Cranch, [5 U. S.] 194; James v. Badger, 1 Johns. Cas. 131; Croughton v. Duval, 3 Call, 69; Chitty, Bills, (Amer. Ed. 1817,) 300; Duval v. Trask, 12 Mass. 154; U. S. v. Nicholl, 12 Wheat. [25 U. S.] 510; McLemore v. Powell, Id. 554, 557; Moore v. Bowmaker, 6 Taunt. 379.

Mr. Lear, for plaintiffs.

Case No. 922.

BANK OF THE UNITED STATES v. LEE et al.

[5 Cranch, C. C. 319.] [1]

Circuit Court, District of Columbia. Nov. Term, 1837.[2]

DEED OF TRUST TO WIFE'S SEPARATE USE — CONSIDERATION—AGREEMENT TO RELINQUISH DOWER —RECORDING.

1. An agreement by a feme covert to relinquish her dower in certain lands, and to mortgage to her husband's creditors other lands held in trust to her separate use, is a sufficient consideration to prevent a post-nuptial deed of trust to her separate use from being a voluntary conveyance; and the subsequent actual release of dower, &c., made it an adequate consideration. The real consideration of a deed is always examinable, and the parties are not estopped to show what was the true consideration.

[See note at end of case.]

2. The notice which will affect the validity of a first incumbrance must be notice at the time the money is advanced or paid by the second incumbrancer. It is not necessary that the first grantees should give notice of their claim of title to a second incumbrancer, if they did not know of the second incumbrance at the time of its execution, or before the money was advanced. Their silence afterwards, cannot justify a charge of fraud or collusion.

3. The joint possession, of husband and wife, of property conveyed to her separate use, is no evidence of fraud.

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Affirmed in 13 Pet. (38 U. S.) 107.]

4. A deed of conveyance of slaves in Virginia, for the separate use of the wife, loses nothing of its validity by the removal of the parties to the county of Washington, in the District of Columbia; and it is not necessary that it should be there recorded.

[See note at end of case.]

5. A power, reserved in a deed of trust, to dispose of any part of the property, with the consent of the trustee, and upon substituting an equivalent, is not evidence of fraud.

6. An executed consideration is a sufficient consideration for a grant—which is a contract executed—however it may be in regard to executory contracts. All our conveyances purport to be for a past consideration.

7. The subsequent conduct of the husband in disposing of some of the slaves without the consent of the trustees, and without substituting an equivalent, is not evidence that the deed was fraudulently made.

In equity. The bill in this case was filed by the Bank of the United States against Elizabeth Lee, widow of R. B. Lee, deceased, Edmund J. Lee, surviving trustee under a deed of trust for the separate use of Mrs. Lee, and Richard Smith, a trustee under a deed from R. B. Lee, to secure his debt to the Bank of the United States. The object of the bill is to set aside the deed of trust for the separate use of Mrs. Lee as being either a voluntary or a fraudulent deed, as to the plaintiffs, who are creditors of R. B. Lee, and to compel Mrs. Lee to surrender the property to Mr. Smith, so that it may be applied to the payment of the debt due to the plaintiffs. [Bill dismissed. This was afterwards affirmed by the supreme court in Bank of U. S. v. Lee, 13 Pet. (38 U. S.) 107. See note at end of case.]

The bill states that R. B. Lee represented himself, in 1817, to be the sole and lawful owner of the property, after mentioned, which was in his possession, as owner. That the bank lent him $6,000, upon the security of the property, and he gave his note, indorsed by E. J. Lee and W. Jones, and on the 11th of June, 1817, executed a deed of trust to Richard Smith, of twelve negroes, valued at $5,000, and all his household furniture, valued at $2,200, and a claim upon one John Hopkins. That the debt remains unpaid. That R. B. Lee died in 1827, intestate, insolvent, and no administration has been taken out upon his estate. That his widow, the defendant, Elizabeth Lee, has taken possession of all the property conveyed to Mr. Smith by the deed of trust, and refuses to deliver it up to him for the purposes of the trust. That by taking possession of the property she has made herself liable, as executrix in her own wrong. That she claims the property under a pretended deed of trust executed by her husband in January, 1809, which she has exhibited to the plaintiffs. That if any such deed was executed, it was a voluntary and fraudulent deed, and therefore void as against the plaintiffs, and as against W. Jones, the indorser of the note. That the considerations expressed in the deed are false, or, if true, insufficient to give it validity. That at the date of the deed, R. B. Lee was largely indebted, and incompetent, in law, to make the same. That if the deed was made, and upon legal and adequate consideration, it was executed in Virginia; that the trustees never had possession of the property, but suffered the said R. B. Lee to retain possession of the same, and to use, enjoy, and dispose of the same for his own use and benefit, as if he were the unqualified owner thereof. That it was never recorded in the county of Washington, nor any notice of it given to the public, or to the plaintiffs, in the lifetime of the said R. B. Lee, nor for many years subsequent to his death; but he was permitted to obtain credit upon it, and to sell and dispose of parts thereof. That the defendants, Mrs. Lee, and Mr. E. J. Lee, the only surviving trustee, knew that the plaintiffs had lent the $6,000 to the said R. B. Lee, in full faith that he was the real and unqualified owner of the property, and knew that he executed the deed to Mr. Smith, to secure the payment thereof, and never communicated to the plaintiffs, or to Mr. Smith, during the life of the said R. B. Lee, nor until several years after his death, the existence of the deed of the 9th of January, 1809, or any other claim inconsistent with the deed to Mr. Smith. All which actings and doings of the said Elizabeth and Edmund, and their omissions and negligences, as aforesaid, are, as to the plaintiffs, in contemplation of law, fraudulent, and preclude them, the said Elizabeth and Edmund, in law and equity, from asserting any right to any part of the said property against the plaintiffs. That the said deed of the 9th of January, 1809, for the reasons aforesaid, is fraudulent and void; and if it ever had any legal validity, it ought now, by a decree of this court, to be annulled. The bill then prays for a discovery, &c.; and that the deed may be produced and proved, and be decreed fraudulent and void, as against the plaintiffs; and that Mrs. Lee may be decreed to surrender the property to the plaintiffs, and to Mr. Smith, and to account for all that may be deficient, or disposed of; and that she may be personally responsible as executor in her own wrong, for the whole amount of debt, interest, and costs; and that Mr. Smith may be ordered to take possession of the property, and sell the same according to the deed of trust, &c.

Mrs. Lee, in her answer, admits the loan, but not the representations, &c., of Mr. R. B. Lee; admits the deed to Mr. Smith, of the 11th of June, 1817, but avers that she was ignorant of its execution until long after it had been delivered, and never consented thereto, and never waived her right to the property. Admits the judgments against R. B. Lee and W. Jones, and that they are unsatisfied. That R. B. Lee died in 1827, insolvent, intestate, and that no administra-

tion had been taken on his estate. She avers that on the 9th of January, 1809, she and her husband then dwelling, and having for a long time before dwelt in the county of Fairfax in Virginia, and the slaves and other property thereinafter mentioned, being in the said county, she agreed with her husband to relinquish her right of dower in certain Spotsylvania lands in which her husband held five eighths of eight thousand acres, and also to convey her right in certain Fairfax lands, containing twenty-one hundred acres, including the estate upon which they then resided, (and which were then held by certain trustees for her use,) to certain trustees to secure a debt of $1,034.-28 due by her husband to Judge Washington; in consideration of which, and of her execution of the conveyances, and relinquishment of dower, her husband agreed to convey to Edmund J. Lee, William Maffit, and Richard Colman, all the household and kitchen furniture, &c., then in their dwelling-house and kitchen, estimated to be worth $1,600, and thirty slaves, named in the answer, in trust for her use during her life, and to her heirs, &c. And that it was further agreed between them, that her husband should be authorized to dispose of, or sell any part of the said furniture, or slaves, with the consent of a majority of the trustees, &c., provided he should convey to them other property real or personal to the full value of the furniture or slaves which he should so dispose of or sell. And that if he should pay the debt to Judge Washington, without selling any part of the lands thus conveyed in trust to secure it, the conveyance to E. J. Lee and others should be void as to seven of the slaves, particularly named in the answer. And she avers that in pursuance of that agreement, and in consideration of the deed of the furniture and slaves to be made to the said E. J. Lee and others, in trust for her use, she joined her husband in the deed for the Spotsylvania lands on the 16th of July, 1809, relinquishing her dower therein; and on the 9th of January, 1809, executed the deed of trust of the Fairfax lands to secure the debt to Judge Washington; and that on the same day her husband executed the deed of trust of the furniture and slaves to E. J. Lee and others; which deed was fully proved and recorded, within eight months from its date, in Fairfax county court, in which county they still continued to reside, and in which the furniture and slaves still remained; which deeds are exhibited and marked No. 1, 2, & 3. That the agreement was bona fide and without fraud; and that she is a bona fide purchaser of the furniture and slaves according to the terms of the said deed. She admits that there was no sale of the Fairfax land, and therefore she does not claim the seven slaves, and that they are not in her possession nor subject to her control. She admits that her husband sold George, and substituted Peter; and she emancipated Peter before the institution of any proceeding of the plaintiffs against her for the slaves. That her husband sold Henry, Milly, Letty, and her two sons, and substituted nothing in their place, except some articles of furniture for Letty and her two children who were sold with the consent of the trustees. That John, Kitty, Frank, Harriet, and Caroline are in her possession. That a great portion of the household and kitchen furniture, &c., has been destroyed in the using, during the period of twenty-six years, and she annexes a schedule of what remains. That the seven slaves were not included in the deed of her husband to Mr. Smith. She denies her liability to account to the plaintiffs for the property conveyed in trust for her use. She admits that her husband was considerably indebted when he made the deed of trust for her use; but denies that it was, in law, a voluntary conveyance; and avers that it was made to procure for her husband the means of discharging a portion of those debts.

She denies that she concealed her title and claims to the furniture and slaves, or by any culpable silence induced or suffered the plaintiffs, or any persons to purchase or receive a conveyance of the same from her husband. She states that her husband died in 1827; that they lived together until his death. That her possession could not be separated from that of her husband, and was consistent with the deed. She admits that he sold some of the slaves, under the pressure of great necessity, without her consent or that of her trustees. She avers that at the time the plaintiffs lent the money to her husband she was not informed that it was intended to be secured, or was secured by the deed to Mr. Smith. That she was not informed that such security had been given, until a long time afterwards; but she cannot recollect the time at which such information was first received. That in addition to the said deed to Mr. Smith, further security was given by a deed from Overton Carr and her husband to Mr. Smith for certain lots in the city of Washington, and by the assignment of the debt due by John Hopkins, and by the conveyance of a tract of land called Langley. That the money lent by the plaintiffs to her husband, or some part of it, was applied by him to the purchase and improvement of the lots conveyed by him and Overton Carr to Mr. Smith. That she has no knowledge that at the time the securities were given any information was given to the plaintiffs, or to Mr. Smith, that her husband had executed any prior deed of any part of the property mentioned in the said deeds. That her husband had remained considerably indebted at the time of his death, but she does not know the names of his creditors, nor the amount of his debts. That she asserted her right to the slaves thus conveyed by her husband to Mr. Smith

as soon as she was informed of the attempt of the plaintiffs to obtain possession thereof under the deed to the said R. Smith. She admits that the debt to Judge Washington has been paid, but she knows not out of what funds.

Mr. E. J. Lee, in his answer, states, that he and the other trustees never had possession of the property; but several times interfered to protect it from the creditors of Mr. R. B. Lee. That he never gave the plaintiffs notice of the deed of trust to him and the other trustees. That he did not know of R. B. Lee's deed to Mr. Smith until shortly before R. B. Lee's death. That he is advised that the deed of trust of 1825, from R. B. Lee and wife, to R. Smith, for further securing the debt, is an abandonment of all lien which the plaintiffs ever had by virtue of the deed to R. Smith, of 1817.

Mr. Richard Smith, in his answer, states that the property conveyed to him by R. B. Lee and Overton Carr, has been sold to the best advantage, and the proceeds have been applied towards the extinguishment of the debt; but that nothing has been obtained from the claim upon Mr. Hopkins, nor from the land called Langley, Mrs. Lee having claimed the same, and obtained an injunction, which is still pending in Virginia. That he had no notice of Mr. Lee's claim to the furniture and slaves, until all the other securities had failed, and he was about to execute the powers given him by the deed of trust of 1817.

The following facts were agreed by the counsel of the parties, namely: That R. B. Lee and wife were housekeepers and resided together in Fairfax county, in Virginia, on the 9th of January, 1809, and the said R. B. Lee then held the property mentioned in the deed of trust of that date, and that the property continued in their possession after, as before, the execution of that deed, and so continued until they removed to Washington city in 1814 or 1815, and brought the property with them. After which the household furniture was assessed to R. B. Lee; and four of the slaves were, for the first time, assessed to him in 1818. That prior to the 9th of January, 1809, R. B. Lee was seized in fee of five eighths of eight thousand acres of land in Spotsylvania county, in Virginia, which was conveyed by him and wife to Ludwell Lee in fee-simple. That the execution, due acknowledgment, and recording of the deeds and bills of sale exhibited with Mr. Lee's answer, are admitted; and also the execution and services of the notices referred to in Mr. E. J. Lee's answer. That the deed of trust of the 9th of January, 1809, was delivered to the trustees therein named; that they agreed to act, but never took possession of the property, or of any part of it.

The cause was set for hearing on the bill, answers, general replication, exhibits, and facts agreed, and was argued by Mr. R. S. Coxe, for the plaintiffs, and Mr. Marbury, for the defendants.

CRANCH, Chief Judge, (THRUSTON, Circuit Judge, absent,) delivered the opinion of the court:

The principal question in the case is, whether the deed of the 9th of January, 1809, from R. B. Lee to E. J. Lee and others, in trust for the defendant, the wife of R. B. Lee, is valid against his subsequent creditors. The execution, due acknowledgment, and recording of that deed, as well as the deed of R. B. Lee and his wife to Ludwell Lee, of the 16th of July, 1809, and the trust-deed to Turner and others to secure Judge Washington, are admitted. The bill avers, that if the supposed deed of the 9th of January, 1809, was ever executed, it was a voluntary and fraudulent deed; and that the considerations expressed in the deed were false. To this allegation the defendant, Mrs. Lee, answers, in substance, that her agreement to relinquish her right of dower in five thousand acres in Spotsylvania county, and to mortgage other lands in Fairfax county, which were then held by trustees for her use, to secure a debt due by her husband, was the consideration of his agreement to convey to E. J. Lee and others, for her use, the property described in the deed of the 9th of January, 1809; and that in pursuance of that agreement the deeds were executed accordingly. This answer, being thus directly responsive to the allegations of the bill, is evidence of a sufficient valuable consideration to support the deed of trust of the 9th of January, 1809, under which Mrs. Lee claims. It was not a voluntary deed, and, therefore, it is immaterial whether Mr. R. B. Lee was, or was not, indebted at the time of executing it. The relinquishment of dower is as fair and meritorious a consideration as the payment of a sum of money. The payment of Judge Washington's claim did not impair the validity of the deed, but operated as a release only, of a certain portion of the slaves therein described.

The fact that the deed to Ludwell Lee, for the five thousand acres of Spotsylvania land, was not executed by Mrs. Lee and her husband until the 16th of July, 1809, although the recital in the deed of trust of the 9th of January, 1809, states it to have been then executed, does not make the deed void. The real consideration of a deed is always examinable; and the parties are not estopped to show what was the true consideration. The agreement to release the dower was a sufficient consideration to prevent the deed from being a voluntary conveyance; and the subsequent actual release of dower made it an adequate consideration. That agreement is proved by Mrs. Lee's answer, which is responsive to the allegation in the bill that the deed was without consideration. The recital is, or is not, an estoppel to the parties

to deny that the deed to Ludwell Lee was executed on the 9th of January, 1809. If an estoppel, the recital must be taken to be true. If not an estoppel, the true consideration may be proved, namely, the agreement to release the dower; and that is proved by Mrs. Lee's answer. If it was not a voluntary conveyance, it can only be impeached on the ground of fraud; and if the consideration was adequate, there can be no pretence for a charge of fraud. Nor is there sufficient evidence to charge Mrs. Lee with any fraudulent concealment of her title; or collusion with her husband to deceive the plaintiffs before, or at the time, of their lending the money to Mr. Lee, or of their taking his deed of trust to Mr. Smith. Indeed, the bill does not charge it. It only avers that Mrs. Lee and Mr. E. J. Lee knew that the plaintiffs had lent the money to R. B. Lee, in full faith that he was the real and unqualified owner of the property; and knew that he executed the deed to secure the payment of the money, and never communicated to the plaintiffs the existence of the deed of the 9th of January, 1809. This charge relates to a time subsequent to the execution of the deed, when neither Mrs. Lee, nor Mr. E. J. Lee, was bound to communicate any such information to the plaintiffs. Nor can their silence, after the execution of the deed, justify a charge of fraud or collusion. The time when the money was advanced is that at which the notice is material. Lord Chancellor Thurlow in Beckett v. Cordley, 1 Brown, Ch. 358. But if the bill had charged them with a fraudulent collusion at the time of Mr. R. B. Lee's deed of trust to Mr. Smith, their answers expressly deny concealment of the claim and knowledge of Mr. R. B. Lee's deed to Mr. Smith, and of his intention to secure the plaintiffs by such a deed until long after it was executed.

It has been contended, that the continued possession of Mr. R. B. Lee after the execution of the deed of trust of the 9th of January, 1809, is evidence of fraud. But that possession was perfectly consistent with the use raised by the deed. As long as Mr. and Mrs. Lee continued to live together she could only enjoy the use of the furniture and slaves, jointly with him; and her possession would appear to be his possession. Her use of property, in that way, could not be evidence of fraud.

The deed was a contract made in Virginia, and was executed with all the formalities necessary to make it valid there. The title to the property was complete, and was valid between the parties wherever they might be. By removing to the District of Columbia, the title was not impaired. There is no ground for supposing it to be necessary that the deed should be acknowledged or recorded in this District. The power, reserved by Mr. Lee, to dispose of any part of the property with the consent of the trustees, and upon substituting an equivalent, it is said, is a badge of fraud. But it is only a general power of revocation which is a badge of fraud; whenever the consent of other independent persons is required, or an equivalent is to be substituted, there can be no objection to the power of revocation; it affords no evidence of fraud.

It is objected that if the recital is to be taken as true, and if the relinquishment of dower had been made before the execution of the deed of the 9th of January, 1809, the consideration was executed, and therefore was not sufficient to sustain the deed. But this objection, I apprehend, applies only to executory contracts, not to conveyances. An executed consideration may not be sufficient to sustain an executory contract, and yet a past or executed consideration may be a sufficient consideration for a grant; which is a contract executed in praesenti—not to be executed in futuro. If the objection is applicable to this deed, it is applicable to all our conveyances; for they also say "in consideration of" so much money, "at or before the sealing and delivery of these presents, in hand paid, the receipt whereof," the grantor "hereby acknowledges," &c. The money may have been paid a year before, or the consideration may be an old debt, and yet we have never heard an objection to such a consideration of a deed; and the deed under which the plaintiffs themselves claim, is given for a past or executed consideration, namely, the sum of $6,000 loaned on the day preceding the date of the deed, the receipt whereof the said R. B. Lee thereby acknowledged; and no other consideration is averred in the deed.

It is objected that the use which Mr. Lee made of the property, by disposing of some of the slaves, and mortgaging others, &c., without the consent of the trustees, or of Mrs. Lee, and without substituting an equivalent, was inconsistent with the nature of the deed, and therefore is evidence that the deed was fraudulent. But as between Mrs. Lee and him, or those claiming under him, (as the plaintiffs do), it is no mark of fraud. It is a matter entirely between her and him, or his assigns. If he has violated the rights of Mrs. Lee, and she chooses to acquiesce rather than quarrel with him, no third person has a right to interfere; the property was hers, and she had a right to do with it as she pleased; and, because she has submitted to some violation of her rights, it does not follow that she must relinquish what are left.

We are of opinion that the deed of trust of the 9th of January, 1809, to Mr. E. J. Lee, Mr. Maffit, and Mr. Colman, was a good and valid deed, made bona fide, and upon a valid and valuable consideration, and has not been impaired by any subsequent conduct or transactions of Mrs. Lee, or her trustees, and that the bill must be dismissed with costs. Bill dismissed.

[NOTE. On appeal to the supreme court this decree, dismissing the plaintiffs' bill was affirmed. The opinion of the court was delivered by Mr. Justice Catron, and, in effect, it was held that the deed of 1809, vesting the property in Mrs. Lee's trustees, was effectual, according to the Laws of Virginia, to protect the title thereto against the subsequent creditors or purchasers from her husband, R. B. Lee, and that their removal into the District of Columbia with the property conveyed by the trust deed did not effect or impair the validity of such deed of trust. Mr. Justice Baldwin dissenting. Bank of U. S. v. Lee, 13 Pet. (38 U. S.) 107.]

Case No. 923.

BANK OF THE UNITED STATES v. LONGWORTH et al.

[1 McLean, 35.][1]

Circuit Court, D. Ohio. July Term, 1829.

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—JUDGMENT LIENS—PRIORITIES.

1. A judgment is a lien on the lands of the defendant within the county, if execution on it be issued and levied within a year.

[Cited in Pence v. Cochran, 6 Fed. 275.]

2. But the judgment on which execution does not issue within the year, constitutes no lien against a subsequent bona fide judgment, on which execution is issued within the year.

[Cited in Pence v. Cochran, 6 Fed. 275.]

3. The purchaser under the judgment cannot be in a worse situation, than the plaintiff who claims the purchase money under a prior lien.

4. The construction of a statute by the supreme court of the state, forms a rule of decision for this court.

[Cited in Pence v. Cochran, 6 Fed. 271.]

5. A law which regulates the issuing of executions on judgments previously rendered, [Act Ohio, Feb. 4, 1824, § 17, 22 Stat. 114,] affects the remedy merely, and is not ex post facto, nor does it impair the obligation of the contract.

[See McClurg v. Kingsland, 1 How. (42 U. S.) 202; Bronson v. Kinzie, Id. 315; Gordon v. South Fork Canal Co., Case No. 5,621; U. S. v. Conway, Id. 14,849.]

[At law. Action by the Bank of the United States against Longworth and Wright to recover possession of certain real property. Judgment for defendants.]

This case was argued by Messrs. Caswell and Starr for the plaintiffs, and by Mr. Hammond for the defendants.

OPINION OF THE COURT. This action was brought by the Bank of the United States, to recover possession of a lot of ground in the city of Cincinnati, under a sheriff's deed. The judgment on which the lot was sold was rendered in April, 1818, in a writ in which Adam Demsey was plaintiff, John Gibson and Thomas Heckwelder defendants. Execution was issued 2nd October, 1828, and levied on the property in controversy, 6th October, 1828. The sale was made the 7th November, and the sheriff's deed was executed the 3rd of December following. The defendants also claim under a sheriff's deed, bearing date 16th January, 1822. The judgment under which this sale took place was rendered in August, 1820, against the same defendants, at the suit of Thomas Graham. Execution was issued on this judgment, returnable to December term ensuing, which was levied on the same lot, and it was sold on a pluries venditioni exponas, the 24th December, 1821. Where the highest judicial court of a state has given a construction to its statutes, such construction is considered by the courts of the United States, as a rule of decision, unless it be repugnant to the laws or constitution of the federal government. This course is sanctioned by sound policy, and a due regard to the institutions of the respective states. The question involved in this controversy depends on the construction of the different statutes which regulate judgments and executions.

By the act of the 24th February, 1820, [section 2, 18 Ohio Laws, 180,] it is provided, "that the lands, tenements and real estate of the defendants shall be liable to the satisfaction of the judgment from the first day of the term in which the judgment is entered," &c. This act limits the lien of the judgment to real estate within the county, and from the time of levying the execution, on lands without the county. This act is repealed by the act of the 1st February, 1822, which does not alter the lien of the judgment, but provides, "that in all cases where the party obtaining judgment shall neglect for one year after the first day of the term in which such judgment shall have been rendered to sue out execution thereon, and cause the same to be levied according to the provision of this act, such judgment shall not operate as a lien upon the debtor's estate to the prejudice of any other bona fide judgment creditor." The 16th section of this act provides "that no judgment heretofore rendered, on which execution shall not be taken out and levied before the expiration of one year next after the taking effect of this act, shall operate as a lien upon the estate of any debtor, to the prejudice of any bona fide judgment creditor." This law was repealed by the act of the 4th February, 1824, which in the 17th section provides, [22 Ohio Laws, 114,] "that no judgment heretofore rendered or which hereafter may be rendered, on which execution shall not have been taken out and levied before the expiration of one year next after the rendition of such judgment, shall operate as a lien upon the estate of any judgment debtor to the prejudice of any bona fide judgment creditor." Under this act the supreme court of the state have decided that the lien of any judgment, without reference to the time of its rendition, ceases to operate against a subsequent bona fide judgment creditor, if execution be not issued on it within the year. 2 Ham. [2 Ohio,] 65.

It is contended that the provisions of this act cannot be applied to judgments entered

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

before its passage, as it would be destructive of rights which had become vested under previous laws. This effect, however, has been given to this act by the decision referred to; and in several cases subsequently, all of which are acquiesced in, and seem to be considered as settling the construction of the act. The provision in the constitution of Ohio that no ex post facto law shall be passed if it embrace civil as well as criminal cases, does not reach the case; and as the change in the law does not impair the obligation of the contract, but modifies the means of enforcing it, it has not been considered in the above cases, nor is it, repugnant to the constitution of the United States. Previous to the law of 1822, the lien continued on the judgment without limitation as to the time of issuing the execution. The law of 1824 transfers this lien on judgments previously entered, to judgments subsequently obtained on which executions have been issued within the year. Some doubt may exist whether the legislature can take away the right of any citizen fairly acquired under an existing law, and vest it in another individual, on account of acts done before the passage of the law, and which could have been in no respect influenced by its provisions. But if the power of the legislature be only doubtful, this court would incline to give effect to its acts; and still more will they be inclined to give effect to them, where by the highest judicial tribunal of the state they have been decided to be constitutional. Under the act of 1824, in the case of Shuee v. Ferguson, 3 Ham. [3 Ohio,] 136, the supreme court decided, that to continue the lien of the judgment on any particular piece of real estate, there must be a levy upon it within the year; that a levy on property releases all other property not levied on, from the lien of the judgment; and that such property may be taken in execution on a junior judgment. These decisions it is contended, were made on questions between judgment creditors, and cannot apply to purchasers of real estate under judgments. The court awarded the money, in the cases cited, to the judgment creditor who had the preferable lien; and does it not follow that the purchaser under the judgment having the preferable lien, would be protected? Is it not, in effect, the same question as if the plaintiffs in the two judgments claimed the money arising from the last sale, supposing the first sale of the lot not to have been effected? In this case it appears that from April term, 1818, at which the judgment was entered, under which the plaintiff claims, there was no levy on the property in controversy until the 6th October, 1828. In April, 1819, by the decision of the supreme court, the lien of this judgment ceased to operate on the property, and it was liable to be taken on any junior judgment, before the 6th October, 1828, when the levy was made. And that levy was voidable by any bona fide judgment creditor who obtained his judgment within a year preceding it. The judgment under which the defendants claim was rendered at August term, 1820; and execution issued within the year and was levied on the lot. No doubt can exist that the junior judgment creditor would be entitled to the money in the case supposed, under the decisions referred to, he having issued his execution within the year and fixed his lien on the property by the levy. But the sale of this property was made on the junior judgment, before the act of 1824 took effect; and it is contended that consequently the provisions of that act cannot reach the case. This might be admitted, if the elder judgment did not come within the provisions of that act. It is not denied that at the time the levy was made under the junior judgment, the elder judgment had the preferable lien, as the law at that time did not require execution to issue within any limited time to continue it. Had the property, therefore, been levied on by an execution issued on the elder judgment, at any time before the act of 1824 could affect the case, the proceedings would have been regular and a sale of the premises valid, notwithstanding the previous sale under the junior judgment. But such proceeding was not had.

The act of 1824 had been in force several years when the levy and sale, under which the plaintiff claims, were made. The provisions of this act, therefore, apply to the case, and the question is, whether the proceeding on the junior judgment to a sale of the premises places the purchaser in a worse situation, than the judgment creditor would have stood, had the judgment remained unsatisfied after the execution was levied. That the purchaser at the sheriff's sale is entitled to all the legal and equitable rights, which could be claimed by the judgment creditor, will not be doubted. Has the sale of the premises weakened the right of the judgment creditor; and is this right less strong in the hands of the purchaser, under the execution? The right which the elder judgment creditor possessed by virtue of his lien, was taken away by the act of 1824; and is it not the same thing, whether this right was destroyed by a levy on the property within the year, under the junior judgment, or by a levy and sale? The plaintiff in the junior judgment was more diligent than the plaintiffs in the elder judgment, and it was the policy of the statute to protect the diligent. Would it not be absurd to say that a levy would fix the right of the junior judgment creditor, and that this right was not transferred to the purchaser at the sheriff's sale? Did this sale destroy or injuriously affect the lien of the judgment? Had the sale not been effected, the property was bound beyond all question, by the judgment and levy, and it was not liable to be sold under the prior judgment. The sale being made, would rather give additional force to the lien, than weaken it. The law of 1824 has a retro-

spective effect without limit, on any judgment which remained unsatisfied. Such is the effect given to it by the cases cited. Where a levy has been made on a junior judgment within a year from its rendition, and the levy under a prior judgment has not been made within the year, nor until the act of 1824 took effect, the first levy fixes the lien on the junior judgment, and the sale in no respect weakens it. The last levy is therefore void against the junior judgment creditor, and equally so against the purchaser of the property at the sheriff's sale. This construction of the act of 1824 is considered to come clearly within its spirit and effect, under the decisions of the supreme court.

I confess I entertain some doubts as to the correctness of the decision, which, in effect, transfers the lien from the judgment to the levy of the execution. If the lien of the judgment be limited to the property levied upon, the judgment, after the levy, has no binding force on other real property within the county. The policy of the act seems to require diligence by a judgment creditor, and prevents his holding a judgment over the property of the debtor, so as to prevent other creditors from reaching it. But, it would seem to me, that the policy of the act, as well as its letter, would be carried into effect by issuing an execution on the judgment in good faith, within the year, and pursuing it with diligence. That the lien of the judgment should not be limited to the property levied on, but should continue to cover all the real property of the defendant within the county, until the money was made. The supreme court, however, have decided this question, and as their decision, giving a construction to the statute, forms the rule of decision in this court, I am disposed to acquiesce in the decision. Any objection to the return of the sheriff, in not designating with accuracy the different lots or pieces of property sold on the execution, is obviated by the deed.

Case No. 924.

BANK OF THE UNITED STATES v. LYMAN et al.

[1 Blatchf. 297;[1] 20 Vt. 666; 11 Law Rep. 156.]

Circuit Court, D. Vermont. May Term, 1848.[2]

CORPORATIONS—ORGANIZATION—BANK OF UNITED STATES—NEGOTIABLE INSTRUMENTS PAYABLE TO CASHIER—EVIDENCE.

1. Where the act of incorporation of a banking company provided that notice of its organization should be given on or before a certain date, and the bank was found in operation afterwards under the act, it is to be presumed that it was organized as early as the time prescribed.

2. The Bank of the United States chartered by congress [Act April 10, 1816, 3 Stat. 266.] had no power to carry on banking operations after the 3d of March, 1836, though it continued in existence two years longer for the settlement of its affairs, &c. But on the 18th of February, 1836, [P. L. 36,] the state of Pennsylvania incorporated a banking company by the same name, in anticipation of the dissolution of the old one—the new company having, with one exception, the same stockholders and capital, the same name and style, and the same capacity, so far as a state institution could have the capacity of a national one. On the 10th of March, 1836, the defendants proposed "to purchase of the Bank of the United States the property of the office at Burlington, as it was upon the 2d day of March, 1836." This contract was perfected on the 1st of April, 1836: *Held*, that it was a contract with the new company.

[See Bellows v. Hallowell & Augusta Bank, Case No. 1,279.]

3. The acts and admissions of one of several joint contractors or promisors, are admissible, for some purposes, as evidence against all. And his acts and admissions while acting as the agent of all in the joint business, relative to anything within the scope of his authority, are binding upon all.

4. If the plaintiff's bill of particulars states his claim to be two particular promissory notes, he is confined to them, and cannot recover upon the pre-existing debt or original consideration. Per Prentiss, District Judge.

[See note at end of case.]

5. If a negotiable promissory note is payable to "S. J., cashier, or order," but is not endorsed by him, parol evidence is inadmissible, to show that the bank of which S. J. is cashier, is the real party in interest, so as to permit the bank to recover upon it, without its endorsement by S. J.

[Distinguished in Bank of Newbury v. Baldwin, Case No. 892.]

[See, contra, Commercial Bank v. French, 21 Pick. 486; Barney v. Newcomb, 9 Cush. 46; Eastern R. Co. v. Benedict, 5 Gray, 561; Folger v. Chase, 18 Pick. 63; Bank of U. S. v. Davis, Case No. 915; Blair v. First Nat. Bank, Id. 1,485; Mechanic's Bank v. Bank of Columbia, 5 Wheat. (18 U. S.) 326; Baldwin v. Bank of Newbury, 1 Wall. (68 U. S.) 234.]

6. In an action brought by the bank, such a note is not evidence of money had and received to its use, or of an account stated with it.

7. The note, however, having been given to Jaudon for property sold and delivered by the plaintiffs to the defendants, the plaintiffs could, perhaps, surrender and cancel the note, and recover on the original consideration, if the declaration contained a count founded thereon. Per Nelson, Circuit Justice.

[See note at end of case.]

8. If the bank, though not the payee, were the real owner of the note, and there had been an actual accounting with it or its agents, those facts might perhaps, with the note, constitute sufficient evidence to support an action by the bank for money had and received, or on an account stated; but an accounting with third persons, to whom the beneficial interest of the bank in the note had been assigned, in trust for specified purposes, would not.

[See note at end of case.]

9. Facts stated, from which notice to an endorser, of the presentment and nonpayment of a promissory note, will be inferred.

10. Questions of evidence examined, in regard to certain notes alleged to be included in

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

[2] [The judgment of the circuit court upon a subsequent trial of this cause was affirmed in 12 How. (53 U. S.) 225.]

the purchase by the defendants, and to have been controlled or discharged by the plaintiffs.

[See note at end of case.]

[At law. Action by the Bank of the United States against Wyllys Lyman, George P. Marsh, John Peck, and John H. Peck. Verdict was given for plaintiffs. Heard on motion for a new trial. Granted. Thereafter plaintiffs had judgment, which was affirmed by the supreme court in Lyman v. Bank of U. S., 12 How. (53 U. S.) 225.]

In this case, a verdict was taken for the plaintiffs at a former term, subject to the opinion of the court on certain questions reserved at the trial. It appeared that the Bank of the United States, created by congress in 1816, had established a branch or office at Burlington, in Vermont, which was several years in operation, and continued to do business until September, 1835. On the 10th of March, 1836, the defendants made a proposition in writing, "to purchase of the Bank of the United States the property of the office at Burlington, as it was upon the 2d day of March, 1836," for the sum of $141,777.87, on an estimate made separately of the real estate, the good notes and demands, and the demands forming what was called the suspended debt. The proposition was accepted on the 15th of the same month; and on the 1st of April the contract was carried into execution, the defendants executing four promissory notes for the sum of $35,500 each, payable in one, two, three, and four years, and taking a conveyance and delivery of all the property, except certain bills or notes which had been paid into the office before the sale was consummated. In consequence of some of the bills or notes having been so paid, and to make up an even amount, the sum of $10,020 was paid in cash to the defendants, so as to make the exact sum of $142,000, the amount of the four notes. The other facts in the case, as well as the questions reserved, will sufficiently appear from the opinions of the judges.

Samuel S. Phelps, for plaintiffs.

Rufus Choate and Asahel Peck, for defendants.

PRENTISS, District Judge. The declaration in this case contains two counts, one for money had and received, and the other on an account stated. In support of the counts two promissory notes were given in evidence, with several accounts current, letters of correspondence, and other documents and testimony. Out of the evidence so given, various questions have arisen, some involving the admissibility, and others the effect or sufficiency of the evidence. The questions possess different degrees of importance, both intrinsically and in their bearing upon the case; and I shall notice them in such order and manner, as will enable me to dispose of them with as much brevity and as little repetition as practicable, entering no further into the facts than may be necessary to present, fully and intelligibly, the grounds of decision upon each particular point.

1. The plaintiffs were incorporated as a banking company, by the name of the Bank of the United States, by an act of the state of Pennsylvania, passed February 18th, 1836, [P. L. 36.] The contract which is the origin or foundation of the principal claim in question, was made sometime after the 10th of March, and was carried into execution on the 1st of April, in the same year. The precise day of the organization of the plaintiffs as a banking company not being shown, it is objected that it does not appear that they were organized, and competent to act as a corporate body, at the time the contract was made. To this, it seems to me, an answer was given by the counsel for the plaintiffs, which is quite sufficient. The act of incorporation having provided, that notice of the organization should be given on or before the 3d of March then next ensuing, and the bank being found in operation afterwards under the act, it is to be presumed that it was organized as early as the time prescribed, which was of course before the making of the contract.

2. It appears that the Bank of the United States, incorporated many years before by an act of congress, [Act April 10, 1816; 3 Stat. 266,] although it ceased to have any power to carry on banking operations after the 3d of March, 1836, continued in existence two years thereafter, for the purpose of suits, for the final settlement of its affairs, and for the sale and disposition of its estate and effects. As that company established the branch at Burlington, and was in existence at the time the contract for the purchase of the property of the branch was entered into, it is insisted that it must be taken, in the absence of direct proof showing it to be otherwise, of which it is said there is none, that the contract was made with that company; and consequently, that the plaintiffs, as to one and much the most considerable of the claims in question, are mere strangers, for anything that appears, without right or interest.

But it is to be observed, that the company established by the act of Pennsylvania, was established in anticipation of the dissolution, so far as banking powers were concerned, of the company established by the act of congress; the new company having, with one exception, the same stockholders and capital, the same name and style, and the same capacity, so far as a state institution could have the capacity of a national institution. It was the substitution of a new charter under the state government in place of the old charter under the general government, so that the banking operations which would cease under the one, might be continued, without intermission or interruption, under the new powers given by the other. Accordingly, the new company, as we have seen,

was to come and did come into existence, as an organized corporate body, before or simultaneously with the termination of the banking powers and operations of the old company; and all the estate and effects of the old company were transferred to the new. The particular time of the transfer, it is true, does not appear. But it is obvious that it would naturally follow the organization immediately, in order to fulfil the purpose in view; and one of the witnesses states expressly that it included the estate and effects sold the defendants. This, therefore, connected with the bringing of the action and possession of the written evidences of the debt by the plaintiffs, is sufficient and very decisive evidence that the contract was in fact made with the new company.

3. To establish several material facts in the case, various letters, acts, and admissions of John Peck, one of the defendants, were given in evidence. This evidence, it is said, was inadmissible, at least so far as it concerns any of the defendants but Peck himself. The objection to it rests upon the ground that though the defendants were joint purchasers of the property, and gave their joint notes for the price, they were not partners, at least in such a sense as to make the acts and admissions of one evidence against the others. Admitting that the defendants are to be regarded, not as partners, properly and strictly speaking, but only as joint contractors or promisors, still the evidence, for some purposes, was undoubtedly admissible. It is a familiar rule of law that an acknowledgment by one of several joint debtors, either by word or act, is evidence to take the debt out of the statute of limitations as to all. Thus, "payment by one," says Lord Mansfield, in Whitcomb v. Whiting, 2 Doug. 652, "is payment for all, the one acting, virtually, as agent for the rest; and, in the same manner," he adds, "an admission by one is an admission by all." This principle, however, does not extend to the creation of a new substantive obligation, or a new additional liability; nor to anything which is necessary to be done by the party claiming, to perfect or give effect to a conditional or imperfect obligation or liability—such, for instance, as a demand of payment and notice of non-payment of a promissory note endorsed by several joint payees. There, the admission of one of the endorsers, either as to the demand or notice, is probably no evidence against the others; especially so, as notice is necessary to each. But, payment by one on a note, in pursuance of an existing joint liability, or an admission by one that the note is unpaid, or that a particular balance is due upon it, whether by stating an account or otherwise, is good evidence against all, in an action for the money due upon the note. That neither creates a new contract nor enlarges the pre-existing obligation or liability, but merely shows that that obligation or liability has not been discharged, or discharged but in part only.

But, however that may be, if it sufficiently appears that Peck was the agent to take care of the joint concern, and transact the business growing out of it, in behalf of the other defendants as well as himself, his acts and admissions while so acting, relative to any thing within the scope of his authority, are, undoubtedly, in law, the acts and admissions of all and binding upon all. Now, it very fully appears that the business was in fact conducted and transacted wholly by and through Peck. The original proposition for the purchase was signed, "John Peck for himself and others;" and this was ratified by the others, by their joining in the notes and completing the contract in pursuance of that proposition. As at the first, so throughout to the last, Peck acted as the ostensible manager, without the appearance, from any thing that is disclosed in the evidence, of any objection or interference on the part of the other defendants. It is obvious that it would be quite inconvenient, in a joint concern of such a nature, for all to take part personally in the correspondence, or to sign every letter and paper that passed, or for notices, accounts current, and other necessary communications, to be sent to and answered by all. It is usual, in such cases, to commit the transaction of the business and the charge of the correspondence to some particular one, and have it done by and through him for all. And where it is done by and through one, professedly for and in behalf of all, for a series of years, as in this case, without objection, all residing in the same neighborhood, and having daily intercourse and communication with each other, the assent of the others, they having adopted the first act, is to be presumed from their silence and acquiescence.

4. The bill of particulars filed by the plaintiffs having stated their claim to be two promissory notes particularly described, it is made a question, and it becomes necessary to decide, whether it was competent for them to give evidence of and recover upon the pre-existing debt or original consideration. According to the general rule of practice, as established by the authorities, it seems that the particulars are considered and treated as incorporated with the declaration, and the plaintiff is not allowed to give any evidence out of them. Thus, it has been held, that where the particular of the plaintiff's demand was a promissory note only, and on being produced it appeared to be improperly stamped, so that it could not be given in evidence, the plaintiff, though he might otherwise have gone into the consideration of the note, was precluded therefrom by his particular. Wade v. Beasley, 4 Esp. 7; Brown v. Watts, 1 Taunt. 353; 1 Tidd, Pr. 537. On these authorities, which are obviously directly in point, the plaintiffs in the present case were confined, by the terms

of their bill of particulars, to the two notes specified, and were not at liberty to proceed upon the original consideration or cause of action.

5. The note first specified in the bill of particulars, and first given in evidence, if the plaintiffs could maintain an action upon it in any form, was undoubtedly admissible under either count in the declaration—not only under the count for money had and received, but also, being a liquidated debt, under the count on an account stated. To the admission of the note, however, an objection was made, arising upon the face of the instrument, which presents the principal and most important question in the case.

The note is signed by the defendants, and is in this form: "We jointly and severally promise to pay to Samuel Jaudon, Esqr., cashier, or order, &c." On the one side it is insisted, that Jaudon is the payee of the note; that the legal interest and right of action are in him; and that the plaintiffs, the note not being endorsed by Jaudon, can neither maintain an action directly upon it in their own name, nor an action in any form in their own name to recover the money due upon it. On the other side it is urged, that as it appears from the evidence in the case, that the note was given for a debt due the plaintiffs, and that Jaudon was their cashier, acting merely as their agent in taking the note, having no personal interest whatever in it, the plaintiffs are to be regarded as the real payee of the note, and, as such, may sue and recover the money in their own name. Upon this question I might content myself with a general statement of the conclusion at which I have arrived, with a summary reference to authorities and reasons; but the nature and importance of the question seem to entitle it to more full and particular consideration.

It seems now to be settled in England, whatever difference of opinion there may have formerly been in regard to it, that parol evidence is admissible to show, that a person not named in a written simple agreement is the real party to it, either for the purpose of charging him upon it, or enabling him to take the benefit of it, as the case may be; but not, however, to discharge a party who has contracted in his own name. Thus, the real principal, or a partner, from or to whom the consideration has moved, may sue or be sued upon a written simple agreement, though he do not appear upon its face to be a party to it. This was so decided in the court of exchequer, in the case of Beckham v. Drake, 9 Mees. & W. 79, afterwards affirmed in the exchequer chamber, in Drake v. Beckham, 11 Mees. & W. 315. But, however clear, undoubted, and now well established this doctrine may be as to mere written simple agreements, the question is, is it applicable to negotiable instruments?

In a very early case, (Evans v. Cramlington, Carth. 5, affirmed in the exchequer chamber, in Cramlington v. Evans, 2 Vent. 307,) it was determined, that where a bill is payable to A. for the use of B., the right of action and of transfer is only in A., he having the legal interest, and B. only the equitable or beneficial interest. This decides that the person named as the payee in a bill, and not the person for whose use or benefit it is made payable, is the party entitled to sue upon it. If this be so where the trust is expressed and declared upon the face of the bill, the case must be much clearer and stronger where neither the trust, nor the name of the party having the beneficial interest, appears at all upon the instrument. The observations of Buller, J., in Fehn v. Harrison, 3 Term R. 757, show very plainly, that, in his opinion, no person could be considered as a party to a bill, unless his name, or the name of his firm, if a partner, appeared upon it. In Siffkin v. Walker, 2 Camp. 308, where a person not appearing to be a party to a promissory note, was joined as a defendant in an action upon it, Lord Ellenborough said, that a note made and signed by one in his own name, could not be treated as the note of him and another person neither mentioned nor referred to. And in Emly v. Lye, 15 East, 7, the same eminent judge, with the concurrence of all his learned associates, held, that on a bill of exchange drawn by one only, it could not be allowed to supply by intendment the names of others in order to charge them; and that the plaintiff, if he would rest his claim on the bill, must confine it to the party who signed the instrument. In the case of Beckham v. Drake, to which I have before referred as settling the general rule as to written simple agreements, Lord Abinger said: "Cases of bills of exchange are quite different in principle from those which ought to govern this case. By the law merchant, a chose in action is passed by endorsement, and each party who receives the bill is making a contract with the parties upon the face of it, and with no other party whatever. That is a class of cases quite distinct in its nature from the present." And Parke, B., said, that where a contract in writing, not under seal, was made in another name than that of the real principal the real principal could sue and be sued. "But," he added, "the case of bills of exchange is an exception, which stands upon the law merchant; and promissory notes another, for they are placed on the same footing by the statute of Anne. In neither of these can any but the parties named in the instrument, by their name or firm, be made liable to an action upon it." Thus it appears, that negotiable instruments, according to these authorities, are exceptions to the rule which governs written simple agreements in general, and that this, for supposed good and sound reasons, is the established doctrine in England.

The same doctrine, I may safely say, prevails in general in this country, though there

may have been, now and then, an occasional departure from it. There can be little doubt, I think, when we refer to the case of Van Ness v. Forrest, 8 Cranch, [12 U. S.] 30, how the rule of law on the subject is understood in the national court. There a note was executed to Joseph Forrest, president of the Commercial Company, for merchandize belonging to and sold as the property of the company. On the question whether an action could be maintained upon the note in the name of Forrest, Marshall, Chief Justice,[2] said: "The suit is instituted on a promissory note given, not to the company, but to Joseph Forrest, president of the company. Although the original cause of action does not merge in this note, yet a suit is clearly sustainable [maintainable] on the note itself. Such suit can be brought only in the name of Joseph Forrest. It can no more be brought in the name of the company, than if it had been given to a person, not a member, for the benefit of the company. The legal title is in Joseph Forrest, who recovers the money in his own name as a trustee for the company."

To notice particularly all the decisions in the various state courts, having a bearing upon the question one way or the other, would not only take up much time, but be assuming an unnecessary task. I have looked, however, into a very considerable number of these local decisions, and it will be sufficient for every useful purpose, without going further, to state the purport of such as have been made in the courts of some of the older and more commercial states. The decisions in the courts to which I refer present three classes of cases. The first is, where a promissory note is expressed to be payable, for instance, to A. B., agent of C. D., both agent and principal being named in the note. In such case it is decided, that the principal cannot sue, though named. It is held that a note payable to a person by name, though he is described therein as the agent of another, is a note payable to the person so described as agent, and that a suit upon it must be in his name, or in the name of his endorsee. The second class is, where a promissory note is made payable to the cashier of a particular bank, giving the name of the bank without the name of the cashier. In such case, it is determined, and very rightly, as I think, that the interest and right of action are in the principal who is named, rather than in the agent who is not named. The third class is, where a bill or note is made payable to, or is signed by, a person designated as agent generally, as A. B., agent, without naming the principal. In such case, it is held that the simple addition of agent, and of course the simple addition of cashier, without any specification whatever of the name of the principal, will not authorize the admission of parol testimony to show who the principal is, and make him a party to the instrument.

There may be, and indeed are, decisions in some of the state courts, not entirely reconcilable with the doctrine of the authorities which have been cited and referred to; but however much such local decisions may be entitled to consideration and respect, on account of the source from which they proceed, they can have no influence upon the question before us, so far as they are at variance with the general prevailing rule of commercial law. In suits in the courts of the United States, as is laid down in Swift v. Tyson, 16 Pet. [41 U. S.] 1, the true interpretation and effect of contracts and other instruments of a commercial nature, are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.

Upon the whole, it appears to me that the true rule of law, as deducible from the adjudged cases, American as well as English, is, that no person, although in fact a principal or partner, can sue or be sued upon a bill or negotiable note, unless he appears upon its face to be a party to it. A promissory note, according to the expression of very great judges, partakes in some measure of the nature of a specialty, importing a consideration and creating a debt or duty, by its own proper force. Being assignable, and passing by mere endorsement, it is necessary that the parties to it should appear and be known by bare inspection of the writing; for, it is on the credit of the names appearing upon it that it obtains circulation. It is for these qualities and on these considerations, that it is distinguished from written simple contracts in general, and made subject to a different rule.

The note in question here is a perfect instrument, without ambiguity in form or purpose, and must have operation and effect according to the terms in which it is expressed. It is made payable to "Samuel Jaudon, Esqr., cashier, or order." The promise therefore is to pay him, or the person to whom he shall order it to be paid; and it would be repugnant to the terms of the instrument to allow the Bank of the United States, or any one else without his order, to demand and enforce payment of it by suit. The bank is not named in the note at all, either as principal or otherwise; nor can it be inferred from anything contained in the note, that it was made even in trust for or for the benefit of the bank, or that the bank has any interest whatever in it. To let in parol evidence to show that the bank is the real principal, and hold that it may sue upon the note as such, would be to subject negotiable paper to the very uncertainty the law intended to avoid. It would be putting promissory notes on the footing of other written simple contracts, and prostrate entirely the distinction which sound policy, as well as the nature and purpose of negotiable securities, demands should

[2] [20 Vt. 666.]

be kept up between the two classes of cases.

As the plaintiffs cannot be regarded as the payee of the note, it is almost superfluous to say that the note is neither evidence of money had and received to their use, nor evidence of an account stated with them. The note creates no privity whatever between them and the defendants; and we have already seen that, by the bill of particulars, they are limited to the note, and cannot go upon the antecedent cause of action, supposing they might otherwise do so under the declaration.

It is insisted, however, that there is evidence, aside from the note, of an actual stated account, showing the balance due, and that that, with the note, is sufficient to enable the plaintiffs to recover under either count. This might be so if the plaintiffs, though not the payees, were the real owners of the note, and there had been an actual accounting with them, personally or through their agents. But it appears that the accounting, whatever there was, was with Robertson and others, to whom the beneficial interest of the bank in the note, with the other effects of the bank, had been assigned in trust for certain purposes, and who, for aught that appears, are still owners of the property in the note. There is no evidence that the account of April, 1840, which was prior to the assignment, was ever delivered or sent to the defendants; and as to the accounts of April, 1842, and November, 1843, each is stated and rendered by the assignees, and each states the balance as due to them. The letter to Peck enclosing the account of April, 1842, is signed "Herman Cope, agent for J. Robertson et al., trustees," and states the account to be an account with them. The letter to Peck, of May, 1844, is signed in the same way, and speaks of the account of November, 1843, as an account with the same persons. The accounts being stated and rendered as accounts with the assignees, to whom the property in the note belonged, I do not well see how the accounts can be treated as stated accounts of money due and owing upon the note to the plaintiffs, or as evidence of indebtedness to them. Even viewed as implying a promise which would follow the right of action on the note, or simply as evidence of indebtedness on the note generally, it would not help the plaintiffs; for, as we have already seen, they are not the payees of the note and have no right of action upon it.

If there had been an account stated by the defendants directly with the plaintiffs while owners of the note, recognizing their right to be accounted with for the note, or such an admission of their title to the money due upon it as would amount or be equivalent to an express promise to pay them, so that a cause of action might be considered as having accrued to and vested in the plaintiffs before the assignment, I do not mean to say that, in such case, the assignees might not sue and recover upon such cause of action in the name of the plaintiffs. How that might be it is unnecessary to inquire, because the evidence presented, in any just view of it, falls short, as it appears to me, of making out any such case.

6. The other note given in evidence is the promissory note specified in the bill of particulars, executed by Lyman & Cole to the defendants, and by them endorsed to the plaintiffs. The plaintiffs being endorsees, and the defendants endorsers, the note was unquestionably admissible in evidence under the count for money had and received, if not under the other count. But the defendants can be chargeable only as endorsers; and this would be so, without any reference to the limited terms of the bill of particulars, whether the transaction be treated as a discount, and therefore a purchase of the note, or as a loan of money, taking the note in payment, or even as a taking of the note in payment of an antecedent debt. Viewed in either light, due presentment for payment and due notice of non-payment were indispensable to create any liability on the part of the defendants. There is proof sufficient of due presentment of the note for payment, but there is no direct proof of notice of non-payment. The only question, therefore, is, whether there is evidence from which notice may be inferred.

It has been often held, that part payment, a promise to pay, or an acknowledgment of liability by the endorser after the note becomes due, is prima facie evidence, not only of notice, but of presentment. Now, what are the facts in relation to the note in question? We have already seen that there is sufficient presumptive evidence that Peck was the agent of the defendants, acting for himself and the others, and that his acts and admissions, relating to the joint interest, within the scope of his presumed authority, which of course extended to this note as a part of the joint concern, are to be considered as the acts and admissions of all. It appears that after the note became due, several payments were made upon it; but as it does not appear but that these payments were made by the makers of the note, they will be passed by. What is material to be noticed is, that after the note had been duly protested for non-payment, it was charged and kept in a separate account, and that Peck, on a proposal to him to have it transferred to the general account, requested that it might continue, for the sake of convenience, to remain charged and kept, as it had been, in a separate account. In May, 1842, an account of this note, together with an account of the other note, separately stated, was rendered to Peck. He acknowledged the receipt of both accounts in June following, making no objection whatever to the account of this note, nor indeed any objection to the account of the other note, except that credit was not given the defendants for certain de-

mands, called the Truesdell and Burrows notes, for which they claimed an allowance. Now, is not the request to have this note remain charged and kept, as it had been, in a separate account, coupled with the fact of an account so charged and stated being rendered, received, and retained without objection, an acknowledgment of liability to pay the note, and can it be at all material whether the acknowledgment was before or after the assignment, or whether to the plaintiffs or the assignees?

I have said that no objection was made to the account of this note; and such, I think, is the just inference from the letter of Peck. But if the objection was intended to apply to the account of this note as well as to the account of the other note, it was not an objection to the justness or correctness of any item in either account, but merely to the amount of the balance claimed. The objection was that a certain credit had not been given, thereby impliedly admitting that the note was a proper item in the account. In Campbell v. Webster, 2 Man. G. & S. 258, where the defendant, in answer to an account sent him by the plaintiff, admitted it to be all correct, except that the plaintiff had not credited him for a certain claim he had, and said he would pay the bill mentioned in the account if the plaintiff would allow that claim, it was held that this amounted to an admission of liability to pay the bill, a counter-claim being made the only objection to paying; and that an admission of liability amounted to an admission that all had been done which was requisite to constitute such liability. This is decisive, that the setting up, in the present case, of a claim for a credit as the only objection, with total silence as to the want of notice, is an acknowledgment of liability to pay the note in question, and thereby an admission that notice had been given.

7. The only remaining question in the case arises upon the claim set up by the defendants on account of certain demands, called the Truesdell and Burrows notes, alleged to have been included in the purchase from the plaintiffs, and to have been controlled or discharged by them.

The circumstances attending the Truesdell debt appear to be these: On the 10th of January, 1835, resolutions were passed by the directors of the branch bank, recommending a compromise of the debt, and an acceptance of an offer which had been made by the Truesdells to pay fifty per cent. as a composition. The resolutions were transmitted the same day to the parent bank, and the compromise so recommended was approved of by the parent bank on the 16th of the same month. The return made by the branch to the parent bank on the 1st of June thereafter, contains the debt in the list of the suspended debt, marked as "desperate," that is, of little or no value. The same return states that the compromise had been carried into effect. So it appears that the debt had not only been marked and returned as bad and hopeless, as early at least as the 1st of June, 1835, but had in fact then been compounded, and was so stated in the return, by the payment of fifty per cent. The debt, notwithstanding, still continued on the books of the branch bank, through some inadvertence or negligence, in the list of suspended debts, up to the 2d of March, 1836, to which time the contract of purchase had relation; the debt never having been transferred, as it is said it should have been, to the general loss account. The inference from all this is, that though the debt stood on the books, apparently as a subsisting debt for a balance of fifty per cent., it was not in fact a subsisting debt, but had been cancelled and discharged. If this fact was known to the defendants at the time of the purchase, the circumstance of the debt continuing on the books in the list of suspended debts can be of no real importance. It appears that two of the defendants, Peck and Lyman, acted as directors of the branch, from some time in 1834 to September, 1835, when the branch office closed. This of course included the time when the resolutions referred to were passed, and the compromise in pursuance of them was carried into effect. These two defendants, therefore, one of them being, as we have seen, the agent in making the purchase, must be presumed to have had knowledge of the facts in relation to the debt; and, if so, it would seem to be very clear that the defendants, especially as the purchase of the suspended debt was in the lump, on an estimate of its value in gross, and at a great discount on that estimate, cannot make the debt in question the foundation of a claim.

The other debt, the Burrows debt, consisting of two notes, also stood on the books of the branch, in the list of suspended debts, apparently a debt due, at the time of the contract of purchase. It appears that a compromise of this debt had been agreed upon by and between the parent bank and Burrows, and that the compromise was carried into effect on the 1st of May, 1835, by giving up the two notes to Burrows, and taking his note for 33⅓ per cent. of the amount. Burrows failed to pay the note so given by him, and the compromise, by its own terms, became null and void; but the two notes which had been given up were retained by him. In the return made by the branch to the parent bank on the 1st of June, 1835, before spoken of, this debt is mentioned, in a memorandum at the bottom, as having been compromised at 33⅓ per cent., which memorandum is signed by Mr. Lyman, one of the defendants, as director. The defendants, therefore, are to be taken as having full knowledge of the condition and circumstances of the debt at the time of the purchase. They purchased the claim, whatever it was, in the state in which it then existed, as they purchased the other claims composing the lump

of the suspended debt. For anything that appears, the claim exists in the same state now as it did then. The plaintiffs have not discharged it, interfered with it in any way, or done anything to deprive the defendants of any right or benefit they could claim in or out of it under the purchase. The plaintiffs sold the debt as it was, as they sold the rest of the suspended debt, without any guaranty or representation whatever on their part; and the appearance of it, as presented by the books, could not have deceived or misled the defendants, two of them having officiated as directors of the branch at the time the compromise was effected. It must be presumed that these two defendants, one of whom, as before remarked, was the agent in making the purchase, knew the terms of the compromise, and all that had been done in pursuance of it. I am obliged, therefore, to say, that I see no legal grounds on which this claim, any more than the other, can be sustained.

Having thus disposed of all the questions raised in the case, I have only to say in conclusion, that the result from the whole is, that, for the reasons given on some of the points reserved, the verdict, in my opinion, [and such is the result of the opinion of the judge who presided at the argument,][4] ought to be set aside, and a new trial granted.

NELSON, Circuit Justice. 1. The plaintiffs cannot recover the amount of the large note made by the defendants on the 1st of April, 1836, and payable to Samuel Jaudon, four years after date, because they do not show a legal title to the same. That is in Jaudon. The addition of "Cashier" is but a description of the person. I find no authority which will authorize the admission of parol evidence for the purpose of showing that the note arose out of a transaction between the parties to this suit, in which Jaudon acted as agent, and took the note in his own name for the benefit of the bank. The parties to the note must appear upon its face. If the name of the principal appears there, that will be sufficient, though the note is taken in the name of his agent. It is then, in contemplation of law, taken in the name of the principal, and he is the payee. Any other rule would very much embarrass the negotiability of this species of commercial paper.

2. The legal interest in the note being in Jaudon as payee, the note is evidence under the money counts only of money had and received by the defendants from him, and not from the plaintiffs, and is not available to sustain the count for money had and received. If the declaration had embraced a count founded on the original consideration, it may be that on cancelling the note the plaintiffs could have sustained the suit. It is a note given to Jaudon for property sold and delivered by the plaintiffs to the defendants; and I do not see but that upon surrendering it the plaintiffs might have gone on the original consideration, the same as if the note had been given to themselves.

3. The plaintiffs cannot recover on the count for an account stated. The accounts were rendered to Robertson and others, assignees and owners of the demands by virtue of the assignment of the 14th of September, 1840. The accounts were stated between them and the defendants, and any promise, express or implied, arising therefrom, or to be predicated upon the rendering of such accounts is a promise to Robertson and others, not to the plaintiffs. No foundation is laid for implying a promise to the latter. Robertson and others were not their agents. They were owners, acting for themselves, as trustees for the creditors. The plaintiffs are neither the legal nor beneficial owners of the note.

4. The plaintiffs are entitled to recover in their name the balance due on the small note of $5,000, made by Lyman & Cole and endorsed by the defendants. The proofs in the case are full to show that John Peck acted as the agent of the other defendants throughout the transaction, both in negotiating the purchase, and in conducting and arranging the payments subsequently. This being so, his acts and admissions afford satisfactory evidence that all the defendants were properly charged as endorsers of the note. Payments were made and arrangements entered into, wholly irreconcilable with the idea that they or any of them had become discharged from their obligation by the laches of the holder or otherwise. The rendition of the accounts, also, including this note, and the claiming of a balance without any objection being made to this item, lead to the same conclusion.

5. The debt of Truesdell & Son was compromised conditionally at the branch office at Burlington for 50 per cent. on the 10th of January, 1845; the transaction was approved by the parent bank on the 16th of January; and the amount was paid before the purchase of the assets of the branch; all which was known to some if not all of the defendants at the time.

The S. E. Burrows debt of $2,766.57, including interest, was compromised on the 11th of April, 1845, for 33⅓ per cent. and his note was taken for that amount, $922.19, on the 1st of May thereafter, and the original paper given up. This was the Burlington debt, and the transaction was well known at the branch office. The compromise, as it regarded other debts due the parent bank, was afterwards annulled on account of the failure of Burrows to carry it into effect, and another was then effected with the bank; but it had nothing to do with the Burlington debt. That remained as it stood at the time of the purchase by the defendants. The defendants, or some of them, must have been

[4] [From 20 Vt. 666.]

fully acquainted with the situation of these debts, at the time of the negotiation for the purchase; and the bank has not interfered or changed the condition or character of them since. There was no guarantee of the amounts due; and as the demands had accrued at the Burlington office, where two of the defendants were directors, they, it is to be presumed, knew more about them, in every respect, than the officers of the parent bank.

6. The proof is sufficient to show that the purchase was made by the defendants from the bank chartered by the State of Pennsylvania, and not from the old bank.

For these reasons, I think there should be a new trial, with costs to abide the event.

New trial granted.

This decision was affirmed by the supreme court at the December term, 1851. (See [Lyman v. Bank of U. S.] 12 How. [53 U. S. 225.]

[NOTE. This judgment was affirmed on writ of error by the supreme court, Mr. Justice Nelson delivering the opinion, in which it was held that the bank having become insolvent, and having made an assignment of its effects to trustees for the benefit of its creditors, it should be allowed to sue in its own name for the benefit of the creditors; the case being the same as if the law had permitted the suit to be brought, and the same had been brought in the name of such trustees.

[Although the bank had endorsed a note among its other assets to its trustees, yet, under the circumstances, it could maintain a suit upon the note, because, where the party who is a holder of a note has transferred it for the purposes of collection, and the same is not paid, but is found in the possession of the original holder, he can recover, as he is remitted to his original rights notwithstanding the endorsement, and if the note is not paid the plaintiff may give it up, and recover upon the original consideration.

[Before the defendants became indebted to the bank, the bank had made a compromise of a certain claim, which, among others, was the subject of a sale and purchase by the defendants. Two of the defendants had knowledge of the conditions of this compromise, and their knowledge must be considered as extending to the other defendants. It was a question of the jury to determine what the defendants purchased. Lyman v. Bank of U. S., 12 How. (53 U. S.) 225.]

Case No. 925.

BANK OF THE UNITED STATES v. MACDONALD.

[4 Cranch, C. C. 624.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

NEGOTIABLE INSTRUMENTS—INDORSERS—NOTICE OF DISHONOR—DISCHARGE OF INDORSER.

1. In order to prove notice to an indorser who is a clerk of a printing-office, and who has a separate room in which he attends daily to the business of the office, it is competent for the plaintiff to show, by evidence, that a written notice was left at such room, although the indorser was not there at the time.

2. After a note is dishonored, and due notice has been given to all the indorsers, the defendant, the last indorser, is not discharged by the holders taking a new note at 60 days, from a prior indorser for the balance due upon the old note, and giving time to such prior indorser without the consent of the defendant.

[At law.] Assumpsit [by the Bank of the United States] against [Stephen Macdonald] the last indorser of William Prentiss's promissory note to John Agg, or order, at 60 days, from April 5, 1831, for $5,200, payable at the office of discount and deposit at Washington, indorsed by Agg and the defendant.

R. S. Coxe, for the plaintiffs, in order to prove demand and notice to the defendant, offered to prove, by Michael Nourse, a notary-public, that on the 7th of June, 1831, he called with the note at the office of discount and deposit, in Washington, and there demanded of the book-keeper, payment of the same, and was answered that there were no funds to pay the same; that on the next day he left a written notice of the non-payment of the said note, for the defendant, at the office of the National Journal, in which place he was employed as a clerk at the date of the note; and offered evidence further to prove that the defendant was clerk and book-keeper of the office at which the National Journal, a daily newspaper, was printed and published, in the city of Washington; that his room was near the front door of the office, and had bars or lattices, so that when he was not in his room, papers could be put into the room and dropped upon a table or desk; that the said notary-public had served other written notices to the defendant, by putting them into his room, in that manner, in his absence; and he believed that the notice in the present case, had been served in that manner; that the defendant's business required him to be daily at his said room; that he was not then a married man, but lived with his sister, who keeps a boarding-house, or was jointly concerned with her in keeping a boarding-house near the Journal office.

To the admissibility of which evidence the defendant's counsel (Mr. Marbury) objected.

But THE COURT overruled the objection; and the defendant took a bill of exceptions.

Mr. Marbury, for the defendant, then prayed the court, to instruct the jury "that if they believed from the evidence that after the note upon which this suit was instituted was due and payable, and after due notice given to the defendant of the non-payment thereof, the plaintiffs took the negotiable promissory note of John Agg, the payee and indorser thereof, payable at sixty days after date for value received, for the balance of principal and interest due on the said note in action without the consent of the defendant, and agreed with the said Agg to wait on said note in action in consideration of his promising to pay curtails and discounts on said new note, and to renew the same from time to time, he, the said Agg, continuing to pay such curtails and discounts until said balance and interest was paid; the said

[1] [Reported by Hon. William Cranch, Chief Judge.]

transactions, if found and believed by the jury, constitute a legal and binding obligation on the part of the plaintiff to give time to the said Agg in the payment of the note in action, and discharges the defendant from liability on the same."

Mr. Marbury cited the case of Cope v. Huntt, [Case No. 3,206,] in this court at March term, 1833, which was an action against the indorser of Mr. Houston's note, due July 7, 1829, for $500. The defendant offered evidence of a subsequent agreement between the plaintiff and Mr. Houston that he should assign to the plaintiff ten dollars a month of his pay as a clerk in the treasury department, in payment of the note; and that the plaintiff should wait for payment in that manner; that Houston continued to make such payments according to the agreement, until April, 1831; and that this agreement was made without the knowledge of the defendant. Mr. Marbury also cited Starkie, Ev. pt. 4, p. 289. Mr. R. S. Coxe, for the defendant in that case, cited Bank of U. S. v. Hatch, 6 Pet. [31 U. S.] 250; 5 Vin. Abr. 527, pl. 17; and Bridg. Dig. Mr. Dunlop, contra, cited McLemore v. Powell, 12 Wheat. [25 U. S.] 554, 556. The court, (Morsell, Circuit Judge, contra,) on motion of the defendant's counsel, in that case, instructed the jury that such an agreement, if proved, discharged the indorser (the defendant) from his liability. The jury, however, found a verdict for the plaintiff; and the court, (Morsell, Circuit Judge, contra) granted a new trial, on the ground that the verdict was against either the law or the evidence, in the case. A new trial, however, was never had in that case, and after continuance for several years, the suit was struck off by order of the plaintiff.

In the present case, THE COURT (THRUSTON, Circuit Judge, contra) refused to give the instruction prayed by Mr. Marbury, as above. See the case of Bank of U. S. v. Abbott, in this court at May term, 1827, [Case No. 906.]

Mr. Marbury then prayed the court to instruct the jury "that if they believe, from the evidence, that after the note in action became payable, and after due notice of its non-payment to the defendant, the plaintiffs took a new note in renewal therefor from Agg, the first indorser, the right of action upon the note in suit was thereby suspended against the said Agg, and the defendant thereby discharged."

Mr. R. S. Coxe, contra, cited Pring v. Clarkson, 2 Dowl. & R. 78; Gould v. Robson, 8 East, 575; Maltby v. Carstairs, 1 Man. & R. 552.

Mr. Marbury cited Chapple v. Ashley, 1 Dowl. & R. 26.

THE COURT (nem. con., but THRUSTON, Circuit Judge, doubting) refused to give this instruction also, there being no evidence that Agg's note was taken in renewal of the note of Prentiss's, indorsed by the defendant.

Verdict for plaintiffs, a new trial was granted by consent and at March term, 1836, the plaintiff struck the suit off, by consent, without costs.

Case No. 926.

BANK OF THE UNITED STATES v. McKENNEY.

[3 Cranch, C. C. 173.] [1]

Circuit Court, District of Columbia. May Term, 1827.

JUDGMENT—MISNOMER—CORRECTION.

Upon a judgment rendered by mistake of the clerk against William McKenney, at the preceding term, the court refused to order the clerk to issue an execution against Samuel McKenney, although the writ, declaration, and pleadings were all in the name of Samuel, who was the person against whom the judgment ought to have been rendered. But the court ordered the judgment to be rescinded, the proceedings corrected, and the continuances entered up under the Maryland act of assembly.

The writ and declaration in this case were against Samuel McKenney, as indorser of William McKenney's note. Samuel was arrested, gave bail, appeared, and pleaded. The clerk, in making out the docket, had named the defendant, William, instead of Samuel; and Mr. Coxe, who was counsel for William, the maker, supposing the action was against William, confessed the judgment, which was entered up against William.

Mr. Lear, for the plaintiffs, first moved the court for leave to take execution against Samuel, considering it as a judgment against Samuel.

But THE COURT (nem. con.) refused.

Mr. Lear then moved the court to order the clerk to strike out the judgment against William, correct the docket, and enter up the continuances under the act of assembly of Maryland.

Which motion THE COURT granted, (MORSELL, Circuit Judge, absent.)

Case No. 927.

BANK OF THE UNITED STATES v. M'KENZIE.

[2 Brock. 393.] [2]

Circuit Court, D. Virginia. May Term, 1829.

STATUTE OF LIMITATIONS — CORPORATIONS —RESIDENCE—BANK OF UNITED STATES—GOVERNMENT STOCK.

1. The 4th section of the act of limitations of Virginia, [Act Feb. 25, 1819; Rev. Code 1819, p. 488, § 4,] limiting the right of action in certain cases, to five years after the action has accrued, applies as well to corporations as to individuals. That section has reference, not to the character of the plaintiff, but to the nature of the action.

2. A note was discounted at the Branch Bank of the United States, at Richmond, and after it arrived at maturity, was regularly protested for

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by John W. Brockenbrough, Esq.]

non-payment. An action on the case being brought by the bank against the endorser to recover the amount of the note, more than five years from the date of the protest, the defendant pleaded the act of limitations. *Held*: That the right of action is barred by lapse of time, the plaintiffs not being, in the sense of the saving of the act, "beyond the seas, or out of the country." The contract having been made in Richmond, in their banking-house there, between the president and directors of the branch bank, and the defendant, the fact of there being an office of discount and deposit of the Bank of the United States, in Richmond, and of the residence of the president and directors of the branch being fixed there, must be considered, with reference to this contract, as fixing the residence of the corporation itself in Richmond, and not in Philadelphia, so far as the saving of the act applies to the locality of the plaintiffs.

3. It seems, that actions on the case, though not within the term of the proviso of the act of limitations, are within its equity: and that it should be so construed as to embrace actions on the case.

4. Though "The United States" is a stockholder in the Bank of the United States, and is, so far, a party in all suits to which the bank is a party, the doctrine of nullum tempus occurrit regi does not apply to exempt the bank from the operation of the act of limitations: for it is a well settled principle, that where a sovereign becomes a member of a trading company, it divests itself, with reference to the transactions of the company, of the prerogatives of sovereignty, and assumes the character of a private citizen.

At law. This was an action on the case, brought by the president, directors, and company, of the Bank of the United States, against Donald M'Kenzie, a citizen of Virginia, to recover the amount of a negotiable note, made by Michael W. Hancock, and endorsed by M'Kenzie. [On demurrer to rejoinder. Judgment for defendant.]

The note was for $4,000, and was discounted at the Branch Bank of the United States, at Richmond, and was regularly protested for nonpayment on the 26th day of December, 1821. This suit was brought in 1828. The defendant pleaded the act of limitations. [Act Va. Feb. 25, 1819; Rev. Code 1819, p. 487.] The plaintiffs replied "that they ought not, &c. to be barred &c. because the plaintiffs are and were at the time of the accrual of their action, a body corporate, duly constituted as such by an act of congress, &c., and by the said act so constituting them a body corporate with full capacity to sue and be sued as such, their said corporation was fixed and established in the state of Pennsylvania, beyond the limits of the state of Virginia, &c., and the president and directors thereof were, and are, citizens of the state of Pennsylvania, &c., and this they are ready to verify, &c." The defendant rejoined that at the time of the accrual of the plaintiffs' cause of action, the plaintiffs "had, and ever since have had, and yet have, an office of discount and deposit lawfully established at Richmond, in the state of Virginia, aforesaid, committed to the management and direction of managers or directors, annually and every year appointed, &c.. which said managers or directors of the said office of discount and deposit at Richmond, have always been members, stockholders, and joint corporators of the said company of the Bank of the United States, and have always been citizens of the United States, and residents and inhabitants of the state of Virginia; and the said defendant in fact avers, that the said promissory note, &c. was transferred and assigned to the said plaintiffs in the course of dealings of the said Michael W. Hancock, with the plaintiffs' said office of discount and deposit at Richmond, &c. And this he is ready to verify, &c. wherefore, &c." The plaintiffs demurred to the defendant's rejoinder, and the defendant joined in demurrer. Upon this demurrer, the following opinion was delivered by

MARSHALL, Circuit Justice. The demurrer in this case makes the question, whether the plea of the act of limitations is a bar to the action? The fourth section of the act for limitation of actions, is copied from the English statute on the same subject, and enacts that "all actions of trespass, &c." "shall be commenced and sued within the time and limitation hereafter expressed, and not after, that is to say, the said actions upon the case other than that for slander," "within five years next after the cause of such action or suit, and not after." It has been observed by English judges, and if the observation had never been made, the truth would be obvious to all, that if the act had contained no other clause than this, it would have barred every action it enumerated, whatever might be the character or condition of the plaintiff. It would have barred the rights of infants, femes covert, persons non compos, or beyond the sea, as well as of corporations. The enacting clause does not contemplate the character of the plaintiff, but looks singly to the action itself. This being an action on the case, is within the enacting clause of the statute, and must be barred by it, unless the plaintiff can be brought within the exception. The twelfth section provides, "that if any person or persons, that is or shall be entitled to any such action of trespass, &c. be, or shall be, at the time of such action given or accrued, fallen or come within the age of twenty-one years, feme covert, non compos mentis, imprisoned, beyond the seas, or out of the country, that then, such person or persons, shall be at liberty to bring the same actions, so as they take the same within such times as are before limited," after such disability shall be removed.

The counsel for the plaintiff contends, 1. That this section limits the words of the enacting clause, so as to restrain them from operating on debts due to corporations. 2. That if this be against him, then the plaintiff is within the saving of the exception.

The argument in support of the first point, is substantially this. A corporation aggregate is not liable to any of the disabilities

which are enumerated in the twelfth section; not even to that of being beyond sea, because being a mere legal entity, being entirely incorporeal, it can have no place of residence. Since it cannot be brought within the twelfth section, it ought not to be comprehended in the enactment of the fourth, because the savings of the statute must be construed to extend to every description of persons, who are the objects of the enacting clause. This argument is, I think, anticipated and answered in the observation made on the words of the fourth section. They do not take into view the character of the plaintiff, but of the action. In construing this section, it is entirely unimportant, by whom the suit is brought. The action is equally barred by length of time, whoever may be the plaintiff. The plain words of the statute are decisive. Nor does any reason of justice or policy exist, which should take a corporation out of these words. The legislature could have no motive for limiting the time, within which a suit should be brought by an individual, which does not apply with equal force to a suit brought by a corporation. We find no words in the exception, intimating the intention to make it co-extensive with the enacting clause, or to limit the general provision of the enacting clause to such general classes of persons, as may furnish individuals for whom justice would require the saving of rights, which are found in the twelfth section. An exception is not co-extensive with the provisions from which it forms the exception; and if a corporation cannot be brought within any of the savings of the statute, the inference is, not that a corporation is withdrawn from the enacting clause, but that the legislature did not think it a being whose right to sue, required a prolongation beyond the legal time, given for suitors generally.

2. The proposition that the plaintiffs are within the saving of the rights of persons out of the country, is one of more difficulty, which requires more consideration. The enacting clause, it has been said, looks to the action only. The proviso which gives further time to those whose particular situation was supposed by the legislature to require it, looks to persons only. Its language is, "if any person or persons, that is, or shall be entitled to any such action, be, or shall be, at the time of any such cause of action given or accrued, within the age of twenty-one years," &c. "that then, such person, or persons, shall be at liberty to bring the same actions, &c." The plaintiff, to come within the letter of the exception, must be considered as a person or persons. This, a corporation aggregate, in its capacity as a body politic, in which alone it acts, cannot be; but the statute of Virginia, is taken almost verbatim from the English statute, and, therefore, the construction which has prevailed in England, may be considered as adopted with the words, on which that construction was made. Long before the statute of Virginia was enacted, the courts of England had extended the construction of this very section, so as to embrace cases within its equity, though not within its words. This decision was not, indeed, made in a case relating to the character of the plaintiff, but in one relating to the character of the cause, which does not stand on stronger reason. In Chandler v. Vilett, 2 Wm. Saund. 117f, it was decided that an action on the case, came within the equity of the saving of the statute, though it is omitted in the enumeration of actions to which that saving applied.[2] The twelfth section of the act of Virginia, likewise omits this action; but I have no doubt that the courts of the state, would so construe that section, as to bring that action within it. The question, I believe, has never been raised, although the occasion for raising it, has frequently occurred. Upon this principle of liberal construction, I think, the twelfth section ought to be extended, so as to comprehend in its provisions, any plaintiff actually affected by the impediments it recites. If, then, the present plaintiff really comes within the equity of the twelfth section, I should be much inclined to allow him its benefits; but if the plaintiff claims the advantage allowed to persons, there is some reason for subjecting him to the consequences resulting from the character in which those advantages are claimed. The plaintiff, is a corporate body, acting by the name and style, of the President, Directors & Company of the Bank of the United States, and consisting of the original subscribers to the said bank, or their assignees. The president and directors, are to be stockholders, and are to be elected annually at the banking-house, in the city of Philadelphia, at which place, they are to carry on the operations of the said bank. They are authorized to establish offices of discount and deposit, wherever they may think fit, and to commit the management of the said offices, and the business thereof, to such persons, and under such regulations, as they may think proper. The president and directors, transacting the business of the bank at Philadelphia, have, in pursuance of the power given in the charter, established an office of discount and deposit, at Richmond, to transact the business

[2] See, also, Rochtschilt v. Leibman, 2 Strange, 836. The proviso in the English statute, omits the action on the case generally, but embraces in its terms, actions on the case for words. The proviso in our statute, omits the action on the case altogether: yet, in the last case cited, the court held, that the equity of the saving, applied to an action on the case on a bill of exchange. The reason for extending the equitable construction of the saving clause of our statute to the action on the case generally, seems to be still stronger here than in England; for as the proviso of the English statute expressly comprehended one species of action on the case, while it omitted the action generally, it might be very plausibly argued, that every other species was excluded, upon the principle that expressio unius, exclusio alterius.

of the bank at that place. At this office, as at every other, the whole business is necessarily conducted in the name of the corporation, and the president and directors of this office, as at every other, are as much the agents of the corporation, as the president and directors doing business at Philadelphia. The president and directors, at Philadelphia, are neither the nominal nor real plaintiffs. The nominal plaintiffs, are the president, directors and company; the real plaintiffs, are all the stockholders. The president and directors transact so much of the business of the company, as is proper for them, at their banking-house, in Philadelphia; but so much of the business of the company as is proper for the president and directors of the office at Richmond, is transacted at their banking-house, in Richmond. The contract, on which the present suit is founded, was made with the company, acting by its agents in Richmond.

To bring the plaintiff within the letter, or the spirit of the saving in the twelfth section, locality must be given to the corporation. A place of residence must be assigned to it, and that place of residence, must be out of the commonwealth of Virginia. The counsel for the plaintiff contends, that the corporation resides in Philadelphia. How is this to be sustained? The corporate body consists of all the stockholders, and acts by a name, comprehending all the stockholders. These stockholders reside all over the United States; but being in their corporate capacity, in which alone they act, a mere legal entity, invisible, inaudible, incorporeal, they act by agents. It may be well doubted, and is doubted, whether the residence of these agents, or their place of doing business, can fix the residence of the corporation. If it can, these agents are divided into distinct bodies, residing in different states, and doing business at distinct places, in those different states. The banking-house of the president and directors of the office at Richmond, is as fixed and as notorious, as the banking-house at Philadelphia. The agents of the company, acting at Richmond, are as notoriously, and as completely its agents, as those who act at Philadelphia. If, then, the residence of the corporate body is fixed and ascertained, by the residence of its agents, or their place of doing business, it resides in Richmond, as truly as in Philadelphia. So far as respects this particular contract, it may, with entire propriety, be said to reside in Richmond. The contract was made here, with agents who reside here, at a banking-house established here, and is to be performed at this place. In equity and in reason, the plaintiff cannot, I think, as to this contract, if as to any, be placed in Philadelphia. When it is recollected that we resort to the equity of the statute to bring the plaintiff or the action on the case within the terms or the operation of the twelfth section, the reason is, I think, the stronger for considering this case as excluded from it, and within the enacting clause. The case of Bank of U. S. v. Deveaux, 5 Cranch, [9 U. S.] 61, 2 Pet. Cond. R. 189, decides this case, in principle. In that case, the court determined that it might look behind, or through the name of the corporation, and see the individuals who were the actual plaintiffs who constituted that legal entity in whose name the corporation acted. It is very much under the sanction of that decision, that the plaintiff is brought within the twelfth section of the act; and that decision makes the plaintiff a resident of every place where any member of the corporation resides. However difficult it might be to apply the principle of that case in reason and in justice to a contract made by an individual residing and sued in a state where no office or banking-house existed, and where a straggling corporator was to be found, no difficulty can exist in applying it to a case like this, where a suit is brought in the state in which the contract was made, in which it was to be performed, and in which the agents and members of the corporation with whom the debt was contracted, and to whom it was to be paid resided.

The plaintiff also insists, that the act does not apply to this case, because the United States, being a member of the corporation, is a party plaintiff. This argument has, I think, been fully met at the bar by the counsel for the defendant. In support of the argument urged at the bar, some decisions made by the supreme court, may, I think, be urged. It may well be doubted, on the authority of these cases, whether the privileges, the prerogative, if I may use the term, of the United States as a sovereign, belong to a case in which it does not appear in its sovereign capacity. In Postmaster General v. Early, 12 Wheat. [25 U. S.] 136, 6 Pet. Cond. R. 480, the jurisdiction of the court was denied by counsel, although the suit was brought for a debt confessedly due to the United States. It was sustained, because in the opinion of the judges, it was given by an act of congress. If jurisdiction could not be maintained without an act of congress, much difficulty would certainly be felt in applying the prerogative of government to such a suit, so as to withdraw the bar of the statute of limitations. In the case of Bank of U. S. v. Deveaux, [supra,] it was not even alleged that the United States was a party, because a member of the corporation, and that jurisdiction could be taken on that ground. In Bank of U. S. v. Planters' Bank of Georgia, 9 Wheat. [22 U. S.] 904, 5 Pet. Cond. R. 794, the defendant pleaded to the jurisdiction of the court, because the state of Georgia was a corporator. The judges of the circuit court being divided on the question, it was referred to the supreme court. In this case, the question, whether a sovereign, becoming a member of a trading corporation, carries its sovereign perogatives with it, was brought di-

rectly before the court. The court said:—"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union, who have an interest in banks, are not suable even in their own courts, yet, they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty; it acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act. The government of the Union, held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by, or against the bank, in the sense of the constitution; so with respect to the present bank. Suits brought by or against it, are not understood to be brought by, or against the United States. The government by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter." This case has, I think, fully decided the question, whether any prerogative of the United States, is imparted to the bank. In Bank of Kentucky v. Wister, 2 Pet. [27 U. S.] 318, it appeared that the state of Kentucky was the sole proprietor of the stock of the bank, yet, it was determined by the court, that the case was decided by the Case of Planters' Bank of Georgia, in 9 Wheat. [22 U. S. 904.] This point, then, is completely settled, as I think, in the supreme court. The law is for the defendant, and judgment is to be given for him.

Case No. 928.

BANK OF THE UNITED STATES v. McLAUGHLIN.

[2 Cranch, C. C. 20.] [1]

Circuit Court, District of Columbia. Dec. Term, 1810.

CORPORATIONS—DISSOLUTION—ABATEMENT OF SUITS—BANK OF UNITED STATES.

The expiration of the charter of the Bank of the United States on the 4th of March, 1811, abated all suits then pending in the name of the president, directors, and company of that bank.

[See Smith v. Frye, Case No. 13,049; First Nat. Bank v. Colby, 21 Wall. (88 U. S.) 609.]

F. S. Key, for the defendant, pleaded in abatement, that since the last continuance, the charter of the Bank of the United States had expired by the limitation contained in the third section.

To this plea, the plaintiffs demurred.

This action [by the president, directors, and company of the bank of the United States against McLaughlin's administrator] was brought on the 23d December, 1809. The charter expired on the 4th of March, 1811, previous to which time the bank had made a general assignment of all its effects to David Lenox and others, in trust, for the purpose of closing its concerns; and this suit had, by the clerk of this court, been entered for the use of the trustees before the expiration of the charter.

Mr. Caldwell, for the plaintiffs, contended that the corporation was not entirely extinct, as by the 10th section of the charter, its notes were still receivable in all payments to the United States.

THE COURT, however, (nem. con.,) was of opinion that the expiration of the charter abated the suit, there being no legal plaintiff.

Judgment for the defendant.

Case No. 929.

BANK OF THE UNITED STATES v. MAGILL et al.

[1 Paine, 661.] [1]

Circuit Court, D. Connecticut. April Term, 1824.[2]

BANKS AND BANKING—BOND OF CASHIER—LIABILITY OF SURETIES—BANK OF THE UNITED STATES.

1. One gave a bond with sureties to the Bank of the United States, conditioned, that he should faithfully perform the duties of cashier of their office of discount and deposite at Middletown, during the term he should hold said office. The bank at Philadelphia hearing that he had been guilty of a gross breach of trust,—by a resolution passed on the 27th of October, 1820, suspended him from office till the further pleasure of the board, and directed the property of the bank to be taken out of his hands. This resolution was communicated to the cashier and carried into effect on the 30th day of the same month: *Held*, that the suspension did not take effect instanter on the 27th, but on the 30th, when it was made known to the cashier; and, that until then he was cashier within the letter of the bond, and the sureties liable for his acts.

[See note at end of case.]

2. Had the resolution been to remove the cashier from office, it would have taken effect and the sureties been discharged from their liability, from the time of its passage.

3. The resolution was sent by mail, and received by the president of the office at Middletown, on the morning of Sunday the 29th:

[1] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [Affirmed in 12 Wheat. (25 U. S.) 511.]

Held, that its not being communicated on that day was not such a want of diligence as would discharge the sureties from their liability for frauds committed by the cashier on that day.

[See note at end of case.]

4. Where a bond with a penalty is given for the performance of covenants, although damages may have been sustained to a greater amount, yet the recovery must be limited to the penalty,—especially in a case of sureties. Contrariety of English authorities on this point.

5. It seems, that this is not the rule where bonds are conditioned for the payment of money.

[Cited in Lawrence v. U. S., Case No. 8,145.]

6. If there has not been a previous demand of the penalty or an acknowledgment that the whole is due, interest is recoverable only from the commencement of the suit.

[See U. S. v. Curtis, 100 U. S. 119.]

At law. This was an action of debt [by the president, directors, and company of the Bank of the United States] on a bond in the penalty of 50,000 dollars, made by Arthur W. Magill, Joshua Stow, Elisha Coe, and Nathan Starr, jun., the defendants, to the plaintiffs, conditioned, that said Magill should, during the term he should hold the office of cashier of the office of discount and deposite of the Bank of the United States at Middletown, Connecticut, execute the duties thereof with integrity and fidelity, and well and faithfully perform and fulfil the trusts reposed in him. The bond was dated the 27th of August, 1819. To the declaration on the bond the defendants pleaded performance; and the plaintiffs replied, assigning breaches.

At the trial the jury found a special verdict, stating circumstantially the following facts: That Magill, between the date of the bond and the 30th day of October, 1820, and while he was cashier of the office at Middletown, fraudulently, corruptly, and unfaithfully permitted overdrawings on the bank, and was guilty of other misconduct, by means of which the bank sustained losses to the amount, with interest, of 7,933 dollars 46 cents. That after the date of the bond, and before the 30th day of said October, 1820, and while he was such cashier, he embezzled monies and funds of the bank amounting, with interest, from the 29th day of October, 1820, to the sum of 58,614 dollars 94 cents: That 23,366 dollars 10 cents principal and interest was to be deducted from the amount of these losses, on account of monies paid by the defendants Starr and Coe, leaving a balance of 43,182 dollars 50 cents damages sustained by the plaintiffs. The verdict also found the amount of the penalty of the bond, with interest, and without interest, after deducting the said payments, in case the court should be of opinion that the plaintiffs were not entitled to recover more. The verdict also found that the president and directors of the Bank of the United States, on the 27th day of October, 1820, at Philadelphia, passed the following resolutions, viz.:

"Whereas it appears, by a report of a committee of the directors of the office of discount and deposite at Middletown, that Arthur W. Magill, cashier of that office, has been guilty of a gross breach of trust, in knowingly suffering overdrafts to be made by individuals, and also making overdrafts himself—Therefore resolved, that Arthur W. Magill, cashier of the office at Middletown, be, and he is hereby suspended from office, till the further pleasure of this board be made known." "On motion resolved, that the president of the office at Middletown be authorized and requested to receive into his care, from A. W. Magill, the cashier, the cash, bills discounted, books, papers, and other property in the said office, and to take such measures for having the duties of the cashier thereof temporarily discharged as he may deem expedient."

Which resolutions were immediately transmitted by mail from Philadelphia to the president of the office at Middletown, who received them on the morning of Sunday the 29th day of said October, and on the 30th, between the hours of four and five in the afternoon, communicated them to Magill, and then and there received into his own care the cash, bills discounted, books, papers, and other property in said office: That Magill, on the 2d day of November, 1820, sent to the president of the bank at Philadelphia a letter containing his resignation, and on the 7th the president and directors of the said bank unanimously dismissed him from his office.

D. Daggett and S. P. Staples, for plaintiffs.

R. M. Sherman and N. Smith, for defendants.

THOMPSON, Circuit Justice. This action is founded upon a bond in the penalty of fifty thousand dollars, given to the Bank of the United States for the faithful performance of the duties of cashier of the branch at Middletown in Connecticut, by Arthur W. Magill. The bond bears date the 27th day of August, in the year 1817, with a condition in the following words: "Whereas the above Arthur W. Magill has been duly appointed cashier of the office of discount and deposite of the said Bank of the United States at Middletown, Connecticut: Now the condition of this obligation is such, that if the said Arthur W. Magill, for and during the term he shall hold the said office of cashier of the said office of discount and deposite, shall execute the duties thereof with integrity and fidelity, and well and faithfully perform and fulfil the trusts thereby in him reposed, then this obligation to be void; otherwise to be and remain in full force and virtue." The case now comes before the court upon a special verdict by which the jury have found negligent, fraudulent, and unfaithful conduct in the cashier, in a variety of instances, which are particularly enumerated and set forth;

by which the bank has sustained losses to an amount beyond the penalty of the bond. It is unnecessary for me to notice particularly the several specifications embraced by the verdict. The defendant's counsel upon the argument confined themselves principally to the embezzlement of the fifty-one thousand and eighty dollars sixty-four cents. I would, however, observe generally, that I entertain no doubt, that the losses found by the jury to have been sustained by the bank in the various other instances found by the verdict, are covered by the bond. They are all found to have been sustained by the fraudulent, corrupt, and unfaithful conduct of Magill, during the time he was cashier of the bank, and are therefore not only within the general scope and object of the bond, but within its express provisions.

The questions requiring examination in the case, may be embraced under the following heads. 1. Can the defendants, under the circumstances found by the special verdict, be made responsible for any part of the fifty-one thousand and eighty dollars sixty-four cents? And 2d. As to the extent of the recovery, that is, whether it can be beyond the penalty of the bond.

The precise time when this money was embezzled by the cashier is not found by the special verdict. It states it to have been after the date of the bond and before the 30th day of October, in the year 1820, while he, (Magill,) was cashier as aforesaid. It was suggested on the argument, that this finding had reference to the particular situation in which the cashier was placed by the proceedings of the directors of the mother bank in Philadelphia. But this conclusion is not warranted. It is the same language that is used in the finding as to every other default, and was manifestly intended to refer to the introductory part of the verdict, which describes him as cashier of the office of discount and deposite of the Bank of the United States at Middletown. The verdict, therefore, finds the embezzlement to have been committed by Magill while he was cashier, and before the 30th day of October, 1820; that being the day on which he was notified of his suspension. The jury have therefore found, that he continued cashier up to the 30th of October. If, however, this is a conclusion of law not warranted by the facts found by the special verdict, it must be rejected as not coming within the province of the jury. If the special verdict is defective as to the precise time of this embezzlement, and if it was material, and the evidence upon the trial would justify a finding, that it was previous to the 27th of October, a venire facias de novo might be awarded, and the verdict in this respect corrected. This, however, not having been asked for on the part of the plaintiffs, the defendants are entitled to all the benefit of the presumption, that the embezzlement might have been between the 27th and 30th of October; and this brings me to the consideration of the proceedings of the directors of the mother bank, in relation to Magill, and the legal effect of those proceedings upon the responsibility of the sureties. The special verdict finds, that the directors of the Bank of the United States, on the 27th day of October, 1820, at Philadelphia, passed the following resolution, (after reciting some misconduct of the cashier:) "Resolved, that Arthur W. Magill, cashier of the office at Middletown, be, and he is hereby suspended from office till the further pleasure of this board be made known;" and the president of the office at Middletown, was by another resolution, authorized and requested to receive from Magill, the cash, books, papers, and other property of the office, and to take such measures for having the duties of cashier temporarily discharged as he should deem expedient. These resolutions were sent by mail to the president, and received at Middletown on the morning of the 29th of October, (being Sunday,) and on the next day between four and five o'clock in the afternoon made known to Magill, and the books, papers, and property of the bank taken out of his possession.

The bond was given to secure the faithful discharge of the trusts reposed in Magill, for and during the term he should hold the said office of cashier; and the question is, when did that office and trust cease, within the true intent and meaning of the bond? Or when did the suspension take effect; whether on the 27th of October when the resolution was passed, or on the 30th when it was made known to Magill? The jury having found that the embezzlement was before the 30th, any neglect on the part of the president in not carrying into effect the resolution of suspension, until the afternoon of that day, may be laid out of view. And I cannot think, that not having done it on Sunday is to be imputed to the president, as that want of due diligence which ought on this ground to exonerate the sureties. If then, there has been no negligence which can affect the question, the single inquiry is, whether the sureties are responsible for any act of Magill's after the 27th of October. And notwithstanding the circumspection with which the law guards and protects the rights of sureties, from the best consideration I have been able to give to the question, I think the liability of the sureties did not cease instanter upon passing the resolution of suspension: But that a reasonable time must be allowed for the resolution to be made known and carried into effect. It was undoubtedly within the power of the directors of the mother bank so to have modified the resolution by express terms, as to have it take effect upon due notice thereof being given; and such is by implication the reasonable intendment of the law. The appointment and removal of the officers in the branches being under the au-

thority and control of the mother bank in Philadelphia, time must necessarily be allowed for communicating such determination.

This was not a removal from office; Magill was still cashier, and so within the letter of the bond. Had he given satisfactory explanations respecting the complaints made against him, so that the directors had seen fit to continue him in office, no new appointment would have been necessary, and upon his restoration the liability of the sureties would unquestionably have attached without any new bond. The expression in the bond "during the term he shall hold the said office of cashier," must be construed to mean, so long as he shall have authority to act by virtue of his office. And Magill clearly had authority to act, until he received notice of his suspension; and the bank would until such time have been bound by his official acts. And if so bound, it must be because he was an officer of the bank, and having authority to bind it; which brings the case within the spirit and intention, as well as within the letter of the bond. The liability of the sureties must according to every reasonable intendment be co-extensive in point of time with the authority of the cashier to act, unless the plaintiffs or their agent are chargeable with want of due diligence in giving notice of the suspension and taking the affairs of the bank out of his hands, which in the present case I think they are not. So long as Magill was clothed with the official character of cashier, and legally left in trust with the property and concerns of the bank, and in a situation to enable him to do the mischief, against which the bond was intended as an indemnity, the responsibility of the sureties ought to remain. Had he been removed instead of being suspended he would not have had the official character of cashier, and a new appointment would have been necessary to give him such character, and a different rule of construction might perhaps have applied to the liability of the sureties. Whenever the cashier was so suspended, or placed in a situation that he could perform no official act binding on the bank, the responsibility of the sureties must also have ceased. But whilst the trust existed and was legally exercised, the sureties were bound to guarantee its faithful execution. I am accordingly of opinion that the bond covers the time up to the 30th of October, previous to which by the finding of the jury the embezzlement took place.

The next inquiry is, whether the recovery can extend beyond the penalty in the bond. On an examination of the English authorities upon this point, some contrariety of opinion will be found. Before the statute 8 & 9 Wm. III., it was held that the penalty of the bond was the debt, and payment of it might be pleaded in bar of the demand. And in many cases since the statute, satisfaction has been ordered to be entered of record on payment of the penalty of the bond and the costs. This practice, however, was not sanctioned by the court, in the case of Lord Lonsdale v. Church, 2 Term R. 388. And the court refused to stay the proceedings on the payment of the penalty into court. But in a later case of Wilde v. Clarkson, 6 Term R. 303, Lord Kenyon expressly lays it down, that the recovery cannot be beyond the penalty, and disapproves of the doctrine in the case of Lord Lonsdale v. Church. I am inclined to adopt as the better opinion, that where a bond with a penalty is given for the performance of covenants, although damages may have been sustained to a greater amount, yet the recovery must be limited to the penalty. That becomes the debt due, and upon which interest according to circumstances may be added. I the more readily adopt this rule in the present instance, because it is a case of sureties. In such cases it is peculiarly fit and proper that they should not be made liable for damages beyond the penalty. If the responsibility was without limitation, prudent and discreet men would be unwilling to become security, and expose themselves to such hazard. No judgment could be formed as to the extent of the risk; nor any calculation made as to the indemnity or counter security necessary for their protection.

I do not mean to be understood as extending this rule to bonds where the condition is for the payment of money only. Such cases might probably require the application of a different rule, and depend on different principles. Considering then the penalty as the debt due, the only remaining question is, whether interest is recoverable, and if so, from what time the calculation is to be made. The general principles of law will, I think, sanction the allowance of interest from the commencement of the suit, but no farther. Had there been any previous demand of the penalty, or any acknowledgment that the whole was due, interest might be recoverable from such time. But that not having been done, the defendants may not be deemed in default until the commencement of the suit. It may be considered somewhat analogous to an obligation to pay a certain sum of money on demand; in which case interest accrues only from the commencement of the suit, when no actual demand is shown. I am accordingly of opinion that judgment be entered for the penalty of the bond, deducting the payments proved to have been made, together with interest on the balance from the commencement of the suit. I reject the interest on the payments. Such payments were an admission of a breach of the condition of the bond, and damages sustained to that amount at least, and were of course made towards satisfaction of a demand admitted to be due. Judgment must accordingly be entered upon the special ver-

dict, for such sums as shall, upon calculation, be found due upon the principles laid down in this opinion.

[NOTE. This judgment was affirmed by the supreme court in M'Gill v. Bank of U. S., 12 Wheat. (25 U. S.) 511. Mr Justice Johnson, in delivering the opinion, said: "We are unanimously and decidedly of opinion that the ground assumed by the defendants below cannot be maintained. What was there in the resolutions of the parent bank to discharge the obligors at all from their liability? The resolution was only to suspend, and this implies the right to restore. The cashier's salary went on; and, had the board rescinded their resolution, what necessity would there have existed for a redelivery of his bond? But there is no necessity for placing the decision on this ground, since, notwithstanding the resolution of the board is expressed in the present tense, a future operation must necessarily be given it, from a cause that could not be overcome,—the distance of the parties from each other. Time became indispensable to giving notice, and the day on which the communication reached the president of the Middletown bank was a day not to be profaned by the business of a bank. There was, then, no obligation to deliver the notice, and dispossess the cashier, until the 30th, and the law makes no fractions of a day."]

BANK OF THE UNITED STATES, (MARTIN v.) See Case No. 9,156.

Case No. 930.

BANK OF THE UNITED STATES v. MOORE.

[3 Cranch, C. C. 330.][1]

Circuit Court, District of Columbia. May Term, 1828.

NEGOTIABLE INSTRUMENTS—SPECIAL INDORSEMENT—CHANGE TO BLANK INDORSEMENT.

The plaintiff, who is not an indorsee of the note, has no right, at the trial, to strike out the words of a special indorsement written over the name of the indorser, so as to convert it into a blank indorsement; and upon such an indorsement the plaintiff cannot recover, although he afterward obtain the indorsement of the indorsee to himself; because he can only recover in that action according to his right of action at the commencement of his suit.

At law. Assumpsit [by the Bank of the United States] against [John M. Moore] the indorser of Josiah Meigs's note for $250, indorsed in full to the president, directors, and company of the Bank of Columbia, but not indorsed by that bank to the plaintiffs. At the trial, the plaintiffs' counsel, Mr. Lear, without the knowledge of the defendant or the leave of the court, erased the words written over the name of John D. Moore, the indorser, so as to leave it a blank indorsement. But the court being of opinion that the plaintiffs' counsel had no right to strike out those words, a juror was withdrawn, and the cause continued; after which the plaintiffs obtained the blank indorsement of the Bank of Columbia, by its president, in this form:—"The President, Directors, and Company of the Bank of Columbia, by Nathaniel Frye, Jr., President." The declaration was amended with the leave of the court, by inserting an averment that Moore indorsed the note to the Bank of Columbia, who indorsed it to the plaintiffs.

THE COURT delivered the following opinion, (nem. con.):—

Upon the above state of the case, the court is of opinion that the plaintiffs cannot recover in this action. The indorsement to the Bank of Columbia, the then last indorsee, being filled up before the commencement of the suit, the Bank of the United States had no legal cause of action upon the note when the suit was brought. The subsequent indorsement by Mr. Frye, as president of the Bank of Columbia, (if he had authority to indorse it, on which point the court gives no opinion,) did not alter the plaintiffs' legal cause of action at the time the suit was brought. It could only authorize a new action; and, even if it would support this suit, it was not filled up when offered in evidence upon the last trial.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 931.

BANK OF THE UNITED STATES v. NORTHUMBERLAND BANK et al.

[4 Wash. C. C. 108;[1] 4 Conn. 333.]

Circuit Court, E. D. Pennsylvania. April Term, 1821.

FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION—BANK OF UNITED STATES.

The plaintiffs are a corporation established by law of the United States; the defendants are a corporation established by an act of the legislature of Pennsylvania. This is a case arising under an act of congress which incorporated the Bank of the United States, and the suit may be maintained in this court.

[Cited in Fisk v. Union Pac. R. Co., Case No. 4,827.]

[See Osborn v. Bank of U. S., 9 Wheat. (22 U. S.) 816; Pacific Railroad Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113.]

[At law. Action by the Bank of the United States against the Northumberland, Union, and Columbia Banks. Judgment for plaintiffs.]

WASHINGTON, Circuit Justice. This cause comes before the court upon an agreement of counsel that judgment should be entered for the plaintiffs for $2,981 23 cents, subject to the opinion of the court on the question, "whether the plaintiffs, being a corporation established by congress, within the city of Philadelphia, can maintain a suit in this court against the defendants, being a corporation established by an act of the legislature of this state, within the jurisdiction of

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

the same, and transacting business therein." By the second section of the third article of the constitution of the United States, it is declared, "that the judicial power of the United States shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors and other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants from different states; and between a state or citizens thereof, and foreign states, citizens, or subjects." The exercise of these judicial powers is, by the first section of the same article, vested "in one supreme court, and in such inferior courts as congress may from time to time ordain and establish." That portion of jurisdiction intended for the supreme court, is not left to be assigned by congress; but is bestowed upon it by the same article. As to the residue of the judicial powers, that was to be distributed amongst the inferior courts which congress might establish, in such proportions as that body, in its wisdom, should think best. The first judiciary act passed by congress, in the year 1789, created two courts, the circuit and district, within each state, on each of which a certain portion of the judicial authority was conferred. To the circuit courts was assigned original cognizance, concurrent with the state courts, of all suits of a civil nature, at common law or in equity, of a certain value, and the United States are plaintiffs, or an alien is a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state. Cognizance in certain criminal cases is also conferred on the circuit court by this section, as well as in cases of appeals from the district courts respectively. It will be observed that this section bestows upon the circuit courts original jurisdiction only in civil suits at common law, and in equity, where the value in dispute exceeds the sum or value of $500, and where the parties to the suit are the United States, aliens, or citizens of different states. Cognizance of cases arising under the constitution, laws of the United States, or treaties, is not assigned by the act to either of the courts which it establishes; and, consequently, neither of them could take jurisdiction in those cases, since the article of the constitution, above recited, leaves to congress the distribution of the judicial powers, not assigned to the supreme court, amongst the inferior courts which that body might ordain. The power therefore not bestowed upon those courts by legislative provision, remained dormant, until some law should call them into action, by designating the particular tribunal which should be authorised to exercise them. Jurisdiction in cases arising under the constitution, laws of the United States, and treaties, is not limited by the above article either as to sum, or by the citizenship of the parties to the suit, but is independent of those restrictions, unless congress should impose them. Thus, if an act of congress should provide that all cases in law and equity arising under the constitution, laws of the United States, and treaties, should be heard and decided by the circuit, or district courts, without any qualification whatever; there could be no doubt in my mind that the court, to which this jurisdiction should be so assigned, might exercise it, though the plaintiff and defendant should be citizens of the same state, and let the sum in controversy be what it might. But congress might grant to those courts only a part of the general jurisdiction in those cases, by limiting it to a certain sum, or description of suitors, reserving the residue for future distribution, if it should so please that body to make the grant.

It follows from what has been said, that when cognizance of cases arising under a law of the United States, is given to the circuit court without limitation, as it is in patent and copyright cases; the value in dispute, and the citizenship of the suitors, have nothing to do with the jurisdiction of the court. That this is a case arising under a law or laws of the United States, is unquestionable. It never could have arisen, if the legislature, in the exercise of its constitutional authority, had not incorporated the Bank of the United States.

The jurisdiction of this court over the case, is given by that section of the law of incorporation, which authorizes the corporate body to sue and be sued, &c., in all state courts having competent jurisdiction, and in any circuit court of the United States. I have thus endeavoured, in as few words as possible, to express, what is much better expressed by the circuit court of Kentucky in the case of this Bank of U. S. v. Roberts, [Case No. 934.] In giving this opinion upon the question of jurisdiction so arising in this case, I refer with great satisfaction to the opinion in that case upon this subject, for the purpose of declaring my entire concurrence. Judgment for plaintiffs.

Case No. 932.

BANK OF THE UNITED STATES v. O'NEALE.

[2 Cranch, C. C. 466.][1]

Circuit Court, District of Columbia. April Term, 1824.

NEGOTIABLE INSTRUMENTS—PLACE OF PAYMENT—DEMAND—DISHONOR.

If a note is payable at a bank, it is a sufficient demand of payment of the maker, if the holder,

[1] [Reported by Hon. William Cranch, Chief Judge.]

on the last day of grace, demands payment at the bank; and the note is dishonored if the maker has no funds there to pay it.

[See Bank of Metropolis v. Brent, Case No. 900; Brent v. Bank of Metropolis, 1 Pet. (26 U. S.) 89.]

At law. Assumpsit [by the Bank of the United States] against [William O'Neale] the indorser of Benjamin G. Orr's promissory note for $7,660, due 26–29 May, 1821.

A verdict was taken for the plaintiffs, subject to the opinion of the court, upon a case which stated that the note and signature of the parties was admitted; that Michael Nourse, a notary public, on the 29th of May, 1821, (the last day of grace,) at the request of the plaintiffs, presented at their office of discount and deposit in Washington, where the note was made payable, the original promissory note, and there demanded payment of the sum of money therein specified, whereunto the teller replied, that he had no funds, and that on the 30th of May, 1821, he gave notice personally to the defendant, that the said note had been protested for non-payment, and that he was held liable by the plaintiffs for the payment of the same; that, on the 29th of May, 1821, Samuel J. Potts, the plaintiffs' book-keeper at their said office of discount and deposit examined the account of the said Benjamin G. Orr, on the books of the said office on that day, and found no funds at his credit, but his account overdrawn. And it was agreed that the note was discounted for the maker, at the plaintiffs' said office, on the day of its date, and was then delivered to them by the maker, indorsed by the defendant.

Upon the case thus stated, THE COURT rendered judgment for the plaintiffs.

Case No. 933.

BANK OF THE UNITED STATES v. PETER.

[5 Cranch, C. C. 485.][1]

Circuit Court, District of Columbia. Nov. Term, 1838.

DECEASED DEBTOR — SALE OF REAL ESTATE TO PAY DEBTS — RENTS AND PROFITS — RIGHTS OF HEIRS.

The only cases in which the court has permitted the heirs of a deceased debtor to have the rents and profits until the sale of real estate sold to pay the debts of the ancestor, are cases of sale under the act of Maryland for deficiency of personal assets.

[See Kurtz v. Hollingshead, Case No. 7,953; Ritchie v. Bank of U. S., Id. 11,863.]

[Suit between the Bank of the United States and the heirs of David Peter.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

Mr. Marbury, for the defendants, the heirs of David Peter, moved the court to order the interest of the proceeds of the sales of the lands and lots to be paid to the heirs, because if they had not been sold, they would have been entitled to receive the rents and profits until a sale under the will of David Peter. There had been an agreement that the property should be sold, and the proceeds stand in the place of the land; but no reservation was made of the interest for the benefit of the heirs.

THE COURT, however, (THRUSTON, Circuit Judge, absent,) refused; and said, the only cases in which the court had permitted the heirs to have the rents and profits until sale, were cases of sale under the act of assembly of Maryland of 1785, c. 72, for deficiency of personal assets.

BANK OF THE UNITED STATES, (RITCHIE v.) See Case No. 11,863.

Case No. 934.

BANK OF THE UNITED STATES v. ROBERTS et al.

[4 Conn. 323.]

Circuit Court, D. Kentucky. 1822.

CONSTITUTIONAL LAW — JUDICIAL POWER OF THE UNITED STATES — JURISDICTION OF CIRCUIT COURTS — PRACTICE — BANK OF THE UNITED STATES.

[1. By the usages of this country and the rules of practice in the federal courts in Kentucky, it is not necessary in any case that a party should make out a warrant of attorney authorizing an attorney to appear for him, and in such courts a corporation may sue under its corporate style and character, and not by attorney.]

[2. The judicial power of the United States extends to two classes of cases: (1) Those in which the supreme court has original jurisdiction; (2) those in which it has only appellate jurisdiction. In cases of the second class the federal jurisdiction is dormant until its exercise is authorized by congress, and a circuit court can have no jurisdiction in such cases except as it is expressly granted by congress.]

[3. The provision of the constitution giving congress power to establish inferior courts, necessarily confers power to give to such inferior courts jurisdiction in all cases to which the judicial power of the United States extends, and as to which original jurisdiction is not given to the supreme court by the constitution.]

[4. The provision of the act incorporating the Bank of the United States, giving it power to sue and be sued, etc., in any state court of competent jurisdiction, or in any circuit court of the United States, authorizes the bank to sue and be sued in a federal circuit court in every case, and should not be construed so as to limit such power to cases wherein circuit courts have jurisdiction only by virtue of the judiciary act.]

[Cited in Bank of U. S. v. Northumberland Bank, Case No. 931.]

[5. Where the judiciary act is in conflict with the act incorporating the Bank of the United

States in respect to the jurisdiction of circuit courts, the bank act, being of more recent date, should prevail.]

[6. The act incorporating the Bank of the United States, while it gives jurisdiction to circuit courts in all cases to which the bank is a party, contains no provision as to costs. *Held*, that if the bank recovers less than $500 in a circuit court it cannot recover costs, and may be adjudged to pay the whole costs of the suit in the sound discretion of the court.]

[7. The provision of the act incorporating the Bank of the United States, which gives concurrent jurisdiction to state and federal courts in cases to which the bank is a party, is fairly within the competence of congress, since state courts, if their jurisdiction were exclusive, might, by refusing to take jurisdiction in such cases, indirectly deprive the bank of its chartered powers and paralyze its operations.]

[At law. Action by the president, directors, and company of the Bank of the United States against Thomas Q. Roberts and Henry H. Roberts to recover upon a bill of exchange. On demurrer to the declaration. Overruled.]

PER CURIAM. The declaration in this case contains two counts. The first is on a bill of exchange drawn by the defendants, in Kentucky, upon Thomas Townley & Co. of New Orleans, in favour of William Bard, or order, payable ten days after sight. The bill, by the procurement of the defendants, was indorsed by William Bard to Samuel T. Beal, and by him indorsed, and the contents directed to be paid, to the plaintiffs; and afterwards, at the instance of the defendants, was discounted and purchased by the plaintiffs, at their office of discount and deposit, established at Lexington; and which bill, after thus becoming the property of the plaintiffs, was presented, and protested for nonpayment. The second count is in the usual form, for money had and received by the defendants, to the use of the plaintiffs. The plaintiffs sue, in their corporate character, in the name and style conferred on them by the act of incorporation, and not by attorney; and the declaration contains no averments as to the citizenship of the defendants, nor of the corporators, nor of any of the parties concerned in the transaction. The defendant, Thomas Q. Roberts, has demurred to the declaration, alleging "that the declaration and the counts therein contained are severally insufficient to authorize this court to take jurisdiction of the case, or render judgment thereon." The act of congress [3 Stat. 266] incorporating the subscribers to the Bank of the United States (section 7) provides, that the corporation, by the name and style of the "President, Directors and Company of the Bank of the United States," shall be able and capable in law to sue and be sued, &c., without requiring them to sue by attorney. By the usages of this country, and the rules of practice in this court, it is not necessary, in any case, that a plaintiff should make out a warrant of attorney, authorizing an attorney to appear and prosecute for him. In the case of Kentucky Ins. Co. v. Hawkins, 4 Bibb, 470, the court of appeals of this state held, that the proceedings were sufficient to enable the plaintiffs to recover, although in that case they sued in their corporate style and character, and not by attorney. We think there is no weight in the first cause of demurrer, and will dismiss it without further observation.

The other causes of demurrer call in question the jurisdiction of this court. Without going into a minute examination of each particular cause assigned, in detail, we will proceed to consider the question of jurisdiction upon general principles, tested by the constitution and laws. The constitution of the United States provides (article 3, § 1) that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish." Section 2: 1st. "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants of different states; and between a state, or citizens thereof, and foreign states, citizens or subjects." 2d. "In all cases, affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make." The seventh section of the act of congress incorporating the subscribers to the Bank of the United States, enacts and provides, that "the subscribers to the Bank of the United States of America, their successors and assigns, shall be and are hereby created, a corporation and body politic, by the name and style of 'The President, Directors and Company of the Bank of the United States;' and, by that name, shall be, and are hereby made, able and capable in law (inter alia) to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and in any circuit court of the United States." Does this section of the act of congress confer on this court jurisdiction of the case before us? If it does not, it will readily be admitted, that there is a failure of jurisdiction. This case is not brought within any of the provisions of former acts of congress, declaring the jurisdictions of the circuit courts; nor does it

belong to either class of cases, authorized by the act, entitled "An act to establish the judicial courts of the United States," to be brought in the circuit courts of the United States.

It must be admitted, too, that whatever may be the extent of the judicial power of the United States, as declared by the constitution, the circuit court can only exercise such portions of that power as are expressly conferred upon it by congress. This results, necessarily, from the nature of the power, and the provisions of the constitution. The judicial power of the United States, is, by the constitution, declared to extend to eleven enumerated classes. This may properly be said to be the potential judicial power; to be called into action, either by some subsequent provisions of the constitution, or by law, or by both. Hence we find, that the constitution proceeds afterwards to declare, that this judicial power shall be vested in one supreme court, created by the constitution, and in such inferior courts as congress shall from time to time ordain and establish. The constitution defines the portions of the judicial power vested in that supreme court, and leaves the residue to be distributed among the inferior courts, which might be established by law; and to be vested, or not vested, in them respectively, from time to time, according to the sound discretion of congress. It follows, that a court, created by law, can only exercise the jurisdiction, which the law confers upon it. It cannot assume jurisdiction, under the constitution alone, without legal power being superadded. It will be conceded further, that the circuit courts of the United States, will not, and cannot take cognizance, by implication. With these concessions, and under these circumstances, has the act of incorporation conferred upon this court jurisdiction?

That the words of the law are not sufficiently explicit to give jurisdiction, will not bear an argument. The charter declares the bank may sue and be sued in any "state court having competent jurisdiction, or in any circuit court of the United States." The right of appealing to the federal tribunals, is, by the charter, made reciprocal, between the bank and the people. If a citizen should appeal to this court for redress against the bank, we should turn him away with an ill grace indeed, by telling him, that although the law said he might sue here, it did not say we should entertain jurisdiction of the suit; and that, therefore, we would give him no redress. The declaration of the law, that the party may sue in a designated court, must, ex vi termini, include the idea, that the court shall be competent to entertain the suit. The law must mean that, or nothing; for it would be futile or ridiculous to send a party into court, for no other purpose but to be sent out again, for want of jurisdiction. We cannot hesitate to believe, that the letter of the charter is sufficiently explicit to give the circuit courts of the United States jurisdiction in all suits by or against the bank. But it is contended for the defendant, that although, by the letter of the statute, the court might have jurisdiction; yet, according to its sound construction, it is otherwise. This has been argued several ways. It was said, that wherever a corporation is erected, the very creation of the corporation, by operation of law, gives it the capacity of suing and being sued; and that therefore, as the words of the charter declaring the capacity of this corporation to sue and be sued only express that which would have resulted by operation of law, without them, they ought to be disregarded in the construction of the statute. This doctrine might have been tenable, if the charter had confined itself to a simple declaration of the corporation's legal capacity to sue and be sued, without designating in what courts that capacity should be exercised. In that case, it might safely be admitted, that the law expressed no more than would have been implied, without being expressed; and good sense would seem to dictate, that, in such a case, the construction should be the same, with or without the words. We think the principle urged in argument wholly inapplicable to the case before us. The statute does not, in its expressions, confine itself to what would otherwise have been implied. It not only declares the capacity of the corporation to sue, but expresses in what courts: "In any state court having competent jurisdiction, or any circuit court of the United States." Surely, it will not be contended, that these expressions, or the idea conveyed by them, would have been supplied, by mere intendment and operation of law. If so, there would be an end of the argument. We cannot, on this ground, be authorized to reject the words of the statute.

It has been argued, that the act incorporating the bank, and the general act establishing the judicial courts of the United States, should be construed together as statutes made in pari materia; that such construction should be given to the incorporating act as would make it consist with the judicial act; and that consequently, the general expression of the act of incorporation, should be qualified and restrained, so as to permit the bank to sue in the circuit courts of the United States, in those cases only, in which it might have sued in those courts, by the provisions of the judicial act. This argument will not bear examination. If, as was very properly urged in the argument for the plaintiffs, the two statutes are consistent in their provisions, they may very well stand together, without any violence to the expressions of either; but if they are inconsistent, the incorporating act being the last expression of the legislative will, must prevail. The constitution of the United States has

divided the judicial power of the Union into eleven distinct classes. As already remarked, it vested a portion of that power in the supreme court, subject to limitations and regulations, to be imposed by congress, and left the residue of that power to be disposed of according to the sound discretion of congress. It is very clear, that the congress did not, in the judicial act, dispose of the whole of that residue, or, in other words, did not vest it in any court. An example or two will serve to prove this position. The judicial act makes no provision authorizing the patentee of a new discovery or invention to sue in the courts of the Union, for an injury done to his patent rights. This manifestly pertained to the judicial power of the Union. The first act of congress, passed on the subject of those rights, did not authorize the patentees to sue in the circuit courts; in consequence of which omission, they were compelled to resort to the tribunals of the states for redress; but, by a subsequent act of congress, they were authorized to sue in the circuit courts, in terms very similar to those used in the charter of the bank. Again, the judicial act did not authorize the assignee of a promissory note, or other chose in action, to sue in the courts of the United States, upon the ground of the plaintiff and defendant being citizens of different states, unless the assignor and the defendant were in the same attitude; although the judicial power of the United States extends, by the constitution, expressly, to all controversies between citizens of different states, whatever may be the subject of controversy. Congress might well, therefore, in any subsequent statute, as they have done in the charter of the bank, provide for a case not provided for in the judicial act, and give jurisdiction beyond the provisions of that act within the limits of the judicial power of the Union. This is a case of that sort; a case before unprovided for. It is a rule in the construction of statutes, equally dictated by the principles of law and good sense, that all the words of a statute shall have some operation, if by possibility they may. A decent respect for the legislature forbids us to believe, that when they speak, they mean differently from what they say, or mean nothing. It is a rule of construction, that a subsequent statute shall control a former; but a former shall not control a subsequent one. This rule results from the very nature of legislation. The last declaration of the public will must prevail. But these rules would be violated, by adopting the construction contended for, on behalf of the defendant, so far as the judicial act and charter of the bank are inconsistent in their provisions. It would require us to reject the expressions of the latter to make it conform to the former; to reject them, too, without necessity, when they are sensible and significant in themselves, and not repugnant to any other expressions used in the statute. No court can be at liberty to indulge such a license in the construction of statute. It was further argued, that the court ought not to take jurisdiction by the construction. This has been already admitted; but the words of the statute are explicit, as has been shown; and it is only by construction, that this court can excuse itself from the exercise of jurisdiction: a construction, too, not warranted by any known rules of interpretation.

The argument derived from the subject of costs is entitled to no weight. Costs are the creatures of statutes. The act chartering the bank is silent on the subject; there is, therefore, no repugnance between it and the judicial act; and consequently, its provisions, in relation to costs, will govern in suits brought by the bank, as in other cases. Although the bank may, from the provisions of its charter, sue in this court for any sum without limitation; yet if it recovers less than five hundred dollars, it cannot recover costs, and may be adjudged to pay the whole costs of suit, in the sound discretion of the court, as other suitors. On the whole, we entertain no doubt of the jurisdiction of this court, if congress possessed the constitutional power to confer it.

This leads to an enquiry of great importance to the bank, and to the good people of the United States: Is the provision in the charter, that the bank may "sue and be sued in any state court having competent jurisdiction, or in any circuit court of the United States," unconstitutional and therefore void? It is admitted, that the power of congress to give jurisdiction to the circuit courts of the United States, in suits instituted by the bank, can be maintained only under the first number of the second clause of the third article of the constitution, declaring that the judicial power of the Union "shall extend to all cases in law and equity, arising under the constitution, the laws of the United States and treaties made, or which shall be made, under their authority." Is the case upon record one "arising under the laws of the United States"? We have felt the novelty and difficulty of the question. It has demanded, and received, our most anxious and deliberated reflections; and the result is, a conviction that we are bound to respond in the affirmative. In the case of McCulloch v. Maryland, [4 Wheat. (17 U. S.) 316,] in the supreme court of the United States, the court decided, that the act "to incorporate the subscribers to the Bank of the United States" is a law made in pursuance of the constitution. That court being the supreme judicial tribunal of the nation, expressly vested, by the constitution, with power to decide, in the last resort, all questions of constitutional law, growing out of the laws of the United States, in its decision, is authoritative and conclusive, in all the courts of the United

States. The learned counsel, therefore, very properly made no question as to the constitutional power of congress to establish the bank. If congress had power to create the corporation, it would seem not to admit of a doubt, that congress must have power to maintain its existence, to protect its powers, to enforce its rights, and to furnish the means of carrying on its operations. The bank was established as a necessary instrument to aid the government in its fiscal concerns. Could this national object be certainly effected, without conferring jurisdiction on the national tribunal? We think not. The state tribunals might safely be left to exercise concurrent, but not exclusive jurisdiction. Whether they would entertain jurisdiction or not, would depend on the courts themselves, and the jurisdiction conferred on them by the constitution and laws of the states. If the tribunals of the states should refuse, or if the laws of the state should forbid them, to entertain a suit instituted by the bank, where in the constitution of the United States, is the power to be found, authorizing congress to compel the state courts to exercise jurisdiction? We would hesitate to pronounce, that the national government possesses such a power. We do not mean to say, that the state courts ought not, or cannot, entertain jurisdiction in suits between the bank and the citizens. We think they may do so, either with or without an express provision in the acts of congress; not as a matter of constitutional obligation, but upon those principles of comity, which authorize the courts of every civilized state to administer law and justice to suitors, although not citizens of the state. Whether congress possesses the power to coerce the state courts to entertain jurisdiction or not, we are satisfied, that an attempt to exercise such a power would justly give greater cause for alarm than the vesting of concurrent jurisdiction in the state and federal tribunals.

If it was competent for congress to create this corporation, to confer upon it the rights and powers, and to require of it the performance of the duties, expressed in the charter, it was clearly competent to submit these rights, powers and duties to the decision of the national tribunals. The powers of judicature must, of necessity, in every well organized government, be co-extensive with the powers of legislation. A government without the power of interpreting and enforcing its own regulations would not only be feeble, but must become contemptible. The framers of our admirable constitution, therefore, wisely extended the judicial power of the Union, to all cases arising under the constitution and laws of the United States. The only difficulty is, in ascertaining whether this be a case of that character. It was said in argument for the defendant, that the words "arising under" must be understood to mean "growing out of, created by, or brought into being by," the laws of the United States. Let the case before us be tested by this definition. The bank itself, its capacity to purchase the bill of exchange, its rights of property in the bill, and the sum of money therein expressed, all grew out of, were created and brought into being by, the act of congress creating the corporation. But for the act of congress, the cause before us could not have existed. It is palpable, that when the case involves the very right of property given and created by an act of congress, as in this instance, it is "a case arising under the constitution and laws of the United States." We are of opinion that, to bring the case within the judicial power of the United States, it need not be of an unmixed character. If the principal right, the right of property in the subject in controversy is given, or created, by an act of congress, made in pursuance of the constitution, it is sufficient. In this case, the principal right, the general right, of ownership in the bill of exchange, and the money for which it was drawn, is of that character. The interest and damages demanded on account of the protest are but incidents, that may follow the principal, as a shadow follows the substance, and may well be regulated by the lex loci. A distinction was attempted, at the bar, between the cases in which a general right is created by act of congress, and those in which a penalty, debt, or specific thing, or damages, are expressly created and given by laws of the United States; and it was insisted, that the latter class only ought to be regarded as cases arising under the laws of the United States. That the distinction attempted is wholly untenable is evident. The constitution uses the same expression, and in the same sentence, in relation to cases arising under the constitution, the laws, and treaties. The distinction can, in no instance, be applicable to a case arising under the constitution, and very rarely, if ever, to one arising under a treaty. The same words ought to receive the same interpretation; and where the distinction cannot possibly be applied to the constitution, it ought not to the laws. It was admitted, by one of the defendant's counsel, and we think, rightly, that the bank could, constitutionally, be authorized, by congress, to sue in the circuit courts of the United States, for a trespass committed upon its corporate rights or property. We are unable to perceive any well founded distinction between a suit brought to redress an injury done to the corporate rights in possession, and suits to redress injuries to the corporate rights in action. They are alike intended to maintain, protect, and enforce the rights of the corporation, conferred upon it by its charter.

A numerous train of decisions in the supreme court tend to prove, and indeed it was conceded in argument, that if this case had been brought originally in a court of the

state, it would have been a proper subject of revision and adjudication in the supreme court of the United States, in the exercise of its constitutional appellate jurisdiction. But it was insisted, with great earnestness that it was not competent for congress to give original jurisdiction of the case to the subordinate federal tribunals. If we have taken a correct view of the constitution, this argument is not maintainable. The judicial power granted by the constitution, is granted to the United States; it is declared to extend to certain enumerated cases; and it is vested in the "supreme court, and such inferior courts as Congress shall, from time to time, ordain and establish." "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." "In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as congress shall make." As the constitution gives to the supreme court original jurisdiction in two only of the eleven cases enumerated in that instrument, it may be asked, was it the intention of the framers of the constitution to leave the residue of the original jurisdiction to be exercised exclusively, by the courts of the states? If so, the power of congress to ordain and establish inferior courts was worse than futile. The authority to establish inferior courts includes authority to confer on them judicial power. If congress can create inferior courts, and give them original jurisdiction, in any case of the nine enumerated cases to which the judicial power of the United States extends, and in which the supreme court has appellate jurisdiction only, it is equally competent for congress to clothe such inferior courts with original jurisdiction in all the other enumerated cases, or in so many, and so much of each of them, as from time to time shall be demanded by the exigencies of the government and the wants of the people. This case being one, in our opinion, "arising under" a law of the United States, decided by the supreme judicial tribunal of the nation, to be made pursuant to the constitution, our judgment is, that this court has jurisdiction, and that the demurrer ought to be overruled.

We have to regret, that we have had but few judicial decisions or former precedents to enlighten our path. We have been compelled to explore our way, chiefly, by the lights furnished by the constitution and laws themselves, and the general principles of law and reason. In the performance of this delicate and arduous task, we have received great assistance from the arguments we have heard from the bar, on both sides; and we shall be happy if we have been enabled to come to a conclusion as satisfactory to an enlightened and impartial community as it is to our own judgments and consciences.

Case No. 935.

BANK OF THE UNITED STATES v. SMITH.

[2 Cranch, C. C. 319.][1]

Circuit Court, District of Columbia. May Term, 1822.[2]

NEGOTIABLE INSTRUMENTS—PLACE OF PAYMENT—DEMAND—PLEADING—DEMURRER TO EVIDENCE.

1. Upon a demurrer to evidence, the court cannot render judgment for the plaintiff, if the declaration be substantially defective.

2. In an action against the indorser of a note which, in the body of it, is made payable at a particular bank, the declaration must aver a demand of payment at that bank.

[See note at end of case.]

3. From the facts, that the note was discounted by the bank at which it was made payable; that the notary, at the request of the bank, presented the note at the store-house of the maker, and demanded payment of his clerk, and that the maker had no balance to his credit, in the bank, on the day the note became payable, the jury cannot infer that the demand of payment was made at the bank, nor that their officers were present at the bank, on that day, with the note, ready to receive the money and give up the note, nor that the officers of the bank, did, on that day, turn to their books to ascertain whether the maker had effects in the bank, to pay the note.

[See note at end of case.]

At law. Assumpsit [by the Bank of the United States] against [Joseph Smith] the indorser of Richard Young's promissory note, at sixty days, for $506.44, dated 17th May, 1817, payable to the defendant, or order, at the office of discount and deposit, at Washington. At the trial, in November term, 1820, when it appeared, in evidence, that the demand of payment was made by the notary at the store of the maker, and no evidence of any demand at the office of discount and deposit,

Mr. Taylor, for the plaintiffs, became nonsuit.

Mr. Lear, for the plaintiffs, at the same term, moved the court to strike out the nonsuit and reinstate the cause, and cited the following authorities: Chitty, 263, 264, in a note; Saunderson v. Judge, 2 H. Bl. 509; Berkshire Bank v. Jones, 6 Mass. 524; Woodbridge v. Brigham, 12 Mass. 403; Nicholls v. Bowes, 2 Camp. 498; Wild v. Rennards, 1 Camp. 425, note; Fenton v. Goundry, 2 Camp. 656; Lyon v. Sundius, 1 Camp. 423; Herring v. Sanger, 3 Johns. Cas. 71; Sanderson v. Bowes, 14 East, 500; Dickinson v. Bowes, 16 East, 110; Howe v. Bowes, Id. 112; Huffam v. Ellis, in the house of lords, 3 Taunt. 415; Bowes v. Howe, 5 Taunt. 30; Foden v. Sharp, 4 Johns. 183; Lang v. Brailsford, 1 Bay, 222; Parker v. Gordon, 7 East, 385; and Fenton v. Goundry, 13 East, 459.

Mr. Swann, contra, cited 4 Johns. 183, in notis, and the cases there cited.

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[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reversed in 11 Wheat. (24 U. S.) 171.]

THE COURT, (MORSELL, Circuit Judge, contra,) considering the question as very important, and that the cause could not be brought before the supreme court, upon a non-suit, reinstated the cause, without prejudice to the question intended to be argued upon the sufficiency of the demand to charge the indorser.

The cause came on for trial again at May term, 1821, when the defendant demurred to the evidence, and the plaintiffs joined in demurrer.

At November term, 1821, the demurrer was argued by Mr. Swann and Mr. Hewitt for the defendant, and Mr. Lear, for the plaintiffs.

Mr. Lear cited, in addition to the other cases, Ambrose v. Hopwood, 2 Taunt. 61; Sanderson v. Bowes, 14 East, 499; and, at May term, 1822, he cited Gibson v. Hunter, 2 H. Bl. 187, 211, as to the inferences which the jury may draw upon a demurrer to evidence; and Tidd, Pr. 914, that, on demurrer to evidence, no advantage can be taken of error in pleading; and, as to sufficiency of notice, Chit. Bills, 234; Reedy v. Seixas, 2 Johns. Cas. 337; Smith v. Whiting, 12 Mass. 6; and Bank of U. S. v. Norwood, 1 Har. & J. 423.

THE COURT, having taken time for consideration, delivered the following opinion, (THRUSTON, Circuit Judge, absent:)

This is an action of assumpsit against the indorser of Richard Young's promissory note, "payable at the office of discount and deposit, Washington, without offset."

The declaration avers that Richard Young, on the 17th of May, 1817, "made his promissory note, by which he promised to pay, sixty days after date, to the order of the said Joseph Smith, 506 dollars and 44 cents, for value received, payable at the office of discount and deposit, at Washington, without offset," &c., and sets forth the indorsement in the usual form; and the plaintiffs aver that, at the expiration of the said sixty days, the time limited, that is to say, on the 19th day of July, 1817, they presented the said note to the said maker, for payment, who then and there refused to pay the same, of which said indorsement, so made on said note as aforesaid, and the said non-payment, he, the said defendant afterwards, to wit, on, &c., had notice, by means whereof, &c. Upon the trial of the general issue, the defendant demurred to the evidence, which was as follows: After setting forth the promissory note and the indorsement by the defendant, and that it was discounted at the office of discount and deposit of the Bank of the United States, at Washington, the demurrer states the protest, (the facts stated in which were admitted to be true,) and in which Mr. Nourse, the notary, stated, that on the 19th of July, 1817, at the request of the president and directors of the office of discount and deposit of the Bank of the United States, in the city of Washington, he presented, at the store of Richard Young, the original promissory note, and demanded payment of his clerk, whereunto he replied, that Mr. Young was not within, and that he could not pay it. That the plaintiffs then offered, in evidence, the deposition of the said Mr. Nourse, in which he testified, that on the 19th of July, 1817, he put into the post-office of Washington city, after the closing of the mail for that day, a letter directed to Joseph Smith, Alexandria, informing him that a note, drawn by Richard Young, dated 17th of May, 1817, for $506.44, and by him and W. M. Chick indorsed, was due and had not been paid. That the plaintiffs also offered, in evidence, the deposition of Samuel J. Potts, bookkeeper of the office of discount and deposit, at Washington, dated December 1st, 1820, in which he states, that on the 19th of July, 1817, when the note of Richard Young, indorsed by the defendant and W. M. Chick, became due, there was no balance to the credit of the drawer or either of the indorsers, on the books of the said office.

In the argument upon the demurrer, it was contended, on the part of the defendant, that it was not necessary for the plaintiffs to prove that the payment was demanded of the maker of the note at the office of discount and deposit, at Washington, where the note was, on its face, made payable; and that, from the evidence given at the trial, as stated in the demurrer, the jury could not infer a demand at that place. To this the plaintiff's counsel answered, that when a note is made payable at a bank, it is only necessary for the officers of the bank to turn to the books of the bank, and if they find no money to the credit of the maker, they need not make any demand of payment; and for this, he cited the case of Saunderson v. Judge, 2 H. Bl. 509, in which case there was a memorandum at the foot of the note, signed by the maker, in which he stated that he would pay it at the house of Saunderson & Co., with whom he had a cash account. Before the note became payable, it became the property of Saunderson & Co., who were bankers. No demand of payment was made of the maker. The court held, that as they, at whose house the note was to be paid, were themselves the holders of it, it was a sufficient demand for them to turn to their books and see the maker's account with them, and a sufficient refusal to find that he had no effects in their hands. The court also held, that, as the place of payment was not inserted in the body of the note, it was not necessary, in the declaration, to aver a demand at that place. He also cited the case of Berkshire Bank v. Jones, 6 Mass. 524, in which Mr. C. J. Parsons says, "The note was payable on a day and at a place certain; and the place is the bank—the plaintiff's bank. A

demand of payment need not be made at any other place, and if the holder of the note is at the bank, on the prescribed day, ready to receive the money, if the maker be there, it is enough for him; and if the maker does not come to the bank, or direct the payment there, he has broken his promise, and no other notice to him is necessary. In the case at bar, as the plaintiffs held this note, we must presume it was in their bank, and there it was made payable. They were not to look up Gleson, (the maker,) or to demand payment of him at any other place. The defendant, by his indorsement, guaranteed that, on the day of payment, the maker would be at the bank and pay the note, and that if he did not pay it there, he agreed that he would be answerable in a suit at law, without previous notice of the default of the promisor." (The defendant had waived notice, but not demand.) "If, on the trial, the plaintiffs can show that, on the day of payment, the note was in the bank, and that the servants or officers of the plaintiffs were there during the usual bank hours, to receive payment and give up the note, they will be entitled to recover, as, by the terms of the note, they were not holden to demand payment but at the bank, which was impracticable, through the default of the maker; and by the defendant's waiver, he cannot claim notice." The plaintiff's counsel also cited the case of Woodbridge v. Brigham, 12 Mass. 403, which recognizes the law as laid down in the Case of the Berkshire Bank.

The court may admit the law to be correctly stated in these cases, and yet the plaintiffs may not be entitled to judgment in the present case. In order to support an averment of a demand at the bank, it may be sufficient to prove that, on the day for payment of the note, the plaintiffs turned to their books and found that the maker of the note had no effects in their hands, or that they were the holders of the note, on that day, and were ready, at their bank, during the usual bank hours, to receive the money and give up the note; but such evidence will not supply the want of an averment in the declaration that the demand was made at the bank. The judgment of the court must be given upon the whole record, and if the court see such a defect in the declaration as would be good ground to arrest the judgment, or as would be a fatal defect upon general demurrer, they must refuse to surrender judgment for the plaintiffs, upon the demurrer to the evidence. The declaration states that the note was made payable at the office of discount and deposit; at Washington. The demand alleged in the declaration is simply a demand on the maker. It is not averred to be according to the tenor and effect of the note; nor does the averment contain any words from which it can be inferred that the demand was made at the office of discount and deposit. In the case of Sanderson v. Bowes, 14 East, 507, it was decided, that when a note is (in the body of it) made payable at a particular place, a demand at that place is a condition precedent; and that the want of an averment of such a demand, in the declaration, is fatal upon the general demurrer, even in an action against the maker of the note. The same point was again decided in the case of Dickinson v. Bowes, 16 East, 110, and recognized by the house of lords, in the case of Huffam v. Ellis, 3 Taunt. 415, in 1811, upon a writ of error, where the bill was accepted, payable at a particular place, that is, at the house of certain persons using the names, style, and firm of Kensington, Styan, and Adams. The plaintiffs, in their declaration averred that "the said bill was shown and presented to the persons so using the names, style, and firm of Kensington, Styan and Adams, for payment thereof, according to the tenor and effect of the said bill, and the said acceptance thereof, and the several indorsements so made thereon." The judgment in the king's bench was for the plaintiffs; and, upon the writ of error, it was argued that the averment could not be true unless it was presented for payment at the place where, by the tenor of the acceptance, it was made payable; and is equivalent to a direct averment thereof, in terms. The judgment of the king's bench was affirmed, upon the ground that the declaration did substantially contain an averment that the demand was made at the place where, by the acceptance, it was made payable.

The court is further of opinion, that there is no evidence, stated in the demurrer, from which the jury can infer that the demand was made at the bank; nor that the plaintiffs, by their officers, were present at the bank on the day of payment, with the note, ready to receive the money and give up the note; nor that the officers of the bank did on that day turn to their books to ascertain whether the maker had effects in bank to pay the note. We are therefore of opinion that judgment, on the demurrer, must be rendered for the defendant.

This judgment was reversed by the supreme court of the United States, in 1826, 11 Wheat. [24 U. S.] 171.

[NOTE. In reversing this decision the supreme court held that, where recourse is had to the indorsers of a note made payable at a bank which is the holder thereof at the time the same is payable, it is a presentment, and, if the maker has no funds in the bank, it is a refusal of payment; also, that an averment in the declaration, or proof on the trial, of a demand of payment at the place designated, was unnecessary. Further, the court stated, per Mr. Justice Thompson, that, to entitle plaintiffs to recover, they "were bound to show that they were the indorsees and holders of the note; that the note was at the bank where it was made payable at the time it fell due; that the maker had no funds there to pay the note; and that due notice of the default of the maker was given to the defendant." Bank of U. S. v. Smith, 11 Wheat. (24 U. S.) 171.]

Case No. 936.

BANK OF THE UNITED STATES v. SMITH.

[4 Cranch, C. C. 712.][1]

Circuit Court, District of Columbia. March Term, 1836.

NEGOTIABLE INSTRUMENTS—APPLICATION OF SECURITY—DISTRESS—SET-OFF.

1. If a creditor takes a security, by deed of trust, of personal property, for a debt due to him by an indorsed promissory note, and the debtor becomes tenant of the creditor, and rent is in arrear, and the creditor, who is the landlord, distrains the goods conveyed to the trustee, as security for the payment of the note, and the same goods are sold under the distress, and the proceeds paid over to the landlord, he is bound to apply the proceeds to the payment of the note, although the goods were found on the premises, at the time of the distress, the same being there, by the consent of the landlord, as security for the note; and these facts are admissible, in evidence, on the part of the defendant, who is sued as indorser of the note.

2. But, at law, the amount of the set-off cannot exceed the proceeds of the sales actually received by the plaintiff.

At law. Assumpsit against [Fleet Smith] the defendant, as indorser of John Strother's promissory note, for $6,023.22, dated 1st October, 1830, payable to the defendant, or order, in one year, with interest from the date. The plaintiffs having given evidence of the execution and indorsement of the note, and of due demand and notice to the defendant, it was read in evidence to the jury.

The defendant then offered, in evidence, a deed of trust, dated 1st October, 1830, executed by John Strother, the maker of the note, to Richard Smith, cashier of the office of discount and deposit of the Bank of the United States, at Washington, of all the household furniture, &c., of the tenement called the City Hotel, in Washington, a schedule and appraisement of which was annexed to the deed, in trust, that if Strother should fail to pay the note when payable, the said Richard Smith should sell the property at public vendue, and apply the net proceeds to the payment of the note, and that Strother should, in the mean time, retain the possession; and Strother agreed to account for the goods, at the appraisement. The defendant also offered evidence that the goods were of the value therein stated; that the plaintiffs, by their proper officers and agents, might have taken the said property and applied it to the satisfaction of the note, immediately upon its protest; that the said Richard Smith, in all the proceedings respecting the said deed of trust, acted as the officer and agent of the bank, and with its privity; that, with the sanction and privity of the bank, he permitted the property to remain in the use and possession of Elizabeth W. Strother, wife of the said John Strother, after he had left the District of Columbia, and gone to the western country, from which he never returned; when the bank, by their duly-constituted agent, levied a distress on the same, for rent accrued after the execution of the said deed, and after the protest of the said note, under a demise from them to the said Strother, of the house, &c., wherein the said property was at the time of the execution of the said deed, and wherein it continued till the said distress.

That on the 5th of October, 1830, the plaintiffs had caused the said Strother to give two specific securities for the said rent; to wit, a deed from the said John Strother and wife, and Thomas R. Miller, to the said Richard Smith, of five slaves, and a deed of the same date, from Lucy E. Fendall, to the said Richard Smith, for three slaves, each of which deeds authorized the said Richard Smith to sell the said slaves, respectively, in case of the non-payment of the rent, when due. That all the property mentioned in the said deed of the 1st of October, 1830, remaining on the premises when the distress was levied, was sold under the said distress, by the bailiff of the bank, by their direction, and the whole proceeds paid over by him, to the bank; and that, on the 4th of October, 1831, when the said note was protested, and ever after, until such distress and sale, all the said property remained at the disposal of the bank and its proper officers and agents, and subject to their exclusive control and management; and that the bank, through such, its proper officers and agents, might, at any time after such protest, have caused the same to be disposed of, and the proceeds applied to the payment of the said note; that the leaving of the said property in the hands of the said Elizabeth W. Strother, and in her use, from the time of the protest of the said note, till such distress and sale for rent, was with the knowledge and consent of the proper officers and agents of the bank, legally acting in its behalf, in the matter.

To the admissibility of the evidence thus offered by the defendant, the plaintiffs objected; but THE COURT (nem. con.) overruled the objection, and permitted the evidence to be given to the jury; and the plaintiffs took a bill of exceptions. After some further evidence, given, both on the part of the defendant and of the plaintiff,

Mr. Coxe, the counsel for the plaintiff, moved the court to instruct the jury, that if they shall believe, from the evidence, that the note on which the suit is brought, was indorsed by the defendant, and that payment was duly demanded, and the said note protested for non-payment, and due notice thereof given to the defendant, as indorser thereof, then the plaintiff is entitled to recover; and that the circumstances given in evidence, as to the distress by the plaintiff, for rent due on the premises, and the sale under the said distress, of the property mentioned in the deed of trust of October 1st, 1830, and the receipt of the proceeds of such sale by the plaintiff, do not amount to payment, either in whole or in part, of the said note. Which instruction THE COURT refused to give, and the

[1] [Reported by Hon. William Cranch, Chief Judge.]

plaintiffs took their second bill of exceptions.

The defendant's counsel, Mr. Jones, then claimed for him; first, a credit against the said note for the full value of all the said property upon which the said distress was levied, though such value should exceed what the property produced at the sale; secondly, a credit for the value of so much of the property conveyed by the said first deed of trust as the jury may, from the evidence, find that the plaintiffs might, with reasonable diligence, have had brought to sale, under the said deed, and which was lost or destroyed by the fault and negligence of the plaintiffs.

But THE COURT, at the instance of the plaintiffs' counsel, decided, and so instructed the jury, that the defendant was not entitled, at law, to any such credit for more than the money actually received by the bank, for the proceeds of the sales so made, under the said distress and deed of trust. To which instruction the defendant excepted.

Mr. Coxe, for the plaintiffs, in order to show that the plaintiffs had a right to distrain the goods conveyed to Mr. Richard Smith, in trust to secure payment of the note, cited Bradb. Dist. (2d Ed.) c. 4, p. 73; Comyn, Landl. & T. 382, 383; Newman v. Anderton, 2 Bos. & P. (N. R.) 224; Davies v. Powell, Willes, 46; and Buckley v. Taylor, 2 Term R. 600.

Mr. Jones and Mr. Dunlop, contra, contended that where goods are on the premises for a certain purpose, with the consent of the landlord, they are not liable to distress for rent. These goods were left on the premises, with the plaintiffs' consent, for the security of a certain debt for which the defendant was surety. Besides, the bank, which was in effect the trustee under the deed made to their cashier, was bound to preserve the trust-fund to pay the specific debt charged upon it. Fowkes v. Joyce, 2 Vern. 129; Tate v. Gleed, 2 Wms. Saund. 290, note 7.

The net proceeds of the sales under the distress were $1,262.04, which the jury deducted from the amount of the note, and gave their verdict for the balance, $5,087.51. No writ of error has been prosecuted.

BANK OF THE UNITED STATES, (SWAN v.) See Case No. 13,668.

Case No. 937.

BANK OF THE UNITED STATES v. SWANN.

[2 Cranch, C. C. 368.][1]

Circuit Court, District of Columbia. Nov. Term, 1822.

NEGOTIABLE INSTRUMENTS—DISHONOR — TIME OF NOTICE TO INDORSER.

Notice to the indorser, put into the post-office at Washington, for the defendant in Alexandria, on the day after the last day of grace, after the closing of the mail of that day, is too late.

[See Seventh Ward Bank v. Hanrick, Case No. 12,678; Fullerton v. Bank of U. S., 1 Pet. (26 U. S.) 604; Lenox v. Roberts, 2 Wheat. (15 U. S.) 373; Bank of Alexandria v. Swann, 9 Pet. (34 U. S.) 33.]

At law. Assumpsit against [Thomas Swann] the indorser of a promissory note due 11th–14th December, 1819.

The notice to the indorser, who lived in Alexandria, was put into the post-office at Washington, on the 15th of December, after the mail of that day for Alexandria had been closed.

THE COURT (THRUSTON, Circuit Judge, absent) said it was too late. Non-pros.

Case No. 938.

BANK OF THE UNITED STATES v. VAN NESS et al.

[5 Cranch, C. C. 294.][1]

Circuit Court, District of Columbia. March Term, 1837.[2]

DISTRICT OF COLUMBIA — JURISDICTION OF MARYLAND—EQUITY—DEED BY GUARDIAN AD LITEM.

1. On the 26th of October, 1801, after congress had, by the act of the 27th of February, 1801, [2 Stat. 103, c. 15,] exercised exclusive legislation over the District of Columbia, the chancellor of Maryland had jurisdiction to decree a conveyance, by an infant, of lands in that district, in pursuance of a contract made by the ancestor of the infant; the suit, for a specific performance, having been commenced before congress had exercised such exclusive legislation.

[See note at end of case.]

2. The chancellor of Maryland, on the 26th of October, 1801, decreed that the infant, Marcia Burns, should, in a certain event, by W. M. D., her guardian ad litem, convey to J. P. V., the purchaser, the property in question. Upon the happening of the event, a deed, purporting to be from the infant by her guardian, and concluding thus: "In witness whereof the said Marcia," (the infant,) "by W. M. D., her guardian in this case, hath hereunto set her hand and seal the day and year before mentioned," was signed by the said W. M. D., "guardian of the said Marcia Burns," and sealed with his seal. The commissioner who took the acknowledgment certified that the said W. M. D. acknowledged the instrument to be "his act and deed as guardian aforesaid, and thereby the act and deed of the said Marcia." *Held*, that this deed, thus signed, sealed, delivered, acknowledged, and duly recorded, was a good and sufficient execution of the decree, and a good deed to pass the title to the purchaser; and that if it be not, yet by the act of Maryland of 1785, c. 72, § 14, the decree itself stands as a conveyance.

[See note at end of case.]

At law. Ejectment [by the lessee of the Bank of the United States against John P. Van Ness and William Jones] for lots 6 and 7 in the square 226 in the city of Washington.

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Affirmed in 13 Pet. (38 U. S.) 17.]

Upon the trial the plaintiffs offered in evidence an exemplification of the record of the proceedings and decree of the chancellor of Maryland in a suit by Isaac Polock v. Marcia Burns, the infant heir at law of David Burns, deceased, for the specific execution of a contract entered into, in writing, in the lifetime of the said David Burns, for the sale of sundry house lots in the city of Washington to the said Isaac Polock; in which suit, which was commenced on the 17th of May, 1800, the chancellor, on the 1st of November, 1800, decreed that upon the complainant's securing to the satisfaction of the chancellor the sum of £10,471 18s. 1d., to be paid on the 17th of April, 1804, with interest annually, the defendant, by W. M. D., her guardian, should convey to the complainant, Isaac Polock, in fee, certain lots in Washington, particularly described in the decree, and including the lots now in controversy.

On the 15th of May, 1801, the complainant, Polock, filed a petition for a commission to certain persons to value certain lands, which he offered to mortgage as security for the purchase-money; which commission was issued on the 26th of May, 1801, and returned on the 21st of October, 1801. On the 26th of October, 1801, the chancellor, being satisfied of the sufficiency of the security offered, decreed, with consent of all the parties, that, upon the complainant's executing the mortgages, and paying up the interest, "the defendant, Marcia Burns, by William Mayne Duncauson, her guardian, shall execute a conveyance to the complainant, Isaac Polock, and his heirs, as directed by the decree in this cause, passed on the first day of November last." On the 12th of January, 1802, a deed was executed by the guardian, William M. Duncauson, to Polock, of the lots mentioned in the decree. It purported to be a deed from Marcia Burns, by her guardian, W. M. D., to Isaac Polock, in fee, and recited the substance of the proceedings and decree; and averred that the security had been approved, the mortgages duly executed, and the interest paid up. It concluded thus: "In witness whereof the said Marcia Burns, by William M. Duncauson, her guardian in this case, hath hereunto set her hand and seal the day and year above written." It was signed "William M. Duncauson, guardian of Marcia Burns," and was sealed.

The commissioner, Alexander White, Esq., who took the acknowledgment, certified that said William M. Duncauson, guardian of Marcia Burns, as aforesaid, acknowledged the instrument to be "his act and deed as guardian as aforesaid, and thereby the act and deed of the said Marcia." The deed was duly recorded. The plaintiffs claimed title under this deed.

The defendant's counsel, Mr. Marbury and Mr. R. S. Coxe, objected to the admission in evidence of the record of the proceedings and decree in the case of Polock v. Burns, and contended that after the 27th of February, 1801, when congress began to exercise exclusive legislation over the district, the chancellor of Maryland could not pass any decree which should affect lands in the district. That although the suit was commenced before this part of the district was completely severed from the state of Maryland, yet no decree, passed after that separation, could be executed here, except in the manner provided in the 13th section of the act of the 27th February, 1801, [2 Stat. 107,] "concerning the District of Columbia," namely, by execution issuing from this court upon an exemplication of the record of the proceedings in the suit in the court of chancery of Maryland. That the decree could not operate here proprio vigore. The deed from Duncauson to Polock was also objected to, on the ground that the guardian's authority had ceased by the transfer of the jurisdiction from the state of Maryland to the United States; for the same reason that letters of administration taken out in Maryland before the separation, did not authorize the administrator to sue in this court after the separation. Fenwick v. Sears, 1 Cranch, [5 U. S.] 259. It was also contended, that the deed was not executed in the name of the infant, Marcia Burns, but in Duncauson's own name; he signed his own name only, and affixed his own seal only, and acknowledged it to be his own deed only,—not the deed of the infant. An attorney who executes and acknowledges a deed for his principal, must execute and acknowledge it in the name of his principal, not in his own name for his principal. Clarke v. Courtney, 5 Pet. [30 U. S.] 320.

Mr. Redin, contra, cited the Maryland act of 1773, c. 7, § 1, by which it is enacted that "persons under age," "seized of any lands," &c., "bound by an agreement to convey," "on a suit for specific performance or execution of such agreement, shall, by direction of the court of chancery," "convey and assure any such lands," &c., "in such manner as the court shall, by such order, direct, to any other person or persons; and such conveyances and assurances shall be as good in law as if such infant" "were of age." He cited also the Maryland act of October, 1778, c. 22, § 2, by which it is enacted that infants, in such cases, shall "be bound and concluded by any deed or deeds, conveyance or conveyances, assurance or assurances, made by their guardian or guardians, (to be appointed by the said court,) in pursuance of the order of the court of chancery, and such deed," &c., "so made, shall be as good and effectual in law, as if such infant or infants were, at the time of making thereof, of full age, and had executed the same."

THE COURT (nem. con.) overruled the objections, being of opinion that the court of chancery of Maryland had jurisdiction and authority to pass the decree of the 26th of October, 1801.

THE COURT, also, (CRANCH, Chief

Judge, doubting,) was of opinion, that the deed of the 12th of January, 1802, made by the guardian, was a good execution of the decree, and passed the legal title to Polock.

THE COURT was also of opinion, (nem. con.) that if that deed did not convey the legal title of the lots to Polock, the decree itself, under the Maryland act of 1785, c. 72, § 14, stands as a conveyance, and passed the title.

One of the demises laid in the declaration was by the heirs of Benjamin Stoddert, under which the plaintiff offered in evidence two deeds from Isaac Polock to Charles Lowndes; one from Charles Lowndes to Walter Smith, in trust, and one from Walter Smith to Benjamin Stoddert. To the admission of which deeds the defendant objected, on the ground that the last-mentioned deed was not made in conformity with the terms of the trust.

But THE COURT (nem. con.) overruled the objection, and the deeds were read in evidence.

The verdict was for the plaintiffs. The defendants took their bills of exception, and carried the cause to the supreme court, where the judgment was affirmed on the 22d of January, 1839.

[NOTE. This decision was affirmed by the supreme court on the grounds, with others, that it was intended, by the agreement between the state of Maryland and the United States, that pending suits as to property in that portion of the District of Columbia ceded by the state should be proceeded with until decree, and that such decrees should have the same effect as if the sovereignty had not been transferred. Furthermore, the court held that the execution and acknowledgment of the conveyance were valid; Taney, C. J., stating that, as the deed substantially conformed, in the manner of its execution, to the directions contained in the decree, it was valid and effectual to convey the property therein mentioned. Van Ness v. Bank of U. S., 13 Pet. (38 U. S.) 17.]

Case No. 939.

BANK OF THE UNITED STATES v. VOORHEES et al.

[1 McLean, 221.][1]

Circuit Court, D. Ohio. July Term, 1834.[2]

JUDGMENT PURCHASER — COLLATERAL ATTACK ON HIS TITLE.

1. A judgment of a court of general jurisdiction, having cognizance of a particular case, will protect the purchaser under the judgment, however erroneous it may be.

[Cited in Doe v. Litherberry, Case No. 13,251.]

[See note at end of case.]

2. The levy of a foreign attachment under the law of Ohio, gives jurisdiction to the court.

3. The court of common pleas is a court of general jurisdiction. Much may be presumed in favor of the proceedings of such a court.

[See note at end of case.]

4. A purchaser is not bound to look into the record, to see whether errors have not occurred, for which the judgment may be reversed. These matters are never examinable where the judgment comes before the court collaterally.

[See note at end of case.]

5. The court of common pleas having taken jurisdiction in an attachment by the levy of the writ, the subsequent proceedings cannot divest the jurisdiction, though erroneous. The purchaser under the judgment is protected by it.

[Cited in Doe v. Litherberry, Case No. 13,251.]

[See note at end of case.]

6. The deed of the auditors may be made to the purchaser at the sale, or to his order.

[See note at end of case.]

[At law. Action of ejectment by the Bank of the United States against John Voorhees and others. Judgment for plaintiff.]

Caswell & Starr, for plaintiff.

Mr. Chase, for defendants.

OPINION OF THE COURT. This action of ejectment is brought to recover a tract of land in Hamilton county. The title of the plaintiff is founded on the proceedings in a certain writ of attachment in the court of common pleas against Seth Cutter, commenced in Hamilton county, in 1807, and under which the land was sold in 1808, by auditors appointed, who made their return in 1808. And at the August term following the sale was confirmed by the court. The land was sold, as appears by the return, to William Stanley and the deed was executed to Woodward and Foster. And on the same day Woodward and Foster conveyed the land to Stanley. By sundry mesne conveyances the land was conveyed to the Bank of the United States. The defendants are in possession under Seth Cutter, the defendant in the attachment, and claim under conveyances from him. And the question for the decision of the court is, whether the proceedings under the attachment divested the title of Seth Cutter to the land attached.

On the part of the defendants it is contended that they did not, on account of manifest irregularities in the proceedings which rendered them null and void. The statute requires that before a writ of attachment shall issue, an affidavit shall be made of the debt due, and that the defendant has absconded, &c., or is not a resident of the state. An advertisement in some newspaper in the state, giving notice of the attachment, &c. is required to be published three months, before judgment can be entered on the attachment. No judgment can be rendered against the defendant until the third term, at each of which terms he is required to be called three times and defaulted. No sale, by the auditors appointed by the court, can be made, in less than twelve months from the return of the attachment. Before the sale of the land attached, the auditors are required to give notice by advertisement fifteen days.

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

[2] [Affirmed in 10 Pet. (35 U. S.) 449.]

The defendants contend that it does not appear from the record that any of these essential requisites have been complied with; and consequently the judgment and sale of the land are void. That this is a proceeding in derogation of the common law, a special jurisdiction created by the statute, and that to render the proceeding valid it is necessary to show that every step has been taken as required by the statute. That nothing short of this can divest the title of the defendant in the attachment. And that as any essential defect in the proceeding vitiates the whole, advantage may be taken of it collaterally, when the record is offered in evidence.

It is true that there is a well defined distinction between the proceedings of courts which have a general and those which have a special jurisdiction. The latter must show their jurisdiction upon the face of their proceedings, but the former take jurisdiction of all cases as a matter of course, unless in due time, the want of jurisdiction shall be set up by plea. The court of common pleas, before which this proceeding was had, is a court of general jurisdiction. And the first question that arises when the judgment of such a court is offered in evidence as the foundation of title is, whether the court had jurisdiction of the case. The subject matter is embraced within the general powers of the court; but has the defendant been served with process, or has a notice been published, or such proceeding had, as authorized the court to take cognizance of the matter? This is not a proceeding against the person of the defendant, but against the property levied on by the attachment. It is substantially a proceeding in rem, and the property is bound from the service of the attachment.

But, it is objected that the statute provides, no attachment shall issue unless an affidavit has been made, and that in this record there is no affidavit. It is not material to enquire whether this affidavit should constitute a part of the record or not; the law provides that if the clerk issue the writ without an affidavit, "such writ shall be quashed, on motion, at the proper cost of the clerk issuing the same." And independent of the presumption which arises in favor of the regularity of the writ, from no such motion having been made, and the general powers of the court, it may well be doubted whether advantage can be taken of such a defect, except by motion as the statute provides. But if the omission to file an affidavit be an error, for which the judgment should be reversed, by an appellate court, still it does not follow that the judgment for this cause, is a nullity. The record states that the plaintiff "has sufficiently testified to the judges of our court of common pleas, that Seth Cutter, who is not now residing in the state is indebted, &c." This shows that the affidavit was made, and the substance of it contained in the record. What more can be required by the most technical rule? The court were the judges of the sufficiency of the affidavit. The levy of the attachment brings the case within the jurisdiction of the court. For the law so far as the property attached is concerned, has substituted it for a personal service.

The court having acquired jurisdiction of the case, it cannot be divested by any error in the subsequent proceedings. The judgment may be erroneous and reversible in a court of errors, but it cannot be treated as void. And unless it be void, the purchase under it is protected. It would be a monstrous doctrine, to hold a purchaser responsible for the errors of the court. He is a stranger, generally, to the proceedings; and in making his purchase, relies upon the judgment of a court of general jurisdiction. Such a rule would operate most injuriously to defendants, as the precariousness of the title, would take from their property, sold under a judgment, more than half its value. But the rule is well settled that errors of proceeding in the court, do not affect the title of the purchaser. The record does not show that the pendency of the attachment was advertised as the statute requires; but, if it were necessary, this might fairly be presumed. But it is not deemed necessary to examine minutely the objections made to the judgment. They are not now properly examinable. And the time has long since transpired when they could be examined on a writ of error. Simms v. Slacum, 3 Cranch, [7 U. S.] 300; Hylton v. Brown, [Cases Nos. 6,980-6,982;] Wheaton v. Sexton, 4 Wheat. [17 U. S.] 506; Elliott v. Peirsol, 1 Pet. [26 U. S.] 340; Tayloe v. Thomson, 5 Pet. [30 U. S.] 370; Hartshorn v. Wilson, 2 Ohio, 28; 6 Ohio, 268; 5 Ohio, 500; Allen v. Parish, 3 Ohio, 190; Ludlow v. Wade, 5 Ohio, 501; Ludlow v. McBride, 3 Ohio, 257. In the case of Thompson v. Tolmie, 2 Pet. [27 U. S.] 157, the doctrine applicable to this case is examined. The court appointed the auditors, and directed the sale of the land, and on the return of the sale, they confirmed it, and authorized a deed to be executed. Now the court exercised their judgment on all these matters, and does not that afford evidence, that they were regularly transacted? The record does not show that the steps required were not taken; then is not the presumption fair that they were taken? at all events, on a collateral examination of the record. The statute does not provide that the title shall not be good, unless the requisites of the statute shall be complied with. And if the judgment be not a nullity, however erroneous it may be, the purchase under it is clearly good. In the case of Tayloe v. Thomson, 5 Pet. [30 U. S.] 370, the court held the title of a purchaser of a term of years, under a fieri facias, good, though the defendant was at the same time, and in the same case, charged in execution under a ca. sa. The doctrine is fully sustained in [Blaine v. The Charles Carter,] 4

Cranch, [8 U. S.] 328; [Wheaton v. Sexton,] 4 Wheat. [17 U. S.] 506.

The objection that the conveyance was made to Woodward and Foster, instead of Stanley, the purchaser at the sale, seems not to be entitled to much consideration. If this be a matter of contest, it must arise between the purchaser and the persons who received the conveyance. So Cutter was in no respect prejudiced by the act, it is not perceived how he can complain. He has received the consideration for which the land sold, and it can be a matter of no importance to him, whether the land was conveyed to the purchaser or to some other person. The title has passed out of the defendant by operation of law, and the right to it may be a matter of controversy arising out of acts subsequent to the sale. But no objection is perceived to the deed as made to Woodward and Foster. Whether it was so made on the order of the purchaser or not, is not material; as it appears on the same day the auditors executed the deed, Woodward and Foster conveyed the land to Stanley. From this fact it may be presumed that the conveyance was first made to Woodward and Foster with the consent or at the request of Stanley, and he immediately afterwards received the conveyance from them. No objection is perceived to the auditor's or the sheriff's making a deed to any individual at the request of the purchaser at the sale, provided the act is done in good faith. This case was taken to the supreme court on a writ of error, and the judgment of the circuit court was affirmed. [Voorhees v. Jackson,] 10 Pet. [35 U. S.] 449.

[NOTE. The supreme court, per Mr. Justice Baldwin, in affirming this decision, assigned as its reasons that, the court of common pleas of Ohio, at the time of the proceedings, being a court of general civil jurisdiction, its record proved itself without reference to the evidence upon which the adjudication was made; that the judgment itself was evidence of the right of the plaintiff to the thing adjudged, and that any error of the court in rendering the judgment, however apparent, could only be examined by the appellate court, and not in a collateral proceeding; that the order of sale was a lawful authority to the auditors to sell, executed by virtue of the authority vested in the court, and the deed by the auditors passed the title to the premises in controversy to the purchaser. Voorhees v. Jackson, 10 Pet. (35 U. S.) 449.]

Case No. 940.

BANK OF THE UNITED STATES v. WASHINGTON.

[3 Cranch, C. C. 295.][1]

Circuit Court, District of Columbia. May Term, 1828.

BANKING—PAYMENT OF CHECK—EVIDENCE OF FUNDS—WITNESS—PRIVILEGE.

1. Payment of a check by a bank is prima facie evidence of funds, and that the apparent state of the funds upon the books of the bank justified the payment; and it is incumbent upon the bank to prove the error if there was any.

[See Bank of Alexandria v. McCrea, Case No. 849; Bank of U. S. v. Wilson, Id. 943.]

2. A bookkeeper of a bank is not obliged to answer a question, the answer to which, might charge himself with the loss.

At law. Assumpsit [by the Bank of the United States against George C. Washington] for money had and received by an overdraft paid by the bank by mistake, owing to wrong addition. The plaintiffs proved all the debit side of their account which consisted of checks drawn by the defendant and paid by the plaintiffs. They proved also that it was their usual practice to pay according to the apparent funds in their leger without examining further into the actual state of the funds.

THE COURT was of opinion that the payment of the checks by the bank is prima facie evidence of funds; and CRANCH, Chief Judge, and THRUSTON, Circuit Judge, were of opinion that the payment of the checks by the bank was also prima facie evidence that the apparent state of the funds upon the books justified the payment, and that it was incumbent on the plaintiffs to prove error in the account, upon the apparent balance of which the check was paid.

The plaintiffs then offered Mr. C. W. Forrest, (who was bookkeeper of the bank at the time,) and asked him whether, at the time a certain check for $1,900 was drawn, the account upon the leger showed a balance to that amount or more in favor of the defendant.

The witness objected to answer this question, because the bank had sued him upon his bond, intending to charge him with the balance of this account, so that he cannot answer, in one way, without charging himself.

THE COURT (nem. con.) refused to compel the witness to answer the question. Verdict for the defendant.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 941.

BANK OF THE UNITED STATES v. WATTERSTON.

[4 Cranch, C. C. 445.][1]

Circuit Court, District of Columbia. March Term, 1834.

NEGOTIABLE INSTRUMENTS—NOTICE OF DISHONOR—MISTAKE IN DATE OF NOTE.

A mistake in [the recital of] the date of the note will not invalidate the notice given to an indorser.

[See Bank of Alexandria v. Swann, 9 Pet. (34 U. S.) 33.]

At law. Assumpsit [by the Bank of the United States] against [George Watterston] an indorser. The notice left by the notary with the defendant was of a note dated in 1832, when the true note was dated in 1830. In all other respects the notice was correct.

[1] [Reported by Hon. William Cranch, Chief Judge.]

THE COURT (nem. con.) was of opinion upon the authority of Mills v. Bank of U. S., 11 Wheat. [24 U. S.] 431, that the notice was sufficient.

Judgment for the plaintiff.

BANK OF THE UNITED STATES, (WHITING v.) See Case No. 17,576.

Case No. 942.

BANK OF THE UNITED STATES v. WILLIAMS.

[3 Cranch, C. C. 240.][1]

Circuit Court, District of Columbia. Dec. Term, 1827.

EXECUTORS AND ADMINISTRATORS—PROBATE PRACTICE—AUDITOR'S REPORT — EVIDENCE — EXCEPTIONS.

The report of the auditor under the Maryland act of 1785, c. 80, is prima facie evidence of the amount due, upon the principles and evidence stated in the report; and if those principles, and that evidence, are approved by the court, so much of the report may be read to the jury, as shows the balance so stated, although before the jury is sworn, the defendant except to the evidence admitted by the auditor, and to his calculations, conclusions, and statements.

At law. Assumpsit [by the Bank of the United States against Brooke Williams, administrator of William B. Williams] for money had and received by the defendant's intestate, as second teller to the plaintiff's use. The cause had been referred to Mr. Redin, as auditor, under the act of Maryland, 1785, c. 80, § 12, whose report was filed on the 19th of December, 1825.

Mr. Jones, for the defendant, this morning, (December 31, 1827,) before the jury was sworn, filed what he called exceptions, which were as follows: "The defendant excepts to the auditor's report in this case, 1st. on the ground of the evidence and statement therein contained, and 2dly. on the ground of the calculations and conclusions drawn from the same. The defendant excepts to all and singular the evidence, examined before the auditor, both written and oral; and excepts to the auditor's statement, and report of the same. The defendant excepts to all and singular the statements, and calculations founded thereon as reported by the auditor. W. Jones, for defendant." Upon the trial he objected to the report as evidence.

But THE COURT (nem. con.) permitted the plaintiff to read the auditor's statement of the balance, which he found due upon the evidence and principles stated in his report, which evidence and principles the court is of opinion were correctly admitted and acted upon by the auditor. The part permitted by the court, to be read to the jury, was as follows: "The auditor finds and reports that the balance of loss and gain account, and the total deficiency in William B. Williams's accounts, as second teller from the 21st of May, 1818, when he commenced the duties of the office, to the 25th of August, 1819, when he ceased to perform them, is the sum of one thousand one hundred and ninety one dollars and three cents." Bills of exception were taken as in the case of the Bank of U. S. v. Johnson, at this term, [Case No. 919.] But the plaintiff became non-pros.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 943.

BANK OF UNITED STATES v. WILSON.

[3 Cranch, C. C. 213.][1]

Circuit Court, District of Columbia. Dec. Term, 1827.

BANKS AND BANKING—PAYMENT OF CHECK—EVIDENCE—PRODUCTION OF ACCOUNT.

1. The defendant had settled his account with the plaintiffs, and paid the balance then claimed. The plaintiffs afterwards changed the entries in their books, so as to show a balance still due to the plaintiffs, and presented him an account thus stated, which the defendant refused to admit or receive as a true statement of his account, but received it only as containing the then aspect of the plaintiff's books. The court refused to compel the defendant to produce that account, at the trial, unless accompanied by the defendant's affidavit of those facts.

2. Payment of a check, by the bank upon which it is drawn, is prima facie evidence of funds; especially when the checks have been surrendered to the drawer.

[Cited in Bank of Alexandria v. McCrea, Case No. 849.]

[See Bank of U. S. v. Washington, Case No. 940.]

Notice had been given by the plaintiffs to the defendant, [James C. Wilson,] to produce his bank-book at the trial. The defendant made affidavit that no bank-book was kept for him, during the transactions; and that he paid the balance demanded of him by the bank. He admits that several years subsequently, changes were made in the entries, in the books of the bank, whereby a balance was made to appear against the defendant; that a statement of the accounts as then appearing, was tendered to the defendant, which he utterly refused to admit or receive, as a true statement of his account, and never did receive the same as such; but received it only, as containing the then present aspect of the books of the bank, and expressly denying that he owed a cent to the bank.

THE COURT ordered the account to be produced, but to be accompanied, if used in evidence, by the defendant's affidavit.

The defendant then demurred to the plaintiffs' evidence, and the plaintiffs joined in demurrer.

The plaintiffs read in evidence, to the jury, the checks drawn by the defendant on the plaintiffs, and by them paid; which checks had been cancelled by the bank, and delivered up to the defendant, upon the settle-

[1] [Reported by Hon. William Cranch, Chief Judge.]

ment of the account; and which had been produced by the defendant upon notice. The plaintiffs also produced evidence that it was the general practice of the bank, not to pay checks without funds; but that, sometimes, customers overdrew, and their checks were paid without funds.

Mr. C. Cox, for the defendant, contended that acceptance of a bill or draft, is an admission of funds, prima facie; and especially when the draft is surrendered. He cited Vere v. Lewis, 3 Term. R. 182; Chit. Bills, 469, 470, 524.

Mr. Lear, contra, cited Tatlock v. Harris, 3 Term. R. 174.

THE COURT rendered judgment for the defendant, upon the demurrer to the evidence, at May term, 1827.

Case No. 944.

BANK OF THE UNITED STATES v. WINSTON et al.

[2 Brock. 252.][1]

Circuit Court, D. Virginia. May Term, 1825.

JUDGMENT LIEN—SUBROGATION.

1. The lien on lands created by a judgment is given by the statute, which authorizes an elegit, and the lien depends upon the right to sue out an elegit.

[Cited in Shrew v. Jones, Case No. 12,818; Re Boyd, Id. 1,746; Massingill v. Downs, 7 How. (48 U. S.) 765; Morsell v. First Nat. Bank, 91 U. S. 360.]

[See U. S. v. Morrison, 4 Pet. (29 U. S.) 124; Burton v. Smith, 13 Pet. (38 U. S.) 464.]

2. Where money is paid by a surety for his principal, the surety is subrogated to all the rights of the creditor whose debt he has discharged. But quaere—Is this ever done in favour of a person not bound by the original security, who discharges it as a volunteer?

[Cited in Dooley v. Virginia Fire & Marine Ins. Co., Case No. 3.999.]

3. The lien of a judgment on which execution is stayed, dates, not from the rendition of the judgment, but from the time when execution may be sued out. Scriba v. Deanes, [Case No. 12,559.]

[Suit by the Bank of the United States against Winston's executors and others.]

MARSHALL, Circuit Justice.—This is an application on the part of Pleasant Winston, to be allowed the sum he has paid the commonwealth as surety for George Winston, on a judgment obtained by the commonwealth.

In the year 1818, the commonwealth of Virginia obtained a judgment against George Winston, for the sum of $17,999.24. No execution has ever issued on this judgment. Soon after its rendition, an act was passed directing that execution should be delayed, on George Winston's giving sufficient surety for the payment of the debt by instalments. In pursuance of this act, bonds for the whole amount were executed, with Pleasant Winston as surety. Before the first instalment became due, judgments were obtained by the Bank of the United States, and by several other creditors, against George Winston. He made a deed of his property for the payment of his debts, giving priority to the debt due to the state of Virginia, which has been set aside by a decree of this court as fraudulent. It being understood that the commonwealth asserted a lien on this property, under its original judgment, and also under the deed, and the commonwealth having declined becoming a party to the suit in this court, no sale was ordered, but the marshal was directed to receive the rents and profits, and to hold them subject to the order of the court. Afterwards, in the year 1824, the commonwealth instituted suit on the bonds given by Pleasant and George Winston, and obtained judgments, some of which have been paid by Pleasant Winston. He claims to stand in the place of the commonwealth, and to be paid his debt before those creditors who obtained judgments in the intervening time between the original judgment of the state against George Winston and the subsequent judgments against George and Pleasant Winston. He contends that the lien created by the original judgment still continues; that by paying a subsequent judgment on a bond given in consideration of the first, he is to be considered as having paid so much in discharge of the first, and, consequently, to be entitled to a preference over the other creditors. This claim is resisted by the other creditors on various grounds, some of which will be considered.

As the lien created by a judgment is given by the statute which authorizes an elegit, it is settled in this country that the lien depends on the right to sue out an elegit. [Eppes v. Randolph,] 2 Call, 125; 4 Hen. & M. 57.[2] This is not controverted; but it is insisted by Pleasant Winston that the commonwealth may now sue out an elegit, on the original judgment against George Winston, and that he is entitled to the priority which that right gives to the commonwealth. When this idea was first suggested, it occurred to me, and I stated to the bar, that the doctrine of subrogation or substitution was confined to sureties, and had never been applied to a mere volunteer. If an assignable instrument be transferred, its obligation

[1] [Reported by John W. Brockenbrough, Esq.]

[2] Nimmo's Ex'r v. Com. And however long the judgment may have been out of date, there is no doubt that, if susceptible of being revived at all, the lien upon the land, yet in the hands of the debtor, would be revived eodem flatu. Tucker, P., in Watts v. Kinney, 3 Leigh, 293. And where there are two judgments, and a surety, bound by the eldest judgment, pays it off, although the lien of the judgment is gone at law, equity will substitute him in the place of the creditor whose debt he has paid, and give him the benefit of his lien. The equity of the surety is superior to that of the second incumbrancer. Id.

at law and equity remains. If a security not assignable, be discharged by a surety whom it binds, equity keeps it in force in his favour, and puts such surety in the place of the original creditor. But I think there is no case in which this has been done in favour of a person not bound by the original security, who discharges it as a volunteer. I will not say that it may not be done, but if it may, equity will consider all the circumstances, and impose equitable terms. The decision of this point, is not, I think, essential to the cause.

Were it admitted that Pleasant Winston has a right to rank on the fund in the power of the court, according to the original judgment in favour of the commonwealth, the inquiry would be, whether that judgment is still a lien. The counsel for Pleasant Winston contend that it is:—1. Because the proceedings under that judgment, on the part of the commonwealth, do not amount to a stay of execution; 2. If they do, the execution may now issue, and will relate to the date of the judgment.

I shall not unnecessarily decide the first question. That may hereafter arise in a case which will depend entirely on it. I do not think this does. The second has already been decided in this court. In the case of Scriba v. Deanes, [Case No. 12,559,] this court determined that the lien of a judgment on which execution is stayed, dates, not from the time of its rendition, but from the time when execution may be sued out. I have not changed this opinion. If, then, Pleasant Winston could claim the lien created by the original judgment, his lien would be postponed to that of other creditors whose judgments were obtained before the expiration of the time, during which execution was suspended, unless it should be decided that the commonwealth could have sued out an elegit, notwithstanding the act of assembly under which the bonds were taken which bind Pleasant Winston. I have said that it is unnecessary to decide this point at present. My reason is this. I think it too clear for controversy, that the commonwealth, and those who claim under her, must abandon or abide by her original judgment. Equity cannot give all the advantages of both. If she, or her substitute, claim under the elegit, the party so claiming must be content with what the elegit will give. If, waiving the elegit, the commonwealth pursues her remedy on the bonds which she has taken, instead of her original judgment, and thereby obtains more than that judgment would yield, equity will not aid her in the attempt to come in under the original judgment also. Waiving every other objection to the claim of Pleasant Winston, this is insurmountable. The debt to the commonwealth is augmented by having recourse to the bonds which have been given in satisfaction of the judgment, and the fund for other creditors is diminished to the same amount, if she still claims her priority. Equity will not, to effect such an object, tack that priority to the subsequent judgments which augment the debt. I think, then, if every other objection to the claim of Pleasant Winston could be removed, it must fail, unless he could comply with the condition a court of equity ought to impose, the reduction of the claim of the commonwealth to the amount of its judgment.

The following order was made in this cause: "This cause came on to be further heard on the papers formerly read, and was argued by counsel; on consideration whereof, the court is of opinion that it can take no cognizance of the question: whether the commonwealth of Virginia has a lien on the lands of George Winston in virtue of the judgment, alleged in the answer of Pleasant Winston to have been obtained by the commonwealth against the said George, on the 19th of June, 1818, for $19,999.24, in the general court of this commonwealth, and that until that question be decided, no decree ought to be made for the sale of the lands comprised in the deed of trust from George Winston to Charles J. Macmurdo and James Winston, dated 21st of August, 1820: liberty is therefore granted to any of the parties to this cause, to proceed in the courts of this state, in such manner as may be deemed proper, to obtain the decision of that question from the competent tribunal, without prejudice to the claim of such party or parties in this cause; and all parties in this cause are enjoined from pleading the pendency of this suit, or from alleging the same in bar of such proceeding."

Case No. 945.

BANK OF UNITED STATES v. FREDERICKSON.

[Ingr. Insolv. 277.] [1]

Circuit Court, D. Pennsylvania. Oct. 14, 1821.

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—DISCHARGE OF INSOLVENT DEBTOR.

[Act March 26, 1814, § 14, providing that a majority in value of the creditors of an insolvent debtor may discharge him, for seven years, from liability on all previously incurred indebtedness, violates the obligation of contracts, and is void.]

[Action by Bank of United States against Frederickson. Defendant moves for "a rule to show cause why process issued in the case should not be set aside, with costs," in accordance with Act Pa. March 26, 1814, § 14. Denied.

[It is provided by Act Pa. March 26, 1814, § 14, that "it shall be lawful for the court by whom any debtor shall have been discharged under this act to make an order that, wherever a majority in number and value of his creditors residing within the United States, or having a known attorney therein, con-

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

sent in writing thereto, he shall be released from all suits, and the estate and property which he may afterwards acquire shall be exempted from execution for any debt contracted, or cause of action created, previous to such discharge, for seven years thereafter; and if, after such order shall be so made, and a majority in number and value of the creditors shall have consented as aforesaid, any action shall be commenced, or execution issued, for such debt or cause of action, it shall be the duty of any judge of the court from which the process issued, to set aside the same, with costs."]

THE COURT. The law upon which the motion is founded is equivalent to a discharge of the debt, and to say the least of it, impairs the obligation of contracts, contrary to the decision of this court in Golden v. Prince, [Case No. 5,509,] and Sturges v. Crowninshield, [4 Wheat. (17 U. S.) 122.] If the legislature can constitutionally take away a creditor's remedy for seven years, they can for seventy; in either case the law impairs the obligation of contracts—they differ only in degree.

Case No. 946.

BANK OF UNITED STATES v. ROBERTS.

[2 Cranch, C. C. 15.][1]

Circuit Court, District of Columbia. Nov. Term, 1810.

NEGOTIABLE INSTRUMENTS—ACCOMMODATION—BLANK INDORSEMENT.

The plaintiff's counsel may fill up the blank indorsement, at the trial, although the defendant indorsed the note for the accommodation of the maker.

[See Vowell v. Lyles, Case No. 17,021.]

At law. Assumpsit [by the Bank of the United States] against [John Roberts] the indorser of Elisha Janney's promissory note.

Mr. Swann, for the plaintiff, was about to fill up the blank indorsement, "Pay the contents to the president, directors and company of the Bank of the United States, for value received."

Mr. E. J. Lee, for the defendant, objected that the defendant was an accommodation indorser, and never received value.

Mr. Swann and Mr. Caldwell, contra. The words "credit the drawer" are equivalent to a check, and show that the money would have gone to the credit of the defendant.

THE COURT (THRUSTON, Circuit Judge, absent) suffered the indorsement so to be filled up.

BANK OF UNITED STATES v. WILSON. See Case No. 943.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 947.

BANK OF WASHINGTON v. BANK OF THE UNITED STATES.

[4 Cranch, C. C. 86.][1]

Circuit Court, District of Columbia. May Term, 1830.[2]

MONEY HAD AND RECEIVED—WHEN LIES—MONEY PAID ON ERRONEOUS JUDGMENT — LIABILITY OF AGENT.

1. Money paid upon an erroneous judgment, may, after reversal of the judgment, be recovered back in an action for money had and received; and if the money shall have been paid to an agent of the original plaintiff, and remains in his hands, at the time of reversal and demand it may be recovered of the agent.

2. If the amount of the judgment be paid to the plaintiff's agent, and he be notified, at the same time, that a writ of error will be taken out to reverse the judgment, and that he will be expected to refund it if the judgment should be reversed, if he then pay over the money to his principal, without security for his indemnity, it is at his own peril.

[See note at end of case.]

At law. Assumpsit [by the Bank of Washington against the Bank of the United States] for money had and received to the plaintiff's use, to recover back money paid upon an erroneous judgment. [Judgment for plaintiff. This was afterwards reversed by the supreme court in Bank of U. S. v. Bank of Washington, 6 Pet. (31 U. S.) 8. See note at end of case. For other opinions connected with this litigation, see Bank of Washington v. Triplett, 1 Pet. (26 U. S.) 25; Triplett v. Bank of Washington, Case No. 14,178; Bank of Washington v. Neale, Id. 951.]

The case was argued by Mr. Key and Mr. J. Dunlop, for the plaintiffs, and by Mr. Jones and Mr. Lear, for the defendants.

The counsel for the plaintiffs cited Ripley v. Gelston, 9 Johns. 201; Burrough v. Skinner, 5 Burrows, 2639; 1 Chit. Pl. 25; Esp. N. P. 6, 19; Frary v. Dakin, 7 Johns. 79.

CRANCH, Chief Judge, delivered the opinion of the court. This is an action brought January 12, 1830, to recover money paid by the plaintiffs to the defendants, upon a judgment of the circuit court which has been since reversed by the supreme court of the United States. The state of the case, as agreed by the parties, is this: "Triplett and Neale recovered a judgment in this court, at Alexandria, in April term, 1824, against the Bank of Washington, [nowhere reported,] which was afterwards reversed in the supreme court, [Bank of Washington v. Triplett, 1 Pet. (26 U. S.) 25.] The Bank of Washington, on the 2d of June, 1824, applied

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reversed in 6 Pet. (31 U. S.) 8.]

to one of the judges of the supreme court, to allow a writ of error to be prosecuted, (the matter in dispute being less than $1,000, so that the bank could not, of right, obtain a writ of error without the special leave of one of the judges of that court.) That judge did not allow the writ; but it was, afterwards, to wit, on the 15th of March, 1825, allowed by the chief justice. After the refusal of the writ, upon the first application, and before its allowance by the chief justice, to wit, on the 30th of August, 1824, Triplett and Neale sued out their execution on the judgment, and immediately sent the same, inclosed in a letter, to Richard Smith, cashier of the office of discount and deposit of the Bank of the United States, at Washington, with an indorsement thereon, in these words: "Triplett and Neale v. The Bank of Washington, 1824. Use and benefit of the office of discount and deposit, United States, Washington city. Charles Neale." That the said Richard Smith wrote an indorsement thereon, in these words: "Pay to Mr. Brooke Mackall. Richard Smith, Cashier." That the said Brooke Mackall, the runner in the said office, presented the execution, &c. to the Bank of Washington, and there, on the 9th of September, 1824, received the sum of $881.18, and signed the receipt thereon, in these words: "Received eight hundred and eighty-one dollars and eighteen cents. B. Mackall." And, at the time of signing the same, William A. Bradley, then cashier of the Bank of Washington, verbally gave notice to the said Mackall, that it was the intention of the said Bank of Washington to appeal to the supreme court, and that the said office of discount and deposit would be expected, in case of a reversal of the judgment, to refund the amount. That the said Mackall received the said sum, as the amount of principal and interest accrued on the said judgment, as appears by his receipt on the said execution; which sum he delivered to the said Smith, who entered it to the credit of C. Neale, one of the firm of Triplett & Neale, on the proper books of the said office. That before delivery of the said execution to the said Smith, as aforesaid, the said C. Neale had promised to appropriate the money, expected to be recovered from the Bank of Washington in that suit, to reduce certain accommodation discounts which he, the said Neale, had running in the said bank, upon notes drawn by him, and indorsed by indorsers as sureties for the due payment thereof, which discounts were still running upon such notes at the time and times the said execution was so delivered, and when the money was paid as aforesaid. That he, said Smith, received the said execution, with the said Neale's said indorsement thereon, as he understood and considered, for collection; and, when collected, he deposited the same in bank, to the said Neale's credit generally, and would have sent the same to him at Alexandria, if he had requested him to do so; and would have paid his check for the amount. That immediately upon the receipt of the said money, as aforesaid, the said Smith wrote a letter to the said Neale, in the words following: "Office Bank United States, Washington, September 9th, 1824. Christopher Neale, Esq. Dear Sir,—I have received the sum of eight hundred and eighty-one dollars and 18–100 cents from the Bank of Washington, in payment of your judgment against it, and have placed the same to your credit. Be good enough to give me specific directions of the way in which you wish it applied. Yours, respectfully, Richard Smith, Cashier." To which letter the said C. Neale returned the following answer: "Dear Sir,—In reply to your esteemed favor, I have to request that you will apply the money received from the Bank of Washington to the reduction of the notes indorsed by John H. Ladd & Co. and John A. Stewart, equally, after paying Thomas Swann and Walter Jones, Esq., $100 between them, or $50 each, as their fees. Yours, truly, Christopher Neale. September 10, 1824." That the said Smith applied the said money pursuant to the directions of the last-mentioned letter.

It is submitted to the court, upon the foregoing case agreed, whether the plaintiffs are entitled to recover of the defendants, the money, with interest, so received and applied by the said Smith as aforesaid. If the court decide in the affirmative, judgment to be entered for the plaintiffs for the sum of $881.18, with interest from the 9th day of September, 1824, till paid, and costs; otherwise for the defendants, with costs. (Any objections to the competency of the evidence as here stated, to be considered by the court.) N. B. The plaintiff also shows the record of the final trial at Alexandria court of November term, 1829, and it is to be considered as here inserted.

There can be no doubt that the money paid upon an erroneous judgment, may, after reversal of the judgment, be recovered back in an action for money had and received. And if the money shall have been paid to an agent of the original plaintiff, and remains in his hands, at the time of reversal and demand, it may be so recovered of the agent. In all the cases in the books, where money paid by mistake, has been paid to an agent, and he has had notice of the mistake before he has, bona fide, paid it over to his principal, he has been held liable to refund it. We do not perceive any difference, in principle, between the case of money paid by mistake, and money paid upon an erroneous judgment. If the assignee of an erroneous judgment is the absolute owner of it by purchase, without recourse to the assignor, and receives the amount from the defendant, he receives it as principal; and upon reversal of the

judgment, is as much liable to refund it to the defendant, as if he had been the original plaintiff in the action, whether he had or had not notice, at the time of receiving it, that the original defendant intended to prosecute a writ of error. If he received the money as agent, and, at the time of receiving it, had such notice, he is put upon his guard; and, if he pays over the money to his principal, without security for his indemnity, it is at his own peril; for the notice makes him liable to refund it to the original defendant in case the judgment should be reversed. In the present case, the notice accompanied the payment. If Mr. Mackall was competent to receive the money, he was competent to receive the notice. It was sufficient for the Bank of Washington that the notice should accompany the payment. They could not tell, beforehand, who would demand payment of the judgment. They could not, therefore, give any previous notice to the bank. It is true that they might have given notice to Triplett & Neale, the original plaintiffs; but they were not bound to give it. It was sufficient for them to wait until payment should be demanded. We think that the notice to Mr. Mackall, the agent of the Bank of the United States, placed that bank on the same ground of liability as that upon which the original plaintiffs stood; and that they are equally bound to refund the money, upon the reversal of the original judgment.

THRUSTON, Circuit Judge, absent, but understood as agreeing in the result of this opinion.

Reversed by the supreme court. [Bank of U. S. v. Bank of Washington,] 6 Pet. [31 U. S.] 8.

[NOTE. The supreme court reversed the judgment for the reason, with others, as stated by Thompson, J., that "no notice whatever could change the rights of the parties, so as to make the Bank of the United States responsible to refund the money. When the money was paid, there was a legal obligation on the part of the Bank of Washington to pay it, and a legal right on the part of Triplett & Neale to demand and receive it, or to enforce payment of it under the execution; and whatever was done under that execution while the judgment was in full force was valid and binding on the Bank of Washington, so far as the rights of strangers or third persons are concerned. The reversal of the judgment cannot have a retrospective operation, and make void that which was lawful when done. The reversal of the judgment gives a new right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost by reason of the erroneous judgment; and, as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right, but as to strangers there is no such privity; and if no legal right existed, when the money was paid, to recover it back, no such right could be created by notice of an intention so to do." Bank of U. S. v. Bank of Washington, 6 Pet. (31 U. S.) 8.]

BANK OF WASHINGTON, (BRENT v.) See Case No. 1,834.

Case No. 948.

BANK OF WASHINGTON v. BRENT.

[2 Cranch, C. C. 538.][1]

Circuit Court, District of Columbia. Dec. Term, 1824.

CONTINUANCE—FAILURE OF PARTY TO APPEAR.

In case of an attachment by way of execution, if there be no appearance of the principal debtor, or garnishee, or other proceeding at the return term of the writ, the attachment is discontinued.

[At law. Action by the Bank of Washington against W. Brent, Jr.]

Attachment, by way of execution upon a judgment of the court, laid in the hands of F. May and B. Thruston, and returnable to October term, 1822.

Mr. Wallach, for plaintiffs.

Mr. Hall, as amicus curiae, suggested that the suit was discontinued, as no appearance had been entered for the principal debtor or garnishees, nor any further proceedings had at the first term.

THE COURT (THRUSTON, Circuit Judge, not sitting) decided that the cause was discontinued.

Case No. 949.

BANK OF WASHINGTON v. ELIOT.

[Cited in Union Bank of Georgetown v. Gozler, Case No. 14,358. Nowhere reported; opinion not now accessible.]

Case No. 950.

BANK OF WASHINGTON v. KURTZ.

[2 Cranch, C. C. 110.][1]

Circuit Court, District of Columbia. June Term, 1813.

EVIDENCE—PRIMARY AND SECONDARY.

Parol evidence cannot be given of the contents of a letter from the notary public to the defendant, put into the post-office, without previous notice to the defendant to produce it.

[Cited in Underwood v. Huddlestone, Case No. 14,339.]

THE COURT refused to permit the notary public to give parol evidence of the contents of his letter to the defendant, who was the indorser of George Frank's promissory note, without previous notice to the defendant to produce the original letter, on the authority of Underwood v. Huddlestone, [Case No. 14,339,] June term, 1813. Quaere?

BANK OF WASHINGTON, (MAGRUDER v.) See Case No. 8,963.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 951.

BANK OF WASHINGTON v. NEALE.

[4 Cranch, C. C. 627.][1]

Circuit Court, District of Columbia. Nov. Term, 1835.

ASSUMPSIT — MONEY PAID ON JUDGMENT SINCE REVERSED—LIMITATIONS OF ACTIONS.

The cause of action to recover back money paid upon a judgment reversed for error, arises upon the reversal, although the appellate court, at the time of reversal, orders a venire de novo to be issued by the inferior court, and the cause is still there pending; and the limitation of the statute begins to run from the time of such reversal.

[See Bank of Washington v. Bank of U. S., Case No. 947.]

At law. This was an action for money had and received, to recover back money paid upon a judgment afterwards reversed for error. In May, 1824, Triplett & Neale, of Alexandria, District of Columbia, recovered judgment against the Bank of Washington, in the circuit court of the District of Columbia, sitting in Alexandria county, (the cause having been removed to that county, from Washington county,) for negligence in not collecting the amount of an inland bill of exchange deposited in that bank for collection. The bank paid the amount of the judgment to the agent of the Bank of the United States, upon the order of Mr. Neale, the acting partner of the firm of Triplett & Neale; and the Bank of the United States placed the amount to the credit of Mr. Neale. When the Bank of Washington paid the money, the cashier gave notice to the agent of the Bank of the United States, who received it, that the Bank of Washington would take out a writ of error to reverse the judgment, and that the Bank of the United States would be expected to refund the money, in case of a reversal. The Bank of Washington accordingly brought their writ of error, and the supreme court of the United States reversed the judgment at January term, 1828, and remanded the cause to the circuit court, with an order to issue a venire de novo. [Bank of Washington v. Triplett,] 1 Pet. [26 U. S.] 25. On the 12th of January, 1830, the Bank of Washington brought an action against the Bank of the United States, to recover back the money paid on the erroneous judgment, and on the 24th of October, 1830, recovered judgment in the circuit court, [Bank of Washington v. Bank of U. S., Case No. 947,] which judgment also was reversed by the supreme court of the United States, at January term, 1832, and judgment ordered to be entered for the defendant, in the court below. [Bank of U. S. v. Bank of Washington,] 6 Pet. [31 U. S.] 8. The original suit of Triplett & Neale v. The Bank of Washington, which was remanded by the supreme court, upon the reversal, with an order for a venire de novo, remained pending in the circuit court, in Alexandria, District of Columbia, until the 6th of November, 1829, when a verdict and judgment were rendered for the defendant, Bank of Washington. [Case No. 14,178.] After the judgment in the case of Bank of Washington v. Bank of U. S. [Id. 947] was reversed, the present action of the Bank of Washington v. Christopher Neale was commenced, on the 24th of March, 1832; to which the defendant pleaded the statute of limitations, more than three years having elapsed since the reversal of the original judgment in January, 1828, but not since the final action of this court, upon the mandate of the supreme court, in that original action; which was on the 6th of November, 1829, as before stated.

Mr. Jones, for the defendant, contended that the plaintiff's cause of action accrued in 1828, when the original judgment was reversed; and that the plaintiffs were under no obligation to wait the issue of the subsequent proceedings upon the venire de novo, in the original action. He cited Wilcox v. Plummer, 4 Pet. [29 U. S.] 182.

Mr. Key and Mr. Dunlop, contra, contended that, as the supreme court, upon the reversal of the original judgment, awarded a venire de novo, the plaintiffs could not ascertain how much they had lost, and to which they ought, in equity, to be restored, until final judgment in the original action. Until that time, they could only recover nominal damages. They cited Clark v. Pinney, 6 Cow. 297; Green v. Stone, 1 Har. & J. 405; Isom v. Johns, 2 Munf. 272; Id. 413; and Till. Lim. 86, note.

THE COURT (THRUSTON, Circuit Judge, doubting) instructed the jury (upon the prayer of the defendant's counsel) that the plaintiffs' cause of action accrued upon the reversal of the original judgment, in 1828, and therefore more than three years before the commencement of the present action.

Verdict for defendant.

BANK OF WASHINGTON, (PATRIOTIC BANK v.) See Case No. 10,806.

BANK OF WASHINGTON v. PEIRSON. See Case No. 953.

Case No. 952.

BANK OF WASHINGTON v. PELTZ.

[2 Cranch, C. C. 241.][1]

Circuit Court, District of Columbia. April Term, 1821.

EXECUTORS AND ADMINISTRATORS—ACTION TO REDUCE CLAIM TO JUDGMENT — ASCERTAINED ASSETS.

There can be no judgment in Washington county, against an executor or administrator for a debt of the testator, or intestate, until

[1] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

the court shall have ascertained the assets, and assessed the sum for which the judgment shall be rendered against the executor or administrator, de bonis propriis.

At law. Scire facias, to revive a judgment rendered at June term, 1818. The docket entry of that term was "judgment for $2,000 damages and costs; damages to be released on payment of $600 with interest from 12th December, 1815, till paid, and costs."

Mr. Wallach, for the defendants, moved to quash the scire facias, because the judgment was not complete, the court having never assessed the sum which the defendants (the executors) ought to pay in regard to the amount of assets in their hands, and the debts due to other persons, as required by Act Md. 1799, c. 101; Id. c. 8, § 8,—and contended that no execution could issue until that sum should be assessed, because the execution must in all cases issue de bonis propriis, as well as de bonis testatoris.

Mr. Caldwell, contra. It does not appear that the court did not assess the sum, &c. The defendant may have admitted assets.

THE COURT (THRUSTON, Circuit Judge, absent) said that there was no judgment against an executor or administrator, until the court has assessed the sum which the defendants ought to pay, according to the amount of assets in their hands. The docket entry is only an admission of the sum which the testator ought to have paid, if he had been living.

THE COURT quashed the scire facias, without costs, and made an order referring the original judgment to the register of wills, to ascertain the amount of assets, and the sum for which the judgment should be rendered.

Case No. 953.

BANK OF WASHINGTON v. PEIRSON et al.

[2 Cranch, C. C. 685.][1]

Circuit Court, District of Columbia. May Term, 1826.

PRINCIPAL AND AGENT—POWER OF AGENT TO INDORSE A NOTE—CONTINUING POWER—REVOCATION BY DEATH OF PRINCIPAL—EVIDENCE.

1. An authority to indorse notes need not be under seal. A power from R. B. to sign, in his behalf, any note for the renewal of notes, of which he was then the drawer or indorser, is a continuing power to indorse notes subsequently given, to renew notes indorsed by the attorney for his principal.

2. The existence of the original note indorsed by the principal, may be proved by parol, without producing it, it having been cancelled and given up to the maker.

3. If the principal authorize his agent to receive notices for him, the authority ceases with his death; a notice given to the agent after the death of the principal, will not bind his executors.

[See Boone v. Clark, Case No. 1,641; Eagleton Manuf'g Co. v. West, etc., Manuf'g Co., 2 Fed. 774; Galt v. Galloway, 4 Pet. (29 U. S.) 344; Hunt v. Rousmaniere, Case No. 6,898; same case, on appeal, 8 Wheat. (21 U. S.) 201.]

[Compare Wylie v. Coxe, 15 How. (56 U. S.) 419.]

At law. Assumpsit [by the president and directors of the Bank of Washington] against [Joseph Peirson and R. Y. Brent] the executors of [R. Brent] the indorser of T. L. Washington's notes. The name of R. Brent, the defendant's testator, was writtten on the back of the notes by J. H. Reily; and to show his authority to indorse for Mr. Brent, the plaintiffs produced a written paper, not under seal, in the following words: "I hereby authorize and empower Mr. John Reily, of the Bank of Washington, to sign for me and in my behalf any note for the renewal of notes, in the said bank, of which I am the drawer or indorser. Given under my hand this 9th day of August, 1818. Rob. Brent. Witness: Robert Brent, William Brent."

Mr. Wallach, for plaintiffs.

Swann & Worthington, for defendants.

THE COURT (nem. con.) decided that it was not necessary that the power to indorse should be under seal; but that the paper might be read to the jury as part of the evidence to show the authority of Mr. Reily to indorse.

THE COURT also decided, (CRANCH, Chief Judge, contra,) that this was a continuing power to indorse notes subsequently given to renew notes indorsed by Mr. Reily in the name of Mr. Brent, to renew notes indorsed by Mr. Brent himself.

THE COURT also decided, (MORSELL, Circuit Judge, contra,) that parol evidence might be given of the existence of a note indorsed by Mr. Brent in the Bank of Washington, previous to the authority given to Mr. Reily; and that the present note was given to renew a note given to renew that note so indorsed by Mr. Brent himself; evidence having been given that the note with Mr. Brent's original indorsement had been canceled and given up to T. L. Washington, the maker, who was dead, and no administration was ever taken upon his estate; that he had no wife nor child; that his brother lived with him at the time of his death, but is also dead, and it did not appear who was in possession of Mr. T. L. Washington's papers; nor that the plaintiffs ever made any inquiry for that note, so as to produce it at the trial.

THE COURT also decided, (THRUSTON, Circuit Judge, contra,) as they had twice before decided, namely, once in this cause, a few days before, and once in another cause between the same parties, at December term, 1824, [Brent v. Bank of Washington, Case No. 1,834,] that notice, of non-payment, given

[1] [Reported by Hon. William Cranch, Chief Judge.]

to Mr. Reily, after the death of Mr. Brent, did not excuse the bank for not giving notice at the late dwelling of the deceased, nor for not inquiring whether any administration had been taken upon his estate, &c. That the defendants, although they had not proved the will and obtained letters testamentary, at the time the notes fell due, yet, as they were executors, they were entitled to notice; and notice to Mr. Reily was not notice to them; they never having authorized him to receive notice for them.

Verdict for plaintiff, $1,001.75. Bills of exception were taken, but no writ of error.

[For another case growing out of substantially the same facts, see Case No. 11,155.]

BANK OF WASHINGTON, (PIERSON v.) See Case No. 11,155.

Case No. 954.

BANK OF WASHINGTON v. REYNOLDS.

[2 Cranch, C. C. 289.][1]

Circuit Court, District of Columbia. April Term, 1822.

NEGOTIABLE INSTRUMENTS — DEATH OF MAKER — DEMAND ON WIDOW — EXECUTORS AND ADMINISTRATORS—BURDEN OF PROOF.

If the maker of a note die before the note becomes payable, a demand of payment made upon his widow, at the last place of his abode, is, prima facie, a sufficient demand to charge the indorser, there being no evidence that there was an executor or an administrator; but if there be actually an executor or an administrator, the demand must be made upon him; the burden of proof, however, that there was an executor or administrator, lies on the defendant.

At law. The defendant was indorser of J. Huddleston's note at sixty days. Huddleston died before the note became payable. The notary, on the day after the third day of grace, called at his last dwelling place and demanded payment of his widow, who replied she had nothing to do with the settlement of the estate. The notary did not know whether there was an executor or an administrator; the defendant having offered no evidence that there was any administration upon the estate.

THE COURT (MORSELL, Circuit Judge, contra) was of opinion, that this was a sufficient demand.

THE COURT, upon the trial, on the motion of the plaintiff's counsel, instructed the jury, (nem. con.) that if they should believe from the evidence that Mr. Reynolds, the defendant, had been several years a resident of the city of Washington, previous to the protest of the note in question, and that several previous notes, upon which he was indorser, had been protested upon demand made on the day after the third day of grace, and had been renewed by his indorsement upon notice given to him on the day after the third day of grace, and that such demand and notice were according to the long existing usage and practice of the bank and its customers, the jury may infer from these facts, that the defendant had a knowledge of such usage in the said bank at the time he indorsed the note, and that he assented to such usage.

The defendant then offered evidence that, when the note became payable, there was an executor of the maker, qualified to act, and residing in this city.

THE COURT (THRUSTON, Circuit Judge, contra) was of opinion, that the plaintiffs were bound to inquire for the executor and demand payment of him.

Verdict for the plaintiffs.

The defendant's counsel moved for a new trial, because the verdict was against the instruction of the court upon the point of law.

But THE COURT refused to grant it.

[NOTE. The practice of demanding payment on the day after the last day of grace was changed by agreement of the banks of the District of Columbia, in 1818, to conform to the general commercial usage. See Bank of Alexandria v. Wilson, Case No. 856; Cookendorfer v. Preston, 4 How. (45 U. S.) 317; Adams v. Otterback, 15 How. (56 U. S.) 539.]

BANK OF WASHINGTON, (TRIPLETT v.) See Case No. 14,178.

Case No. 955.

BANK OF WASHINGTON v. WALKER.

[Hayw. & H. 53.][1]

Circuit Court, District of Columbia. Dec. 21, 1841.[2]

USURY—WHAT CONSTITUTES — DISCOUNTING—NOT A QUESTION FOR THE JURY.

1. Where there was an application to a bank for a discount upon a note to be secured collaterally, and the party applying drew checks upon the bank, which were paid before the note was actually discounted, and the bank treated the note, when discounted, as having been so discounted on the day of its date, instead of a subsequent day, on which its proceeds were carried to the credit of the party, it was *held* not to be usury.

2. It is incompetent for the jury, in case of a written contract or agreement, to pass upon the question of usury; it is exclusively for the decision of the court.

[At law. Suit by the president and directors of the Bank of Washington against John Walker on a promissory note. Tried by jury. Verdict and judgment for plaintiff. The defendant, by writ of error, subsequently took the case to the supreme court, where the judgment was affirmed in Walker v. Bank of Washington, 3 How. (44 U. S.) 62.]

J. Hellen, for plaintiff.

Brent & Brent, for defendant.

[1] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

[2] [Affirmed in 3 How. (44 U. S.) 62.]

This action was brought upon the following note: "$10,000. City of Washington, May 9, 1840. Thirty days after date I promise to pay to Henry Walker, or order, ten thousand dollars, for value received, negotiable and payable at the Bank of Washington. Jno. Walker. Credit the drawer." It was indorsed by Henry Walker, Lewis Walker and John Walker. The defendant's plea was usury.

The facts of the case were, that: John Walker, the defendant, desired to obtain a loan for the purpose of purchasing cattle, and addressed a letter to the bank to that effect, assenting to assign as security an accepted draft of a certain navy agent. He executed a promissory note in favor of Henry Walker or order for $10,000. The note on which suit is brought is a renewal of it and dated as above. The plaintiff gave in evidence the note and proof of the handwriting of the defendant to the same.

The defendant then gave evidence tending to show that the note was given in renewal of a previous note similarly signed and indorsed, payable ninety days after date, which was discounted by the plaintiff at the request of the defendant, for his accommodation, as a loan, on the 18th of February, 1840, but not passed to his credit until the 22d of February, 1840, at which time an officer of the plaintiff deducted from the proceeds of said note the interest on the same, computing from the 6th of February, 1840, the date of said note, for the period of ninety-four days, and that said note nowhere appeared on the books of the plaintiff until the 18th of February, 1840; that the whole amount credited by plaintiff to the defendant, as the consideration of said note dated the 6th of February, 1840, and discounted only on the 18th of February, 1840, and passed to defendant on the 22d of the same month, was the sum of $9,843.33; and that the sum of $156.67 was taken by said plaintiff as the interest upon said note for the time said note was discounted, that said note of the 6th of February, 1840, was surrendered to the defendant upon the execution of the said note of the 9th of May, 1840, the last being but a renewal of the former, and that the plaintiff credited the defendant on account of said note of the 9th of May, 1840, only the sum of $9,843.33 and took as interest the sum of $156.67, which was exacted from the defendant.

The plaintiff then gave in evidence that on the 20th of January, 1840, the defendant had checked out of plaintiff's bank $1,224.93, on the 6th of February, 1840, $2,500, and on the 21st of February, 1840, $7,000, all of which were charged to defendant on the books of the plaintiff, and no moneys or funds appeared to his credit at the time of drawing out said sums of money; that on the 22d of February, 1840, the plaintiff credited said defendant with $9,843.33, as the proceeds of said note of the 6th of February, 1840, and the balance then appearing to be due to the defendant on the books of the plaintiff, after charging him with the several amounts so drawn out by him previous to the 22d of February, 1840, was $997.86.

The defendant gave in evidence that the said note of the 6th of February, 1840, was brought on or after the 11th of February, 1840, it being a discount day, by the president or a book-keeper of the plaintiff, to the discount clerk, a witness in the case, and given by him as a note not done, or not passed, by the board of directors, and that said note remained in the hands of said clerk until the 18th of February, 1840, when it was passed by the board, and on the 22d of February, 1840, the sum of $9,843.33 was passed to defendant's credit as the net proceeds of said note, and that interest at the rate of six per centum per annum on $10,000, computed from the date of said note, for ninety-four days, was reserved at the time of entering such credit by direction of some officer of the plaintiff; and that it was the usual practice of plaintiff to take on discounts only from the time of making the discount; and that it does not appear that defendant was credited on plaintiff's books with the interest computed from the 6th of February, 1840. The defendant asked the cashier whether the amounts drawn out of bank by the defendant previous to the 22d of February, 1840, were not charged on the books as overdrafts, and were not allowed as the personal credit of the defendant. The said cashier answered that he had no doubt but that the defendant was allowed to check upon said note of the 6th of February, 1840, before the same was entered to his credit on the books. And being asked further for the reasons of this opinion, he stated that he had no recollection of said note being in bank previous to the 18th of February, 1840, or of its existence, or of any arrangement with reference to it previous to that date, and that the amounts so checked out previous to the 22d of February, 1840, would not have been paid on defendant's checks, but for the knowledge, on the part of the cashier, that he, the defendant, had a large contract with the navy department for the supply of beef, and the defendant had given to the plaintiff good collateral security, from which, however, no surplus resulted after paying the defendant's antecedent liabilities, and that the said advances made to the defendant after the 6th of February, 1840, and previous to the 22d of February, 1840, were made on security given, or to be given, but he does not know of any security given during that time, except the defendant's letter of the 30th of January, 1840, a bill of sale by defendant to plaintiff of his barrelled beef, dated the 20th of February, 1840, and two acceptances of the navy agent dated respectively the 19th February, 1840, and the 2d of April, 1840, and the note dated the 6th of February, 1840, of which the said

cashier has no recollection, until the 18th of February, 1840; and that he is satisfied that said advances were not made on the personal credit of defendant, and from all the above circumstances, he has no doubt that said note of the 6th of February, 1840, was in bank from the time of its date, and that defendant was allowed to check on said note from the day of its date. There was considerable evidence taken to show that the Virginia notes paid to the defendant by the plaintiff were depreciated, being ½ to 1 per cent. less than the notes of the banks of the District or notes of the banks of Baltimore, Maryland.

The following prayers, among others, were offered by the defendant:

1st. The defendant moved the court to instruct the jury that the facts mentioned by said cashier are evidence, but the inferences or opinions of said cashier are not evidence, but the court refused to give such instructions as prayed, but instructed the jury that inferences or opinions of said witness are not of themselves evidence of the facts so inferred, but that the facts stated by the witness, as the ground of his inference or opinion, are competent to be given in evidence to the jury, together with the inference or opinion of the said witness; from which facts the jury are to judge whether such inferences and opinion are justified by the facts stated. The defendant, through his counsel, excepted to the said refusal and to the instructions so given.

2d. If the jury believe, from the evidence aforesaid, that the plaintiff on the 18th of February, 1840, agreed to loan the defendant the sum of $10,000, and on the 22d of February, 1840, credited him with $9,843.33, on plaintiff's books, as the proceeds of a loan made on his note for $10,000, dated the 6th of February, 1840, and payable in 90 days, and the retained interest upon said $10,000 computed from the date of said note for the time it had to run, then the presumption of law is that there was usury in said transaction and the burden of proof is on the plaintiff to show mistake or inadvertence in the reservation of said illegal interest.

Which THE COURT refused to give as prayed by the counsel for the defendant, but instructed the jury, that, if they believe from the evidence aforesaid, that interest was taken by the bank officers from the date of said note instead of the day on which it appears to have been discounted for the purpose of obtaining and exacting thereby more than lawful interest from the defendant, then such taking and exaction would be usury. But if interest was so taken because the defendant had been, from the date of the said note, allowed by the plaintiff to check upon the credit of the said note and its accompanying securities for the amount of said note, deducting the regular discount therefrom from the date of the note; or if it was taken by the mistake or inadvertence of the officer who made the calculation or entry, or directed them to be made, without any intention to exact unlawful interest; or, if the jury believe that the clerks and officers of the plaintiff were uniformly directed and required by the plaintiff in all discounts and negotiations of the plaintiff, to demand and take no more than lawful interest, and that, notwithstanding such direction they (the officers) did take the interest on this note from its date, either from mistake or from believing that the defendant ought to be charged such interest, because they believe that he had been allowed to check for the proceeds of said discount from the date of the note, and that such calculation and charge of such interest was so done by said clerk or officer without the knowledge or consent of the plaintiff and against its direction as aforesaid, then such taking and charging such interest was not usury. To which refusal of the aforesaid instruction prayed by the defendant's counsel, and to the instruction so as aforesaid given at the prayer of the defendant's counsel, the defendant excepted.

3d. If the jury believe from the evidence aforesaid that the advances to defendant named in the evidence were not made upon the note of the 6th of February, 1840, and that the plaintiff, upon discounting the said note, received or reserved more than at the rate of 6 per centum per annum, then the said jury may infer usury from the whole evidence aforesaid in said note of the 6th of February, 1840, which was refused, the court having already refused an instruction covering the same point.

4th. If the jury believe from the evidence aforesaid that the note of the 9th of May, 1840, was given in renewal of a former note of the defendant dated on the 6th of February, 1840, payable in ninety days after date, and which last note was discounted by the plaintiff as a loan to the defendant of the 18th of February, 1840, but was not passed to the credit of the defendant until the 22d of February, 1840, and that the said plaintiff then charged and received interest upon the same from the date of the said note, to wit, from the 6th of February, 1840, it is the taking above six per centum per annum for the loan of the money made to the defendant upon said note, and is usury; and the defendant is entitled to a verdict in his favor upon said note notwithstanding the jury may find from the evidence that the defendant had overdrawn his account as stated in the evidence, unless they further find that the said interest reserved as aforesaid was credited to defendant's account as a credit to take effect from the 6th of February, 1840.

But THE COURT refused to give the above as prayed to which refusal the defendant, through his counsel, excepted.

5th. It is competent for the jury, from

all the circumstances in evidence, to infer usury in the agreement or agreements on which the notes in suit were founded.

THE COURT refused to grant this last prayer, to which refusal the counsel for the defendant excepts.

Verdict for the plaintiff for $10,000, with interest from June 11th, 1840, till paid.

This case was taken to the supreme court of the United States by writ of error, and affirmed. See [Walker v. Bank of Washington,] 3 How. [44 U. S.] 62.

NOTE, [from original report.] The supreme court laid down this rule of law in [Walker v. Bank of Washington,] 3 How. [44 U. S.] 62: "The mere change of securities for the same usurious loan to the same party who received usury or to a person having notice of the usury, does not purge the original illegal consideration, so as to give a right of action on the new security."

Case No. 956.

BANK OF WASHINGTON v. WALKER.

[1 Hayw. & H. 60.] [1]

Circuit Court, District of Columbia. Dec. 27, 1841.

DEPOSITION—OF MOTHER UNABLE TO ATTEND—WITHDRAWAL.

The deposition of a mother taken de bene esse, who is unable to attend, is proper to be read to a jury, and after being read may be waived and withdrawn, by the party offering the same, from the consideration of the jury.

[At law. Suit by the Bank of Washington against Henry Walker on a promissory note. Tried by a jury. Verdict for defendant.]

The declaration avers that a certain party promised to pay the defendant or order the sum of $6,000, sixty days after the date thereof, viz., 25th day of February, 1840, negotiable at the Bank of Washington, and delivered the said note to the defendant, who before the time limited in the note for the payment thereof, endorsed the said note to one Lewis Walker, and delivered it to the said Lewis, who before the time limited, &c., endorsed the said note to plaintiff and delivered, &c. That the said defendant promised to pay without the usual demand on the maker according to the tenor and effect of the said promise, and waived notice of the nonpayment by the said maker and promised the plaintiff to pay it in default of any such demand, and in default of notice thereof to the said defendant. The usual money counts were added. The plea of defendant was infancy.

The deposition of Dorcas Walker, mother of defendant, taken de bene esse, was read on the trial; the following interrogatories had been propounded to her: 1. Do you know the age of Henry Walker? 2. And if yea, state how you know the same, and what relation you bear to him, and when he was born?

In answer to the first, the deponent saith: He was born on the 1st day of October, 1819. In answer to the second: She is his mother. She answers further that there was a family Bible in which was entered the births of her children, but that the Bible has been lost and cannot now be found, although diligent search has been made for it. He was the youngest child and she remembers his age perfectly well.

In the trial the counsel for the plaintiff offered evidence tending to prove the defendant's handwriting on the note and to the waiver of demand, &c. The defendant, by his counsel, offered to read in evidence the certificate of the doctor as to the health of Dorcas Walker, which was admitted as if the witness was produced and the certificate was sworn to; and then offered to read in evidence to the jury the above deposition taken before the mayor of Washington city. To the production of which the plaintiff, by its counsel objected. The defendant then further proved by a witness then present that the said deposition was taken on the 14th of December, 1841, at the place and hour appointed by the said mayor, and that the said mayor retained the same in his own hands until he delivered the same, after being so taken, to the chief judge of this court, in open court, who delivered it to the clerk of this court, in open court, and further called on the said mayor as a witneess, who also proved the above facts, and stated that the date 1814 in his certificate was a mistake and should have been 1841. The plaintiff, by his counsel, objected to the said evidence as not admissible so as to make the said deposition evidence in this case, and objected to the same and to the said depositions as evidence. The court overruled the objections and allowed the said evidence to be given, and the said deposition to be read in evidence, and the defendant, after having read the said deposition to the jury, waived and offered to withdraw the answer to the third interrogatory and let it be considered as in evidence or not at the option of the plaintiff, and the plaintiff objected to said answer being so waived, and withdrawn by the defendant after having been read in evidence to the jury, which objection was overruled by the court, to which overruling plaintiff, by its counsel, excepted.

Verdict for defendant.

There was a bill of exceptions signed by the court. But no further action was taken in the case.

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

Case No. 957.

BANK OF WASHINGTON v. WAY.

[2 Cranch, C. C. 249.][1]

Circuit Court, District of Columbia. Oct. Term, 1821.

NEGOTIABLE INSTRUMENTS — DEMAND — JOINT INTEREST OF MAKER AND INDORSER— ALTERATION OF INSTRUMENTS.

1. If a note be discounted by the plaintiff for the joint benefit of the maker and indorsers, or if they are jointly interested in the object for which the money is raised, it is not necessary, in order to charge an indorser, to demand payment of the maker, or give notice to the defendant, of the non-payment, although the parties should be interested in unequal proportions, and the defendant should have indorsed as surety for the other parties to the extent that the whole note exceeded his own interest therein.

2. If a note be made payable in sixty days, by the agent of the indorsers, for his and their joint accommodation, to be discounted at a bank, who refuse to discount it unless made payable in forty-five days, the maker may alter it accordingly, provided it be done at the request, or with the consent, or subsequent approbation of the defendant and the other indorsers, and they receive the benefit of the discount; but the burthen of proof of such previous consent, or subsequent approbation lies on the plaintiff, and is not to be inferred from the mere circumstance of the defendants afterwards participating in the benefit of the discount.

3. The maker of a note cannot be compelled to testify for the plaintiff in an action against the indorser, because the maker would be liable for the costs of the suit in case the plaintiff should recover against the indorser; but the maker's letter to the plaintiff, inclosing the note for discount, may be read in evidence.

[See Wood v. Steele, 6 Wall. (73 U. S.) 80; Angle v. Northwestern Life Ins. Co., 92 U. S. 330; Hartley v. Corboy, 150 Pa. St. 23, 24 Atl. 295. Contra, see Union Bank v. Cook, Case No. 14,349.]

At law. This was an action against an indorser of a promissory note made and signed by "John McGowan, Agent," for $3,000, payable originally at sixty days, to be discounted by the plaintiffs to raise money for a mercantile adventure in which all the parties upon the note were jointly interested. The bank (the plaintiffs) refused to discount it unless made payable in forty-five days; whereupon the maker, who was the agent of all the parties, in the management of that joint adventure altered the note accordingly, and it was discounted by the plaintiffs, for the joint benefit of the maker and the indorsers. It was contended by the plaintiffs that this alteration was made with the consent or approbation of all the parties.

THE COURT (nem. con.) at the prayer of Mr. Caldwell, for the plaintiffs, instructed the jury "that if they should be satisfied by the evidence that the note was discounted for the joint benefit of the defendant and the other parties on the note, or that the defendant was jointly interested with them in the gain or loss on the cargo, to raise the money for the purchase of which the note was given, it was not necessary for the plaintiffs to have made any demand of the maker, nor to have given notice to the defendant of the non-payment by the maker." To which instruction the defendant excepted.

Mr. Jones, for the defendant, then prayed the court to add to the instruction the following, viz.: "But if the jury believe from the evidence that the note was given and discounted for the aggregate amount of the individual and separate interests of the maker and indorsers, and that each indorser indorsed as security for the other parties to the extent that the aggregate amount of the note exceeded his own individual share of the adventure, then the plaintiffs cannot recover without proving due demand and notice."

But THE COURT (nem. con.) refused to make this addition to the instruction, and the defendant excepted.

Mr. Swann, for the plaintiffs, then prayed the court further to instruct the jury, "that if they should be of opinion from the evidence that the note was altered by McGowan, the agent of the parties to the note, so as to make it conform to the discount offered by the bank, it is not material whether the alteration was made before or after the note was offered to the bank for discount, provided the alteration was so made at the request, or with the consent of the defendant and the other parties concerned, or they subsequently acquiesced in it, and received the benefit of the said discount."

Which instruction THE COURT gave, and at the prayer of Mr. Jones, for the defendant, further instructed them, "that if the note was so altered after it was drawn and indorsed as aforesaid, and without the consent and authority of the defendant, before or after, the plaintiffs cannot support their said action on the said note." And further, "that the burden of proof lies on the plaintiffs to show such previous consent or subsequent approbation on the part of the defendant, and his knowledge of the fact of such alteration at the time he did any act or made any declaration implying a participation in such discount; and that such knowledge, consent, and approbation are not to be inferred from the mere circumstance of his afterwards participating jointly with others in the benefit of the said discount."

To these additional instructions the plaintiffs excepted.

Verdict and judgment, for the plaintiffs.

BANKRUPTCY CASES, FEES IN.

[See "Costs and Fees," Appendix; "Fees for Registering," Appendix.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 958.

In re BANKS.

[1 N. Y. Leg. Obs. 274; 5 Law Rep. 371.][1]

District Court, S. D. New York. 1843.

BANKRUPTCY—DISCHARGE — FRAUD — OBJECTIONS TO DECREE—BOOKS OF ACCOUNT.

1. Objections which might have been urged to show that a decree ought not to have been granted, will be considered waived after the court have declared the petitioner a bankrupt.

2. To make out a case against a bankrupt to justify the court in refusing him his discharge and certificate, there must appear by indisputable evidence some act of fraud, willful concealment of property, &c., or facts, from which such a deduction would be plain and palpable.

3. It is not put upon the bankrupt to show that he has kept proper books of account, &c., it is for the creditor, impugning his right to a discharge and certificate, to make out, by satisfactory proof, such a case as will bar the bankrupt's right to an allowance thereof.

In bankruptcy. This case came before the court on objections to the allowance of discharge and certificate to [Mark Banks] the bankrupt, the circumstances of which sufficiently appear in his honor's adjudication.

Benedict and Belknap, for creditors.

Sandford and Marselis, for bankrupt.

Before BETTS, District Judge.

BETTS, District Judge. The objection to a certificate and discharge must rest upon the particulars designated by the statute as causes for refusing it to a bankrupt. Such matters as touch only the regularity or frame of the proceedings should be brought forward on the first notice, or after a decree of bankruptcy they will be regarded as waived. It would be grossest injustice to bind a party by the decree, and never allow his property to be rescued from it, and yet defeat all its beneficial effects to him by objections of mere form, tending to show that the decree ought not to have been rendered. Congress manifestly intended, by this double set of notices, to show cause to discriminate classes of objections that should be urged under the first, or the advantage of them be lost as to creditors.

I lay out of view all but two of the eight objections filed, because part belonged appropriately to the petition to be declared a bankrupt, and there is no evidence applicable to any except the 5th and 6th against the petition for a certificate and discharge; which are, that he has been guilty of a wilful concealment of his property or rights of property, and has admitted a false or fictitious debt against his estate. No direct proof is offered which supports these allegations in their terms or even spirit, and the counsel seeks to maintain them argumentatively, and by inference and presumption.

The concealment of property, or rights of property, attempted to be shown, relates to Virginia mining stock received by Benedict in satisfaction of a debt due the firm of which the petitioner was a partner.

It is to be remarked, that there is not, in the testimony or papers of the bankrupt, proof that the debt this stock satisfied, belonged in any respect to the petitioner, and if there be a legal interest with him in it, that he set up such right, or supposed he possessed it. A bond of $3,000, owned by the firm, had been assigned to one of their creditors as collateral security for a large debt, and this stock was afterwards accepted, with the assent of the bankrupt, in discharge of that bond, but the bearing of the transaction and subsisting interests of the parties import what the testimony most strongly tends to prove, that the payment of stock was for the benefit of the holder of the bond, and not of the bankrupt. Until there is clear evidence showing that he did not so understand the matter, there will be no foundation laid for imputing wilful concealment to him in the transaction. A similar observation may be made with respect to various choses in action transferred to other creditors as collateral securities. There must be, first, evidence of his scienter, that there could be a surplus, or of facts from which that deduction would be plain and palpable, before any presumption can be raised that he designed a fraudulent concealment. But this consideration is to be connected with the bearing and effect attributable to the evidences, that the bankrupt has given some statement of these assets, and, if only imperfect in form or precision, the exception should have been taken previous to the decree of bankruptcy. That would be sufficient cause to stay his petition for a decree until the petitioner had reformed his schedules, so as to furnish every particular demanded by the statute in a manner satisfactory in substance and form.

I cannot, with these principles in view, find just cause in the proofs for charging that the bankrupt has been guilty of wilful concealment of his property or rights of property. It seems to me, also, that there is no satisfactory evidence supplied of the admission of false or fictitious debts by the petitioner against his estate. Taking the insertion in the schedule of a spurious demand to be a violation of the statute in this respect, I do not find that fact made out by the proofs.

Great stress has been laid upon the debt set forth as owing to Benjamin J. Knapp, to the amount of $13,071.35, because the bankrupt has also stated, that large amounts of the assets of the estate were placed with this creditor to meet that debt, and also, because, when sued on that bond by the creditor, the bankrupt pleaded payment and verified the plea by his oath. The bankrupt does not state this as an absolute debt. He gives the date and amount of the bond, adding that a suit has been brought on it, and is

[1] [5 Law Rep. 371, contains partial report only.]

now pending. He refers to notes deposited for its security, and in Schedule B particularizes those notes. Now, whether this method of describing the claim, and its actual condition as a demand upon the estate, be sufficient and allowable, is not the question raised by the objection. The point made is, that the debt is known by the petitioner to be false and fictitious. Clearly, that language of the act cannot embrace a claim admitted to be just in its origin, but against which the obligor insists upon rights of set-off, and, indeed, asserts that the debt itself is satisfied. The difference between stating a bond and debt unquestionably outstanding against a party, with his claim of defence to it, and fabricating a debt where none exists in fact, is too palpable to mislead any one. No creditor, reading over these papers, can suppose this entire debt is admitted as subsisting against the estate. The bond for its full engagement is admitted to be valid, and then the assets hypothecated for its satisfaction, greatly exceeding it in amount, are specified. This, in my opinion, entirely obviates the point of the objection.

Numerous criticisms were applied by counsel to other portions of the schedules, but they were mostly to matters of form. The only specific matter insisted on, covered by the objections, and not already considered, was, that the petitioner, being a merchant, did not keep proper books of account. It only appears upon the proofs, that the petitioner is by profession a merchant, not that he was at the time of his petition, or had been for several years preceding, engaged in the transaction of mercantile business. The proper books of account called for by the statute are those appropriate to the business pursued by the party, and such as will exhibit a full account of his dealings as a merchant. But the petitioner is not compelled to furnish evidence of the fact on his part. The creditor, impugning his right to be decreed a final discharge, must give satisfactory proof of the matter which is to bar such discharge. The creditors show no continued trading requiring the keeping of regular books, and, accordingly, the mere non-existence of books of account interposes no obstacle to the discharge prayed for.

The court, in disallowing, in this and various other cases, the objections offered by the creditors to a free certificate being granted, does not enter into the moral obligations subsisting between him and those who have given him credit. Nor is it intended, in any manner, to affirm that all such cases are clear of doubts and uncertainties as to the integrity of parties who are opposed. But the court limits its judgment to the facts in proof as applied to the charges preferred against the bankrupts. In this case, then, according to my view of the objections and the evidence, there is not enough shown to bar the discharge and certificate. Decree accordingly.

BANKS, (BACKSTACK v.) See Case No. 711.

BANKS, (COWEN v.) See Case No. 3,295.

Case No. 959.

BANKS v. GREENLEAF.

[1 Hughes, 261;[1] 6 Call, 271.]

Circuit Court, D. Virginia. Nov. Term, 1799.

INSOLVENCY — VALIDITY OF DISCHARGE IN OTHER STATES.

G., a citizen of Maryland, gave his bond, in Virginia, to B., a citizen of Virginia, and afterwards, in Maryland, became a bankrupt by the laws of Maryland, under which he was duly discharged by the competent tribunal of Maryland under a general direction with respect to his creditors. This did not discharge him in a suit afterwards brought upon the bond in Virginia.

[Cited in Green v. Sarmiento, Case No. 5,760.]

[See Hinkley v. Marean, Case No. 6,523; Baldwin v. Hale, 1 Wall. (68 U. S.) 223; Towne v. Smith, Case No. 14,115.]

[At law. Action of debt by Banks against Greenleaf. Heard on demurrer to plea. Demurrer sustained.]

Some years past, Greenleaf, a citizen of Maryland, became indebted, by bond given in Virginia, to Banks, a citizen and inhabitant of the state of Virginia. Afterwards, Greenleaf took the benefit of the bankrupt laws of Maryland; and being arrested for the foregoing debt in this court, he pleaded the discharge, under the bankrupt laws of Maryland, in bar of the claim. To this plea the plaintiff demurred; and the defendant joined in the demurrer.

Bennet Taylor, for the plaintiff, contended, that the plaintiff and defendant, not being citizens of the same state, the laws of Maryland did not bind the plaintiff. For the several states are sovereign and independent of each other, (2 Wash. [Va.] 298,) and therefore, the laws for one cannot, for transactions out of its limits, bind the citizens of another more than two unconnected countries can bind the subjects of each other, (Cooke, Bankr. Law, 243; Wythe, 133; James v. Allen, 1 Dall. [1 U. S.] 188.)

Randolph, contra.

The discharge, under the bankrupt laws of Maryland, is a complete bar to the plaintiff's action. All countries make laws against absentees; and, if they are improper, it is a state and not a judiciary question. Robinson v. Bland, 1 W. Bl. 258, takes the distinction between local and general statutes, making the latter to be obligatory in other countries. But Solomons v. Ross, 1 H. Bl. 131, is decisive; and proves the universal effect of bankrupt laws, with respect to personal actions, which is confirmed by Martin, Law Nations, 104. There is no difference as to the obligation, whether it be a judiciary or

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

legislative act of a foreign country. Besides, in this case, the court of chancery in Maryland has acted with regard to the creditors at large of the bankrupt; and so far as it may be called judicial.[2] The articles of confederation between the United States give the inhabitants of one state all the benefit of the other states; and if they took the conveniences they should sustain the inconveniences. This, necessarily, results from the reciprocal rights of citizens of different states, because they are all, as it were, citizens of each state. The case of Miller v. Hall, 1 Dall. [1 U. S.] 229, is expressly like this, and ought to govern it. The constitution itself establishes the reciprocal respect due to laws of one state in another, and our doctrine is not repelled by the power of congress to make bankrupt laws; because what we contend for only applies until congress have acted on the subject. Cur. adv. vult.

WASHINGTON, Circuit Justice. The principles laid down by Huberus, and universally acknowledged, are, that the laws of every government have force within the limits of the government, and are obligatory upon all who are within its bounds, whether subjects or temporary residents. They have no effect directly with the people of any other government, but, by the courtesy of nations, to be inferred from their tacit consent, the laws which are executed within the limits of any government are permitted to operate everywhere, provided they do not produce injury to the rights of such other government or its citizens. This principle is universally admitted among all civilized nations, and has grown out of mutual convenience which they experience from it. "For," says the same author, "nothing would be more inconvenient in the promiscuous intercourse and practice of mankind, than that what was valid by the laws of one place should be rendered of no effect elsewhere by a severity of law." From these principles has arisen the doctrine admitted by all, that whoever makes a contract, in any particular place, is bound by the laws of that place as a temporary citizen. So a will or conveyance of movable property, executed according to the forms prescribed by law where made, has effect in every country, though not consistent with the forms or ceremony there observed. But there are certain exceptions from and modifications of these rules, some of which it may be proper to mention. As if a person shall go into a foreign country to perform a particular act, with a view to elude the laws of his own country in fraudem legis. So the effect of a contract, made in one place, will be allowed according to the laws of that country, if no inconvenience results therefrom to the citizens of the country where those laws are sought to be enforced, for the courtesy of nations could not be supposed to go so far as to admit the force of foreign laws to produce a prejudice to its citizens, to which they had, by wont of their own, submitted. So if the law of a place where a contract is made be contrary to the laws of our own country, in which a contract is also made inconsistent with a contract made in another place, we should observe our own law rather than the foreign one.

Let us proceed to examine this case, according to these rules: The contract in question was made in Virginia, by a citizen of Maryland with a citizen of Virginia. The contract is, therefore, subject to the laws of Virginia; and the question is, whether the laws of a foreign country (if Maryland be such) discharging a contract, can be admitted here? The rule is, that the laws of a foreign country prevail if not prejudicial to the country or its citizens, and this is merely gratuitous; but to admit them to prejudice its own citizens, would be a courtesy bordering on quixotism. No government would submit to it; no government can be presumed to have tacitly submitted to this. But if the citizens go abroad and submit to their [foreign] laws, as temporary subjects, they must be bound by them, though to their prejudice; if they make a contract there, the law of that country is to prevail. In this case it would be a matter of choice; if the laws of that country give effect to the contract, he must submit to their laws which discharge it.

If a will or deed is made abroad, or matrimony contracted, all the consequences follow. But if the parties have never so submitted, no government would permit a citizen to be prejudiced by foreign laws. Here are two conflicting laws. One giving validity to a contract, and governing it throughout to its discharge; and the other discharging it in a manner different from and in violation of the contract, and the appeal is made to our laws. Which is to prevail? The rule is, magis est ut in tali conflictu, ut jus nostrum, quam jus alienum, servemus. The contract in question obliges Greenleaf to pay Banks so much money. The law of Maryland says he may deliver himself by paying a part. If this be valid here, it would have been so if it had said he should deliver himself without paying any part. These laws are contradictory to each other. What, then, says the law of nations upon this subject? That the law of the country where the contract is made shall prevail; and if the law of a foreign country be inconsistent with ours, ours shall prevail.

I think the rule may safely be laid down, that if a foreigner come into our country, and there enter into a contract, the laws of his nor any other foreign country can, in our courts, be received to control, alter, or discharge it, unless the parties, by some

[2] This was merely the order of the chancellor with respect of the creditors in general of the bankrupt, and did not relate to this case in particular, nor was the petitioning or suing before him.

act of their own, submit to the laws of such foreign country.

Let us examine the cases which have been cited at the bar, and see whether they throw light upon this subject. The first case which I shall notice is that of Warder v. Arell, in the court of appeals of this state, 2 Wash. [Va.] 298. In that the contract was made in Pennsylvania, and discharged under the laws of that state. That case lays down the rule as stated by Huberus, that the contract having been made in Pennsylvania, the laws of that state must govern, not as to the form, validity, or construction of the contract, but as to the discharge, for this was the only question. The expressions of all the judges in that case are remarkably strong to prove that the ground on which the laws of Pennsylvania, operating to produce the discharge, prevailed, was, that the contract was made there. Devisme v. Martin, Wythe, 133, was the case of British subjects altogether, but the chancellor states generally that the remedy of an American creditor against the bankrupt would not have been affected by the transfer of the bankrupt's effects to the assignee under the English law. Whether, if the contract has been made in England, he would have so decided, does not appear, nor was it necessary, since that was not the case before the court. In James v. Allen, 1 Dall. [1 U. S.] 188, it does not appear where the contract was made. If in Pennsylvania, I concur in the decision. If in New Jersey, I do not; because in such a case, the decision would go too far, if I am correct in the principles before laid down. Miller v. Hall, 1 Dall. [1 U. S.] 229, is obscurely reported, as to the state of the case, for it is doubtful whether the agreement, which is said to have been executed in Pennsylvania, was the one made by Miller and Hall with the owners of the goods, or the articles of copartnery between Miller and Hall. The suit, as I understand it, was brought by Miller to recover his proportion of the commission upon goods sold in Massachusetts; if it means the former, then unquestionably the cause of action arose in Massachusetts, and Hall had by no act of his submitted to the laws of Pennsylvania; if the latter, it might be a doubtful matter where it arose. The doctrine I admit is laid down very broad by the chief justice, and I do not know of any case which has gone so far as this. Emory v. Grenough, [Case No. 4,471,] was decided before Judge Iredell, in the circuit court of Massachusetts. The parties were citizens of Massachusetts, and the debt contracted there. The debtor afterwards became a citizen of Pennsylvania (not in fraudem), and obtained a certificate of bankruptcy, and pleaded it in Massachusetts, but it was not allowed. Judge Wilson, however, decided a similar case otherwise.

We come now to the British decisions. Solomons v. Ross, 1 H. Bl. 131; Jollet v. Deponthieu, Id. 132; Neale v. Cottingham, Id.; 1 Bac. Abr. 434,—are all alike. The debts were contracted, it is probable, in Holland, at all events it does not appear that the creditors had been in Holland, and there became the creditors of the bank. 1 H. Bl. 131. Sill v. Worswick, Id. 694, was a contract between British subjects, and the contract was made there. It is, in this case, that the doctrine was laid down, that personal property has no locality, and is subject to the law which governs the person of the owner, but the meaning of the judge, as to this general expression, is explained, for he says, as to the disposition of it, and its transmission by succession, or the act of the party. This is all true, all is consistent with the principles laid down. He does not contend that a contract made in St. Christopher should be governed by the laws of England, but that in such a case as the one he was speaking of, the government of St. Christopher, and all others, would give effect to the bankrupt laws of England, and so they ought. But the cases of Warring v. Knight, [Cooke, Bankr. Law, 1st Ed., 372,] mentioned by the judge, proves clearly that the place of contract would make a difference. He says that it does not appear whether the person was a resident in Gibraltar, prior to the bankruptcy, or the debt was contracted there, or whether he appeared to the suit, facts which would have materially altered the decision. In the case [Anon.] reported in [1] Brown, Ch. 376, of a payment made in Carolina, the chancellor relies upon the circumstance that the debt was contracted there. Thus, I think, it is clear that the cases which touch this point do in general support, and that there is not one which contradicts it, unless it be that of Sutter & Hart,[2] which I am not clear does so.

I will admit it is a hardship upon Greenleaf, but it would be equally hard upon Banks, and therefore it is more proper to observe our law than that of Maryland. This cannot be considered as a judgment of a Maryland court, which can bind persons residing out of that state; they are no parties to it; the claim of the plaintiff has not been litigated, after the plaintiff and defendant had submitted to the laws of that country, and had a dispute settled and adjudged. Admiralty causes bind all the world, because decided upon the laws of nations, and for the convenience of all nations. But the justice of other decisions may be questioned, and if a law of a foreign country were to declare that a decision of causes, without notice, should bind everybody, no foreign country would observe it. Our attachment law is fair and just, and would be regarded everywhere.

The next point is, whether Maryland, as to her municipal regulations, is to be con-

[2] [Not found.]

sidered foreign to this state? Although I am clearly of opinion that the general government derives its existence and power from the people, and not from the states, yet each state government derives its powers from the people of that particular state. Their forms of government are different, being derived from different sources, and their laws are different. Those of one state are as little obligatory upon another, as those of a foreign country. They are not as represented, and have no control over those who made them. They cannot be said to owe allegiance to any state in which they do not reside. What effect, then, has the 1st section of the 4th article of the constitution upon this subject? Read it as if it only said, full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. But for this it would be foreign, and their validity might be questioned. But this clause forbids it. Full faith must be given. Therefore you cannot question the validity of the judgment. This is the construction given in the case of Armstrong v. Carson, [Case No. 543,] in the circuit court of Pennsylvania, by Judge Wilson, where the doctrine was so laid down by Bradford, and admitted by Ingersol. But if there be a doubt upon those words, those which follow remove it. Congress is to prescribe the manner in which they shall be proved, and the effect thereof. The demurrer is sustained.

Case No. 960.

BANKS v. KING.

[1 Cranch, C. C. 543.][1]

Circuit Court, District of Columbia. June Term, 1809.

SET-OFF—WHEN ALLOWABLE—NOTE EXECUTED BEFORE BANKRUPTCY.

In an action by an insolvent debtor for the use of his trustee, the defendant may set off the plaintiff's note to a third person, with a blank indorsement, upon proof that the note came to the defendants' hands before the insolvency; but he cannot set off a joint note of the plaintiff and another.

At law. Assumpsit [by Banks, an insolvent, for the use of his trustee, against George and A. King] for goods sold; non assumpsit, and discount pleaded in bar. The defendant offered to set off a note made by the plaintiff to John Templeman, and by him indorsed in blank.

Mr. Porter, for the plaintiff, objected that it did not appear at what time the note came to the hands of the defendants, and that the precise time must be proved. Dickson v. Evans, 6 Term R. 57.

THE COURT (DUCKETT, Circuit Judge, absent,) permitted the defendant to read the note in evidence, on proof that it came to his hands before the plaintiff's insolvency.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Mr. Morsell, for the defendant, offered to set off a note due from Lowdermilk & Banks to Kunkle & Ghequere, and by them indorsed to the defendant, and offered to prove that the original debt was due from Banks alone for goods sold him by Kunkle & Ghequere.

Mr. Porter, for the plaintiff, contra, objected that they must be mutual debts, and due in the same right, and cited 1 Pow. Cont. 440; 1 H. Bl. 659; 1 Wils. 155; Bull. N. P. 179; and Cowp. 133.

And of that opinion was THE COURT, (DUCKETT, Circuit Judge, absent.) Verdict for plaintiff.

Case No. 961.

BANKS et al. v. McDIVITT et al.

[13 Blatchf. 163;[1] 8 O. G. 860.]

Circuit Court, S. D. New York. Oct. 29, 1875.

COPYRIGHT—INFRINGEMENT—COMPILATION FROM ORIGINAL SOURCES—NEW EDITION—PROVISIONAL INJUNCTION.

1. B. took a copyright, in 1871, for the "Rules of Practice of the Supreme Court of the State of New York," and one in 1874 for the "General Rules of Practice of the Courts of Record of the State of New York." The book of 1871 contained the rules adopted by the judges under the authority of a state statute, in 1870, with notes to each rule, stating the substance of the decisions of the courts in regard to such rule, giving the volumes and pages of the reports. The book of 1874 contained like rules adopted in 1874, with like notes. By law, the judges were required to revise the rules every two years. M. published in 1875 a book containing the rules adopted in 1874, with notes to each rule, referring only to the volume and page of the reports of decisions in regard to such rule. M., in compiling his book, copied the citations in B.'s book of 1874, and supplemented them by citations from B.'s book of 1871, and by results of his own research. In a large majority of the notes in M.'s book, the citations were the same, and placed in the same order, as in B.'s book of 1874: *Held*, that M. had infringed B.'s copyright of 1874.

[Cited in Johnson v. Donaldson, 3 Fed. 25.]

2. Compilers of books which contain facts derived from common sources of information, must investigate for themselves from the original sources which are open to all persons, and cannot use the labors of a previous compiler, animo furandi, and the subsequent compiler cannot save his own time by copying the results of the previous compiler's study, although the same results could have been obtained by independent labor.

[Cited in Johnson v. Donaldson, 3 Fed. 25.]

3. The publication by B. of the rules of 1874, with appropriate notes, was not the publication of a new edition of the rules of 1871, within the statute requiring certain words in regard to the copyright to be inserted in the several copies of every edition of a copyrighted book.

4. Where an infringement is palpable, and a provisional injunction will not be attended with serious injury, such injunction is not ordinarily refused as to so much of the work as is a plain infringement of the prior publication.

[In equity. Bill by David Banks and others against John R. McDivitt and others for a

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

provisional injunction restraining an infringement of copyright. Injunction granted.]

Elbert E. Anderson, for plaintiffs.
Reed & Drake, for defendants.

SHIPMAN, District Judge. The plaintiffs are the proprietors of a book which was published in 1871, entitled, "Rules of Practice of the Supreme Court of the State of New York," &c., and are also proprietors of a book which was published in the year 1874, entitled, "General Rules of Practice of the Courts of Record of the State of New York." All the requirements of the statutes of the United States in regard to copyright have been complied with by the plaintiffs in respect to each of these books. The book which was published in 1871 contains the rules of practice which were adopted in general session of the justices and judges of the state of New York, on December 20th and 21st, 1870, with notes appended to each rule. The notes briefly state the substance of the decisions which had been made by the courts of New York in reference to the rules to which the notes are respectively appended, give the number and page of the volume in which the decision is to be found, and in like manner refer to the volume and page of the statutes which relate to the rule. A convention of justices and judges is required to be held biennially, to revise, alter, abolish and make rules which shall be binding upon courts of record in the state. The book which was published in 1874 contains the rules of practice which were adopted in the convention of the justices and judges on November 24th, 1874, and which took effect on February 1st, 1875, and also contains notes and references upon the plan of the book of 1871, but upon a much larger scale, the book of 1871 having seventy pages, while the book of 1874 is of one hundred and twenty pages. The plaintiffs published a similar volume in 1858.

In the year 1875, the defendants published a book entitled, "New Rules of the Courts, General and Special, 1875," &c. This volume contains the rules which had been adopted by the judges on November 24th, 1874, with notes appended to each rule, which notes refer only to the volume and page of the various statutes and reports of decisions which relate to the rule. The book also has an index of the general rules, and contains the special rules of the supreme and other courts of the state.

The plaintiffs brought, in February, 1875, a bill in equity, alleging that the introduction, the notes, and the index of the defendants' book were copied from the plaintiffs' book of 1874, in violation of the rights secured to them by the acts of the United States respecting copyright, and praying for an injunction, and also filed a motion for a provisional injunction. This motion has been heard, and is the only part of the case which is now to be decided. The plaintiffs do not claim that they have acquired any title to the rules, which are admitted to be common property, neither do they assert that there is anything novel in the plan, or system, or arrangement of their compilation, or of their index. The notes are mainly a digest of the decisions of the courts of New York and of the statutes of the state. The volumes which contain the decisions and the statutes are sources of information which are common and open to all, and to which each compiler can resort. But the plaintiffs complain that the defendants have not availed themselves of the original sources of information, but have resorted to the labor-saving expedient of copying the citations which the research of the plaintiffs had discovered, and that such a use of the labors of an author or compiler is an unauthorized violation of the rights which are secured by the acts of congress.

The rights and duties of compilers of books which are not original in their character, but are compilations of facts from common and universal sources of information, of which books, directories, maps, guide books, road books, statistical tables and digests are the most familiar examples, are well settled. No compiler of such a book has a monopoly of the subject of which the book treats. Any other person is permitted to enter that department of literature and make a similar book. But, the subsequent investigator must investigate for himself, from the original sources which are open to all. He cannot use the labors of a previous compiler, animo furandi, and save his own time by copying the results of the previous compiler's study, although the same results could have been attained by independent labor. The compiler of a digest, a road book, a directory, or a map can search and survey for himself in the fields which all laborers are permitted to occupy, but cannot adopt as his own the products of another's toil. "He may work on the same original materials, but he cannot exclusively and evasively use those already collected and embodied by the skill and industry and expenditures of another." 2 Story, Eq. Jur. § 940. The rights of compilers of this class of works have been recently carefully considered by Sir W. Page Wood, vice-chancellor, in the cases of Jarrold v. Houlston, 3 Kay & J. 708; Kelly v. Morris, L. R. 1 Eq. Cas. 697, and Scott v. Stanford, L. R. 3 Eq. Cas. 718, and the rule which I have stated has been reaffirmed. In the case of Kelly v. Morris, the learned vice-chancellor says: "In the case of a dictionary, map, guide book, or directory, when there are certain common objects of information, which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done." The rule is recognized or stated in Hogg v. Kirby, 8 Ves. 215;

Matthewson v. Stockdale, 12 Ves. 270; Longman v. Winchester, 16 Ves. 269; Wilkins v. Aikin, 17 Ves. 422; Lewis v. Fullarton, 2 Beav. 6; Hotten v. Arthur, 1 Hem. & M. 603; Gray v. Russell, [Case No. 5,728;] Folsom v. Marsh, [Id. 4,901;] Emerson v. Davies, [Id. 4,436;] and Curt. Copyr. 174–177. I do not understand that the rule prohibits an examination of previous works by the compiler before he has finished his own book, or the mere obtaining of ideas from such previous works, but it does prohibit a use of any part of the previous book, animo furandi, "with an intention to take for the purpose of saving himself labor." Jarrold v. Houlston, 3 Kay & J. 708.

A careful inspection of the plaintiffs' books of 1858, 1871, and 1874, and of the defendants' book, and of Lansing's Code and Rules, published by the plaintiffs, to which my attention has been directed by the defendants' counsel, has led me to the conviction, that the general course which was adopted by the compiler of the defendants' book, was to copy the citations in the plaintiffs' book of 1874, and, if necessary, to supplement them with other citations in the book of 1871, and with references which his own research had discovered; but his chief original source of information was the plaintiffs' book of 1874. The conclusion that he copied these citations, in the first instance, from the plaintiffs' compilation, is derived from the fact, that, in a large majority of the notes, the citations are not only the same which are given in the plaintiffs' book of 1874, but are placed in precisely the same order in which they were arranged by the plaintiffs. This peculiarity is manifested throughout the defendants' book. It is noticeable in the notes which are appended to nearly all of the ninety-seven rules, other than those which follow rules 20, 22, 33, 35, 37, 43, 45, 47, 51, 53, 56, 58, 61, 63, 66, 68, 69, 71, 72, 77, 78, 82, 85, 86, 87, 88, 92, 93, 94, 96, and 97. Thus, the citations under rule 7 are, "Rule 7, of 1871, amended; 2 How. 154; 1 Code R. 119; 3 How. 276; 1 Code R. 42; 5 Paige, 83; 4 do. 140." The citations under rule 8 are, "Rule 5, of 1858, amended; Rule 8, of 1871, amended; Code, sects. 193 to 197; 4 Bosw. 632; 1 Wend. 35; 2 East, 181; 1 H. Blk. 76; note at 7 Abb. 73; 15 John. 535; 20 John. 129; 1 Chitt. 713; 2 W. Blk. 799; 2 Strange, 889." These citations are the same as those which are contained in the plaintiffs' book, and are placed in the same order in each compilation. There are, in the defendants' book, under the 18th rule, sixty-two citations of decisions, all but one of which are the same, and are in the same order, as those which are contained in the plaintiffs' book of 1874. It is impossible to suppose that the defendants could, by accident, have placed their references in the exact order in which they are found in the plaintiffs' book. The inference is irresistible, that the plaintiffs' book was first resorted to for the purpose of saving the time and labor which must otherwise have been spent in an original examination of the reports. I presume that the defendants' compiler subsequently examined the reports, in order to verify the accuracy of the citations, and to conceal the errors which he may have found, and that he did correct errors; and it is apparent, that, in many instances, he added citations which his own investigations discovered; but, it is manifest, that he was, to a large extent, in the first instance, a copyist of the labor of the plaintiffs. He states, indeed, in his affidavit, that his notes and references were principally taken from the plaintiffs' books of 1858 and of 1871, and from Lansing's Code and Rules, published by the plaintiffs in 1872, but thinks that he did not draw materially from the plaintiffs' book of 1874.

The defendants' index, of ten pages, is almost a reprint of the plaintiffs' index, except that the former refers to the rule, instead of the page. This fact is not denied in the affidavit of the defendants' compiler, and an examination shows that his index was almost exclusively made with the scissors, and not with the pen. Three sentences of the plaintiff's introduction are also substantially found in the corresponding portion of the defendants' book; but I do not deem this resemblance to be important.

It follows, that the principle of law which I have stated has been violated, and that the plaintiffs are entitled to relief, unless they are debarred from any remedy by some other principle which may be invoked by the defendants. They insist, in this part of the case, that the provisions of the copyright act, which are now contained in section 4962 of the Revised Statutes of 1874, have not been regarded by the plaintiffs. This section provides, that no person shall maintain an action for the infringement of his copyright, unless he shall give notice thereof, by inserting in the several copies of every edition published, on the title-page, or the page immediately following, if it be a book, * * * the following words, "Entered according to act of congress, in the year , by A. B., in the office of the librarian of congress, at Washington." The proper page of the book of 1874 contained the entry, "Entered, &c., in the year 1874," but did not also contain the announcement that a previous edition had been entered in the year 1871; and it is contended, that, inasmuch as the book called "Rules of 1874" is another edition of the "Rules of 1871," the non-entry in the book of 1874 of the fact that the book of 1871 was entered, has destroyed the right to any action for an infringement. It is not necessary to consider the consequence of a non-compliance with this section in each edition of a book, for, I am of the opinion that a publication of the rules of 1874, with appropriate notes, is not a subsequent edition of the rules of 1871. The statute of New York provides that a convention of justices

and chief judges shall be held at the capitol in the city of Albany, on the first Wednesday of August, 1870, and every two years thereafter, and such convention shall revise, alter, abolish, and make rules, which shall be binding upon all courts of record, so far as they may be applicable to the practice thereof. The rules of 1874 were adopted in pursuance of this statute, on November 24th, 1874, and were ordered to commence and take effect on February 1st, 1875, and were a new and revised set of rules. New rules had been added and old rules had been amended. They were virtually new rules of the courts, which were to take effect on an appointed day, and the publication of the plaintiffs was in no proper sense a new edition of the rules of 1871. [An "edition" is defined to be "a republication, sometimes with revision and correction; any publication of a book before published." Webst. Dict. The book entitled "The Rules of 1874" was not a republication or a publication of "The Rules of 1871."] [2]

It is also suggested that the plaintiffs are not entitled to protection, because they are also infringers of previous publications of like character. I have not been referred to any book which they have infringed, except the Rules of Practice published by W. C. Little & Co., in 1858, and, from my examination of this book, I cannot perceive that the plaintiffs have made any unjustifiable use of it.

Where an infringement is palpable, and a provisional injunction will not be attended with serious injury, it is not ordinarily refused, as to so much of the work as is a plain infringement of the prior publication. Let a provisional injunction issue restraining the defendants from the sale of any volumes or books which contain the notes which are appended to the "New or Revised Rules of 1875," other than the notes to rules 20, 22, 33, 35, 37, 43, 45, 47, 51, 53, 56, 58, 61, 63, 66, 68, 69, 71, 72, 77, 78, 82, 85, 86, 87, 88, 92, 93, 94, 96, and 97, and which contain the index now printed in said book.

Case No. 962.

BANKS v. The METROPOLIS.

[45 Hunt, Mer. Mag. 590; 1 Pars. Adm. 597, note.]

Circuit Court, S. D. New York. Nov. 8, 1861.

COLLISION—LOOKOUT—LIBELLANT'S DUTY TO ATTEMPT SALVAGE.

[The owner of a vessel sunk in a collision in the middle of Long Island sound, is not bound to attempt to save anything from the wreck, but is entitled to recover as for a total loss.]

[Cited in The Nebraska, Case No. 10,076.]

[2] [From 8 O. G. 862.]

[Appeal from the district court of the United States for the southern district of New York.

[In admiralty. Libel by Simon Banks against the steamboat Metropolis for collision. The district court gave a decree for libellant, (unreported.) Respondent appeals. Affirmed.]

NELSON, Circuit Justice. The libel is filed in this case to recover damages against the Metropolis for a collision with the sloop Golden Rule, on the night of the 12th August, 1858, on Long Island sound, some five or six miles off Falkland's Island, and nearly midway between that and the Long Island shore. The sloop was laden with corn and feed and bound for Providence, Rhode Island. The Metropolis was on her usual trip from Fall river to the city of New York. The night was not very dark, the wind light, east southeast or southeast, the sloop going but one or two miles an hour, close hauled; she saw the lights of the steamer several miles off, and, when within some two or three miles, coming on a course apparently towards her, a bright light was hoisted by a hand standing on the deck; and afterwards, the steamer still continuing her course, he stood upon the top of the cabin, holding the light as high as he could with his arm.

The pilot of the Metropolis admits he saw a light of a vessel some two or three miles off on his port bow, but that it soon disappeared, and he did not again see it till the moment of the collision. No change was made in the course or speed of the vessel, which was sixteen miles an hour, after discerning the light; nor, for aught that appears, was there any attention paid to it. The look-out admits he saw no light, nor did he report any till just as the collision happened. The better opinion, upon the proofs, is that, with a competent and vigilant look-out on the steamer, the sloop might have been seen even without a light, as the night was not very dark; but, with the light exhibited on the sloop, of which we cannot doubt, as all on board testify to it, there is no excuse for not having seen her in time to have avoided the disaster. We consider the case a very plain one of fault on the part of the steamer. As to the damages, we agree with the court below that the libellant was entitled to recover on the basis of a total loss. The injury to the vessel and cargo was so great,—and both submerged near the middle of the sound, which, at the place of collision, was some sixteen miles wide,—he was not under obligation to encounter the hazard and expense of attempting their rescue, or to save anything from the wreck. If the attempt had resulted in the increase of his loss, which it probably would, the respondents would not have been liable for it. Decree affirmed.

Case No. 963.

BANKS v. MILLER.

[1 Cranch, C. C. 543.][1]

Circuit Court, District of Columbia. June Term, 1809.

DEPOSITION—RESIDENCE OF ADVERSE PARTY—PRODUCTION OF BOOKS AND PAPERS.

1. It is a sufficient averment of the residence of the adverse party, by the magistrate who takes a deposition under the act of congress, if he certifies that it appears to him that the party resides more than one hundred miles from the place of caption.

2. If books and papers are in court they may be called for after the jury is sworn.

[Cited in Wallar v. Stewart, Case No. 17,109.]

[See Merrill v. Dawson, Case No. 9,469; Edmonston v. Barrell, Id. 4,284; Patapsco Ins. Co. v. Southgate, 5 Pet. (30 U. S.) 604.]

A deposition, taken under the act of congress, was offered in evidence by the defendant. The magistrate who took it, certified that it appeared to him that the adverse party and his counsel resided at the city of Washington, upwards of one hundred miles from the place of taking the said deposition.

Mr. Caldwell, for the plaintiff, objected, that it was not a positive averment that the adverse party and his attorney were at the time more than one hundred miles, &c.

But THE COURT (DUCKETT, Circuit Judge, absent) overruled the objection.

After the jury was sworn, the defendant called on the plaintiff to produce his books of account, which were then on the table.

THE COURT thought it due notice, as the books were in court.

BANKS, (PAIGE v.) See Case No. 10,671.

BANKS, (SMYTH v.) See Case No. 13,134.

BANKS, (WADDINGTON v.) See Case No. 17,028.

BANNATYNE, (HERBERT v.) See Case No. 6,396.

Case No. 964.

BANNENDAHL v. REDFIELD.

[4 Blatchf. 223;[2] 40 Hunt, Mer. Mag. 75.]

Circuit Court, S. D. New York. Oct. 2, 1858.

CUSTOMS DUTIES — ACTION TO RECOVER PENALTY —ACT MARCH 3, 1851—ACT AUG. 30, 1842.

1. The 3d section of the act of March 3, 1851, (9 Stat. 630,) in regard to reappraisals of imported goods, applies to all goods, as well those imported by their manufacturer, as those imported by their purchaser.

2. The 17th section of the act of August 30, 1842, (5 Stat. 564,) authorizes the imposition of a penalty of 50 per cent., for the undervaluation of any goods imported, other than those purchased, which latter are provided for by the 8th section of the act of July 30, 1846, (9 Stat. 43,) which imposes a penalty of 20 per cent. on their appraised value.

At law. This was an action [by Conrad N. Bannendahl] against [Heman J. Redfield] the collector of the port of New York, to recover back a penalty of 50 per cent., imposed under § 17 of the act of August 30, 1842, (5 Stat. 564,) for the undervaluation of goods, and paid under protest. The plaintiff claimed to have been the manufacturer of the goods, and insisted that, for that reason, no penalty could be imposed on them under that section. He also claimed, that a reappraisal which was had in the case, under the act of March 3, 1851, (9 Stat. 630, § 3,) should not have been made under that act, but should have been made under the acts of March 1, 1823, (3 Stat. 734, § 13,) and May 28, 1830, (4 Stat. 410, § 4.) [Judgment for defendant.]

NELSON, Circuit Justice. The reappraisal was properly made under the act of March 3d, 1851. The 3d section of that act applies to all goods imported into the United States, as well those imported by their manufacturer, as those imported by their purchaser.

The 17th section of the act of August 30th, 1842, authorizes the imposition of a penalty of 50 per cent., for the undervaluation of any goods imported other than those purchased, which latter are provided for by the 8th section of the act of July 30, 1846, (9 Stat. 43,) which imposes a penalty of 20 per cent. on their appraised value.

There must be a judgment for the defendant, upon the questions reserved in the case made.

BANNER, The, (WARD v.) See Case No. 17,149.

Case No. 965.

The BANSHEE.

[Blatchf. Pr. Cas. 580.]

District Court, S. D. New York. Dec. Term, 1863.

PRIZE—VIOLATION OF BLOCKADE.

Vessel and cargo condemned for an attempt to violate the blockade.

In admiralty.

Before BETTS, District Judge.

BETTS, District Judge. The above-named steamer Banshee and her cargo were libelled in this court December 1, 1863, charged with being rightfully subject to capture as lawful prize of war. They were seized at sea, off the coast of North Carolina, while at-

[1] [Reported by Hon. William Cranch, Chief Judge.]

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

[1] [Reported by Samuel Blatchford, Esq.]

tempting to violate the blockade there imposed by the United States government, and were sent into this port for adjudication. Process of attachment and monition was regularly issued, returned, and published in the case, and a decree by default was ordered by the court, and registered therein December 22, 1863. It is quite needless to rehearse the contents of the numerous documents and vouchers submitted to the court and examined by it in the consideration of this case, as the direct and explicit testimony of the witnesses examined in the preparatorio demonstrates the culpability of the prize, and the court will avoid encumbering its files by repeating details which are of no service in establishing the causes for the conviction of the prize. The certificate of British registry shows that the vessel was of English build and ownership, and was registered in Liverpool September 14, 1863, to Toulin Lawrence, merchant, of Liverpool, Jonathan Walkden Steele being master. The shipping agreements found on board the vessel show that she had been employed under the said master, in October and November, 1863, in voyages from Liverpool to Nassau, N. P. and from Nassau to Confederate ports.

The master, on his examination in preparatorio, states that the vessel was captured November 21, 1863, about ten or twelve miles to the eastward of Cape Lookout, North Carolina, for attempting to run the blockade; that she had a Confederate flag, and no other on board to hoist when going into a Confederate port; that the United States vessel Fulton made the capture; that she fired sixteen shots; that the Grand Gulf fired four shots; that the prize was owned by E. Lawrence & Co., of Liverpool, England; that the witness was master of the vessel, and was appointed by Lawrence & Co., at Liverpool; that the vessel came out of Nassau November 17, 1863; that her voyage was to have ended in Wilmington, North Carolina; that the bills of lading, bags of letters, and other papers on the ship were thrown overboard during the chase; that he knew Wilmington was under blockade and was at war with the United States; that the Banshee had run the blockade eight times under his command; and that they endeavored to escape from the capturing vessel, but were chased and brought to by being fired at. The chief mate says that the chase of the prize continued from four to five hours, and that she was taken while attempting to run the blockade and get into Wilmington. The second and third mates and the purser concur in the general tenor of the testimony of the master and first mate. No evidence is given by either witness exculpatory of the offence of attempting to violate the blockade of Wilmington charged and proved against the vessel.

A decree of condemnation and forfeiture is, therefore, upon the proofs, ordered to be entered against the steamer and her cargo.

Case No. 966.

BANTA v. McNEIL.

[5 Ben. 74;[1] 15 Int. Rev. Rec. 144.]

District Court, E. D. New York. March Term, 1871.[2]

JURISDICTION—HALF PILOTAGE—MARITIME CONTRACT.

1. A court of admiralty has jurisdiction over an action brought by a pilot to recover the half pilotage, declared by a state statute to be due to the first pilot who tenders his services to a vessel.

[Cited in Mason v. Ingraham, Case No. 9,238; Weaver v. McLellan, Id. 17,309.]

[See note at end of case.]

2. Cases, arising quasi ex contractu, pertaining to navigation, are cases in admiralty.

[In admiralty. Libel in personam by Alexander S. Banta against Alexander McNeil, owner of the bark Maggie Mitchell, to recover half pilotage, under the pilot act of New York. Decree for libellant. Subsequently the petition of Alexander McNeil for a writ of prohibition to the judges of the district court was dismissed by the supreme court in Ex parte McNeil, 13 Wall. (80 U. S.) 236.]

BENEDICT, District Judge. This case presents for a decision but a single question of law. It is an action by a pilot against the owner of the bark Maggie Mitchell, to recover half pilotage.

The evidence shows the tender of the service, as alleged, and also the refusal of the service by the master, and that the libellant was the first pilot who made such a tender. The only question in the case is as to the right of the libellant to maintain such an action in the admiralty, to recover the half pilotage, which he became entitled to demand upon the facts proved. This question is new in this court. If the demand be pilotage, or within the principles applied to pilotage, strictly so called, no doubt can be entertained as to the libellant's right to recover in this action; for it was long ago decided that pilotage is within the jurisdiction of the admiralty. But this demand is said to be simply a demand for a penalty created by a state law. The law referred to is the pilot act of the state of New York, which contains the usual provision for half pilotage, a feature so common in pilot laws, that it is unnecessary more fully to describe it here. This statute of the state has never been adopted as a national law by any statute of the United States. The act of August 7th, 1789, [1 Stat. 54, § 4,] only adopts the statute of the states then in force, and does not include the present act, and the declaration that "pilotage shall continue to be regulated in conformity with such laws as the states may respectively hereafter enact for that purpose," which is con-

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

[2] [Petition for writ of prohibition denied in 13 Wall. (80 U. S.) 236.]

tained in the act, has no effect to adopt future laws of the states, but simply to manifest the understanding of congress, that the power to legislate upon the subject is not exclusive in the United States. Cooley v. Board of Wardens, 12 How. [53 U. S.] 320. Congress never having legislated upon this subject, the statute of the state of New York referred to is, therefore, a valid enactment, within the power of the state to make; and its legal effect is to render the defendant debtor to the libellant for the half pilotage here demanded.

The half pilotage which becomes due and payable under such circumstances, has been distinctly held by the supreme court not to be a penalty, but a sum due on contract for services. In Steamship Co. v. Joliffe, 2 Wall. [69 U. S.] 450, it is decided, that, although half pilotage be given by the statute, it is only in consideration of services rendered, and that it is recoverable, notwithstanding the subsequent repeal of the statute, upon the ground that "where a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, the repeal of the statute does not affect it."

Again, in a later case, Steamship Co. v. Port Wardens, 6 Wall. [73 U. S.] 34, it is declared, "that the right to recover half pilotage rests not only on state laws, but upon contract. Pilotage is compensation for services performed. Half pilotage is compensation for the services which the pilot has put himself in readiness to perform by labor, risk, and cost, and which he has actually offered to perform." According to these decisions, then, the defendants are liable to the libellant, upon a contract to pay him for his services in boarding the vessel, and making tender of his services to pilot their vessel to New York.

The only question remaining is, whether such contract be maritime, and within the jurisdiction of the admiralty.

And, first, it is to be remarked, that, although the state statute fixes the amount of compensation to be paid, this does not destroy or change the nature and character of the transaction. The amount due for wharfage is, in general, fixed by statute, but the demand is none the less within the jurisdiction of the admiralty. And so, too, it was held in Hobart v. Drogan, 10 Pet. [35 U. S.] 120, in regard to pilotage proper, that the only effect of the state statute fixing the amount, was to limit the recovery in admiralty to the sum recoverable under the state laws, without affecting the jurisdiction. The jurisdiction depends upon the character of the contract.

Now, it is evident from the opinion of the supreme court, in Steamship Co. v. Port Wardens, 6 Wall. [73 U. S.], 34, that the contract for half pilotage is considered by that court to be similar in character to a contract for pilotage. Nor can I see how any distinction can be drawn between these two classes of demands, under the view taken by the supreme court. The service, the labor, and risk in reaching and boarding the vessel, for which half pilotage is paid, are clearly maritime in character; in fact, they form part of the service for which full pilotage is paid, when the pilot is taken. The liability to pay for these services is created in the interest of navigation. The safety of the vessel is the thing sought to be attained, and the ship actually derives the advantage of an opportunity to be piloted by an experienced pilot. These are the features of a maritime contract. But it is urged that, if the case be not one of penalty, it is no more than a case arising quasi ex contractu, and that such cases have not as yet been held to be maritime contracts, within the meaning of the constitution.

Cases arising quasi ex contractu, where the transaction, in nature and effect, appertains to navigation, are as clearly cases in admiralty as cases depending upon voluntary agreements.

It has been the constant practice of the admiralty to entertain proceedings arising either ex contractu or quasi ex contractu, or ex delicto or quasi ex delicto. The Mayurka, [Case No. 1,175.] As one instance, cases of salvage may be mentioned, which are not cases of contract, and certainly not of tort. The Eagle, 8 Wall. [75 U. S.] 23. Such cases, from the beginning of navigation, have been conceded to be within the jurisdiction of the admiralty. Moreover, salvage awards are not compensation for services rendered, and do not depend upon the quantum meruit. They are rewards which the maritime law, in the interest of commerce, declares shall be given under certain circumstances.

If, then, it were true that this action is simply to recover a penalty, there would not be wanting foundation to claim that it could properly be imposed by a court of admiralty. No reason is seen why, if salvage, which is a maritime reward, be within the jurisdiction, a maritime penalty should not be. Indeed, maritime penalties, imposed as punishment by maritime courts, are a common and characteristic feature of the jurisdiction. The three months' extra wages decreed for an unlawful discharge of a seaman is a statutory penalty, in part, at least, for the use of the government. Emerson v. Howland, [Case No. 4,441.] The forfeitures which are imposed upon seamen are mulcts for misconduct, inflicted by courts of admiralty in accordance with ancient rules of the maritime law. The Elizabeth Frith, [Id. 4,361.] The offences of drunkenness, theft, quarreling, and desertion, have all been thus punished by courts of admiralty, time and time again.

These instances are referred to here, not because I sustain this case as one of penalty, but because they tend to show that there is nothing new or strained in holding that a liability, arising from the law upon

facts maritime in their character, may as well be enforced in a court of admiralty as a liability produced by the consent of parties.

Let the decree be in favor of the libellant for the amount claimed.

[NOTE. The petition of Alexander McNeil for a writ of prohibition to the judges of the district court of the United States was dismissed by the supreme court. Mr. Justice Swayne, in delivering the opinion of the court, said: "The precise question we are considering came before this court in Cooley v. Board of Wardens, 12 How. (53 U. S.) 299. The suit was for half pilotage under a statute of Pennsylvania, substantially the same, in this particular, with the statute of New York. The plaintiff recovered in the lower court, and the supreme court of the state affirmed the judgment. The case was brought here for review by a writ of error under the 25th section of the judiciary act of 1867, (1 Stat. 85,) and was argued with exhaustive learning and ability. This court, after the fullest consideration of the subject, also affirmed the judgment. * * * The other objections taken to the judgment relate to the jurisdiction of the court. It is said there is no jurisdiction in admiralty to maintain a libel for a penalty. It was not a penalty that was recovered. There was a tender of services upon which the law raised an implied promise to pay the amount specified in the statute." Ex parte McNeil, 13 Wall. (80 U. S.) 236.]

BANTER v. McNEIL. See Case No. 966.

Case No. 967.

BANTZ v. ELSAS et al.

[1 Ban. & A. 351;[1] 6 O. G. 117.]

Circuit Court, S. D. Ohio. June Term, 1874.

PATENTS FOR INVENTIONS—REISSUE OF LETTERS—NEW MATTER.

1. Letters patent for an "Improvement in Boiler-Furnaces, for Burning Wet Fuel," reissued to Gideon Bantz, February 6, 1872, and extended for seven years from June 22, 1872, examined and sustained.

2. The fact of reissue, raises a presumption, that the invention, claimed in the original and reissued patents, are the same, and, that the reissued patent has not been extended beyond the original invention.

[Cited in Dederick v. Cassell, 9 Fed. 307.]

3. Dead chambers were shown in the drawings of the original patent, but were not referred to in the specification: *Held*, that it was competent to describe them, point out their functions, and claim them, in a reissue.

[In equity. Bill by Gideon Bantz against Jacob Elsas and others for infringement of patent No. 20,616. Decree for complainant.]

John E. Hatch and Fisher & Duncan, for complainant.

Jacob Schroder, for defendants.

SWING, District Judge. The bill in this case, alleges that the complainant was the original and first inventor of an "Improvement in Boiler-Furnaces for Burning Wet Fuel," for which he received a patent, June 22, 1858; that he surrendered said letters patent, February 6, 1872, and obtained new letters patent therefor, which were afterward extended for seven years from June 22, 1872. It further alleges, that he is the sole owner of said reissued and extended letters patent; that he has expended large sums of money, in making and vending the improvement, and making it profitable for himself, and useful to the public; that many persons have been licensed to use the same, with great advantage to the public; that the public have acknowledged and acquiesced in his rights to said improvement; and, that he will realize large gains and profits therefrom, if the infringements by defendants, shall be prevented; that the defendants, well knowing the premises, without license and in violation of the rights of complainant, did unlawfully make and use boiler-furnaces, made according to, and containing his patented invention, and are threatening to use and make the same, in large quantities. The bill then prays, that defendants may be compelled to account for, and pay over the profits of the infringement, and may be enjoined from making, vending, or in any wise using the patented improvement. The defendants answer: 1. Denying, generally, the allegation of the bill. 2. Denying, specially, the infringement. 3. Denying that complainant was the first and original inventor of the patented improvement, and setting up a prior use, by several persons named in the answer. They also seek to attack the validity of the reissued patent of the complainant: 1. By showing that the original patent was for a combination of all the elements described therein, as a combination, while the reissued patent is for those elements, separately, or, for a combination of a less number than the whole. 2. That the reissued patent contains a new element, which is not found in the original, to wit, the dead-chambers.

The patentee, in his specification, claims to have invented "a new and useful improvement in furnaces for burning wet fuel;" and then proceeds to give a description of the invention, and says:

"I do not claim a furnace for burning wet fuel, broadly, nor the use of a series of fireplaces, connecting with the common flue, arranged between the furnace and boiler, as I am well aware this has been done before. Having thus described my invention, I claim:

"1. In a furnace for burning wet fuels, having two or more single fire-chambers, not arranged under the boiler, the combustion chamber or reservoir C, arranged above the top of said fire-chambers, and located directly under the front end of the boiler, essentially as described.

"2. The cyma-reversa bottom m n, of the combustion chamber or reservoir C, in combination with the narrow throats e, of the separate fire-chambers, and the narrow exit-flue o, of the bridge walls f, for the purpose essentially as described.

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

"3. In combination with the combustion chamber or reservoir C, arranged and located as described, I claim the side door or doors h', for the admission of atmospheric air, for the purpose described.

"4. In combination with a series of fire-chambers A, and the combustion chamber or reservoir C, located and arranged directly beneath the front end of the boiler, and above the crown of said fire-chamber, I claim a series of reverberatory-chambers D, provided with side-doors h, and a diving-flue E, at the rear end of the boiler, to hold the heat beneath the same throughout its entire length, and to arrest and deaden the sparks, as described.

"5. In a furnace for burning wet fuels, in which the fire-chambers are not arranged under the boiler, I claim the arrangement of the boiler upon the rear wall of the furnace, and the rear wall of the diving-flue E, for the purpose of obtaining the full advantage of the heat of the walls of the furnace, and of the diving-flue, as described.

"6. In a furnace for burning wet fuels, having a flat top, and supplied through openings therein, I claim the dead-chambers arranged between the floor and the arches of the fire-chambers, for the purpose of maintaining the top of the furnace cool for the workman, as described."

Complainant insists that respondents have infringed the first and third claims of this reissued patent. But one expert has been examined, and his testimony shows, that the furnace of the respondents, embodies, substantially, the invention of the complainant, as set forth in the first claim of his patent. That, it is a furnace for burning wet fuel, having two single fire-chambers, not arranged under the boilers, and a combustion-chamber, or reservoir, arranged above the top of the fire-chambers, and located directly under the front of the boiler, in the same manner and for the same purpose as complainant's invention, and also that it embodies substantially complainant's invention, as set forth in the third claim of his patent, to wit: In combination with the combustion-chamber or reservoir, the side-door, for the like uses and purposes, as in complainant's furnace.

It is claimed, however, by respondents, that there is no infringement of either of these claims, because the combustion chamber or reservoir of the complainant, is one having a cyma-reversa bottom, with a narrow throat, whereas, the combustion chamber or reservoir of the respondents, has not the cyma-reversa bottom, but, has one which is flat, and set inclined, and has a wide throat, instead of a narrow one.

If, the first and third claims of the complainant, are to be confined strictly to a combustion-chamber or reservoir with a cyma-reversa bottom and a narrow throat, then, the respondents do not infringe.

I think, however, that the leading idea of the complainant, is found, in a combustion chamber or reservoir, arranged in its relations with the fire-chamber and boiler, for a particular purpose, rather than, in the particular form of the back or throat of such chamber or reservoir. It may be true, that he supposed the one described by him, was best adapted for the purpose for which it was designed, but, there can be no doubt, that the defendants' combustion-chamber occupies substantially the same relation to the fire-chambers and boiler that the complainant's does, and, is for, and accomplishes, the same purpose, in the same way. The only difference is, in the shape or form of the bottom and size of the throat, and it is not claimed that there is any difference in the principle of the two. If this be so, shall the respondents by a mere change of form, be permitted to use the complainant's invention? I think not.

As to the question of first and original invention, the testimony of Gideon Bantz, and (by stipulation), that of John Duvall and Gideon Bantz, Jr., shows, that the invention of the complainant, dates back as far as 1854, while the testimony of J. C. Baum, who claims to be the first and original inventor, only reaches back to 1856. True, Mr. Baum testifies, that, in 1858 or 1859, complainant acknowledged that he, Baum, was the author of the invention, but, this is positively denied by complainant, and it is not likely that such conversation did take place. when, as the testimony shows, complainant's invention was made two years before Baum claims to have invented it.

As to the patent of Thompson, there is nothing to show its nature or character, nor that the invention was of the same character as the complainant's. Besides, no such defence is set up in the answer; neither is there any testimony, establishing a prior use of such a furnace.

If the validity of the complainant's reissued patent, was properly put in issue, I cannot, for any of the reasons assigned by the learned counsel for respondents, conclude, that such reissued patent is invalid.

1. The presumptions of the law are all in favor of its validity. The very fact of reissue raises a presumption, that the inventions, claimed in the original and reissued patent, are the same, and the presumptions of the law, are, that the complainant has acted rightly, and has not extended the reissued patent beyond the original invention.

2. But, aside from this, by a comparison of the original with the reissue, I do not find it extended beyond what I include in a fair and reasonable construction of the original. I do not think the original patent is for a combination; it is not, as described in the patent, specifications or claims, and, if it be not for a combination, the patentee had a right to a reissue for any of its valuable elements, separately or together.

3. But it is said the reissued patent em-

braces an element not within the original patent, to wit, the dead-chamber. It is true, that nowhere in the specification of the original patent, are these dead-chambers spoken of, or their functions described, but they are clearly shown in the drawings accompanying the specification, and the reissue does nothing more than describe them and point out their functions. This is certainly not going beyond what is shown in the original patent.

Decree for complainant.

[NOTE. Patent No. 20,616, was granted to G. Bantz, June 22, 1858; reissued February 6, 1872, (No. 4,731.) For another case involving this patent, see Bantz v. Frantz, 105 U. S. 160.]

Case No. 968.

BAPTIST MISSIONARY UNION v. TURNER.

[6 McLean, 43.] [1]

Circuit Court, D. Michigan. June Term, 1853.

PRACTICE—NOTICE OF TRIAL—INJUNCTION TO STAY PROCEEDINGS.

Where an injunction has been applied for to stay proceedings at law in a bill to quiet title, on the ground that the remedy at law was not adequate; a notice by the complainant that he will insist on the trial at law, is necessary, so that the witnesses by [for] the plaintiff at law may be summoned.

[At law. Action of ejectment by the Baptist Missionary Union against Israel Turner.]

Frazer & Davidson, for plaintiff.

Patterson, Vanamringe & Gould, for defendant.

OPINION OF THE COURT. This is an action of ejectment where a bill has been filed to stay proceedings by injunction and quiet title on the ground that there was not adequate relief at law. The bill in chancery was continued at the last term with leave to amend. It is now insisted that the case at law shall be tried.

The plaintiff's counsel at law contends that without notice from the complainant in equity they cannot be ruled to a trial.

THE COURT held, a notice was necessary, as the party could not know that the complainant in equity would not insist on a hearing; that until notice, the plaintiff at law could not be expected to have his witnesses brought before the court.

Case No. 969.

BARBEE v. WILLARD et al.

[4 McLean, 356.] [1]

Circuit Court, D. Indiana. May Term, 1848.

PLEADING — DECLARATION — AVERMENT OF COVENANTS PERFORMED — PARTIAL PERFORMANCE — DEMURRER.

1. The parties, plaintiff and defendants, entered into partnership and afterwards plaintiff selling out to the defendants his interest in the entire concern, dissolved, the [agreement] embracing personal and real estate. The defendants agreeing to pay Barbee $6,872.72. In payment the defendant French agreed to give his note for $3,000 with interest, payable three years after date; and the other defendant agreed to convey to plaintiff 800 acres of land and other tracts on or before the 1st May, 1842. Upon the execution of such deeds and the note for $3,000, at the above date of May, 1842, Barbee was to execute a conveyance to the defendants of his interest in the partnership, etc. The plaintiff avers he has always been ready. To the declaration there was a demurrer—which was sustained, [on the ground that it should have contained an averment of at least partial performance of the covenants, or should have shown a reasonable excuse for nonperformance.]

[2. The general averment of performance of all covenants, stipulations, etc., is not sufficient under which to show partial performance, or that defendant has received a partial benefit from the contract in suit.]

[At law. Action by Barbee against Willard and French on a contract for the dissolution of a copartnership. Heard on demurrer to the declaration. Demurrer sustained.]

Mr. Smith, for plaintiff.

Bradley & Hammond, for defendants.

HUNTINGTON, District Judge. The agreement set out in the declaration (the original being lost) shows that the plaintiff and defendants were partners at Oswego, Indiana. The agreement is dated 19th March, 1842, and is in substance as follows: 1. Barbee being a resident of Troy, Ohio, and the defendants of Oswego, Indiana, agree to dissolve their partnership, the dissolution to take effect from that day, March 1842. 2. Barbee, the plaintiff is admitted to be the owner of one entire half of the lands, mills, goods, and assets of the firm. 3. He agrees to sell his undivided half to the defendants, consisting of lands, mills, wagons, horses, goods, etc. In consideration of such sale, the defendants agree to pay the debts of the firm in New York and elsewhere, some of which debts are due to Barbee individually, on notes then in his possession—and also to pay Barbee, the plaintiff, $6,872.72, it being the sum agreed on as the value of Barbee's interest in the firm and in the property by him sold to them. In payment of this sum of $6,872.72, the defendant, French, agreed to give to plaintiff his note for $3,000, with interest, payable three years after date—and Willard was to convey to Barbee eight hundred acres of land in Wells county, estimated at $2,000; forty acres in Delaware county, estimated at $200; eighty acres in Shelby county, Ohio, at $600; and a bouse and lot in Cincinnati, at $1,600, and also four hundred acres of land more, in Wells county, which by the terms of the contract were to be deeded to Barbee by Willard, on or before the 1st of May then next, namely, May, 1842. Upon the execution of such deed by Willard, and the execution of the note for $3,000, by

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

French, which, it is manifest from the general tenor of the agreement, were to be done at the same time, May, 1842, Barbee the plaintiff, was to execute a deed of conveyance to Willard and French, of his interest in the lands, etc., of the firm, upon the execution of which, Willard and French were to execute a mortgage of the whole premises, (with the exception of the Pearson tract, so called,) to Barbee, to secure the performance of their part of the agreement—Barbee giving to Willard and French two and three years for the payment of the debts, (by notes,) due to said Barbee, by the firm. The debts of the firm due to others to be secured before the expiration of two years, so that Barbee was not to be bound for them as a member of the firm. The agreement then states "possession is this day given by said Barbee of all the within described land and property, to said Willard and French, and said Willard and French do hereby give to said Barbee possession of said lands and lots to be deeded to said Barbee, and should said Willard decide to take back the twelve hundred acres of land in Wells county, at the end of three years from that date, he has the option so to do by paying said Barbee $2 50 per acre, and interest thereon, from this date," also the same option in regard to the lands in Delaware and Shelby counties, Ohio, and the house and lot in Cincinnati upon the same terms. This is the substance of the agreement set out. The plaintiff then avers that he has, 1. Faithfully kept his covenants. 2. That he has always been ready and willing to execute deeds, etc., for the lands by him sold. 3. That on the 12th of October, 1846, at Oswego, Indiana, and at the residence of Willard and French, he did duly tender and offer to deliver a good and sufficient warranty deed, with relinquishment of claim to the land described on the agreement, and by him sold, according to the true intent and meaning of his covenants, and demanded performance, etc., on their part—that they refused, etc.

He then assigns the following breaches: 1st. That the defendants have never yet paid the said sum of $6,872.72, or any part of it. 2d. That they have not settled up the liabilities of the firm, and especially the several notes due from the firm to the plaintiff individually, copies of which notes are set forth. 3d. That defendants are indebted to him the sum of $4,000, for which he held the notes of said firm, etc.

To this declaration the defendants have filed a general demurrer, and in support of the demurrer it is said that the covenants are dependent—that their deeds, notes, and mortgages are mutually to be executed on or before the 1st of May then next—that as neither did perform or offer to perform, their part of the agreement, on or before that day, neither party can sue upon the covenants in the agreement, in short, that after the expiration of the day, either party may, if he choose, regard the agreement as at an end.

I am inclined to think, upon a full examination of the terms of the agreement, that it was the intention of the parties that the deed, mortgages and $3,000 note should be executed and exchanged at the same time, that is, on or before the first day of May, 1842. This being the case, it is very clear upon authority, that neither party could sue for a violation of the agreement, without first having offered to perform his part of it, or show some excuse for not doing so, and that offer to perform must be made within a reasonable time. It is said in Ballard v. Walker, 3 Johns. Cas. 60, that the lapse of four years after the time of performance rescinds the contract. But it is said in answer to this objection that, by the terms of the agreement, possession was given of the mills, personal property, etc., to the defendants, that this was a part of the consideration of the agreement, and as he has received a partial benefit, it would be unjust that he should enjoy that part and not be compelled to pay anything for it; and this is the true doctrine undoubtedly. See 1 Chit. Pl. 334. But, according to the same authority, "it seems necessary to aver, in the declaration, performance of at least a part of that which the plaintiff covenanted to do, or to show, that otherwise the defendants have received a partial benefit." There is no such averment in the declaration. It is true, there is a general averment that the plaintiff has kept and performed all his covenants, stipulations, etc., but this is not sufficient. Demurrer maintained.

Case No. 970.

BARBER v. HALLETT.

[4 Ban. & A. 213.]

Circuit Court, D. Massachusetts. April Term, 1879.

[See 10 Fed. 130.]

BARBER, (GUIDET v.) See Case No. 5,857.

BARBER, (MOWRY v.) See Case No. 9,892.

BARBER, (NEEDERER v.) See Case No. 10,079.

BARBER, (WASHINGTON v.) See Case No. 17,224.

Case No. 971.

BARBOUR v. RUSSELL.

[3 Cranch, C. C. 47.][1]

Circuit Court, District of Columbia. Dec. Term, 1826.

DEBT—BOND WITH COLLATERAL CONDITION—SPECIAL BAIL.

Bail will not to be required in an action upon a bond with a collateral condition.

[1] [Reported by Hon. William Cranch, Chief Judge.]

[At law. Action of debt on a bond by James Barbour, secretary of war, to the use of Roland Clapp, against Gilbert C. Russell. Heard on defendant's motion for leave to enter an appearence without special bail. Leave granted.]

Debt for $120,000, the penalty of a bond given by Nimrod Farrow, and the defendant, one of his sureties, under the act of congress of the 3d of March, 1825, "for the relief of Nimrod Farrow and Richard Harris," with condition that Farrow should appropriate the proceeds of the property in the act mentioned, towards the payment of the debts contracted by Farrow and Harris, in the erection of a fortification on Dauphin Island. The declaration alleged the breach of the condition to be in the non-payment of $6000 due by Farrow and Harris to one Roland Clapp, for supplies, &c., in and about the erection of the said fortification.

Upon the return of the writ, Mr. Jones moved for leave to enter his appearance for the defendant without special bail. 1 Petersd. Bail, 405, 411; Edwards v. Williams, 5 Taunt. 247; Bosanquet v. Fillis, 4 Maule & S. 330.

Mr. R. S. Coxe, for the plaintiff, objected and produced the affidavit of the said Roland Clapp, stating that the defendant, Russell, is indebted to him in $6000 due on a bond dated 19th April, 1825, entered into by the defendant to James Barbour, secretary of war, "for the use and benefit of this deponent and others in the penal sum of $120,000, conditioned for the performance of divers covenants, and for the payment of the said sum of $6000;" and cited Hobson v. Campbell, 1 H. Bl. 245.

The name of the said Roland Clapp is not mentioned in the bond or its condition, nor is any sum of money therein stated to be due to him.

THE COURT (THRUSTON, Circuit Judge, absent) permitted the defendant to appear without special bail.

BARBOUR, (WOODWORTH v.) See Case No. 18,010.

BARCLAY, (CAMPBELL v.) See Cases Nos. 2,352 and 2,353.

Case No. 972.

BARCLAY v. GOODALE.

District Court, D. Oregon. Aug. 17, 1872.

ARRESTS IN INDIAN COUNTRY—REMOVAL FOR TRIAL—ACT JUNE 30, 1834.

[Act Cong. June 30, 1834, (4 Stat. 733, § 23,) authorized arrests by the military force of the United States in the Indian country for certain purposes, and for removing for delivery to the civil authorities for trial, "provided that no person apprehended by military force as aforesaid shall be detained longer than five days after the arrest and before removal." *Held*, that the arrest and detention of a defendant, for more than five days before removal, renders the person making the arrest liable for false imprisonment, although he had no sufficient means wherewith to do otherwise.]

[Cited in Re Carr, Case No. 2,432, and Waters v. Campbell, Id. 17,265.]

[Note. Nowhere reported; no opinion on file at the clerk's office.]

Case No. 973.

BARCLAY v. GOVERS.

[1 Cranch, C. C. 147.][1]

Circuit Court, District of Columbia. Dec. Term, 1803.

GUARDIAN AD LITEM — APPOINTMENT ON MOTION.

The court, on motion, will appoint a guardian ad litem for an infant defendant.

[See Rhinelander v. Sanford, Case No. 11,739.]

At law. Case for goods sold.

On motion of Mr. E. B. Caldwell, alleging that the defendant was an infant, James Thompson was appointed guardian to plead for the defendant.

FITZHUGH, Circuit Judge, absent.

Case No. 974.

BARCLAY et al. v. HOLME.

[17 Betts, D. C. MS. 1.]

District Court, S. D. New York. Oct. 31, 1849.

CHARTER PARTY—ANTECEDENT VERBAL AGREEMENT.

[1. By the execution of a charter party, all antecedent verbal agreements inconsistent with its terms are waived, and the charter party becomes the only competent evidence of the contract between the parties.]

[2. By a charter party dated October 3, 1848, but not signed until October 23d or 24th, when bills of lading were signed and delivered by the master, it was stipulated that the charter should commence "when the vessel is ready to receive cargo at her place of loading, and notice thereof is given" to the charterers. The charterers brought action for damages by way of demurrage, alleging that respondent agreed when the charter party was entered into that the vessel should be ready to receive cargo on October 7th. The vessel was not ready to receive cargo until October 14th or 17th, the respondent having before the latter day given the charterers notice that the vessel was ready. *Held*, that the charter party was the only competent evidence of the contract between the parties, and that, as the charterers had failed to prove a breach thereof, they could not recover.]

[In admiralty. Libel by Delaney Barclay and Schuyler Livingston against John L. Holme to recover damages by way of demurrage. Libel dismissed.]

BETTS, District Judge. The respondent chartered the Norwegian brig Aural to the libellants for a voyage from New York to

[1] [Reported by Hon. William Cranch, Chief Judge.]

Madeira to carry a cargo of eight thousand bushels of Indian corn in bulk and pipe staves to fill up. The charter party is dated the third of October, 1848, but was not signed by the parties until the 23d or 24th, when the bills of lading were signed and delivered by the master. One of the stipulations in the charter was that "it shall commence when the vessel is ready to receive cargo at her place of loading, and notice thereof is given to the party of the second part, or their agent." This action is brought for damages by way of demurrage. The libellants allege that the respondent agreed, when the charter party was entered into, that the vessel should be ready to receive the cargo on the 7th of October, and that he advised and sent word to the libellants she would be so ready at that time, and requested the cargo might be delivered on board; that lighters were employed which transferred the corn to the vessel on the 9th of October, but the master refused to receive it, and did not allow it to be laden on board until the 14th of October, his vessel not being made ready to receive it prior to that day.

The bill also claimed damages for loss on exchange by the depreciation of the rate between the 7th and 23d of October, when bills of lading therefor were signed by the respondent, averring the bills on the 7th and 9th of October would in market have produced $.58 more than was obtained for them when drawn after the bills of lading were delivered. There is a diversity in the recollections of the witnesses as to the representations between the parties in regard to the time and manner the agreement was to be fulfilled by the defendant, I think the weight of evidence, admitting that Mr. Balchen was his authorized broker, is that the understanding on the part of the defendant, previous to drawing up the contract, was that the vessel should be ready to take in her cargo on the 7th of October, and if the decision of the case turned upon the bearing and effect of the oral evidence, I should determine this point for the libellants. It is, however, to be borne in mind that all the negotiations and treaties between the parties antecedent to closing the contract, by executing the charter party under consideration, proceeded upon the understanding that the agreement adopted by them was to be in writing. The written contract, therefore, upon the soundest principles of the law of evidence, must furnish the proof of the actual understanding upon which the parties closed their negotiations relative to all matters which are the subject of stipulation in it.

The charter party bears date the 3d of October, but it was not consummated by the signature of the libellants until the 23d. By executing it then, the libellants ratified its terms as the true contract upon which the vessel was obtained and loaded by them, and they cannot be allowed to go back to antecedent propositions and understandings, and charge the respondent upon them, in contradiction to the terms of the charter party, which they so accepted. Accordingly, if the respondent originally engaged to have the vessel ready to receive cargo on the 7th of October, and was not in fact prepared to do so until the 14th, or even the 17th, before which last day it is proved he gave the libellants notice he was ready, and the libellants chose then to act under the contract and affix their signature to it, they must be held to have relinquished all propositions and understandings inconsistent with the stipulations of the charter, and to have accepted it according to its written terms. They thus bound themselves that the charter party should commence from the time they had notice the vessel was ready to receive cargo, and there is no pretence that the respondent did anything after that time violating his agreement. By receiving the charter party from the respondent on the 23d or 24th of October, and then signing it themselves, the libellants are precluded in law from setting up any anterior arrangements or understandings in respect to the bargain inconsistent with the written engagements. They cannot, therefore, maintain the action because the respondent failed to comply with his first proposals or promises, for they are not independent and outside of the charter party, but a stipulation is inserted covering that subject.

The remedy of the libellants, if any, would have been to reject the charter party as not fulfilling the agreement made between the parties, and then have recovered damages for the non-performance. No breach of the written agreement being proved, the libellants cannot maintain their action upon an alleged non-performance of an anterior agreement analogous to one in the charter party, but not included in terms in the written contract.

Libel dismissed.

Case No. 975.

BARCLAY et al. v. HOWELL.

HOWELL v. BARCLAY et al.

[4 Haz. Reg. Pa. 227.]

Circuit Court, E. D. Pennsylvania. April Sessions, 1829.[1]

EVIDENCE—IMPEACHING DOCUMENTS BY ORAL TESTIMONY—EJECTMENT — MUNICIPAL CORPORATION —IMPLIED GRANT—EASEMENTS—PRESUMPTION OF GRANT—DEEDS — CONSTRUCTION — ACCEPTANCE OF CONVEYANCE—EFFECT—USER—DEDICATION—DESCRIPTION OF PROPERTY — REQUISITE PROOF.

[1. Declarations made by a surveyor when laying off a town are incompetent to impeach the map of the survey which has been adopted by the proprietors.]

[See note at end of case.]

[1] [Reversed in 6 Pet. (31 U. S.) 498.]

[2. In ejectment, a municipal corporation must sustain its title by proof of as high an order as would be necessary by an individual.]

[3. Where anything is granted, the law implies a grant of those things without which the principal subject cannot be enjoyed, as incident thereto.]

[4. This right is confined strictly to the necessity upon which it is founded, and cannot exceed its just demands.]

[5. The right of the inhabitants of a city to access to a river over the land of the town proprietors is a mere right of way, and does not divest such proprietors of the fee to the land so used.]

[6. The presumption of a grant to the public furnished by the uninterrupted use of a way for convenience is raised by use for a much shorter time than in the case of use by an individual.]

[7. This presumption may be repelled by showing the owner's assertion of right, and denial of the use assumed by the public.]

[8. Ambiguity in the language of a deed requires it to be construed most strongly against the grantor.]

[9. In construing a deed, effect is to be given to every expression, if it can reasonably be done.]

[10. By accepting a conveyance without objection, and with knowledge that a street through the demised premises had been dedicated, the grantee takes subject to the easement thereof.]

[11. In determining the right to an easement of way acquired by user, the fact of user not only must appear, but likewise that the land was susceptible of such use.]

[12. A street dedicated to a municipal corporation vests in the public, subject to its regulation and improvement by the corporation, and cannot be treated or used as private property by that body.]

[See note at end of case.]

[13. In ejectment, it is sufficient to describe the locus in quo sufficiently to acquaint the defendant with knowledge of what is claimed, and to enable him to prepare his defense.]

[14. In ejectment, plaintiff must prove the length of defendant's enjoyment of the premises and their value.]

At law. This was an ejectment [by the lessee of R. H. Howell against Barclay, Florence, and Cotter, officers of the corporation of Pittsburg] to recover a messuage, lot, piece or parcel of land, lying between Water street and the Monongahela river in the city of Pittsburg. [The action was begun in the district court for the western district of Pennsylvania, and removed to this court, under Act March 3, 1821. Heard on objections to evidence. Objections sustained. Verdict for plaintiff. Motion for new trial denied, and judgment on the verdict. This was reversed by the supreme court in Barclay v. Howell's Lessee, 6 Pet. (31 U. S.) 498. See note at end of case.]

The title of the lessor was regularly deduced from Alexander Wilson, to whom the late proprietaries (the acknowledged owners of the manor of Pittsburg, of which the city of Pittsburg and the ground in question, made a part), on the 26th of September, 1814, conveyed all the ground in the above city, lying between Water St. and the Monongahela river. It appeared in evidence that, on the 22nd April, 1784, Mr. Francis, the agent and attorney in fact of the Penns, employed George Woods, a deputy surveyor, to lay off the town of Pittsburg. This duty he performed on the 31st of May, 1784, and returned to Mr. Francis a plan of the town, which he approved of and confirmed on the 30th of September, in the same year. On the diagram representing the survey or plan of this town was written, by Mr. Woods, the words "Water Street" on a space extending along the south front of the row of lots facing the Monongahela from Grant street to the junction of that river with the Allegheny river. This space was of different widths, from about 219 feet at Grant street to about 108 feet at West street, its breadth further west not being shown; and it extended from the row of lots before mentioned, to the Monongahela river, embracing a space of table land from 70 to 80 feet wide in the broadest part, to a few feet in the narrowest, and also embracing a steep bank of the river, and the river beach, which in time of freshes was nearly or quite covered with water.

The town, now city, of Pittsburg, was incorporated as a borough by an act of assembly passed in the year 1804, with the usual powers and privileges, and by various ordinances of the corporation, commencing in the year 1816, that body exercised acts of ownership over this slip of land bounding on the river, by authorizing the erection of wharfs, exacting tolls from all persons landing goods on the beach, etc.

The plaintiff gave in evidence a written agreement between the agent of the Penns and Craig & Bayard, by which the former agreed to sell and convey a certain parcel of the ground, afterwards embraced in Wood's plan of the town, lying in a point formed by the junction of the rivers Allegheny and Monongahela bounded on two sides by the said rivers, and on the third by the fosse of Fort Pitt. On the 31st December, 1784, a deed was executed by this agent to the said Craig & Bayard, for 32 lots, as marked and numbered in Wood's plan, bounded southerly by the Monongahela river; and on the 2d October, 1784, another deed was made to John Ormsby for two lots bounded by Front street on the north, and on the south by the Monongahela. A number of deeds from the Penns to different persons were given in evidence, bearing different dates, subsequent to the year 1784, for lots fronting the rivers Monongahela and Allegheny, the former bounding southerly on Water street, and the latter, on the river, no street having been marked between the lots fronting on that river and the river. Amongst other evidence offered by the defendant's counsel, was the deposition of Samuel Ewalt, for the purpose of proving various declarations of George Wood's, at the time he was engaged in laying off the town of Pittsburg in relation to Water street. This was objected to, as hear-

say evidence of parol declarations to explain or to contradict a written instrument, by an agent acting under a limited authority to lay off the town, and nothing else. Cases cited: 1 Serg. & R. 526; 4 Serg. & R. 298; 4 Yeates, 100; 1 Yeates, 284; 2 Smith's Laws, 256, note; 3 Bin. 175; Mayo v. Murchie, 3 Munf. 358. On the other side were cited: 1 Pet. C. C. 205, [Wright v. Deklyne, Case No. 18,076;] [Mechanics' Bank of Alexandria v. Bank of Columbia;] 5 Wheat. [18 U. S.] 336; 8 Johns. 508; 16 Serg. & R. 396.

Chauncey & Baldwin, for plaintiffs.

J. R. Ingersoll and Charles Smith, for defendants.

WASHINGTON, Circuit Justice. The evidence offered is altogether inadmissible. The authority of Woods was confined to laying off this town, which of course included the acts of surveying and plotting the lots and streets, so as to exhibit a plan of the town. His work, when completed, was binding upon no person until it received the confirmation of the owner of the ground, either expressly, or to be presumed from his subsequent acts. Woods so understood his authority, for he returned the survey, soon after it was made, to Mr. Francis, who by his letter to Woods in Sept., 1784, approved and confirmed the same. He might have rejected it altogether, had he chosen to do so, and directed another survey to be made upon a different plan. But having confirmed it, it afterwards became a muniment of title, to which the purchasers of lots, and all persons connected with this town, including the grantors, had a right to look, as evidence of title, and by which they were bound. To permit now the parole declarations of Woods to alter, or in any way to affect this delineation of the town, and this muniment of so many titles of which it is the evidence, would be to violate one of the best established rules of evidence, and to let in the most extensive mischief. It is one thing to prove acts tending to explain and point out the true boundaries of a survey, and quite another, to give evidence of the parole declarations of the officer who made it, which might be misunderstood, and of which purchasers as well as vendors looking at the plan, and relying upon it, could have no notice. Woods was the agent of the Penns; but he had no authority to bind them, even by his acts, until they were confirmed. How then could he bind them by his declarations, which forming no part of his report, accompanying the plan, could not be, and therefore were not approved and confirmed?

The great question in the cause, was, whether Water street extended from the range of lots fronting on that street along the entire range of them from Grant street to the river Monongahela, or whether the width of the street was unascertained, and was left to be afterwards laid out of a convenient width? Both sides referred to the case of Mayo v. Murchie, 3 Munf. 358; and the defendants' counsel relied much upon M'Donald's Case, 16 Serg. & R. 396; they also cited 1 Sandf. 323, to show that the corporation, or the inhabitants of the town, were entitled to this slip of land as an easement. They also cited 1 Conn. 103; 3 Mass. 284; 6 Mass. 332; 15 Johns. 447; 2 Starkie, Ev. 655, 656; 3 Starkie, Ev. 1216–1219; [Ricard v. Williams,] 7 Wheat. [20 U. S.] 109.

Charge: WASHINGTON, Circuit Justice. Whether the surveys of the plaintiffs or of the defendants, in this controversy, will most subserve the interest and the prosperity of the inhabitants of Pittsburg, is a question which neither the court or the jury can very well answer.—This however is manifest to both, that it is not a question involved in that issue, which, and which alone you are sworn and affirmed to try and decide. That issue is whether the plaintiff has shown to your satisfaction, such a right to the property in dispute, as ought to enable him to recover the possession of it. Considerations such as have been pressed upon your attention by counsel can never tend to promote the ends of justice, and never will be regarded by a conscientious court or jury. The case which you have now to pass upon is by no means a complicated one. There is in truth but one question upon which the controversy mainly turns, and whatever difficulty may attend the decision of it, is to be solved by the jury, since it rests altogether upon the evidence which has been laid before them. The object of the court will be to clear away those matters which do not seem materially to affect the case, in order that that question may more distinctly be perceived. To do this, the claims set up by the defendants to the property in dispute, will be first examined.

The defendants are merely officers of the corporation of Pittsburg, and of course, assert no title in themselves to this property. But they set up a title in the corporation, and in case that cannot be maintained, still they insist that the plaintiff cannot recover in this action, upon the ground, that the entire space between the southern row of lots fronting the Monongahela and that river, was dedicated by the owners of this manor in the year 1784, to the public, as a street, or highway.

As to the title of the corporation, it is proper to premise, that this must, in all cases, be maintained by the same muniment of transfer as would be necessary in the case of an individual. In the year 1784, and down to the period of the conveyance to Alexander Wilson, this slip of land, if it was not wholly given to the public as a street, or so much of it as was not so given, was vested in the Penns, as the undisputed owners of it. It has not been shown in evidence that a grant or transfer of it was at any time made by

them to the corporation, or the town before it was incorporated, or to any person for the use of that body, or the inhabitants thereof. No right of possession in the corporation has been proved, or even asserted, arising from length of time.

But it is claimed as appurtenant, or incident to the right of the inhabitants and lot owners, who cannot enjoy, it is contended, the property granted to them without the use of this slip of ground, whereby they may have free access to the river. Were this species of title to be admitted to exist in the lot owners and inhabitants of the city, it would nevertheless be difficult to discern, how this admission would maintain the claim of the corporation to hold and enjoy this property for their use and benefit in exclusion of the enjoyment thereof by the inhabitants. For if it belongs to the corporation, they may use it in any way most beneficial to the body corporate, and not injurious to the individual corporators or inhabitants of the town. But I cannot understand how one piece of land can be incident to another piece of land; and if it could, still it has not appeared in evidence that the corporate body is entitled to a foot of land within the limits of the city, or to any other right but that of governing the city. If the claim in behalf of the inhabitants be merely of right of way, or reasonable access to the river, that presents quite a different subject of inquiry, which will be attended to, after I have stated for your information the rule of law which applies to the subject. That is, that where anything is granted, the law implies a grant of those things, without which the principal subject cannot be enjoyed, as incident thereto; as if a lease be made of land with all the mines therein, and there be no mine opened upon the land, the lessee has an incidental right to excavate the earth for the purpose of obtaining the mineral, without which the grant in respect to them would be of no value. So and for the same reason, if a grant be made of a close surrounded by the lands of the grantor, the grantee has a right to a way or passage over the lands of the grantor. But this right is confined strictly to the necessity upon which it is founded, and cannot exceed its just demands. The grantee, therefore, cannot claim a right to as many roads as may suit his whim or convenience, nor can he exercise any privilege, but that of a right of way; if he go unnecessarily out of such way upon other parts of the grantor's land he is a trespasser. Now to apply these principles to the present case. A street or streets, it is insisted, leading to the river Monongahela, are necessary to the enjoyment by the inhabitants of their property in the town, derived from the persons under whom the plaintiff claims. If this be so, they are entitled to have them laid off over the land in dispute; if it be private property (which is the great question in the cause) of right, and not of favor; and the law points out a mode by which this right may be enforced. But the right of soil, is not, as I conceive, thereby divested out of the owner of the other parts of the ground, which beyond all question remain in him, as it was before the street shall have been laid out. The only difference in this respect between the city of Philadelphia and Pittsburg is that Wm. Penn granted expressly to the former this privilege of streets leading from Front st. to the river, which the law would have implied as an incident, and which may be implied in relation to the latter city. But the ground lying to the east of Front st. and between the streets running to the Delaware remained the undisputed property of the proprietor, and as such was used or granted away by him. If the ground in controversy then was not dedicated to the public as a street, it remained in the Penns, subject to the incidental right which has been spoken of; and the only right of the corporation would be to regulate and to preserve such streets as should be laid out running over it to the river.

This brings us to the great question in the cause; was the whole of the ground lying between the lots fronting on the Monongahela, and that river, dedicated by the Penns for a street, or only so much thereof as might be necessary for such an easement? And this leads to an examination of the plaintiff's title. The only direct evidence of such dedication is the survey and plan of George Woods returned to and confirmed by the authorized agent of the Penns. The survey was made on the 31st of May, 1784, and received the approbation of that agent on the 30th September, in the same year. The deed to Alexander Wilson bears date the 26th December, 1814, and it conveys to him all the land lying between the south line of Water street, and the low water mark of the Monongahela river from Grant st. to the confluence of the Allegheny and Monongahela rivers. That a street running south of the line of lots on that river was granted by the name of Water street is satisfactorily proved, not only by the plan referred to, but by the subsequent grants of those lots, all of which call for Water street as their south western boundary. The question which this plan gives rise to, is whether the whole of this slip of land to the river was dedicated to the public as a street, or whether a street of undefined width, but such as convenience might require, was intended to be appropriated.

The defendants' counsel insist that the plan itself furnishes direct proof that the whole space was laid out and intended as a street, the south line of it being distinctly marked, running along the margin of the river. This is denied on the other side, who insist that the line referred to, merely marks the margin of the river, and not the line of a street, and in confirmation of this assertion, they refer to the Allegheny river as it is laid down on the plan,

where the same line is discoverable; and yet it is agreed by both sides, that no street was laid off or intended to be along that river, all the subsequent grants or lots facing it running across the vacant space bordering on the river, to the river. They further rely on the testimony of Vickroy, who made the survey under the direction of Woods, who states that no line was, in fact, run on the river Monongahela south of the lots facing the same. It will be for you to say, whether the appearance of this line on the river in connection with the other lot lines was intended to indicate or does indicate the southern boundary of this street or not?

The other evidence in the cause relied upon to strengthen and confirm that which is termed direct is of a presumptive character. The defendants insist that this evidence establishes a long and uninterrupted use and enjoyment of this slip of ground by the inhabitants of Pittsburg, not short of 45 years. They rely further upon the long acquiescence in the enjoyment and in various acts of ownership exercised by the corporation in authorizing the construction of wharfs into the river, imposing tolls, and the like; upon the evidence of Mr. Coates the agent of the Penns, since the year 1800, who was authorized by them to sell and survey all their lands in the state, that he had no knowledge that this slip of land belonged to the Penns; and lastly that although all the lots in the plan of this town were sold by the agents of the Penns, yet the ground in dispute was never laid off into lots or offered for sale by those agents.

There is no doubt, in point of law, that the uninterrupted use by the public of a way over the ground of an individual for public convenience, for a length of time, affords a presumption of a grant of it by the owner for that purpose; and that a much shorter time will suffice to raise this presumption than would affect the title of an individual in ordinary cases. But the presumption in these cases, as in all others, may be repelled by evidence tending to show an assertion of right by the owner, and a denial of the use assumed by the public. In answer to the acquiescence insisted upon by the plaintiffs, two grants have been given in evidence by the plaintiffs, both dated in the year 1784, the one from the Penns to Ormsby for two lots in October, and the other to Craig and Bayard for 32 lots in December, of that year, both of which call for the river Monongahela for their southern boundaries. The defendants' counsel endeavor to remove the weight of this evidence by insisting that although such are the calls of those grants, still as they refer in express terms, to the lots as numbered in Wood's plan, they were in reality bounded and were intended to be bounded by Water street, and not by the river. That the survey having been made, the plan completed and confirmed, and Water street marked on it, as dedicated to the public, the Penns had no right, nor did they intend to exercise any, to extend these grants beyond the north line of Water street.

Whatever weight the jury may give to these grants as evidence to refute the alleged acquiescence by the Penns, will be for them to decide; but the court cannot yield to the arguments of the defendants' counsel as to their legal effect. To do so, would in my apprehension be to subvert two of the best established rules for the construction of deeds. The one is that they are always to be construed most strongly against the grantor where there is an ambiguity in their language, and the other is, that a meaning is to be given to every expression in them, if it can reasonably be done. Now, the lots conveyed by these deeds are those marked on Wood's plan, but then they are to run to the river. If they are to be bounded by Water street, the intention, of the parties, as shown by the expression of the deed, will be frustrated. By extending the two lines of those lots pointing to the river, a meaning is given to every expression in those deeds,—and what is to prevent this extension? It is said, that by doing so, they must run across a public highway, or street which would split each lot into two lots. But this would by no means, be the case. The land on both sides of the street (if you should say the street does not cover the whole of the ground) belonged to the Penns, and they had a right to grant each of these lots as entire parcels to the river, subject only to the easement over it which they had previously granted to the public. These observations apply to the deed to Ormsby. But they apply with increased force to that to Craig and Bayard, who were equitably entitled to the ground granted them in December, 1784, in virtue of their written agreement with the Penns in the January preceding, by which the latter were bound to convey the same to them, bounded on one side by the Allegheny river and on the other by the Monongahela. After that agreement, it was not competent to the Penns to encumber that ground with a road or in any other way; without the consent of Craig and Bayard. By accepting the conveyance without objection, and with the knowledge that Water street had, in the mean time, been granted, (as may for the present be presumed) they consented to take the ground so encumbered, not by force of some new contract, of which not the slightest evidence has been given, save the grant itself, but as a fulfilment and execution of the old one.

As to the long use of this disputed piece of ground by the public, it will be for you to say, whether, in point of fact, such use has been proved. In point of law, you must be satisfied, not merely that it was used by the inhabitants of Pittsburg, or others, but that it was used as a highway, or street; and in weighing the evidence on this point, you will naturally inquire, whether, from the

nature of the ground, it was capable of being so used.

As to acts of ownership, exercised, by the corporation in the way which has been stated, it is manifest, that they are altogether inconsistent with the right asserted in behalf of the public, since, if the whole of this ground to low water mark on the river, was dedicated for a street, it was vested as much in the public subject to be regulated and improved by the corporation, and could not be legally treated or used as private property by that body. If upon the whole you shall decide that this ground was granted or dedicated as a street, the plaintiff cannot recover in this suit. If otherwise, and that the spot in dispute in this suit constituted no part of the street, it passed to Wilson under the deed to him, and consequently to the plaintiff who has deduced his title to the same regularly from him.

Verdict for plaintiff.

On Motion for a New Trial.

Rule to shew cause why a new trial should not be granted; 2d, why judgment should not be arrested.

The following reasons were assigned for both rules:

1. Because the verdict is uncertain and insufficient, in not ascertaining a locus in quo, that being left uncertain by the declaration also;

2. Because, by the declaration and verdict, the whole question at issue between the parties is left uncertain, and the controversy remains undetermined;

3. Because there was no evidence to shew possession in the defendants in the land described in the declaration, if the description be at all applicable to any ground;

4. Because the declaration claims "one messuage, a lot, piece or parcel of land, lying between Water street and the river Monongahela, with the appurtenances, situate and being in the city of Pittsburg;" and the verdict is general, for the plaintiffs, without describing position, extent, boundaries or situation of the land claimed;

5. Because if the finding of the jury were intended to embrace part of the premises stated in the declaration, it should have designated particularly such part.

In support of these rules, the following cases were relied upon: 1 Ld. Raym. 191, 277; Cowp. 346; 11 Coke, 55; Yel. 118, 119; Poph. 197; 4 Mod. 97; 1 Term. R. 371; 3 Term. R. 481; 2 Burrows, 668; [Barr v. Craig,] 2 Dall. [2 U. S.] 151; [Chirac v. Reinicker,] 11 Wheat. [24 U. S.] 280; Tidd. Pr. Append. 479.

On the other side were cited the following cases: 6 Serg. & R. 189; 9 Vin. Abr. tit. "Ejectment," K; Runn. Ej. 470; 1 Burrows, 133, 629, 630; 1 Johns. Cas. 101; 5 Johns. 366; 4 Bin. 78; 3 Serg. & R. 418; 4 Serg. & R. 271; 7 Serg. & R. 101; Runn. Ej. 121; Adams, Ej. 20; Cro. Eliz. 458; Runn. Ej. 438; Adams, Ej. 328-332.

Binney, Baldwin & Sergeant, for plaintiff.

Charles Smith and Jos. Ingersoll, for defendants.

WASHINGTON, Circuit Justice. The third reason assigns the only ground in support of the 1st rule, and that is unsupported by the facts in the case. It was clearly proved that the defendants were in possession of a wharf, and other parcels of ground (as officers of the corporation of Pittsburg) lying between Water street and the Monongahela river, in the city of Pittsburg, at the time this declaration in ejectment was served.

The only real question to be decided is, whether that declaration and verdict are so uncertain that judgment cannot with propriety be entered. The ancient rule was, that the sheriff was bound to deliver possession according to the writ of habere facias possession, which would of course confirm the judgment, and so long as this rule prevailed there was much reason in requiring such certainty in the description of the land sued for in the declaration or verdict, as would enable the sheriff safely to execute his writ without going out of it to obtain information of the particular parcel which had been recovered, and of which possession was delivered. But when this rule was relaxed, which it has long been, and a new principle introduced, by which the plaintiff was to point out to the officer the particular parcel of land which, in execution of the writ, he is to deliver possession of, and is to take possession, at his peril, of only that to which he has title, the reason for the strictness formerly required in describing the land sued for necessarily ceased, as did the rule founded upon it. And it may now be safely laid down, that it is sufficient so to describe the lands that the defendant may know whether he is in possession of, or claims title to, that which is sued for, or to some part of it, so as to prepare for his defence. That the declaration in this case is certain to this extent, cannot admit of a doubt. Indeed, I am by no means prepared to say that this declaration would not stand the test of the severity of the ancient rule. The location of the land, its position and width, are stated with all convenient certainty, and nothing is wanting to the most precise identification of it, but to describe its length and the number of acres contained in it, which have never been supposed to be necessary in this species of action, certainly not for more than a century past. The defendant can never be injured by an uncertainty in describing in the declaration the particular land sued for, unless he is thereby prevented from fully defending his title to that which he claims and is in possession of. If the plaintiff take possession, under his execution, of land which was not recovered, or of more than he has

recovered, he thereby makes himself a trespasser; besides which, the defendant may be relieved in a summary way upon motion. Neither can the defendant suffer any injury from this uncertainty in the action for mesne profits, for, although the judgment is conclusive as to the title, yet the plaintiff can recover only the value of the profits received by the defendant in consequence of the ouster complained of in the ejectment.

As to the length of time the defendant has occupied, the judgment proves nothing, nor as to the value. The plaintiff must therefore prove how long the defendant had enjoyed the premises, as well as their value.

Both rules discharged.

[NOTE. Reversed by the supreme court, on the grounds with others, that if the land dedicated for the street was essentially connected with the town lots, and enhanced their value when they were sold by the proprietors, the increased value realized by them and their long acquiescence would estop them from asserting any claim, though the land dedicated was not designated on the map; that the declarations of the surveyor should have been admitted in evidence, because, under all the circumstances, they formed part of the transaction; that the court erroneously instructed the jury, in substance, that there could be no right to the street without its use; that the jury should have been instructed that the different calls ought to be taken together, and that the calls for the river might be controlled by the other calls in the deeds, if the jury were satisfied that such call had been inserted through inadvertence or mistake. Mr. Justice McLean, in delivering the opinion, stated: "Whether Water street extended to low or high water mark can be of no importance in the present controversy. If its southern boundary be limited by high water mark, it is clear that the proprietors parted with all their right. It is admitted by both parties that the river Monongahela, being a navigable stream, belongs to the public; and a free use of it may be rightfully claimed by the public, whatever may be the extent of its volume of water. If Water street be bounded by the river on the south, it is only limited by the public right. To contend that between this boundary and the public right a private and hostile right could exist would not only be unreasonable, but against law. * * * If the jury shall find that the ground in question was dedicated to the public as a street or highway, or for other public purposes, to the river, either at high or low water mark, the right of the city will be established, and the plaintiff in the ejectment must consequently fail to recover." Barclay v. Howell's Lessee, 6 Pet. (31 U. S.) 498.]

Case No. 976.

BARCLAY v. KENNEDY.

[3 Wash. C. C. 350.] [1]

Circuit Court, D. Pennsylvania. April Term, 1818.

USURY—INTEREST ON RUNNING ACCOUNTS.

Where there have been running accounts between parties, and one party has been in the habit of transmitting his accounts regularly to the other, striking a balance, and charging or giving credit for interest, as the balance might be, and no objections have been made to it; and [or] where this mode of stating accounts is shown to be the custom of trade; such manner of charging interest is legal, and will be supported. [Smith v. Shaw, Case No. 13,107, distinguished.]

[Applied in Denniston v. Imbrie, Case No. 3,802. Cited in Bainbridge v. Wilcocks, Id. 755.]

At law. This was an action to recover the balance of a stated account, sent by the plaintiffs, [Barclay & Co.,] merchants of London, to the defendants, [Kennedy & Co.,] of Philadelphia, in 1803. The plaintiffs and defendants had been for some years engaged in a commercial intercourse; the former purchasing and shipping goods, and making advances to the latter; and receiving from them, in return, remittances in various ways. The usage between these parties, was for the plaintiffs to state the accounts between them, generally, annually; sometimes, semi-annually, charging interest on the balance, on whichever side it might be, and adding it to the balance of principal, to bear interest from the day on which the account was so stated. These accounts, presenting a balance with the interest added to it, sometimes in favour of the defendants, and sometimes in favour of the plaintiffs, were regularly transmitted to the defendants, who never, until at the trial of this cause, objected to the mode of adding the interest to the principal. The plaintiffs examined one witness, who deposed, that the uniform usage of the trade, between the merchants of London, and of this place, in transactions of this kind, was to transmit their accounts at the end of the year, and sometimes oftener; and to add the interest to the balance, as part of the principal on which aggregate interest is charged.

This mode of charging the interest, was objected to by Rawle and Dallas, for the defendants, who relied on the rule laid down by this court, in the case of Smith v. Shaw, [Case No. 13,107.]

Binney and Tilghman, for the plaintiffs, contended, that the above case did not apply to one where a different mode of charging the interest was agreed upon between the parties, or was affected by the usage of the trade, which was tantamount to an agreement. That compound interest was not forbidden by the statute of usury; and, if agreed to by the parties, could not be impeached upon the ground of contract. That the transmission of accounts, by the plaintiffs to the defendants, at regular periods, with the interest added to the balance,—retained by the defendants, without objection,—was evidence of an agreement to make the interest principal; and that the usage, independent of such implied agreement, was tantamount to it. They cited 2 Ves. Jr. 15; 9 Ves. 223.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

WASHINGTON, Circuit Justice, charged the jury. In the case of Smith v. Shaw, [Case No. 13,107,] this court decided, that the proper mode of charging interest, was to deduct the payments from the interest, and if any surplus remained, to apply it to diminish so much of the principal. This decision was grounded upon two well established principles of law; 1st. That interest is incapable of producing interest, inasmuch as it forms no part of the debt; and is a mere compensation for the detention of the debt, or principal sum, and is recoverable as damages, the rate of which is ascertained by the laws against usury; 2d. That where the creditor has different demands against his debtor, and a partial payment is made, if the latter does not make the application to the one or the other, the former may make it; and, as the interest does not, and cannot, upon general principles, carry interest, he will of course, and may, lawfully, apply the payment to the discharge of the interest.

But although interest cannot, as such, bear interest, there can be no doubt but that the creditor and debtor may agree to give it that capacity, either at the time the contract is made, or after it has become due. Whenever the creditor has a right to demand it, he may waive that right, and lend it to the debtor, as so much money due; and thus change its nature, by contract, into debt. In running accounts, the parties may agree, at stated periods, to settle their accounts, strike the balance, and convert the interest into principal. The general principle of law before mentioned, does not forbid such an agreement, nor is it opposed to the provisions of the statute of usury. In such a case, the credit expires, and the principal debt becomes due at the time the account is settled; and the creditor, or the party in whose favour the balance is, has a right to stipulate for a prolongation of the credit, upon the condition of making the interest principal, instead of insisting upon a payment of the whole. If such an arrangement may legally be made by an express agreement, it may be done by an implied one; and accounts, regularly stated and balanced, and the interest added to the balance, received by the debtor, and acquiesced in without objection, may fairly be considered by the jury, as evidence of such agreement. In like manner, a well established usage of trade, sanctioning such a mode of stating the account, may have the effect of an agreement. But, in such a case, the usage should be fully proved, and should appear to be sufficiently ancient and uniform, to leave no doubt of its being known by all persons concerned in that particular trade. Nevertheless, if this question rested upon the testimony of the single witness, who was examined in the cause, respectable as he is, we should not think it sufficient to establish such a usage; and we are, therefore, of opinion, that the only ground for admitting this contested charge, is the implied agreement between the parties; should the jury be satisfied that the accounts, adding the interest to the balance of principal and interest, were regularly transmitted to the defendants, and were acquiesced in by them.

Case No. 977.

BARCLAY v. LEVEE COM'RS.

[1 Woods, 254.] [1]

Circuit Court, D. Louisiana. April Term, 1872.

REMOVAL OF CAUSES—COURTS.

1. The act of congress of [February 5,] 1867, [14 Stat. 385,] which authorizes the removal of suits from a state court to the U. S. courts either by the plaintiff or the defendant, who shall make oath that he cannot have a fair trial on account of local prejudice and influence, overrides the provision of the 11th section of the judiciary act, which declares that those courts shall not have cognizance of any suit to recover the contents of any note or other chose in action in favor of an assignee, unless suit might have been prosecuted in such court to recover said contents, if no assignment had been made.

[Cited in Deford v. Mehaffy, 13 Fed. 491.]

[See Hobby v. Allison, 13 Fed. 401, and note as to the right of removal under sections 11 and 12 of the judiciary act, and under act of 1867.]

2. The provisions of the 11th section of the judiciary act in regard to suits in the U. S. courts on notes or other choses in action held by assignment, was intended to prevent fraudulent assignments of choses in action, made for the purpose of giving the court jurisdiction; and was not founded on any constitutional principle.

[3. Cited in Woolridge v. McKenna, 8 Fed. 679, to the point that a petition for the removal of a cause from a state court to a federal court may be amended in the latter court to conform to the facts.]

Action at law [by James M. Barclay against the board of levee commissioners and the police juries of Madison and Carroll parishes, La.] Heard upon motion to dismiss the petition [for removal. Motion denied.]

E. T. Merrick, Geo. W. Race, W. H. Foster, and T. S. McCoy, for plaintiff.

S. R. & C. L. Walker, for defendants.

BRADLEY, Circuit Justice. This suit was originally commenced in the thirteenth judicial district court of Louisiana, for the recovery of the amount due on a large number of warrants issued by the board of levee commissioners, defendants, payable to the order of various persons, by whom they are indorsed. Suit was commenced by petition in 1867, and citation was duly served on the president of the board. In December, 1870, the police jury of the parish of Madison intervened, and prayed leave to defend the suit. The petition of intervention was afterwards withdrawn, and the plaintiff removed the suit to this court under the act of con-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

gress of February 5, 1867, (14 Stat. 385.) In the original petition, the plaintiff was described as a resident of the city of New Orleans. By a supplemental and amended petition filed in this court after the removal of the cause, he states that that was a mistake of his attorney; that he is, and for many years has been a citizen and resident of the state of Tennessee, and he furnished his own affidavit and the affidavit of others to show the truth of this allegation. By his amended petition he also makes the police juries of the parishes of Madison and Carroll, parties defendants in the suit, and prays for judgment against them, as well as against the board of levee commissioners.

The defendants move to dismiss the petition on several grounds:

First. That the parties are not such as to give this court jurisdiction. The plaintiff has shown that he is a citizen of Tennessee, and was so when the suit was originally commenced, and the defendants being political, or quasi political corporations of Louisiana, are necessarily citizens of the latter state. So far as citizenship of the parties goes, therefore, the court has jurisdiction.

Second. It is urged that the form of the security sued on is such that this court has no jurisdiction of the case, and for this point the defendants rely on the 11th section of the judiciary act of [September 24,] 1789, [1 Stat. 79,] which declares that no district or circuit court of the United States shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless suit might have been prosecuted in such court to recover said contents, if no assignment had been made. This case undoubtedly comes within the purview of that section. But the plaintiff contends that the act of 1867, [14 Stat. 385,] which authorizes the removal of suits from a state court either by the plaintiff or defendant, who shall make oath that he cannot have a fair trial on account of local prejudice and influence, overrides this provision of the 11th section of the judiciary act. And I am inclined to think that this position is correct. The provision referred to was intended to prevent fraudulent assignments of choses in action made for the mere purpose of giving the court jurisdiction, and was not founded on any constitutional principle. As the act of 1867 is general in its terms, and gives the right of removal in all cases without exception where the parties are citizens of different states, I do not think it necessary to import into it an exception grounded on the 11th section of the judiciary act.

Third. The defendants contend that as against the police juries of Madison and Carroll, the action is an original one, and therefore that the judiciary act applies as to them. If the original action was properly removed, and if the addition of these parties was a matter properly incident thereto, I think the objection cannot prevail. But I cannot see how those police juries are proper parties in the case. I do not see how one corporation can be made liable for the debts and obligations of another without a voluntary assumption thereof. But this is, perhaps, a matter more proper to come up on the trial of the cause, when the plaintiff may be prepared with evidence to show their liability. I shall not dismiss the cause as to them, if the plaintiff sees fit to continue them in it.

Some other objections of a technical nature were made, which it is not necessary to notice. If the defendant's existence as a corporation has ceased, the plaintiff's judgment will be a vain thing. I see no evidence, however, that it has ceased; nor any evidence which convinces me that process has not been properly served upon it. The motion to dismiss is denied.

[NOTE. Plaintiff recovered judgment in this action, June 19, 1872, (unreported; opinion not now accessible.) See Barkley v. Board Levee Com'rs, 93 U. S. 258, affirming decision of United States circuit court for district of Louisiana, denying plaintiff's application for a mandamus to compel the assessment and collection of a tax for the payment of such judgment.]

BARCLAY, (McMILLIN v.) See Case No. 8,902.

BARCLAY, (ST. LUKE'S HOSPITAL v.) See Case No. 12,241.

Case No. 978.

BARCLAY et al. v. THAYER et al.

[12 Blatchf. 107;[1] 1 Ban. & A. 267; 6 O. G. 2.]

Circuit Court, S. D. New York. May 27, 1874.

PATENTS FOR INVENTIONS—BRACELETS.

The invention covered by the claim of the letters patent granted to John Barclay, [August 24, 1869, reissued,] December 6th, 1870, for an "improvement in the manufacture of plated metal bracelets," which claim is, "The improved manufacture or bracelet, as made with the turned parts or beads, E, E, arranged with respect to the plates, C, D, in the manner substantially as represented and described," has relation only to bracelets in which the fellow piece is soldered to the base plate, and is not anticipated by a bracelet in which the fellow piece is not soldered to the base plate.

[In equity. Suit by John Barclay and Edward C. Knapp against Oscar S. Thayer and Peter B. Cushman for infringement of patent. Decree for plaintiffs.]

John Van Santvoord, for plaintiffs.

Carroll D. Wright, for defendants.

BLATCHFORD, District Judge. This suit is brought on reissued letters patent granted to John Barclay, December 6th, 1870, for an "improvement in the manufacture of plated metal bracelets," the original patent having

[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 1 Ban. & A. 267; and here republished by permission.]

been granted to him, as inventor, August 24th, 1869. The specification says: "This invention relates to a bracelet which is made of base metal plates, coated with a more costly metal or other material, and the foundation plate of which is provided with beads at its edges, at such a distance apart that they hug closely the fellow piece of the bracelet, and that, after the two parts of the bracelet have been united, no uncovered portion of the base metal remains visible, thereby producing a bracelet superior in finish to similar bracelets as heretofore made, without any increase in the cost of manufacturing the same." The specification then goes on to state, that a bracelet made of metal plates, plated or coated with gold or other material, had been ordinarily constructed of two pieces, by soldering the upper portion of the body, or fellow piece, onto the lower portion, or base plate, (the upper portion being bent, so that its cross section presents the form of a U, before it is applied and fixed to the lower portion,) and then filing down the edges of the base plate, so as to make them even with the outer sides of the fellow piece, thus leaving the edges of the base metal exposed, without any coating or plating. It then states, that the patentee, in carrying out his invention, bends or turns up each edge of the lower portion or base plate, C, in the manner shown in the drawing, which is to roll it over upon itself, giving a rounded external surface, each edge of the plate, after the bending has been accomplished, resting upon, or being directly over, the upper or uncoated surface of the plate, the whole being so arranged as to form beads, E, E, on the flanks of the plate, and with the coating material on the external or exposed surface of the plate and of the beads. The upper portion or fellow piece, D, bent as in the old construction, and having the coating material on its outer surface, is then placed on the lower portion or base plate, and between the beads, and soldered to the base plate, the beads being made to fit closely to the sides of the fellow piece. The specification states, that, by these means, the edges of the baser metal are concealed, and, also that the beads stiffen and strengthen the base plate, and improve the appearance of the bracelet, and hide the solder from view, and enable it to effect a firmer union of the two plates. The claim is in these words: "The improved manufacture or bracelet, as made with the turned parts or beads, E, E, arranged with respect to the plates, C, D, in the manner substantially as represented and described."

It is apparent, that the patentee's invention has relation only to bracelets in which the fellow piece is soldered to the base plate. He specifies, as advantages of his arrangement, that the beads not only conceal the base metal, and stiffen and strengthen the base plate, but hide the solder, and enable it to effect a firmer union of the two plates. The patent granted to John S. Palmer, March 19th, 1861, for an "improvement in constructing bracelets, &c.," and which is brought up as anticipating the invention of Barclay, sets forth, as a difficulty in constructing bracelets, that, when the fellow piece is soldered to the base plate, and the superfluous stock is trimmed from the latter, the baser metal thereof, when plated stock is used, will be exposed, and then states that Palmer turns over the edges of the base plate, so as to make an overlaying lip or slide on each edge of the outside of the bracelet. This turning over of the edges of the base plate leaves them with smooth round edges on the outside, and gives substantially the beads which Barclay has. But Palmer, instead of soldering a fellow piece to the base plate at the inside of the beads, slides bits of metal, with projecting lips, under the lips or slides of the base plate, and so makes his bracelet. This is a very different arrangement from that of Barclay. Palmer dispenses with solder, and uses two lips, with rivets passing through both of them. Barclay retains the use of solder. Palmer dispenses with a fellow piece in one piece, and substitutes therefor short bits of metal, each slid into place separately, and making, when arranged together, a fellow piece. Barclay retains the old fellow piece in one piece. It is of no consequence, that the defendant may so turn over the beads as to leave a space between them and the surface below, which space might be used for the insertion of a lip or slide. Such space is not so used by the defendant, and serves no purpose. The space which may be so left by the defendant is not used by the defendant for the purpose set forth by Palmer, and the defendant's arrangement is none the less Barclay's arrangement by reason of having such space, nor does such space cause the defendant's arrangement to be that of Palmer. The defendant, to enable himself to construct a bracelet having a fellow piece in one piece, and to still use solder for the attachment together of the two plates, has availed himself of the invention of Barclay, and has not followed the invention of Palmer.

There must be a decree for the plaintiffs.

[NOTE. Patent No. 94,064 was granted to J. Barclay, August 24, 1869, reissued December 6, 1870, (No. 4,192,) and has not, so far as ascertained, been involved in any other cases reported prior to 1880.]

BARCROFT, (CHESAPEAKE & O. CANAL CO. v.) See Case No. 2,644.

BARCROFT, (STEWART v.) See Case No. 13,422.

BARD, (RAPP v.) See Case No. 11,577.

BARENT v. DAY. See Case No. 836.

BARGE.

[Note. Cases cited under this title will be found arranged in alphabetical order under the

names of the barges; e. g. "The Barge Called the Wilkesbarre Coal & Iron Co. 129. See Wilkesbarre Coal & Iron Co. 129," Case No. 17,661.]

BARGER, (CHAPMAN v.) See Case No. 2,-603.

Case No. 979.

BARGER v. MILLER.

[4 Wash. C. C. 280.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1822.

EVIDENCE—DEED—POWER OF ATTORNEY—EJECTMENT—ADVERSE POSSESSION.

1. An exemplification of the record of a copy of a deed is not evidence.

[See Lemon v. Bacon, Case No. 8,241; Gregg v. Forsyth, 24 How. (65 U. S.) 179; Dick v. Balch, 8 Pet. (33 U. S.) 30.]

2. An exemplification of an agreement between A and B. executed only by B, can not be given in evidence against A.

3. A deed by an attorney, executed in his own name, is not the deed of his constituent.

[See Hanrick v. Barton, 16 Wall. (83 U. S.) 166, 173.]

4. The principal is not bound by any act of his attorney in fact, unless he acts within the scope of his authority.

5. In what case a defendant in ejectment may, and where he may not be allowed to take the possession of a prior occupant to his own, to bar the plaintiff by length of possession. The principle decided in Potts v. Gilbert, [Case No. 11,347,] explained [and distinguished.]

[See Walden v. Gratz, 1 Wheat. (14 U. S.) 292; Doswell v. De La Lanza, 20 How. (61 U. S.) 29; Shuffleton v. Nelson, Case No. 12,822.]

[At law. Ejectment by lessee of Barger, against Miller.] The lessor of the plaintiff claimed under a warrant and survey, dated in 1701, in the name of Daniel Falkner, styled the agent for the German purchasers, for upwards of twenty-two thousand acres, and a conveyance by Falkner in 1708, of the whole tract to J. H. Sprogle. The lessor of the plaintiff is one of the heirs of Sprogle, and claims one fifth of one eighth of the whole of the above tract. The defendant offered in evidence, in support of his title to the land now in dispute, an exemplification of certain articles of agreement, purporting to have been executed by the said J. H. Sprogle and V. Guiger on the 16th of April, 1718, by which Sprogle agreed to sell to Guiger two hundred and fifty acres, part of the above mentioned tract of land, for the sum of £50. This instrument was signed and sealed by Guiger only, and was admitted to record in the year 1746, upon the acknowledgment of Guiger, and his declaration that the counterpart of the agreement was duly executed by Sprogle, and was afterwards consumed by fire, and upon the certificate of Johanna Sprogle, widow of J. H. Sprogle, Jun. that an agreement was found by her amongst the papers of J. H. Sprogle, Sen. in the hand writing of her deceased husband, of which the paper so offered to be recorded was a just copy. This paper was objected to by the plaintiff's counsel.

BY THE COURT. The evidence is altogether inadmissible, either as an exemplification of a recorded deed, or on the ground of the antiquity of the instrument; since it is not the original instrument, but merely an asserted copy of it. As such, it could not be legally admitted to record, and consequently, an exemplification of it is no better than any other copy of it would have been; besides, it professes to be the deed of Guiger only, and is therefore totally inoperative for the purpose for which it is offered. The ex parte affidavit of Guiger, that the counterpart was executed by Sprogle, and was afterwards consumed by fire, cannot be regarded for a moment by the court.

The defendant's counsel then gave in evidence a deed of mortgage of seven thousand five hundred acres, part of the above mentioned large tract, by J. H. Sprogle to Henry Soames, bearing date the 20th of March, 1732, and another deed dated the 20th of December, 1733, by which, for the consideration of the mortgage debt, and of other sums, Sprogle released to Soames his equity of redemption in the mortgaged premises. The court was requested to note, that these deeds were furnished by the counsel for the plaintiff to the defendant's counsel. These instruments were offered, and admitted to record in the year 1749. The defendant's counsel then gave the following evidence:—A deed bearing date the 1st of December 1749, from Thomas Preston to V. Guiger, which, after reciting the above mentioned mortgage, and release of the equity of redemption, the will of Henry Soames, by which he devised all his estate to his son John Soames, the death of John Soames intestate and without issue, leaving Catharine Yaldwin and Mary Johns, his heirs at law, and a conveyance by them to the said Preston of two hundred and fifty acres of land, part of the above mentioned mortgaged premises; conveys the said two hundred and fifty acres by metes and bounds, to the said V. Guiger, in fee simple. A deed from V. Guiger, bearing date the 27th of October 1757, to George Burgart, for one hundred acres, part of the above mentioned two hundred and fifty acres. A record of the orphan's court in 1764, vesting in John Guiger, third son of V. Guiger deceased, the remainder of the above mentioned tract of land, being one hundred and fifty acres; he agreeing to take the same, and to pay to his brothers and sisters their proportions of the appraised value of the said land. A deed from John Guiger to George Burgart, bearing date the 4th of July 1766, for the said one hundred and fifty acres. The will of George

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

Burgart, dated the 30th of July 1782, devising twenty-nine acres, part of the said two hundred and fifty acres, to his sons Tobias and George; and a deed dated the 26th of February 1788, between Tobias and George Burgart, sons of the said George Burgart, by which the former conveys to the latter his moiety of the said one hundred and twenty-nine acres. Lastly, a deed bearing date the 10th of May 1802, by the surviving administrator of George Burgart, the son, (made under an order of the orphan's court) conveying the said one hundred and twenty-nine acres to the defendant. The defendant then examined an ancient witness, who stated that about the year 1760, he remembered V. Guiger the elder in possession of this land. After him, he remembered old Mr. Burgart to be in possession, and living on the land. After his death, his sons Tobias and George lived on it, and George died there. After his death it was rented to different persons, and amongst others to the defendant. He thinks that the defendant has lived on the land near thirty years. It appeared by other evidence that Miller came into possession about the year 1799.

The plaintiff then gave in evidence a power of attorney executed by Henry Soames, bearing date the 1st of May 1740, authorizing Samuel Mickel to collect, sue for, and recover all moneys due to him in America, to give acquittances, and to settle and compromise the same as he might think right. Also to lease his lands in Pennsylvania, and to collect his rents, and to sell and convey all and every of his said lands, or any part thereof, and in the name of the said Soames, to execute any deeds or conveyances for the lands so sold. Also an instrument signed and sealed by Samuel Mickel, styling himself, in the body of it, attorney in fact for Henry Soames; by which he fully acquits John H. Sprogle, his heirs and assigns, from all obligations, bonds, mortgages or conveyances, touching the premises in Hanover or elsewhere, in the county of Philadelphia, having had a final settlement with his son J. H. Sprogle, Jun. July 1740, of all accounts with J. H. Sprogle and Henry Soames, "and all papers and parchments cancelled, having received satisfaction." There is no date to this instrument, but it was admitted to record in 1742. This paper, it was proved, was found a few months past amongst some old cast away papers in the garret of Mr. Say, one of the subscribing witnesses to it.

Phillips and J. R. Ingersoll, for the plaintiff, contended, that the only apparent blemish in their title being the mortgage and release of the equity of redemption by J. H. Sprogle in 1732 and 1733, it was completely removed by the deed executed in 1740 by the attorney in fact of H. Soames, and the delivering up of the said deeds by him to be cancelled, whereby the title to the 7500 acres of land became revested in the Sprogle family. That as to the length of possession relied upon by the defendant, it was in proof that he did not come into the possession until the year 1799, and this suit was brought in the year 1819, within the period of twenty-one years, fixed by the act of limitations of this state. And that he could not tack to his own possession that of the persons under whom he claimed; they relied upon the decision of this court in the case of Potts v. Gilbert, [Case No. 11,347.]

Kittera, for the defendant, insisted, that the deed of the attorney of Soames did not, in any manner, operate to revest the estate in the Sprogle family, and manifestly did not apply to the 7500 acres of land, nor was it so understood by the parties. That the plaintiff's title therefore was clearly defective. But that, at all events, the defendant had shown a regular continuing actual possession out of the lessor of the plaintiff, and those under whom he claims, for upwards of sixty years; and in the defendant, for more than twenty-one years before this suit was brought.

[Plaintiff suffered a nonsuit.]

WASHINGTON, Circuit Justice, charged the jury. The first, and most important question for your decision is, whether the plaintiff has made out such a title to the land now in controversy as will authorise you to give a verdict in his favour? If he has not, your verdict ought to be for the defendant, however imperfect his title may be. The first question is one purely of law; and the opinion of the court is, that the title of the plaintiff is altogether defective. We go back to the year 1732, at which time the title of J. H. Sprogel to the large tract of land, of which that in question was a part, was unexceptionable. But in that year he mortgaged 7500 acres of that tract, including the land in controversy, to Henry Soames, for securing the payment of £75. The money not having been paid at the time stipulated, Sprogle, in the succeeding year, in consideration of the debt aforesaid, and of an additional advance, released to Soames his equity of redemption in the mortgaged premises, whereby Soames became entitled to the estate therein, both legal and equitable. The next inquiry is, whether, by any subsequent act of Soames, or of any person claiming under him, the estate became revested in the Sprogle family. It is insisted by the plaintiff's counsel that the deed executed by Samuel Mickel produced this effect. With respect to that deed, it is to be premised, that it makes its appearance before the court in a very questionable shape, if indeed it be entitled to all the importance which is attached to it by the plaintiff's counsel. It is not even dated; and so little attention seems to have been bestowed upon it, that the common and neces-

sary form observed in the execution of deeds by an attorney, was disregarded. In the body of it, it is true, Mickel styles himself the attorney in fact of Henry Soames, but it is signed and sealed in his individual name, not as attorney of his constituent, nor with his name. This might answer very well to a paper which imported no more than a mere settlement of accounts, and an acquittance; but it cannot, upon any principle of law, be said to be the deed of Henry Soames. Where would we expect to find a deed of the importance attributed to this paper by the counsel, and where was it found? One would suppose amongst the title papers belonging to this estate, in the possession of the Sprogle family; since, without the evidence of a reconveyance, the title was forever gone, and vested in Soames by the deeds of 1732 and 1733. But instead of this, it was scraped out of the cast away papers in the garret of a Mr. Say, by one of his descendants, in the course of a few months past. It professes to be an acquittance of all bonds, mortgages, and conveyances, touching the premises in Hanover and elsewhere, and the cancelling of all papers and parchments. What became then of the deeds of 1732 and 1733? The plaintiff's counsel answer, that they furnished them on the trial to the defendant's counsel. This is true; but were they found amongst the title papers of the Sprogle family? No evidence of this kind was offered. But how happens it, that they were recorded in the year 1794, nine years after the time when Mickel's deed declared they were cancelled, if it be true that they were at all referred to, or in the contemplation of the parties when that deed was executed? They must have been offered for record, either by J. H. Sprogle, or Henry Soames. If by the former, it was surely an extraordinary mode of cancelling and destroying them, to perpetuate by record proof of the evidence of their being subsisting and valid deeds. If they were recorded at the instance of Soames, it proves that they still remained in his possession, the evidences of his title to the 7500 acres of land, which he deemed it prudent to perpetuate; and if so, they could not be conveyances to which Mickel's deed referred. But be it one way or the other, they never were cancelled, and Mickel's deed states that the papers and parchments to which it applied were so. But suppose the deed under consideration clear of all these difficulties;—what is its purport, and legal effect? It professes to amount to no more than an acknowledgment that all accounts between Sprogle and Soames had been finally settled. and an acquittance to Sprogle from all debts by bond or mortgage. It has not one feature of a grant of any land, much less of that, the equity of redemption in which had been released to Soames. It cannot be considered even as an agreement to reconvey the 7500 acres of land; and even if it could, it would not benefit the plaintiff in this action, who is bound to establish in himself a legal title to the land in controversy. If it were necessary to go further, it might be very safely laid down, that even if the deed in question were in fact a reconveyance of the 7500 acres of land, it was not warranted by the power of attorney to Mickel. That power referred to accounts and debts then open and subsisting; whereas the debt which was secured by the mortgage deed of 1732 had been finally closed and discharged seven years before the power was given, by the deed of 1733. It authorised Mickel to sell the lands of his constituent; but the deed under consideration does not even profess to be the evidence of a sale of any kind.

The title of the plaintiff being thus obviously defective, I should not deem it necessary to notice that of the defendant, founded upon length of possession, if the plaintiff's counsel did not seem to have misunderstood the decision of this court in the case of Potts v. Gilbert, [Case No. 11,347,] which was altogether different from the present. In that, the persons, of whose possessions the defendant sought to avail himself, were mere intruders, or squatters, as they are called, upon a vacant possession, without title or colour of title, between whom and the defendant there was no privity. The court laid it down, that the title of the plaintiff drew to it a constructive possession sufficient to bar the running of the act of limitations against him. That when that possession was disturbed by the actual possession of A, a continuance of such possession for twenty-one years would have divested the right of the owner to the particular part so possessed, and vested a right in A. But that if, after possessing the land for a number of years, short of those mentioned in the statute, A left the land and B took possession, the constructive possession of the owner revived. and B could not tack to his possession that of A the prior occupant, so as to make out a twenty-one years possession against the real owner of the land. These were the principles of that decision. In this case, Preston entered under a claim and colour of title derived under Soames, although the title papers recited in his deed to Guiger have not been produced; and in 1794 he conveyed the land, of which the tract in question is a part, to Guiger, from whom the title is regularly deduced to the defendant. No two cases therefore can be more unlike than Potts v. Gilbert, [supra,] and the present. Upon the whole, the defendant is clearly entitled to your verdict.

The plaintiff suffered a non-suit.

Case No. 980.

BARGH et al. v. PAGE et al.

[4 McLean, 10.] [1]

Circuit Court, D. Michigan. June Term, 1845.

COURTS—JURISDICTION—DIVERSE CITIZENSHIP.

1. The citizenship of a person not served with process, who is a joint promissor, must appear in the declaration.

[See Smith v. Clapp, 15 Pet. (40 U. S.) 125.]

[Distinguished in Bank of Circleville v. Iglehart, Case No. 860.]

2. If he be a citizen of the same state as the plaintiff, the court can take no jurisdiction.

[At law. Suit by Bargh and Arcularius against Timothy Page and others. Motion to set aside verdict. Granted, with leave to amend declaration.]

Bates, Walker & Douglass, for plaintiffs.

Witherel & Buell, for defendants.

OPINION OF THE COURT. This is a motion to set aside the verdict obtained by the plaintiffs, for the reasons assigned. The second ground of the motion is, that there is no averment of citizenship of Timothy Page, one of the parties to the note, but who was not served with process.

By the plaintiff, it is contended that the non-joinder of a joint contractor can only be pleaded in abatement. Cabell v. Vaughan, 1 Saund. 290, 291c, note 4; Rice v. Shute, 5 Burrows, 2611; Minor v. Mechanics' Bank of Alexandria, 1 Pet. [26 U. S.] 46; Gilman v. Rives, 10 Pet. [35 U. S.] 298.

This was undoubtedly the rule at the common law, but the limited jurisdiction of this court will not admit of the same rule. The circuit court can take jurisdiction from the citizenship of the parties, only, when they reside in different states. By the act of 1839, if process shall not be served on all the defendants, the plaintiff may proceed to judgment against those who are before the court, provided it can be done without prejudice to those who have had no notice. But if the absent defendants live in the same state with the plaintiff, the court can not take jurisdiction, as between them and the plaintiff, as the suit would not be, as to them, between citizens of different states. But with this exception, the court may give judgment, though a part of the persons named as defendants have not been served with process. Against those who are served, the judgment will be good. In the special counts, there was an averment of non-residence as to T. Page, on whom process was not served, but those counts were discontinued, and in the general counts there was no such reference to his citizenship as to make the averment, in this respect, in the special counts, a part of the general. As this must appear on the face of the declaration, there was no necessity to plead an abatement, to take advantage of it as at common law. Upon the whole, we think the verdict must be set aside on the point reserved, and leave given to the plaintiffs to amend their declaration.

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

Case No. 981.

BARING et al. v. ERDMAN et al.

[14 Hag. Reg. Pa. 129; Amer. Sent. Aug. 23, 1834.]

Circuit Court, E. D. Pennsylvania. Aug. 4, 1834.

INJUNCTION—TAKING PROPERTY WITHOUT AUTHORITY OF LAW.

[1. An entry upon lands for the purpose of diverting a stream which flows thereon is, if done without right, such a trespass as may be restrained by the decree of a court of equity.]

[2. Equity has jurisdiction to restrain such entry and diversion, though the persons making it be the agents of the board of canal commissioners of the state, if such agents have not authority of law to do the acts complained of. If they act without authority from the state, they are mere trespassers.]

[3. In construing the Pennsylvania statutes of 1825 to 1830 in relation to the construction of state roads and canals, the court must consider them as forming a connected series of legislation to effect an object of great public utility, and they must receive a liberal interpretation.]

[4. In construing the statutes, the court will consider the object of the enactments, and will not suffer it to be defeated, but will make them answer the intention which the legislature had in view, as collected from the cause or necessity of the statutes, though the construction seem contrary to the letter.]

[See Ogden v. Strong, Case No. 10,460; Hadden v. Collector, 5 Wall. (72 U. S.) 107.]

[5. The history and situation of the country will be recurred to, to ascertain the reason as well as the meaning of a statute, to enable the court to apply the rules of construction.]

[6. Although none of the Pennsylvania statutes of 1825 to 1830 on the subject of state railroads and canals contain any express provision authorizing the appropriation by the state of the property of the individuals on their sites, or the taking of materials for their construction, yet, in view of the facts that the state has expended on these improvements $20,000,000, that they extend through the most populous and highly cultivated portions of the state, and that the ground on which they are located, and the materials for their construction, are owned by individuals, without the appropriation of whose property the object must necessarily be defeated, such authority must be implied as necessary to effectuate the object of the statutes.]

[7. A bill in equity was filed which alleged that the plaintiffs were owners of certain lands; that the respondents, agents of the board of canal commissioners of Pennsylvania, entered upon said lands, diverted a stream of water thereon by constructing a dam across it, and dug a trench to carry off the diverted waters for the use of the engines on the inclined railway on the bank of the Schuylkill; and that such acts were done without authority of law,—and prayed for an injunction. The canal commissioners had authority to construct and repair the railway, and to take materials from the adjoining lands for that purpose, but the railway had been completed without a permanent appropriation of the water. *Held*, that the diversion could not be justified under the authority

to construct and repair; nor could the diverted water be considered a material, within the meaning of the statute.]

[8. The word "material," in a statute authorizing the taking of materials from neighboring lands for the construction and repair of a railroad, refers to those things which are component parts of the road, and necessary for its completion in all its parts, and does not include the means or facilities of transportation upon it afterwards.]

[9. It did not appear from any of the laws prior to 1834 that it was any part of the original scheme of the Pennsylvania state system of canals and railroads to furnish engines for the purpose of transportation. In 1834 authority was conferred on the board of canal commissioners "to procure such locomotive engines or tenders for the use of passengers and merchandise as may be necessary for doing the whole or any part of the transportation," (Laws Pa. 1834, p. 508;) and by another act of the same session a heavy punishment was prescribed for breaking, cutting down, or destroying, in whole or in part, any water station, drain, or bank belonging to any railroad constructed by the state, or stopping up or obstructing any culvert, drain, pipe, water station, or well belonging thereto, (Laws Pa. 1834, p. 202.) *Held*, that these laws afforded evidence that the legislature regarded water stations, wells, etc., for the supply of the engines belonging to the railroad, as a part of its appendages, and that, in view of the doubt raised thereby, a preliminary injunction restraining the diversion of water for the supply of the engines as without authority of law would not be granted on a motion on the pleadings and affidavits.]

[10. Authority to take materials or divert water for the use of a railroad from lands contiguous to, adjoining, or near the railroad is not limited to the lands next to, and bounding upon, the railroad, but extends to lands in a reasonable vicinity, which must depend upon local circumstances.]

[11. "Near," in such a statute, does not necessarily mean next to, but a reasonable vicinity; and what that is must depend on local circumstances.]

[12. On motion for a preliminary injunction to restrain the taking of the water it was contended that the taking of the water was not necessary, inasmuch as there was a sufficient supply of water upon the tract of land through which the railroad passed, and affidavits in support of this view were filed. Counter affidavits were filed by the defendants, of apparently equal weight, to show that the diversion of the water was necessary. *Held*, that the affidavits raised an issue of fact which should not be determined by the court on the motion; that the necessity of diverting the water was, to some extent at least, within the discretion of the commissioners; and that, in the absence of anything to show an abuse of discretion, the court could not interfere therewith.]

[13. The acts complained of were begun May 19th, and the complainants had notice thereof on May 22d. On May 28th an attempt was made by him, with the assistance of a peace officer and some others, to take possession of the land, and expel the respondents and their workmen, but without success. The complainants notified the respondents not to proceed with the work, but took no further means to prevent its progress till the filing of the bill, on June 25th. In the mean time the dam was built to the height of eight or ten feet, a trench dug across the complainants' land, and the water of the stream conducted to a reservoir on adjoining land, whence it was conveyed through pipes to the engine house. The only act remaining to be done on the premises was the laying of pipes in the trench and filling it up. *Held*, that the acts complained of had practically been completed before the filing of the bill, and an injunction could not issue to restrain a completed act; and that the complainants, by standing by after notice of the commencement of the work until near its completion, when all the substance of the injury had been completed, had forfeited their right to a preliminary injunction.]

[See Webb v. Portland Manuf'g Co., Case No. 17,322; Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., Id. 2,990.]

[14. On a bill to restrain an entry upon land by canal commissioners, on the ground that the entry is illegal and without authority of law, the question whether the entry is illegal because it has been made without compensation does not arise.]

[In equity. Bill for an injunction by Alexander Baring and Ann Baring, in right of the said Ann, and Henry Baring and Maria Baring, in right of the said Maria, all aliens and subjects of the king of the United Kingdom of Great Britain and Ireland, against Frederick Erdman and William Williams, both citizens of the state of Pennsylvania. On motion for an injunction pendente lite. Motion denied.]

This was a bill in equity, praying for an injunction to restrain the respondents from proceeding in the erection of a dam, digging a trench, and diverting and using the water of a stream, on the estate of the complainants, called "Lansdowne," in the immediate neighborhood of Philadelphia. It appeared that the respondents were superintendents and agents under the board of canal commissioners, by whom they were directed to execute the works complained of, in order to supply the locomotive and stationary engines on the inclined plane with the necessary quantity of water. The motion for an injunction was resisted; affidavits on both sides were taken, and the case fully argued.

Jos. R. Ingersoll and Charles Ingersoll, for complainants.

G. M. Dallas, for respondents.

Before BALDWIN, Circuit Justice, and HOPKINSON, District Judge.

BALDWIN, Circuit Justice. The complainants, who are the subjects of the king of Great Britain, having filed their bill on the equity side of this court, setting forth that they are owners of a tract of land, on the western bank of the Schuylkill, of which they have long been in the quiet and peaceable possession, through which a stream of water has run from time immemorial until its diversion by the respondents, by means of a dam, erected across it, on the land of the complainants, and a trench made to conduct it to the Pennsylvania Railroad, for the supply of the engines thereon; that the injury thereby caused is permanent and irreparable, and committed under color of, but without any authority conferred by law on the canal commissioners or any agent or officer appointed by them; they therefore pray for an injunction to restrain the re-

spondents from the commission of any further trespass on the premises, from the further use and diversion of the water of said stream, and the further prosecution of any works, which may in any manner interfere with the full and quiet possession of said land and the water flowing through in its accustomed bed, and general relief. That the title and possession of the premises is and has been for many years in the complainants is admitted; it is also admitted, that the respondents, under the authority and by the direction of the canal commissioners and their engineers, have erected the dam, dug the trench, and conducted the water from and across the premises to the railroad, for the use of the engines employed thereon, for the transportation of passengers and merchandise, up the inclined plane on the western bank of the Schuylkill. From the affidavits on both sides it appears that the work was commenced without notice to the agent or tenant of the complainants, but that as soon as the agent received information, he notified the defendants, not to proceed any further; they, however, persisted, notwithstanding all remonstrances and open opposition, and availing themselves of superior numbers, kept possession of the premises, till they had finished the dam and trench, so as to divert the water to its destination. On these admitted or uncontested facts, various interesting questions have arisen, which have been very fully and ably argued, and deserve our most serious consideration.

If the respondents had invaded the peaceable possession of the complainants, under any pretension of an adversary right, or had diverted the water course for their own individual benefit, by a sheer act of trespass, the nature of the injury would be a proper subject for an injunction. The owner of an estate has a right to use it without any control or interference by others. Whether he makes it the source of profit, pleasure or amusement, his right of property [is] equally protected. No man has a right to judge of the purposes to which the proprietor devotes his time, his capital or his estate, or the relative value and importance of its varied uses. The parks, the pleasure grounds, the shade, ornamental or forest trees, the springs, the water courses or fish ponds, are as much in his full dominion as his mansion house, his grain fields, his meadows or orchards. An immediate injury done to either will be redressed at law or in equity, on the same principles; in a court of law, the remedy depends upon the right of the complainants, and can be afforded only after the injury is committed, but a court of equity interferes to protect a possession held under a claim and color of right, and will prevent an impending or threatened injury, until the party out of possession shall establish his right at law, or otherwise be put into possession by some process which the law recognizes. So far then as the case depends upon the nature of the injury, we should feel it our duty to grant the injunction, if the respondents could be considered as mere trespassers on the possession of the complainants, by any assumed right in themselves, nor would the case be changed if the acts done by them or threatened to be done by them, under the authority of the board of canal commissioners, should appear to be clearly unwarranted by any act of assembly. Though they act as the mere agents of the board or the state, we should be bound to view them as mere trespassers, whom we should enjoin from any future acts, however deeply it might affect the interests of the state. The acts of its agents or officers cannot be permitted to transcend the authority conferred on them by law. They must be clothed with jurisdiction over the subject matter, and with power to do the act complained of, or their proceedings will be controlled by the same rules which restrain private persons from committing irreparable injury to the property of others, [Osborn v. Bank of U. S.,] 9 Wheat. [22 U. S.] 842. By the principles of the common law, confirmed by Magna Charta, and numerous statutes in England, no freeman could be deprived of his freehold but by the judgment of his peers on the law of the land, (1 Bl. Comm. 138,) or as it is expressed by Lord Coke, "verdict of his equals, or legal process, or due process of law," (2 Co. Inst. 45, 46,) due process of the common law, (Id. 50,) or the law of the land. The statutes provide that no man's land shall be seized into the king's hands against the form of the great charter and the law of the land, and if any thing be done against the same, it shall be holden for none. 1 Puff. Law Nat. 209, 263. All the writers on national law lay down the position that private property may be taken for public use, but that this right is subject to the concomitant obligation on the government, to make compensation to the owner. Vatt. Law Nat. 112; Ruth. Inst. 43; Burlam. Nat. 150; Puff. Law Nat. 829, 830; Gro. 333, 334. The ninth section of the ninth article of the constitution of Pennsylvania adopts the provision and language of Magna Charta. The fifth amendment to the constitution of the United States adopts the expression "due process of law;" it also declares that private property shall not be taken for public use without just compensation. The constitution of Pennsylvania is still more explicit: "Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being made." It is therefore clear that according to all the fundamental laws of society, the appropriation of private property for public use must be authorized by the law of the land, the judgment of peers, or due process of law, and by compensation to the owner. When such an appropriation is deemed necessary for the

general benefit, the public is considered as an individual treating with another for an exchange; and the legislature may compel the owner to part with his property for a fair price. 1 Bl. Comm. 139, 140. This is ascertained either by the verdict of a jury on a writ of ad quod damnum, or by some other process prescribed by the law, making or authorizing the appropriation. Our inquiry must therefore be directed to the question, whether the state has by law authorized the disseisin of the complainants of any part of their freehold, or the taking or application of their property for public use. It would be a waste of time to examine whether the officers of the state can do it without law or legal process, in direct violation of the constitution and every principle of the common and public law held sacred in all governments, and which cannot be impaired in this without its destruction.

It is a matter of no little surprise to find that none of the acts of assembly of Pennsylvania in relation to the great system of national improvement by roads and canals at the expense of the state, contains any express provisions authorizing the appropriation of the property of the individuals on their sites, or the taking of materials for their construction. This omission is the more singular when we find this authority in all cases explicitly conferred on all corporations created for the construction of bridges, canals, turnpikes, or railroads, and a mode prescribed by which compensation is made to the owners. It cannot be owing to any opinion of the legislature that the constitutional rights of proprietors are less sacred when the state requires their property for the construction of public improvements at its own expense and for its general benefit, than when they are constructed by a company incorporated for that purpose. The whole course of legislation on the subjects of the canals and railroads which are the property of the state, repels an imputation so unworthy of its wisdom and justice.

After the canal commissioners had executed the duties enjoined on them by the act of 1825, the legislature by the act of 1826, (Pamph. Laws, 55,) authorized and directed them to commence the construction of the canal: the eighth section directed them to make agreements with the owners of the land through which it should pass, or if unable to do so, provision was made to summon a jury to ascertain the damages, to value the quantity and duration of the interest and estate which would be taken or injured thereby, also to ascertain the value of materials required for the canal or the works thereof, the dams, locks, feeders or any works appurtenant. By the second section of an act passed at the same time, (page 302,) the commissioners were authorized and directed to take and pay for materials for reparation of the works in the same manner as for materials for constructing such works which may be removed or taken away. The eighth section of the act of 1827 (page 196) made provision for compensation to any person who might be aggrieved by the canal passing through his land or in any wise interfering with his rights of property; the tenth section authorizes the commissioners to receive releases of damages to land or by the taking of materials. The eighth section of the act of 1828 providing for the commencement of a railroad, directed the commissioners, previous to its final location and putting under contract, to receive releases for the damages to the owners of land by its passing through it or the taking the materials to construct the same. Pamph. Laws, p. 224. The fifth section of the act of 1830 directed them to offer to the owners a reasonable compensation for damages to land or for materials, and if it was not accepted, the governor was by the sixth section authorized to appoint a board for their assessment. Pamph. Laws, p. 220. From these acts it is apparent that, in the opinion of the legislature, the canal commissioners were authorized to locate and construct the canals and railroads on private property, to take up and apply it for public use, as well as all materials necessary for its construction and repair, and that provision had been made for compensation to all persons who might be aggrieved thereby. Such opinion, however, is not of itself sufficient to confer the authority, if it was not given by the former acts; a mistaken opinion of the legislature concerning the law does not make the law, [Postmaster General v. Early,] 12 Wheat. [25 U. S.] 148, and the court is not bound by a legislative misconstruction of a former law, unless it is a positive interpretation of a former act, imposed by the legislature, in subsequent act, (16 East, 333, 334,) or the mistake is manifested in words competent to make the law in future, (4 Taunt. 841.) "If the law expresses the sense of the legislature on the existing law as plainly as a declaratory act, and expresses it in terms capable of conferring jurisdiction, the words ought to receive this construction. If this interpretation of the words should be too free for a judicial tribunal, yet if the legislature has made it, if congress has explained its own meaning too unequivocally to be mistaken, their courts may be justified in adopting that meaning." [Postmaster General v. Early,] 12 Wheat. [25 U. S.] 148–150. In construing these acts of assembly, we must consider them as forming a connected series of legislation, tending to effect an object of infinite public utility, which ought to receive the most liberal and benign interpretation, ut res magis valeat quam pereat,—to make the private yield to the public benefit. Such are the settled rules of construing all statutes made for public benefit in favor of public institutions and all establishments of piety, charity, education and public improvement. 11 Coke. 70–78; Hob. 97, 122, 157; 1 Lev. 55; 3 Dyer, 255; 5 Coke, 14b; 10 Coke,

28a; [Town of Pawlet v. Clark,] 9 Cranch, [13 U. S.] 331; [Inglis v. Trustees of Sailor's Snug Harbour,] 3 Pet. [28 U. S.] 140; [Trustees of Phila. Baptist Ass'n v. Smith, Id.] 481; [City of Cincinnati v. Lessee of White,] 6 Pet. [31 U. S.] 436; 7 Johns. Ch. 340. The court will look to the object in passing the law, and, if it can be discovered in its provisions, will not suffer it to be defeated, but make it answer the intention which the makers had in view. This will be collected from the cause or necessity of making the statute, and will be followed though the construction seem contrary to the letter. A thing which is within the meaning of the makers of a statute, is as much within the statute as if it were within the letter, and a thing which is within the letter but not the intention of the makers is not within the statute. 15 Johns. 380, 381; 14 Mass. 92, 93; [U. S. v. Wiltberger,] 5 Wheat. [18 U. S.] 94; [Postmaster General v. Early,] 12 Wheat. [25 U. S.] 151; [Boyle v. Zacharie,] 6 Pet. [31 U. S.] 644. When the whole context demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to effect it. [Durousseau v. U. S.] 6 Cranch, [10 U. S.] 314.

The sense of the legislature, as apparent from the whole statute or other statutes passed before or after on the same subject, the general system of legislation in relation to it, must be taken into view, not according to the words of a statute, but its provisions will be extended beyond or restrained within them according to the apparent sense and meaning thus to be collected. 1 Pick. 254, 255. The history and situation of the country will be recurred to, to ascertain the reason as well as the meaning of a provision to enable a court to apply the rule of construction. [Preston v. Browder,] 1 Wheat. [14 U. S.] 121. In doubtful cases, the title or preamble of any act may be referred to, to explain it,—[U. S. v. Palmer,] 3 Wheat. [16 U. S.] 631; 4 Serg. & R. 166; and if by a view of the whole, a clear intention is apparent, such intention is the law. No principle is better settled than that in the constructions of all instruments, the necessary implication resulting from the language used, is equivalent to express words used to express the intention of the parties.

In examining the various laws on the subject of the railroads and canals, on which the state has expended twenty millions of dollars, it is impossible to mistake the object in view, or the intention of the legislature; they extend through the most populous and highly improved portions of the state; the ground on which they are located, and the materials for their construction, are owned by individuals, without the appropriation of whose property the object must be necessarily defeated. It would be unnecessary to go into a detail of the acts in which, during ten successive years, the legislature have authorized the board of canal commissioners to locate, contract for, construct, complete, and keep in repair the various works constructed under their authority, in order to extract from them evidence of an intention to authorize an entry on private property, and its seizure for all the uses contemplated. We must be judicially blind not to perceive at the first view that such were the object and intention of the law makers, and, being so convinced, are bound to give such exposition to their acts as to effectuate the great object designed —the completion of a great system of internal communication by which the whole country is benefited. The courts are bound to protect the property of individuals from all aggression not authorized by law, and to construe strictly and carefully all laws which authorize any men or body of men to appropriate the property of another to their use, so as to confine them within the jurisdiction and powers conferred. 2 Dow, 521, 534; 1 Burrows, 382; 4 Burrows, 2244; Lofft, 442; Cowp. 26; 3 John. Cas. 108; 7 Durn. & E. [Term R.] 363, 364. Yet this does not require us to overlook the intention, and regard only the letter of the law; this is not the rule in criminal cases, much less in cases in which the interest of the country is involved. [U. S. v. Wiltberger,] 5 Wheat. [18 U. S.] 94, 95. Were this therefore a case in a court of law depending upon strict legal right, we should not entertain a doubt of the general authority of the officers of the state to make the same use of private property for the completion and repair of the canals and railroads as if it were given in express terms; the intent is apparent—the words used are competent to give the power, and in our opinion do give it by necessary implication.

The only subject on which we could entertain a reasonable doubt, is the one which is the immediate cause of the present motion. The diversion of the complainants' water course was not for the purpose of constructing or repairing the railroad, or any of its appurtenant works; they could be and were completed without a permanent appropriation of this water; nor can it be considered as a material, within the meaning of the acts. This word refers to those things which are component parts of the road, necessary for its completion in all its parts, but not to the means or facilities of transportation upon it afterwards.

It does not appear from any of the laws prior to those of April last, that it was any part of their original object to furnish engines for the purpose of transportation. They seem only to have had in view the completion of a railroad, with locomotive or stationary engines. Laws 1827, p. 194. The commissioners had no authority to purchase or procure engines till they were authorized by act of last session. "To procure such locomotive engines or tenders for the use of passengers and merchandise as may be necessary for doing the whole or any part of the transportation." Laws 1834, p. 508. By an act

passed at the same session, a heavy punishment was prescribed for breaking, cutting down, or destroying, in whole or in part, any water station, drain, or bank belonging to any railroad constructed by the state, or stop up or obstruct any culvert, drain, pipe, water station, or well belonging thereto. Page 202. Taking these two laws in connection, it seems to have been the opinion of the legislature that water stations, wells, etc., or the supply of the engines belonging to the railroad as a part of its appendages; they certainly are put on the same footing as to protection or destruction from injury, as the bed of the road. This goes very far to show that it was their intention to authorize their being made, though it may be doubted whether such intention can be so made out as to give the power to enter on private property for this purpose, and make a permanent appropriation of a water course. No provision is made for compensation to the owner in the other cases; nor is there any express direction to construct reservoirs or water stations, or to provide a supply of water for the engines by any other means,—these considerations have their weight on our minds though we are not prepared to decide that there is a want of, or an abuse of authority in doing the acts complained of, we are far from being so clearly of opinion that the law gives the commissioners this power, as that of constructing and repairing the road itself—on a case on the law side of the court it would be our duty to express a decided opinion on this question; so it may be when this case comes up for a final hearing, if the legislature should not in the meantime remove the difficulty; but on a motion for the injunction, we think it not proper to do it.

In the late case of Atkinson v. Philadelphia & T. R. Co., [Case No. 615,] we declared "that if the act complained of is done under color of authority conferred by law, the court will not interfere if there is any ground of doubt as to the authority, until the doubt has been removed, and the matter finally determined at law." Still retaining the same opinion and having the serious doubts as to the authority in this case, we do not feel at liberty to award the injunction on this ground in the present stage of the cause. We are less inclined to do it, as the effect would be to suspend the transportation on this important road; no appeal lies from our present decision; it would not be final, and infinite injury would result, if we should now give an erroneous one. The case must be a plain one to justify such consequences, and a reasonable doubt as to any material point, must be conclusive on a motion.

The counsel of the complainants assume another position, which, if tenable, is an important one,—that admitting the powers of the commissioners to conduct water to the engines; yet it must be done from land contiguous to, adjoining, or near the road, according to the words of the act of 1826, (section 8, p. 55,) and other acts making provisions for damages in taking materials. These words must have a reasonable interpretation, according to the subject matter, with reference to the object to be effected, of which the officers, to whom the power of taking materials is confided, must judge according to their discretion. Near does not necessarily mean next to, but a reasonable vicinity. 1 W. Bl. 20. What that is, must depend on local circumstances. That another tract of land separates the railroad from the premises of the complainants is therefore no objection to the exercise of the authority to take materials, or to direct water for the use of the road, if it is necessary for that purpose. On this subject there is great contrariety of opinion between the persons whose affidavits have been taken for our information. On the part of the complainants, it is contended that the diversion of their water course was not requisite, inasmuch as there was a sufficient supply of water upon the tract of land through which the road passes, which could be used with more convenience and at less expense, in which they are supported by the affidavits of very respectable persons, of competent capacity to form a judgment; on the other hand the respondents are sustained in the opposite opinion by the affidavits of persons equally respectable and competent, as far as we know. There is thus an issue of fact between the parties, which we cannot decide on a motion, when there is such a difference between the affirmants, both as to matter of opinion and fact. Should the case ultimately turn on the necessity of diverting the complainants' water course, in order to effect the object of the law, the verdict of a jury ought to be taken on suit brought, or an issue directed; it is not our province (at present, at all events) to judge of the credibility of witnesses, or weigh their respective opinions; it is enough for the purposes of this motion, that the fact is so extremely doubtful as to make it difficult for us to form an opinion on the question of the necessity. By awarding the injunction on the ground assumed by the complainants, we should pronounce a judgment on conflicting evidence: whereas, by referring to an issue, or the final hearing, we should not incur the hazard of doing an irrevocable injury, by a premature order which on more full information, it might be our duty to annul. Besides this is a matter so much of discretion, that we would interfere only in a plain case of abuse or a want of discretion on the part of the public officers, intrusted with the execution of the work. The canal commissioners are a tribunal constituted for this purpose, with power to appoint subordinate officers, who act under their supervision; the law has confided to the board a broad discretion which no other tribunal can assume to itself; while they act within their jurisdiction, and exercise their judgment on the matters confided to them in

good faith, their acts are clothed with the authority of the law, and their judgment is conclusive, unless some mode of revision is provided for by an appeal to some other tribunal. [U. S. v. Arredonds,] 6 Pet. [31 U. S.] 729; [Satterlee v. Matthewson,] 2 Pet. [27 U. S.] 412; 2 Dow. 521; 20 Johns. 740; 7 Johns. Ch. 340; [M'Culloch v. State of Maryland,] 4 Wheat. [17 U. S.] 423; Atkinson v. Savage [Atkinson v. Philadelphia & T. R. Co., Case No. 615.] In the affidavits we can perceive no ground of imputation of bad faith in the commissioners or their agents; they profess to have acted in the exercise of their discretion, according to their judgment, and not from partiality or design to oppress the complainants or improperly favor others. Under such a state of things, if we differed in judgment with the commissioners, as to the necessity of diverting this water course, and were even of opinion that one equally convenient could be found without going on the complainants' premises, it would be no ground for an interference. So long as it is a mere question of discretion, depending on the relative conveniences and facilities to effect the authorized objects, it is intrusted to a tribunal over whose honest and impartial judgment we have no appellate power. We can prevent the effects of perversion or abuse of discretionary power, but not of their legitimate, honest exercise; the latter belongs exclusively to tribunals of appellate jurisdiction.

These reasons would induce us to decline granting the injunction, on motion, if there were no others, but we cannot omit noticing another which has powerful if not conclusive influence on our minds. The acts complained of, were begun on the 19th May, of which the agent of the complainants had notice on the 22nd. On the 28th an attempt was made by him with the assistance of a peace officer and some others, to take possession of the land and expel the respondents and their workmen, but without success; the complainants notified them not to proceed with the work, but took no further means to prevent its progress or completion, till the filing of the bill on the 25th June; in the mean time the dam was built to the height of eight or ten feet, a trench dug across the land of the complainants, and the water of the stream conducted to a reservoir on the adjoining farm, whence it was conveyed through pipes to the engine house. As the nature of an injunction is to prevent the doing of an act threatened or about to be done, it is too late to apply for one after the act is consummated; the dam is erected, the trench is dug, and water flows through it; we cannot order the one to be prostrated or the other to be filled up; by acquiescing in the commission of these acts, after ample notice, the complainant has rested on his legal rights and looked to his legal remedies, having suffered the thing to be done, his preventive cannot apply, and he must look to damages for his past injuries. Injunction is a remedy altogether prospective. It was in the complainants' power to have applied for one, either in court or to either of the judges, as soon as they had notice of the intended works. They had their election to apply for the preventive or wait for the compensatory remedy; as to acts committed before the filing of the bill they must look to the latter remedy, though it is not too late to apply for the prevention of any future injury which is in its nature an enjoinable one when impending or threatened. There is no allegation that any act of this kind is about to be done on the premises, unless it be the conducting the water from the dam through the trench in pipes to the reservoir. Taking this as the gravamen of the bill, we cannot perceive in it an irreparable injury to the complainants' property; it would redress one act complained of by filling up the trench over the pipes, leaving the surface of the ground unbroken, without in any way interfering with its use for tillage, or pasture, which would be much less injurious than an open ditch or trench. Whether the water sinks into the earth in the trench, or is conveyed to the reservoirs in pipes, matters but little to the complainants; its use is lost in either case; an injunction in using pipes would therefore be of no benefit to them in preventing the diversion of the water, while the dam and the trench remain, yet it might immediately suspend all operations at the inclined plane. Under such circumstances we cannot therefore consider the mere act of laying pipes to be such an injury as is the subject of an injunction, and the other act complained of having been done before the bill was filed, we think there has been such acquiescence, such reliance on the legal remedy, and such expenditures made on behalf of the state, as precludes the complainants from any present relief in equity. Had the application been made as soon as the work was commenced, the attention of the commissioners might have been directed to other sources of supply of water if they had been accessible, and thus have avoided the risk of a suspension of their operations; the conduct of the complainants may have led them to the belief that the only subject of controversy was damages for the injury sustained by the diversion of the water, and to the expenditure of money in the construction of the works. By standing by after notice of the commencement of the work, until near its completion, when all the substance of the injury had been committed, without calling for the interference of equity to arrest its progress, the complainants must now be content to abide by their legal remedy or be refused any equitable relief until a final hearing. 2 Dow, 536.

The complainants' counsel have considered the acts of the respondents to be illegal, because they have entered upon the premises without notice, or any offer to make terms

with the complainants in relation to damages, as is required by several acts in relation to the canals and railroads of the state. This question would arise on an action of trespass for the entry, but not on a bill for equity, circumstanced as the present. It might have been a good reason for our interference to suspend the work, till all the requisites of the law had been complied with, and the effect of the omission may be to make the respondents trespassers, although their authority would have been ample after notice and an attempt to procure a release or adjust the damage, but the neglect to do it can have no bearing on the present motion on account of the lapse of time and the submission to the acts done.

It is also contended that the acts of the respondents are without any authority in law, because no compensation has been made for the property thus appropriated to public use, and we know no mode provided by law for assessing damages in a case like the present one. If the complaint of this bill was the want of any provision for compensation, or of its actual payment before taking actual possession of the premises, or applying the water to public use, and the prayer had been to order a suspension of all proceeding till it had been done, there might have been strong grounds for our interference; the obligation upon the state to make compensation is undoubtedly co-extensive with their power to take or apply private property to public use. As this obligation is a constitutional one, it is not impaired by the omission to provide for it by the law which authorizes the entry or seizure; it can be enforced by action for damages in courts of law and injunction in those of equity. We are far from saying that a law is void which gives the authority without directing compensation to be made in some way, or that the legislature may prescribe the mode in which it shall be done without a trial by jury, inquisition or writ ad quod damnum, nor that a party is not entitled to all his common law remedies if the law is silent on the subject. Whatever may be the decision of a court of law on the constitutional right of an owner of property thus taken on any question of damages, depending upon the strict principles of law, which would be imperative on the court:—a court of equity acting according to sound discretion on the principles of equum et bonum would not interfere, if a just compensation was offered, or the state was willing to make some equitable adjustment of the damages. This question is not, however, now before us. The right to take the property in question under any circumstances is denied on the ground of there being no law which authorizes it to be done for the purposes to which it is applied, even if compensation was provided, for the complainants do not offer to cede or relinquish their right on receiving compensation. The object of the bill is not money, but to retain the same full property and dominion over the lands as they have heretofore enjoyed before the entry upon it by the respondents. If they ask and receive compensation, their right to the water passes forever to the state, as the use to which it is applied is to be permanent. Should we now enjoin the agents of the state till compensation is made, the injunction would be dissolved on its payment:—when the complainants are willing to admit the right to take and use the water, and tender the prayer for other and general relief, or by an amended or supplemental bill, shall ask for just compensation for injuries sustained, the matter will be fully and fairly before us to award or refuse the injunction, as the justice and equity of the case may require.

At present there is no ground in which we can feel justified in granting the injunction. The complainants must be left to their remedy on a final hearing in an action at law.

Case No. 982.

BARING et al. v. FANNING et al.

[1 Paine, 549.][1]

Circuit Court, D. New York. April Term, 1826.

JUDGMENT—EVIDENCE.

1. A judgment or decree of a court can be used as evidence in another suit only as against parties and privies; and if in the second suit there are new parties, against whom the judgment could not have been used, had it been adverse, they cannot introduce it in their favour.

[See Patterson v. Gaines, 6 How. (47 U. S.) 550; Gregg v. Forsyth, 24 How. (65 U. S.) 179; Barr v. Gratz, 4 Wheat. (17 U. S.) 213; Drummond v. Prestman, 12 Wheat. (25 U. S.) 515; Fellows v. Pedrick, Case No. 4,724; Davis v. Forrest, Id. 3,634,—as to the exceptions to this rule.]

2. And it makes no difference that the new parties, as assignees of a chose in action, are endeavouring, together with the assignor, to enforce the same right that was established in the former suit in favour of the assignor.

3. And in such a case, where a court of chancery had ordered an account, and made a decree thereupon in favour of the assignor, it was held not to be a matter decided ex directo, by a court of competent jurisdiction, so as to bring it within the exception to the general rule.

In equity. At the hearing of this cause, it was referred to a master to take an account between the parties; and on the coming in of the report, exceptions were taken thereto by the defendants, and now argued. The case made by the bill was as follows: On the 20th December, 1809, Consequa, one of the complainants, a Hong Kong merchant, residing at Canton, shipped at that place, on board the Chinese, a ship belonging to the defendants, a cargo of merchandise, the cost of which was 43,025 dollars 87 cents, consigned to the defendants, [Fanning and Coles,] who were merchants of New-York, to be sold for the account of Consequa. The cargo having been received, on the 26th of Sep-

[1] [Reported by Elijah Paine, Jr., Esq.]

tember, 1810, Consequa assigned the cargo and its proceeds to the other complainants, William Baring, James Malony, and James T. Roberts, composing the firm of William Baring & Co., and on the 24th of December, 1810, advised the defendants of this assignment, by letter, and desired them, in case they had made any remittance to him on account of the shipment, or otherwise disposed of the funds arising from it, to make good to Baring & Co., or their agents, out of any other funds of his in their hands, the full nett proceeds of the shipment. Baring & Co. transmitted this letter to their agents, Willing & Francis, of Philadelphia, with an endorsement requesting the defendants to pay the contents to Willing & Francis. They communicated this letter to the defendants on the 27th of April, 1811, and on the 29th, the defendants replied, informing them that remittance had been made on the shipment, and that whatever balance should ultimately be found due to Consequa, would be paid to any one authorized to receive it. On the 24th of November, 1811, Consequa, by another letter, ordered the defendants to pay to the order of any one holding the before-mentioned assignment, any balance of any of his property, to an amount not exceeding 43,025 dollars 87 cents, which letter was in like manner delivered to Baring & Co., and by them endorsed, and transmitted through Willing & Francis to the defendants, and received by them on the 5th of August, 1811. The bill prayed an account of the proceeds of the shipment, and of the payments and remittances on account of the same, and of the balance in hand; and that the defendants might admit funds in their hands belonging to Consequa, to the amount of 43,025 dollars 87 cents, or render an account of the effects of Consequa, in their hands, at the time they were notified of the assignment, and of the disposition thereof. The cause was brought to a hearing on bill, answer, and proofs, and an order made, referring it to a master to take an account of the monies arising from the said shipment, and of the disposition thereof by the defendants, and of the amount due the complainants by virtue of the said assignment; and that if such monies should have been remitted to Consequa, or otherwise disposed of prior to the 5th of August, 1811, so that the same had not come to the hands of the complainants, that then an account should be taken between Consequa and the defendants to that time, so far as might be necessary to ascertain whether the balance, if any, due by the defendants to Consequa, for monies or merchandise, which might have come to their hands, was sufficient, with the remaining proceeds of said shipment, to make up the said sum of 43,025 dollars 87 cents. Upon the reference the complainants exhibited their charges, claiming the invoice cost of the shipment, with interest from the 5th of August, 1811; and in support of their charges, offered in evidence the decree and proceedings in the court of chancery of the state of New-York, in a cause between Consequa, the complainant, and the defendants, in which a balance was established against the latter of upwards of 100,000 dollars. This evidence was objected to by the defendants. In order to take the opinion of the court, it was, however, arranged by the parties, that the master should admit it, and report the whole amount of the complainant's charges.

Exceptions were taken to this report by the defendants, and now on the argument, it was agreed, that the decree and proceedings offered in evidence, were to be found in the report of the case, in 4 Johns. Ch. 587, and 17 Johns. 511.

R. Emmet for the defendants, insisted: That as Consequa was the only one of the present complainants who was a party to the suit in chancery, the proceedings and decree in that suit could not be given in evidence in this, because the other complainants were neither parties nor privies thereto, and if the decree had been against Consequa instead of in his favour, they would not have been bound by it; and that if such had been the case, the defendants could not have availed themselves of it as evidence in this suit: That therefore, as the decree could not have been used equally for the benefit of both, it was not evidence by the settled rules of law. Gilb. Ev. 34; Cas. t. Holt, (Farresley,) 135; Bull. N. P. 233; 16 Johns. 51; 1 Munf. 394, 398; Phil. Ev. 226–234. That this case could not be brought within any of the exceptions to this general rule of evidence. It was not like the cases of custom, toll, tithes, settlement of paupers, elections, &c. where the rule was dispensed with in favour of the settlement of rights of a public character. Nor was the decree in a court of exclusive jurisdiction, like the ecclesiastical courts, or the admiralty or exchequer courts, proceeding in rem, whose judgments directly upon a point, were conclusive upon the same point arising incidentally in another court. 4 Price, 154, note; Phil. Ev. 226, 234. That the indebtedness of the defendants to Consequa, as it resulted on the taking of the account, and appears in the decree, was not a matter of fact found ex directo by the court of chancery. A matter decided ex directo, is where the question admits of a simple negative or affirmative, such as devastavit vel non, marriage or no marriage, prize or no prize, adultery or no adultery, &c. Nor does the question of the defendants' indebtedness to Consequa arise incidentally in this cause. It is the very foundation of the suit. But if the decree and proceedings are admissible in this cause, they are not conclusive against the defendants; because the bill in that suit was filed for specific claims, and not for a general account, and a general accounting was not gone into.

T. L. Ogden for the complainants, contended: That the bill filed in chancery was to ascertain the state of accounts in reference to the property, of which the partial assignment had been made to Baring & Co. That it did not embrace any transactions subsequent to that assignment, but referred exclusively to those which were prior; and that decree therefore precluded the necessity of again litigating the same points which were involved and decided in the suit with Consequa. The objection that that suit was res inter alios acta cannot be sustained. The decree was of a court of competent and exclusive jurisdiction, deciding ex directo on the matters in controversy, and conclusive as to the same matters in any other court. The question was a single one, whether the defendants were debtors to Consequa to some and what amount. Bull. N. P. 243-245; 2 Bac. Abr. 630; Amb. 756; 2 Esp. 607. Again, the complainants, Baring & Co. claim under Consequa, and are on that ground entitled to the benefit of the decree. Bull. N. P. 243; 2 Bac. Abr. 629; 1 Phil. Ev. 230. Consequa is a mere trustee for them, and they would be entitled to file their bill claiming the benefit of the decree in his favour. 2 Madd. Ch. Pr. 408; 4 Brown, Parl. Cas. 33. The account before the master must be taken on the principles of that taken in the court of chancery, without any reference to the pretended counter claims of the defendants; for the existence of such claims was not set up when the assignment was notified to the defendants; no proof has been exhibited of their existence, and the order of reference does not authorize their admission. The result of a new account would therefore be the same as the former. [Exceptions sustained, and report set aside.]

THOMPSON, Circuit Justice. The question now presented for decision arises on an exception to the report of the master, under an order of reference. This order directed an account to be taken of the monies arising from the merchandise, shipped in the Chinese, in 1809, by Consequa, and consigned to the defendants; and of the disposition of the said monies, and of the amount due on said consignment to Baring & Co., by virtue of the assignment of Consequa to them, set out in the bill. And if the proceeds, or any part thereof, shall have been remitted to Consequa, or otherwise disposed of prior to the 5th of August, 1811, so that the same have not come to the hands or use of the said Baring & Co., that then an account be also taken, and stated between Consequa and the defendants, down to the 5th day of August, 1811, so far as the same may be necessary to ascertain whether the balance, if any, due by the defendants to Consequa, for monies or merchandise, which may have come to the hands of the defendants, be sufficient with the remaining nett proceeds of the said merchandise, to make up the original invoice value of the same merchandise, amounting to forty-three thousand and twenty-five dollars eighty-seven cents. Upon the reference, the complaints offered in evidence, a certain decree heretofore obtained in the court of chancery of the state of New-York, by Consequa, one of the complainants in this cause, against the above defendants, and the proceedings in the suit in which said decree was obtained. This evidence was objected to on the part of the defendants, but admitted by the master, as competent and conclusive in the present case. By that decree a balance was found due from the defendants to Consequa, of upwards of one hundred thousand dollars; and the master has accordingly reported in the present case, that there is due to Baring & Co. the whole balance claimed by them, including interest, amounting to eighty-seven thousand one hundred and forty dollars sixty-one cents, being the amount of the forty-three thousand and twenty-five dollars eighty-seven cents, assigned by Consequa to Baring & Co., and the interest on the same.

The objection taken to the admissibility of this decree is, that it was res inter alios acta. The general rule on this subject is, that judgments and decree are evidence only between parties and privies. But it is contended, that there are exceptions to this general rule, under which the decree in question was admissible, and the broad principle is assumed, that the final decree or judgment of any court of competent jurisdiction, deciding ex directo on any matter, is conclusive as to that matter, in any other court, between any other parties. This position, if admitted to embrace the present case, is not supported by authority, and cannot, I think, be sustained on any sound principle applicable to the rules of evidence. The matters in controversy in the court of chancery of this state, related to the mere private rights of the parties. The exceptions to the general rule, (which requires that verdicts or judgments should be admitted in evidence only between parties to the suit, or privies,) which are mentioned in the books, relate generally to some question of custom, right of common, right of way, right of election, &c. In such, and the like cases, a former verdict in an action between any other parties, is admissible in evidence, when the point there directly decided is in issue. But it is not in such case conclusive. The common reputation of the place would, in these cases, be evidence of the right; and the verdict of twelve men, upon oath, is considered at least of equal weight. Phil. Ev. 233.

Nor are the cases of judgments, or decrees in rem, or of courts of exclusive jurisdiction, applicable to the present case. The court of chancery of New-York had not exclusive jurisdiction of the matters in contro-

versy, nor was the decree there rendered a decree in rem. There is nothing, therefore, in relation to the subject matter in controversy in that suit, or the nature and operation of the decree, that should take it out of the general rule. As between the same parties, it is right and proper that the verdict of the jury finding a fact, or the judgment or decree of a court on facts found, should be conclusive, and operate as estoppels. [Hopkins v. Lee,] 6 Wheat. [19 U. S.] 109. But such estoppels should be mutual, and no one be permitted to have the benefit of a judgment or decree, who would not have been prejudiced by it, had it been the other way. Gilb. Ev. 34; Cas. t. Holt, 135; Bull. N. P. 233. Had the decrée been in favour of the defendants, it would not have concluded the rights of Baring & Co. They not having been parties to that suit, had no opportunity to set up and maintain their claim against the defendants. There would, therefore, be no mutuality of benefit to the parties in the present suit. Paynes v. Coles, 1 Munf. 373. The case of Chapmans v. Chapman, 1 Munf. 398, is very analogous to the present suit. It was there laid down that a record in one suit cannot be read as evidence in another, on the ground that the defendant and one of the plaintiffs in the latter suit, were parties to the former, and that the same point was in controversy in both; another plaintiff, and the person under whom both the said plaintiffs jointly claimed, not having been parties to such former suit. Phil. Ev. 222-334, where most of the cases are collected. But if no well founded objection lay to the admission of that decree in evidence, by reason of the variance of parties in that and the present suit, I am unable to discover that the matters in controversy, in this cause, have been there decided. The bill, in this case, seeks a particular account of the proceeds of the shipment, by the Chinese, on the 2d of December, 1809, consigned to the defendants, and which had been assigned by Consequa to Baring & Co.; the first cost of which cargo amounted to forty-three thousand and twenty-five dollars eighty-seven cents, and also of the payments and remittances on account of the same. And that the defendants might admit funds in their hands belonging to Consequa, to the amount of forty-three thousand and twenty-five dollars eighty-seven cents, or render an account of all other goods, monies, and effects in their hands, belonging to Consequa, at the time of notice of assignment to Baring & Co., on the 5th of August, 1811, and of the sales, payments, and disposition of the same.

For the decree and proceedings in the court of chancery of this state, reference, by consent of counsel, is made to the report of the case, 3 Johns. 587, and 17 Johns. 511; by which it appears that the shipment of the 2d of December, 1809, was not at all in question, but was excluded from the account then taken. The report of the master, in that case, did not, therefore, purport to state an account of the proceeds of the shipment now in question, and of the payments and remittances on account of the same, which was a direct and particular subject of reference to the master in this case. In this case any inquiry into the state of the accounts between Consequa and the defendants, is by the order of reference made contingent, depending on the facts, whether the proceeds of that shipment, or any part thereof, had been remitted by the defendants to Consequa, or otherwise disposed of prior to the 5th of August, 1811, so that the same had not come to the hands of Baring & Co.; and if they had, then the master was directed to state an account as between Consequa and the defendants, down to the 5th of August, 1811. The proceedings in the case of Consequa against the defendants, do not ascertain these facts; the report of the master there states the balance as it stood on the 31st of January, 1818, and not as it stood on the 5th of August, 1811, as is required in this case; so that neither of the inquiries referred to the master, in this case, were directly decided in the case of Consequa against the defendants. The proceedings in that case were not offered in evidence, to show admissions by the defendants, of any particular facts necessary to be established in the present case; but to show a final and conclusive balance in favour of Consequa, to an amount sufficient to cover the plaintiffs' claim; and for this purpose, and to this extent, the evidence was received by the master, which I think cannot be sustained. The report must accordingly be set aside, and the cause referred again to the master, under the orders of reference heretofore entered in the cause.

Case No. 983.

BARING et al. v. LYMAN.

[1 Story, 396;[1] 4 Law Rep. 303.]

Circuit Court, D. Massachusetts, May Term, 1841.

NEGOTIABLE INSTRUMENTS — LETTER OF CREDIT—PARTNERSHIP—AGENCY.

1. Where, by a banker's circular, a banking commission was named on credits or bills "used east of the Cape of Good Hope;" it was *held*, that the drawing of bills under a letter of credit, in favor of a third person, who, upon the faith of the letter of credit, takes and receives the same for value, and is entitled to hold and use them on his own account, is a use of the letter of credit within the terms of the circular, although the bills are never presented for acceptance or payment. Thus, the agent in Boston of certain London bankers, gave to A. a letter of credit, by which B., in Canton, was authorized to value upon them to the amount of £25,000 sterling at six months' sight, at Canton, the customary commission on bills, used under similar letters, being two per cent. The credit was obtained to furnish funds in

[1] [Reported by William W. Story, Esq.]

part for loading the ship of A., which was consigned to B., at Canton. Bills were accordingly drawn in Canton by B. payable to C., but as there was no demand whatever at that time for exchange, the latter agreed to send the bills to his agent in Boston, and to give A. the option of replacing them, with other funds, or to have them forwarded to London, to the account of C. On the arrival of the bills in Boston, A. concluded to reimburse C. by remitting dollars to Canton, and the bills and letters to the London bankers were destroyed. An action, brought by the London bankers for the customary commission on the bills, was defended on the ground, among others, that they had never been used; but it was held, that the defence was not maintainable.

[Cited in Russell v. Wiggin, Case No. 12,165.]

2. Any partner in a firm may be the agent of a third person in drawing bills in favor of the firm, for advances made to such third person, under an express authority.

3. A firm may negotiate its own paper to one partner, and the latter will thereby become the owner thereof. So, a firm may take a separate negotiable security from one of its partners, and hold and use the same for its own purposes. A fortiori, where he acts as the agent of third persons.

At law. Assumpsit [by Francis Baring and others, comprising the firm of Baring Bros. & Co., against Theodore Lyman, as executor of T. Lyman, deceased] for the recovery of money, viz., five hundred pounds sterling, claimed as due to the plaintiffs for commissions, at the rate of two per centum, upon twenty-five thousand pounds, alleged to have been drawn for by Robert B. Forbes, in bills upon them, under a letter of credit, given by them to the defendant's testator, dated 7th of June, 1838. By that letter, Forbes was authorized to value upon them to that amount, at six months' sight at Canton, on account of the testator; the bills to be duly honored, when presented at the banking house of the plaintiffs, if drawn within twelve months from said date. And in case of accident to Mr. Forbes, whereby he should be prevented from attending to the business, Messrs. Russell & Co., of Canton, were authorized to use the credit for account of the testator. By a receipt in writing of the same date, the testator, in consideration of the said credit, agreed to provide in London, sufficient funds to meet the payment of whatever (bills) might be negotiated, by virtue thereof, at maturity of the bills, and also to give security therefor, here, at any time previous, if required; and that the property, which should be purchased by means of said credit, and the proceeds thereof and the policies of insurance, and bills of lading, were thereby pledged as collateral security for the payment as above provided, and held subject to the plaintiffs' order, on demand, with authority to take possession and dispose of the same at their discretion, for their security and reimbursement; that in all payments, settlements, and recoveries in the United States, growing out of the said credit, the pound sterling should be estimated at the current rate of exchange on London, existing at the time of such settlement. And the testator added a request and direction to his executors and administrators, that in the event of his decease, before maturity of all the bills, which might be drawn under the above credit, and the due provision for the same, as stipulated, they should provide promptly for them, as they should become payable, without regard to the probate laws of Massachusetts. The regular and customary commission charged by the plaintiffs, on bills used under similar letters of credit, east of the Cape of Good Hope, is two per cent. And if the whole amount authorized is not used, the commission is charged only on so much as is used. The credit was given to furnish funds in part for loading the testator's ship Vancouver, which arrived at Canton, December 1, 1838, consigned to R. B. Forbes, who became a member of the house of Russell & Co., 1st January, 1839. The consignment was agreed upon by him and the testator, before the credit was procured. The business of the ship was transacted by Russell & Co. On the 18th of March, 1839, Russell & Co. wrote to the testator, advising him of their determination to load the ship and despatch her directly for Boston; and that there being no demand whatever for exchange, even at the very unfavorable rate, at which they had concluded to place his bills, they had obtained a loan for the purpose of getting the ship away. But that as Mr. Forbes had no orders to resort to, he authorized them to draw the bills at the market rate, and to give him his choice of paying for them in London, or replacing the cost of the cargo in dollars, without delay, paying at the rate of nine per cent. per annum interest; and that they should charge their usual commission of one per cent. for drawing, and should send the bills and letters of advice to their agent in Boston, to be cancelled, upon his agreeing to replace the funds, or to be forwarded to London for their account, if he should conclude to meet them there. This arrangement was consummated on their part, by their loading the ship, and sending forward the bills drawn by R. B. Forbes, May 4th, 1839, in favor of Russell & Co., as proposed, and specially indorsed to their agent, J. M. Forbes, of Boston, with corresponding instructions. The testator died on the 24th of May, 1839, before the letter or ship arrived; and they were received by the defendant, who, without delay, notified J. M. Forbes, that he should remit dollars to reimburse Russell & Co., at Canton. Neither the bills and letters to Baring & Co., accompanying them, nor any advice thereof, were ever sent forward to London. But the bills were destroyed by the said Forbes, after the specie was shipped and received. The specie was shipped by the defendant, in the years 1839 and 1840, and received and credited by Russell & Co. in 1840 and 1841, the proceeds of which covered the amount of the advance.

The bills before mentioned were held by J. M. Forbes for Russell & Co., on the 11th of July, 1840. The case was submitted to the court on the above statement of facts, with liberty for either party to refer to certain letters and documentary evidence, which were in the case. Among these was a circular of the plaintiffs, dated January 1st, 1838, a copy of which was sent to the testator, in which it is stated, that "the banking commission on credits or bills used east of the Cape of Good Hope, to be two per cent." The other documentary evidence is sufficiently exhibited in the arguments of the counsel and the opinion of the court.

Charles P. Curtis, for plaintiffs.

The question is, whether the credit granted by the plaintiff, to the defendant's testator, has been used, or not; if it has, then the plaintiffs are entitled to the commission of two per cent. on the amount used. It is not denied, that R. B. Forbes, the agent of the defendant's testator, has drawn bills of exchange on the plaintiffs, in favor of Russell & Co., amounting in all to £25,000 sterling; and that Russell & Co. indorsed and forwarded them to J. M. Forbes, their agent in Boston. In point of form, the terms of the letter of credit have been strictly complied with, so that if the bills had been presented to the plaintiffs, at their banking house in London, they would have been bound by their contract to accept and pay them. What more was necessary to constitute a use of the credit? The letter of credit authorized R. B. Forbes to value on Baring Brothers & Co., London, at six months' sight, at Canton, for account of T. Lyman, Esq., of Boston, for any sums not exceeding £25,000 sterling; and by a subsequent clause, Russell & Co. were authorized to use the credit, in case of accident to Forbes. What is the mercantile meaning of the phrase, to value on a banker? To draw and pass bills on him, to negotiate bills on him. The authority given to R. & Co. in the event of Forbes' inability "to value" on the plaintiffs, is, to use the credit, as he was to use it, that is, by drawing and passing bills under it. The agreement of the testator, acknowledging the receipt of the credit, contains an engagement on his part, to provide funds in London to meet the payment of whatever bills might be negotiated by virtue of the letter of credit. These, then, are synonymous terms; to value, to draw and pass bills, to negotiate bills, is to use the credit. The use of such a credit cannot depend upon the subsequent use of the bill drawn under it. If the party, who grants the letter of credit, is for any period of time liable to accept the bills, the credit has been used, and the whole commission earned. The liability of the banker is fixed, as soon as a bill is negotiated, in conformity with the terms of the letter; for, by the law of the United States, the taker of a bill so drawn, who receives it on the faith of such a document, has a right to claim upon it as an accepted bill; and though this may not now be the law of England, (which is the place of performance of the contract in this case,) yet there a suit in chancery might be maintained by the holder of such a bill of exchange, to compel the specific performance of the banker's agreement. The bills drawn by R. B. Forbes, in May, 1839, and negotiated to Russell & Co., were held by them, in the hands of their agent, J. M. Forbes, for upwards of a year, as appears by his letter of the 11th of July, 1840; during all which time the plaintiffs were bound to honor them at any time, when they should be presented at their banking house. The act of the defendant prevented them from honoring the bills; but they were always ready to do so. And this is sufficient to entitle them to their commission, which does not depend on the actual acceptance and payment of the bills, but on their liability to do so. It might be contended with safety, if necessary, that the plaintiffs would be entitled to their commission on the amount of their credit used, as before stated, even if they had refused to accept the bills; for, in that case, the holders would have their legal remedies, as before stated, and the testator would have had a right to recover from them for all the damages he might sustain from their breach of promise. But the case does not require the assertion of this principle; the whole service stipulated by the plaintiffs, or at least as much of it, as was not prevented by the defendant, was performed by the plaintiffs, and they were always ready to perform the residue.

If it is contended by the defendant, that the bills drawn by R. B. Forbes, were not used or negotiated, the answer is found in R. B. Forbes's deposition, who says; "I drew bills for £25,000 sterling, on Baring Brothers & Co. at six months, dated Canton, 4th May, 1839, in favor of Russell & Co., and indorsed by them to J. M. Forbes, Esq., Boston." "The bills were held by Russell and Co. as their security for the advance they had made; they had no orders to advance funds for Mr. Lyman; but thinking it was for his benefit, they did it, and held the bills as their security. Mr. Lyman's instructions were merely to act in exchange." The letters of Russell & Co. to the testator, also, show, that the value of the bills was actually passed to his credit; the cargo was paid for by his agent, by bills on the plaintiffs, and was shipped to Mr. Lyman as his property. But Russell & Co., regarding his interest in the transaction, gave him the option of providing for the bills in London, or of redeeming them in the United States, by shipping dollars to Canton. Mr. Lyman, the defendant, elected the latter alternative, and the bills were held by J. M. Forbes, till the dollars were received in Canton. This was in effect a purchase by the defendant of his testator's bills, on better terms than the payment of them in London

would have been. Mr. Lyman has availed himself of the benefit of the plaintiff's high credit; his cargo was purchased and shipped to him on the faith of it; he has had the opportunity of a more advantageous mode of remittance than he expected, when he took the credit; he has enjoyed the whole consideration for which the plaintiff's right to compensation accrued; and he is therefore legally bound to pay the stipulated price.

Charles G. Loring, for defendant.

What was the contract, and what was done under it? The contract is contained in three documents, namely, a letter of credit given by the plaintiffs, through their agent, Mr. Ward; the receipt given by the defendant, and the circular of the plaintiffs. By the letter of credit, Mr. Forbes, or, in event of accident to him, Messrs. Russell & Co. were authorized to draw upon the plaintiffs to the amount of £25,000, at six months sight, if drawn within twelve months from 7th of June, 1840; and the plaintiffs promised to honor the bills, when presented at their banking house. The obligation, therefore, was to accept the bills, if presented at their banking house, within the time specified, and nothing more. Consequently, they could be under no liability until such presentation. By the receipt, the testator promised to provide funds in London to pay whatever bills should be negotiated by virtue of the credit, at their maturity; and to give security in Boston previously, if required. And, that all property purchased by means of the credit, &c. should stand pledged as collateral security for such payment; that all settlements growing out of the credit should be at the current rate of exchange; and in the event of the death of the testator before the maturity of the bills, his executors, &c. should provide promptly for them as they should become payable. This is the whole contract on his part, excepting as to the compensation, which the plaintiffs were to receive, which was not specifically provided for, but left to the operation of the custom of the plaintiffs, which is set forth in their circular. By the circular, it was stated, that "the banking commission, on credits, or bills, used east of the Cape of Good Hope, was to be two per cent." The use, for which this compensation was provided, is clearly indicated, by the whole tenor of the circular, to be the negotiation of the bills and acceptance of them by the plaintiffs; corresponding precisely with the use, as described in the letter of credit itself, the gist of which is the promise to accept. And also, with the use described in the receipt, which provides for providing funds to meet such bills, as should be negotiated, at their maturity, which necessarily implies acceptance. Upon this contract, then, two things are clear. (1st.) That the use of the credit contemplated by both parties, was, the drawing and delivery of bills for the purpose of their being presented to the plaintiffs to be accepted by them, whereby they would assume the liability of acceptors; and that the compensation or commission was to be for such a use, and nothing short of it; for there could be no pretence, that the mere issuing of the letter of credit, if no bills were drawn, or that if the plaintiffs should refuse to accept any drawn, the commission would then be due. (2d.) While the contract was obligatory on the plaintiffs to accept all bills so drawn and presented, it was perfectly optional with the testator, whether to use the credit, or not to use it. He might have destroyed it, or kept it in his pocket until the expiration of the twelve months, with the right to use it at pleasure; but unless he had actually used it, he was under no liability to pay any compensation to the plaintiffs. The power and the right to use it, were, therefore, totally distinct from the actual use; and the testator might desire and enjoy great benefits from possession of the mere power; but such results from its mere possession, would give no right to the plaintiffs to claim compensation. Nothing short of the exercise of that power, that is, the actual use of the credit as stipulated for, could give them any claim to the compensation agreed upon.

The question, then, is, whether there was any such use of this credit, as was contemplated as the consideration of the commission. The facts are, that the letter of credit was delivered to Mr. Forbes, who became one of the firm of Russell & Co., who were the consignees of the vessel, and on whom the testator relied to furnish the cargo, before any steps were taken to procure one. Finding it difficult or impossible to negotiate any bills under this credit, in order to procure a cargo, in the manner directed by the testator, this firm negotiated a loan of money on their own credit, on his account, with which the cargo was procured. This being done without his authority, and not being binding upon him unless ratified, they gave him notice accordingly; and, in order to provide for the contingency of his refusing to ratify this proceeding, and reimburse themselves for their advance, Mr. Forbes, then being one of the firm, drew these bills in favor of his house, and sent them to their agent here, with a letter of advice to the drawees, to be forwarded to them at London for acceptance, if the testator should refuse to ratify and provide for the loan; but to be destroyed, if he should ratify and provide for it; and, in order to preserve the usual formal regularities in such cases, the bills were charged at the current rates in the books of the firm. But the bills were never negotiated, nor for a moment out of the possession or control of the firm. The testator did ratify the loan, and pay it; and the bills were consequently cancelled here, and the plaintiffs were never notified of their being drawn, and were never called upon to accept or provide for them. Upon these facts, it is denied, that there was any

use of the credit, which entitles the plaintiffs to a commission. It is clear, that the right to use, or not to use, the credit, was entirely at the option of Mr. Lyman or his agent; and equally so, that it was optional with him to make the use of it dependent upon any contingency or condition to occur within the time limited. It is obvious, too, that any "use of the credit," which should vest a right in the plaintiffs, must be one that bound them, or made them liable to the party receiving or acting upon the credit or bills; for, unless they incurred some obligation or responsibility, their credit was not used. And, in this case, as the bills were payable at a given time after sight, it is clear, that the payees, Messrs Russell & Co., could have no claim on the bills until actually accepted; and that their only remedy, if they had finally resorted to this credit, must have been by a special action on the case, founded on the letter of credit, and their reception of the bills under it. So that the letter of credit, and not the bills, could alone give them any security.

Now, then, there is no pretence, that the cargo was purchased on the faith of this credit. It was quite otherwise. They expressly forbore to use it; they adopted other means of procuring the cargo, and pointed out other means for the testator's reimbursement of their advances. The utmost, that can be alleged, is, that Messrs. Russell & Co. would not have made the loan, but for the power they possessed of using this credit, if they should see fit so to do, on the testator's refusing to ratify the loan. But this was no more than a mere possession of the power to be used at their option, upon the happening of a contingency, but was not any actual exercise of it. Messrs. R. & Co. might well say; "We will furnish the cargo, but whether we shall use the credit, or rely upon other resources, we shall decide hereafter;" and they might be so far influenced in furnishing the cargo by the power to use the credit, that they would not otherwise have done it. And yet, as between them, or the testator, and the plaintiffs, there would have been no use of it. The benefit thus derived from the possession of the letter of credit to the testator, would have been incidental and collateral merely, not affecting the plaintiffs in the slightest degree, and not contemplated by the parties, as a subject of compensation.

Keeping in mind the distinction between the use of the credit and the mere power to use it, let us see, whether the facts show any actual use of it. It is apparent, that in the drawing and delivery of the bills to his firm, Mr. Forbes acted as the agent of the testator, as well as a partner of the house; so that there could be no possibility of misapprehension of the mutual understanding and intention of the parties. In the drawing and delivery of the bills, he was the agent of the testator, and had his power of absolute or conditional use of the credit. Did he, then, by his acts, create any actual liability or responsibility on the part of the plaintiffs, by the drawing of these bills? Or was such liability entirely contingent upon the happening of a future event? It will not be pretended, that the mere drawing of the bills, was a use of the credit; for if he had locked them in his desk, or delivered them to his firm for safe keeping merely, surely no one would say, that he had used the credit, and that the plaintiffs were entitled to their commission. What, then, were the circumstances and terms, upon which he drew and delivered these bills. He and his partners had already advanced funds for purchasing the cargo, and had elected to give the testator the opportunity of reimbursing them without using the credit. When, therefore, the bills were delivered to the house, it was upon condition, that they should not be used, and that the house should not have any claim under the letter of credit, unless the testator refused to ratify the loan, and otherwise reimburse the advances. This condition of the delivery was communicated in writing to the testator, and constituted a written contract between him and them. It is certain, therefore, that although the house were in possession of the bills and letter of credit, they could not use them, nor have any possible claim upon the plaintiffs, until the testator had made his election; and that upon such election to ratify the loan and repay the advances, the bills and letter of credit became, as blank paper,—a mere nullity. In other words, there had been no actual use of the credit, but something remained to be done, before it should be decided, whether the right of using it, should, or should not, be exercised; and the contingency, upon which it was not to be exercised, having happened, no use was ever made of it. Suppose a suit had been brought by Russell & Co., upon the credit, against the plaintiffs, before or after the testator had made his election, it is manifest, that the facts stated would prove a perfect defence. It would appear, that Russell & Co. so far from acting on the faith of the credit, or any liability of the plaintiffs, had in truth declined so to do; they had made their advances upon a different credit, and with a view to a different resource for reimbursement; and had, at the most, only a contingent right to resort to this upon the happening of an event, which had never taken place. Suppose, that Mr. Forbes had never drawn any bills, but retained the letter of credit in his possession, with the intention to draw, if the testator should not ratify the loan and reimburse the advance; could it be pretended, that the credit had been used, and that the plaintiffs were entitled to their commission? Clearly not. But the case at bar is essentially the same; for the delivery of the bills to Russell & Co., being upon the condition stated, would as

effectually prevent their recovery during the continuance of the condition, as if the bills had not been drawn; for proof of the condition would defeat any intermediate claim; and the position of Forbes, as agent of the testator, and a partner of the house, rendered it as safe and easy for all parties to protect them, by this delivery of the bills on condition, as could have been done by his omitting to draw, until the condition should terminate. And it is plain, that the reason, why he did draw, was, not to give or create any security to the firm, for that already fully existed in his power to draw, he also being one of the firm; but his only object was to facilitate and expedite arrangements here, if the loan should not be ratified. It is substantially the same thing, as if he had retained the letter of credit and bills in his own hands, to await Mr. Lyman's decision. As to the alleged notice to the plaintiffs, of the use of these bills, none was given. Forbes or Russell & Co. withheld any, not intending to notify them, or put them to any liability or trouble, unless the testator should reject the loan, and they were the only persons to notify. The letter of the executor, after the testator's death, was no notice, that any bills were, or would be drawn; for he could not know, that any would be. It was no more that a notice, that any bills drawn under the letter of credit, which the plaintiffs, doubtless, had from their agent here, would be provided for.

To illustrate the position, we take, that the cargo was not furnished on the faith of this credit, nor any such use made of it, as entitles the plaintiffs to their commission, the following may be suggested as parallel cases. Suppose, that the testator had proposed to Forbes here, to purchase the cargo by an advance or loan, such as was made, and to be repaid in the same manner; and Forbes had refused, but would agree to do it, if the testator would furnish him such a letter of credit as this, to be used, if circumstances should render it inconvenient to make the loan, or more advisable to resort to bills of exchange; and this had been done, and his house had proceeded to procure the cargo without first determining, which fund they would resort to, but had finally determined to make the loan, and not to use the credit. There would be in such a case, a purchase of the cargo, on the faith of the credit, equal to that alleged here, and as much a use of it. But no one would pretend, that the plaintiffs would be entitled to a commission, for there was no purchase on the faith of the credit; nor was there any use of it, affecting the plaintiffs for an instant. Or, suppose, the testator had agreed with Forbes, that his house should furnish a cargo, to be paid for by a shipment to be made to them by the testator, if he would furnish such a credit as this, to be used, if the shipment should not arrive within a limited time, and the cargo was furnished before the arrival of the shipment,—which, however, was received within the time; and so no bills were drawn. There would have been precisely such a use of the credit in that case, as there was in this; but surely no commission would have been earned. The only distinction between those cases and this is, that in them, the contingency, upon which the use of the credit was to depend, was contemplated by the parties, when it was delivered to the agent, so that an absolute use was not then contemplated. But it is not perceived, why one might not be created by the agent, subject to the ratification of the principal; and be as effectual, if ratified, as if originally appointed. In either case, there would no actual use of the credit until the determination of the contingency.

The position, taken by the plaintiffs' counsel, amounts to this; that if the consignee or agent be influenced by the mere power of using the credit, this is such a use, as entitles the party, giving it, to his full commission. But it seems clearly untenable. The power to use, is created by the mere delivery of the letter of credit. Its exercise is entirely at the volition of the receiver. And neither he nor his agents are bound to any immediate or absolute decision, but may exercise the right of election at any time within the period limited, and upon any reasonable contingency; and it is the exercise, and not the mere possession of the power, which gives the right of compensation. As to the language of Mr. Forbes in his deposition,—wherein he states, that the house of Russell & Co. held the bills as collateral security,—we are to look to the facts to ascertain, what he means by those terms, and not to take this mere declaration as proof of a position inconsistent with these facts. Now, upon the facts appearing in the correspondence and deposition, it is manifest, that Russell & Co. did not hold the bills as collateral security; properly speaking they merely held the right to use them as such. The bills in their hands were in themselves of no avail, to bind the plaintiffs, being after sight, and if they would have been binding on the plaintiffs, if delivered, to be sent to them, they were not so here, for they were not delivered to Russell & Co., to be sent for acceptance, but to hold until a certain contingency should happen, which was to determine, whether they should be sent or not. Russell & Co. were not, therefore, in possession of those bills, with any right whatever to use them, and never could have acquired that right upon a condition, which never happened. In truth, therefore, the only security which Russell & Co. had in the possession of the bills, was the power to use the credit, if the condition should happen, upon which the use was to depend. But the same power existed, the moment the credit was delivered by the testator to his agent. And the mere possession of the power was surely no exercise of it. In order to say properly, that the bills were

held as collateral security, it should appear, that the holder had elected to use them, by notifying the drawees, or taking the usual means to bind them. It is one thing to possess the power to use the credit, and quite another to use it by an actual exercise of the power. The mere drawing of the bills, as above shown, was no use of the credit; for they might have been locked up in Forbes's desk. Nor was the mere delivery of them into the hands of Russell & Co. such use; for the delivery was to them, as bailees, for safe keeping, merely until the happening of a contingency, which alone would authorize the use of them, and which never occurred. No moment has ever existed, when Russell & Co. could claim of the plaintiffs to accept or pay these bills. Any presentation for acceptance, would have been a violation of the trust, reposed in them by Forbes and the testator; and the facts existing would have exonerated the plaintiffs from all obligation to accept or pay, if Russell & Co. had attempted to induce or compel them to do so. The mere drawing and delivery of the bills, upon such a condition, is no more a use of the credit or the creation of a collateral security, than the intention of drawing upon such a contingency would be. Suppose, that instead of thus drawing and delivering the bills, the house had made the advance, relying on Forbes's power so to draw, in case the testator should not ratify the loan; and that it be admitted, that otherwise they would not have made the loan. There would have been just as much reliance on this credit, as collateral security, in that case as in this. In other words, the power to draw would be the collateral security, such as it was here. But would any one pretend, that it was a use of it, which entitled the plaintiffs to a commission?

The case has thus far been presented, as if Forbes and Russell & Co. were not partners, when the bills were drawn and delivered; but it is much strengthened by the consideration, that they were such. For the case, in that point of view, becomes the same, as if Forbes had merely drawn the bills and kept them in his own pocket. He and Russell & Co. were one person; and the drawing and delivery of the bills in the manner proved, amounts, in fact, to nothing more than the mere intention to draw, if the emergency should require it. It cannot be correctly said, that the contingency, upon which the bills were to be used, was a condition subsequent, and not precedent. For none of the acts, which were to be done, upon the drawing of the bills, for the purpose of creating any liability on the part of the plaintiffs, were performed. If the bills had been so drawn, the property, by the terms of the contract, was to be pledged to the plaintiffs; and bills of lading, &c., were to be made out, and forwarded to the plaintiffs in a particular manner; and they were to be notified of the drawing, &c. To constitute this a condition precedent, all the measures should have been taken to fix a present liability, with notice of the condition of defeasance; and the plaintiffs should have been informed of the drawing intended, and use of the bills, and that they should be held responsible, unless the testator should elect to ratify the loan. Instead of which, all these preliminaries were dispensed with, and the notice was deferred, until the plaintiffs' election was made. it was clearly, therefore, a condition precedent, and not subsequent. And such is the plain purport of the correspondence. [Judgment for plaintiffs.]

STORY, Circuit Justice. The first question naturally arising in this cause, is, as to the true construction of the circular of the plaintiffs, of the 1st of January, 1838, with reference to which the letter of credit in the present case was given and accepted by the testator, Lyman. By that circular, Messrs. Baring & Co. expressly stated, that "the banking commission on credits or bills, used east of the Cape of Good Hope (is) to be two per cent." The question is, what is to be deemed in the sense of this circular a use of the bill of credit? Is it the mere drawing of any bill under the letter of credit, in favor of a third person, who, upon the faith of the letter of credit, takes and receives the same for value, and is entitled to hold and use it on his own account? Or is it necessary to make the right to the commission attach, that it should be presented to Messrs. Baring & Co., and accepted and paid by them, or at least should be accepted by them? If it be necessary, that acceptance and payment, or, at least, that acceptance by them, should take place before the right to the commission attaches, it is very clear, that the present action is not maintainable; for there never has been any presentment of the bills, drawn in the present case. My opinion, however, is that neither presentment for acceptance to Messrs. Baring & Co., nor payment by them, is essential, under the terms of the circular, to give the right to the stipulated commission. In the sense of that circular, the bill of credit was used the moment any bills were drawn upon Messrs. Baring & Co. under the letter of credit to the testator, Lyman, and placed in the hands of holders, who took it for value upon the faith of the letter of credit, and thus became entitled, as such holders, to require an acceptance and payment thereof, according to their tenor, whether they were ever presented for acceptance and payment, or not. My reason is, that Messrs. Baring & Co. from the moment, that such bills were drawn and taken for value, became bound, as well to the holders, as to Lyman, to accept the bills upon presentment, and to pay them at maturity; and if they had refused, an action might have been

maintained against them, upon the promise contained in the letter of credit, not only by Lyman, but by the holders. Indeed, if the bills were made payable at a certain time after date, instead of after sight, and were received by the holders upon the faith of the letter of credit, the holders might maintain an action thereon against Messrs. Baring & Co., as upon a virtual acceptance. Such was the decision of the supreme court in the case of Coolidge v. Payson, 2 Wheat. [15 U. S.] 66, following out the doctrine of the cases of Pillans v. Van Mierop, 3 Burrows, 1663, and Pierson v. Dunlop, 2 Cowp. 571, and Mason v. Hunt, 1 Doug. 296.

It is of no consequence, what were the nature and extent, or conditions, of the contract between the holders and Lyman, under which the bills were received, provided Messrs. Baring & Co. became for a single hour liable to accept and pay the same to the holders; for every such contract would be res inter alios acta, with which Messrs. Baring & Co. could have nothing to do, and of which they could have no power to avail themselves, not standing in privity with the parties thereto. The question is not, what were the duties or liabilities between Lyman and the holders, under the bills and contract connected therewith; but whether Messrs. Baring & Co. were liable thereon. The use made of the bills by the holders for value, after receiving them, was of no consequence to Messrs. Baring & Co., or whether any use was made by them at all; but whether any responsibility attached to them for a moment, to accept or pay the bills under the letter of credit. The commission is, by the very terms of the circular, to arise from the use of the letter of credit, and not from the use afterwards made of the bills drawn under it. Suppose the bills had been unconditionally transferred to third persons, so as to become their absolute property, and afterwards, upon a new negotiation, they had been delivered up and cancelled by the parties before acceptance, would not the right to the commissions have attached? Suppose the bills had been accepted by Messrs. Baring & Co., and afterwards and before the maturity, they had been taken up and paid by Lyman, would not the like right to the commission have attached? The commission was a commission, not accruing upon the payment of the bills, but designed as an indemnity and compensation for the risk run, and responsibility incurred by Messrs. Baring & Co. and their duty to accept and pay the bills, if drawn under the letter of credit. If ever there would be perfect justice in the application of the maxim, Qui sentit commodum sentire debet et onus, the present case, under such circumstances, would seem to furnish a fit occasion to apply it. I agree, that if Messrs. Baring & Co. were never responsible to the holders of these bills at all, and that no right attached in favor of the holders, for a moment, to bind them to the acceptance thereof, then they have no claim for the commission; for they have not earned it, and the letter of credit has not been used. On the other hand, if they are entitled to any commission, they are entitled to the whole commission, for there can be no apportionment of the contract at law. If the bills have been subsequently withdrawn, or paid by Lyman, that cannot vary the rights of Messrs. Baring & Co., if any rights once attached. It is a mere waiver by the holders and Lyman, of the right to require an acceptance and payment of the bills, instead of Lyman's providing for a subsequent reimbursement, after payment thereof by Messrs. Baring & Co. In the receipt of Lyman, of the 7th of June, 1838, he acknowledges the receipt of the letter of credit, and among other things, he promises "to provide, in London, sufficient funds to meet the payment of whatever may be negotiated by virtue thereof, at the maturity of the bills." Now, it seems to me, that the word "negotiated" is here used in precisely the same sense, as the word "used" in the circular. A bill is properly said to be negotiated, when it has passed into the hand of the payee, or indorsee, or other holder for value, who thereby acquires a title thereto.

In my judgment, therefore, the whole case turns upon the consideration, whether these bills were, at any time, in the hands of the holders, valid subsisting bills, taken by them for value, and held, either absolutely, or as security, for advances made to Forbes on account of Lyman; or whether they were merely lodged in the hands of Russell & Co., not to give a present title of any sort thereto, as security, or otherwise, but merely as a future springing, contingent title, dependent upon future occurrences, and in the meantime to be held as a mere special bailment in trust and for the benefit of Forbes or Lyman. In other words, the question seems to me (as I intimated at the argument), to resolve itself into this point, whether the bills were in the hands of Russell & Co. upon a condition precedent, or a condition subsequent. If the former be the true view of the facts, then they took no title whatsoever in the bills, except in the event, that Lyman should refuse to ratify the acts of Forbes, as to the advances and arrangements made for the benefit of Lyman, in lieu of the bills. On the other hand, if the latter be the true view of the facts, then a present title to the bills passed to Russell & Co., subject to be divested by the acceptance and ratification by Lyman of the acts and arrangements of Forbes. And to the consideration of this point I shall now address myself. It is not an unimportant circumstance, in examining this point, that Forbes, the agent of Lyman, and a partner in the house of Russell & Co., through whom the whole transaction was negotiated, and who certainly stands before the court as a disinterested witness, explicitly states in

his deposition, that "the bills were held by Russell & Co. as their security for the advances they had made. They had no orders to advance funds for Mr. Theodore Lyman; but, thinking it was for his benefit, they did it, and held the bills then as their security." Now, if this statement is to be relied upon, as the true exposition of the transaction, it puts an end to the controversy; for if the bills were held by Russell & Co., as a present security for their advances, they had a present title to them, and a present right, against Messrs. Baring & Co., to demand the acceptance and payment thereof; otherwise they would be no security at all. Still, Forbes may mistake in the matter; and, therefore, we are led to examine, whether the actual transactions, as disclosed in the correspondence, and other transactions in Canton at the time, do, or do not, confirm his recollection and interpretation thereof. And I must say, that upon a full examination of all the acts and correspondence of the parties, it seems to me, that Forbes is fully borne out and confirmed in his statement by them; and that every other view thereof would be somewhat forced and strained, if not unnatural. In the first place, the bills were actually indorsed and sent by Russell & Co. to their agent in Boston, to await the final decision of Lyman, and if he did not confirm the proposed arrangement, then to be used and forwarded to London. Certainly, this would seem to be the exercise of a virtual authority and title over the bills, as owners, and could, in no just sense, be deemed a mere agency for the drawer, or for Lyman. It vested a title to the bills in favor of the agent at Boston, good against Messrs. Baring & Co., and against Lyman, and indeed against all the world, except Russell & Co. The natural effect of the indorsement, was that of an indorsement, conferring a present legal title to the agent, to hold and use the bills for the benefit of Russell & Co., and not a mere right to hold the same, as bailee, for the benefit of Lyman, until he had done some future act to transfer the title to Russell & Co. In point of fact, also, although Lyman's executor, (he having died on the 24th of May, 1839, before the advices were received,) assented to the arrangement, made by the agent, Forbes, when the advices were received, and this assent was immediately made known to the agent of Russell & Co., in Boston; yet the bills of exchange were not thereupon surrendered, but they remained in the possession of the agent of Russell & Co. in Boston, (as appears by his letter of that date,) up to the 11th of July, 1840; and, indeed, it is stated, that the bills were not cancelled until December, 1840, after the last remittance had reached Canton. Now, if the bills were intended to take effect solely in the case of Lyman's refusal to assent and confirm the arrangement of Forbes, and not before, as soon as Lyman had so assented to and confirmed it, they ought to have been given up. But the parties did not so act upon the case; nor did Lyman require the bills to be then given up. On the contrary, they were retained without any objection; and this can scarcely be accounted for, except upon the supposition, that they were retained as security for the due fulfilment on the part of Lyman, of the arrangement with Forbes by repayment at Canton, of the moneys advanced by Russell & Co. In this view, the retainer of the bills assumes a natural character. In any other view, it would seem inconsistent with the true rights and duties of the parties. Now, let us suppose, that after Lyman had acceded to the arrangement of Forbes, the moneys advanced by Russell & Co. had never been repaid to Russell & Co., either by the death of Lyman, or by the remittance being lost on the voyage, or in any other manner, would it not be clear, that the bills would be valid and obligatory against Messrs. Baring & Co., in the hands of the agent of Russell & Co., as well as against Lyman? If so, how can they be said not to be a security for the due fulfilment of the arrangement of Forbes? And if they were a security, must they not be so from the time they were actually drawn and delivered to Russell & Co. up to the time, when the advances were repaid in Canton by Lyman? If they were designed as a security in this way, is it not equally clear, that Russell & Co. were, in the meantime, holders of the legal title for value?

Let us, in the next place, see, how the case stands upon the correspondence. The first letter of Russell & Co. to Lyman, of the date of the 18th of March, 1839, at Canton, says; "Your funds, under the credit of £25,000 at five shillings per dollar, with proceeds of rice and specie, we estimate, after deducting expenses of the ship, at about $106,000, which will not fill the ship by about one hundred tons. Freight could not be procured at over twenty dollars per ton; and if we had authority to fill up with freight for Boston, at market rate, we should doubt the expediency of so doing, fearing it might interfere with her ultimate destination. There is no demand, whatever, for exchange at the very unfavorable rate at which we have concluded to place your bills; and we have obtained a loan for the purpose of getting your ship away. But as our Mr. Forbes had no orders to resort to this, he authorizes us to draw your bills at the market rate, and to give you your choice of paying for them in London, or returning the proceeds of the £25,000 to us in dollars, without delay, paying at the rate of nine per cent. per annum, interest, until the amount is refunded. We shall, in either case, charge our usual commission of one per cent. for drawing, and shall send the bills and letter of advice to our agent in Boston, to be cancelled, upon your agreeing to replace the funds, or to be forwarded to London for our account, if you conclude to meet them there." Again, on the 4th of May, 1839, they wrote to

Lyman as follows: "In our letter of the 18th ult. (meaning the 18th of March), we indicated the course, which we then thought of pursuing with regard to your funds. The present aspect of affairs, and the prospect for the future, is much changed since that date, and a different disposition of your bills would now be much more for our interest. But we confirm, what we then said, and now recapitulate more distinctly the arrangement, which we authorize our agent, (Mr. John M. Forbes,) to carry into effect. Our R. B. Forbes has drawn on Messrs. Baring Brothers & Co. under this date, the following bills (enumerating them), proceeds to your credit at five shillings per dollar, making £25,000 sterling. These bills will be forwarded to Mr. T. W. Forbes, Boston, accompanied by the letters of advice. Should you determine to provide for them in London, they will be sent forward immediately. But should you prefer to replace the amounts to your debit, as per statement, annexed in this place, paying interest at the rate of nine per cent. per annum from this date, you can do so," &c. "When the remittance is realized in Canton at the market value, we shall consider your charge of interest at an end, and not till then." The letter of advice of Russell & Co. to their agent in Boston, of the same date, which accompanied the bills, also of the same date, says: "On receipt of this letter, you will please call on Mr. Lyman, or his agent, and offer him a choice of the two plans indicated in our letter to him, one of which is, to allow the bills to be disposed of, as you may deem most for our interest, by selling them in the United States, and investing the proceeds in specie for our account, or forwarding them to London, to be there invested in specie for our account; or on the other hand, to cancel the bills in the United States, upon Mr. Lyman's giving you full security, that the amount advanced to him, as per memorandum at foot, shall be returned to us in specie, the interest at the rate of nine per cent. per annum from this date, (May 4th,) to be charged, until the loan is realized in Canton, the dollars being disposed of at the market rate."

Now, it seems to me manifest, that this correspondence, in its very terms and imports, demonstrates, that the parties understood the bills to be in the hands of Russell & Co. as the true owners thereof for value, as a present, immediate, and continuing security, for the advances made by them under the letter of credit, and the instructions for the voyage; that an option was intended to be given to Lyman to reimburse Russell & Co., by a remittance of the amount, in specie, to Canton; and when that amount was received in Canton, and not till then, the interest was to cease, and the bills were to be cancelled. In this view, the correspondence amply confirms the deposition of Forbes, (the agent of Lyman,) that the bills in the intermediate time were in the hands of Russell & Co., as their security; and, of course, were their property, and were negotiated to them. Indeed, the language of the correspondence shows, that Russell & Co. treated the bills as their own in point of right and power of disposal, and only offered an option to Lyman to deliver them up, upon his acceding to another proposed arrangement, which was in the nature of a condition subsequent. It can make no legal difference in the case, that the drawing of the bills was never notified to Messrs. Baring & Co. That was not necessary to give them a legal validity, or to bind the latter to accept and pay them. It is sufficient, that they were bills drawn and negotiated for value under the letter of credit, and that the letter of credit was "used" for this purpose. Suppose, after the acceptance of the proposals by Lyman's executor, the terms had not been complied with, can there be a doubt, that Russell & Co. could have enforced their rights under the bills against Messrs. Baring & Co.? They had nothing to do with the new proposals to Lyman, nor with his acceptance or refusal of them. Nor would it have been any justification of their refusal to accept the bills, if Russell & Co. and Lyman had differed on the point, whether the proposals were accepted or not, or what was the true interpretation thereof. If the bills were once negotiated for value, to Russell & Co., conditionally or otherwise, as a present subsisting security, until they were actually cancelled by agreement of the parties, Messrs. Baring & Co. were bound by them. And I cannot but think, that the whole correspondence shows, that so all the parties understood the matter.

It was suggested at the argument, that R. B. Forbes, having become a partner in the house of Russell & Co. at the time, when the bills were drawn and delivered to Russell & Co., might vary the case favorably to Lyman. I am wholly unable to perceive, how any such effect can arise. R. B. Forbes was still Lyman's agent, and the bills were drawn as a security, not to Forbes alone, but to the firm; and the other members had a vested title in the same. There is nothing in the law, which disables any partner in a firm from being the agent of a third person, in drawing bills in favor of the firm, for advances made to such third person, under an express authority. A firm may negotiate its own paper to one partner, and the latter will thereby become the owner thereof; and on the other hand, a firm may take a separate negotiable security from one of its partners, and hold and use the same for its own purposes. A fortiori, the firm may do so, where he acts as agent of a third person.

Upon the whole, upon the best reflection which I have been able to bestow upon this subject, my opinion is, that the plaintiffs, upon the facts, are entitled to recover the full amount of the commissions; and that they ought to have judgment accordingly.

Case No. 984.

BARING et al. v. PUTNAM.

[1 Holmes, 261.][1]

Circuit Court, D. Maine. Oct. Term, 1873.

EXECUTORS AND ADMINISTRATORS — ADMINISTRATOR DE BONIS NON—ACTION AGAINST FOR MONEYS PAID BY MISTAKE TO PREDECESSOR.

An action lies in favor of a banker against an administrator de bonis non, as such, to recover money credited by mistake to the intestate during his life, and drawn by, and paid to, the original administrator in his representative character, in the belief that it belonged to the estate.

[See Owen v. Blanchard, Case No. 10,628; Calder v. Pyfer, Id. 2,299.]

Action at law heard by the court upon an agreed statement of facts. The plaintiffs, [Thomas Baring and others,] who were foreign bankers having accounts with Charles Thompson of Kennebunk, Me., and also with Charles Thompson of Topsham, Me., by mistake, credited on their books to Charles Thompson of Topsham, the defendant's intestate, a considerable sum received by them, instead of to Charles Thompson of Kennebunk, to whom it belonged. Before either account was settled, Charles Thompson of Topsham died; and his original administrator, as such, drew from the plaintiffs all the funds standing on their books to the credit of his intestate, including the amount erroneously credited as above; neither party being aware of the error. Subsequently the original administrator resigned, and the defendant [William L. Putnam] was appointed administrator de bonis non. Afterwards, on settlement of the account of Charles Thompson of Kennebunk, the error was discovered; and thereupon the plaintiffs brought this action against the defendant, as administrator de bonis non, to recover the amount erroneously paid to the original administrator.

The defendant contended that the only claim of the plaintiffs was against the original administrator personally, and that the action did not lie. [Judgment for plaintiffs.]

S. C. Strout and H. W. Gage, for plaintiffs.

William L. Putnam, for defendant.

SHEPLEY, Circuit Judge. Whatever property or money is lawfully recovered or received by the executor or administrator, after the death of his testator, or intestate, in virtue of his representative character, he holds as assets of the estate; and he is liable therefor, in such representative character, to the party who has a good title thereto. This doctrine was established by the supreme court of the United States, after full consideration of the conflicting cases upon the subject, in the case of De Valengin v. Duffy, 14 Pet. [39 U. S.] 283, 290.

This money was deposited with the plaintiffs, and was placed on their books to the credit of the intestate prior to his decease, and so stood at and after his decease. No one but the personal representative of Charles Thompson could withdraw the funds; and it was the duty of his administrator to collect the balance which he found standing to the credit of his intestate. In the absence of any knowledge on the part of the administrator of the mistake, he acted lawfully and in the pursuance of his duty in the execution of his trust, and not tortiously, in collecting the money. He could only do this upon proof of his appointment and qualification as administrator. No credit was given to him personally, nor was any money paid to him in any other way than in his representative character. The old doctrine seems to have been that, upon any promise made after the death of the testator or intestate, the executor or administrator was chargeable, if at all, as of his own goods, and not in his representative capacity. More recent cases have settled that an executor or administrator may, in some cases, be sued in his representative capacity on a promise made by him in such capacity, and a judgment had against the assets of the estate. This, however, is limited to cases where the transaction which constituted the cause of action arose in the lifetime of the deceased, and does not extend to actions for goods sold and delivered to an executor, or work and labor done for him as executor. In such cases, the defendant is charged personally, and not in his representative character. If, after the decease of Charles Thompson, the Barings had by mistake placed this sum to the credit of H. P. Thompson as executor, and he had collected it, a different question would have been presented, which it is not necessary in the present case to decide, as the case of De Valengin v. Duffy, 14 Pet. [39 U. S.] 283, is in the opinion of the court conclusive, when applied to the facts in this case.

Judgment for plaintiffs, with interest from date of demand made upon the estate.

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

Case No. 985.

BARING et al. v. WILLING et al.

[4 Wash. C. C. 248.][1]

Circuit Court, D. Pennsylvania. April Term, 1820.

TRUSTS—ENFORCEMENT IN EQUITY—APPOINTMENT OF AGENT—LIEN OF AGENT.

1. Jurisdiction of courts of equity over trusts, and confirming the appointment of an agent made by a majority of the trustees, or in appointing an agent by the court.

[Cited in Curtis v. Smith, Case No. 3,505.]

[See Batesville Inst. v. Kauffman, 18 Wall. (85 U. S.) 151; Watson v. Jones, 13 Wall. (80 U. S.) 721; U. S. v. Hoyt, Case No. 15,410; James v. Atlantic Delaine Co., Id.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

7,177; Harrison v. Rowan, Id. 6,143; Ketcham v. Mobile & O. R. Co., Id. 7,737; Dias v. Brunell, 24 Wend. 9.]

2. In what cases the court will not direct an agent to deliver up the papers in his possession; as, if he has a lien.

[See Irvine v. Dunham, 111 U. S. 327, 4 Sup. Ct. 501.]

[In equity. Bill by Alexander Baring, Henry Baring, and others against Thomas M. Willing and Charles Willing Hare to confirm the appointment of an agent nominated by the trustees under the will of William Bingham, other than the defendant trustee Hare. Decree confirming nomination.]

WASHINGTON, Circuit Justice. The object of this bill is to obtain a decree of the court, to confirm the appointment of the agent nominated by the plaintiffs and the defendants, Thomas M. Willing, to transact the business of the estate of William Bingham deceased, and to execute the trusts created by his will so far as may be necessary, or to appoint some other person to act in that capacity; and also to compel the defendant, Charles W. Hare, to deliver over the papers belonging to the estate of the testator to the agent so to be appointed. The will of William Bingham, which is made an exhibit in the cause, devises the whole of his estate, real and personal, to the plaintiffs and to the defendants, in trust, after the payment of the debts and legacies, to divide the same into five equal parts, and to stand seised of two of the said parts, for the use of his son, then and still a minor, and of the other three for the use of his daughters, the wives of the plaintiffs Alexander and Henry Baring, the rents and profits, interest, and dividends, to be paid to them equally, and after their deaths to be divided equally amongst their children respectively. The interest, dividends, rents and profits of the two parts given to his son, to be employed for his maintenance and education, and the surplus, if any, to be invested in the American funds until the son should attain his full age. The will further empowers the trustees, who are also constituted executors, to sell and convey the whole, or any part of the real estate, and to invest the proceeds in the American funds in the names of the trustees, for the uses above mentioned. It further empowers them to appoint an agent or agents to transact all business necessary for the execution of the trusts, and declares that they shall not be answerable for the acts of their agent, nor should one trustee be answerable for the acts of the others. This will was duly proved, and the plaintiffs and defendants accepted the trusts. The bill states that the defendant, C. W. Hare, was appointed by the other trustees the agent under the will to execute the trusts, and that he continued to discharge the duties of that office until the 1st of January, 1819; having in September preceding addressed a letter to the other trustees, in which he declared his determination to withdraw from the agency after that period, and requesting that another agent might be appointed to succeed him, and to receive from him the papers of the estate, the entire custody of which had been with that defendant. In consequence of this intimation, the other trustees nominated John H. Powell to act as the agent, and to receive the papers. This nomination was disapproved of by Charles W. Hare; and he therefore refused to concur in the appointment of the agent, or to deliver over the papers to him. The bill further states, that the Messrs. Baring are subjects of the king of the United Kingdoms of Great Britain, &c. and resident there; that the other plaintiff is a resident of the state of Maryland; and the defendants of this state. That the defendant, C. W. Hare, refuses to have any communication or correspondence with the other defendant, T. M. Willing, or to deliver over to the agent so nominated by the other trustees, such of the papers as concern the duties of his agency; in consequence of which, and of the refusal of Mr. Hare to concur in the appointment of the agent nominated by the other trustees, the estate of Mr. Bingham is exposed to great embarrassment and loss, and the trusts of the will cannot be executed. These charges in the bill are in substance acknowledged by the separate answers of the defendants, and there is in reality no matter of fact material to the determination of this cause in dispute between the parties. The questions are, whether the plaintiffs are entitled to the relief prayed in the bill, or to any other, and what relief? It is in the first place to be remarked, that the bill contains no charge against the integrity or solvency of Mr. Hare, nor against his capacity to execute the duties of trustee and executor. In all these respects, and in any and every other which concerns his character and conduct generally, or in relation to the management of the affairs of this estate, he stands before the court free from all exception. The only charge is his refusal to concur with the other trustees in appointing the agent nominated by them to execute the will, and his refusal to deliver the papers to such agent; and the court can entertain no doubt but that this refusal has been induced by the best motives, and by a conscientious devotion to what this gentleman believes to be the real interest of the persons interested in the estate of the testator.

All this being admitted, the first question is, whether the court can, and ought to interfere in the appointment of an agent for the purposes mentioned in the will? The power of the court to appoint an agent, and the expediency of doing it in this case, are both denied by the defendant, Charles W. Hare. As to the power. Courts of equity have always claimed and exercised exclusive jurisdiction in cases of trusts and over the con-

duct of those appointed to execute them. This has never been disputed ground. No other tribunal can so properly direct the manner of executing them; or inquire into and correct abuses where there has been, or is likely to be, mismanagement by the trustees. No other court can so conveniently provide against those unforeseen casualties which may defeat the will of the party who created the trust. It would be a reproach upon the administration of justice, if a court of equity did not possess these powers, since it must be admitted on all hands, that they cannot be exercised by courts of common law. We are therefore of opinion, that upon the reason of the case, as well as upon authority, a court of equity has a power to enforce the execution of trusts in such manner as may be most likely to accomplish the object of the party who created them; in cases where, without such interference, the trust would be imperfectly executed, or not executed at all.

2. Is it expedient in this case that the court should interfere in the appointment of an agent to represent the trustees, and to execute the trust? The will authorises the trustees to appoint such an agent. Such a power was foreseen by the testator to be absolutely necessary to enable the trustees to act with effect. Two of them resided in England; one in the state of Maryland; and the other two in Pennsylvania. They had authority to sell the whole, or any part of his real estates, and to invest the proceeds of such sales, as also the income of the part given to the infant son, beyond what might be necessary for his education and support, in the American funds. The joint act of the trustees would be necessary for the performance of many of those duties, the difficulty and delay in obtaining which might frequently be productive of serious injury to the estate. The want of this co-operation of the trustees, and of an agent duly appointed, has given rise to this suit; and the obstacles to the execution of the trust charged in the bill, are examples of many others which might, and most probably would, occur, in the further discharge of the duties of the trustees, if the interference of this court should be withheld. It happens from an unfortunate misunderstanding between the two trustees who reside in this state, where the business is principally to be transacted, that they have no intercourse with each other, and one of them refuses to unite in the appointment of the agent selected by the others. The court cannot inquire into the cause of the difference which exists between these gentlemen, and most certainly imputes blame to neither. The consequences nevertheless are to be deplored, and so far as they do of necessity prevent the proper execution of the trusts, it is the duty of this court to avoid them.

3. The next question respects the person to be appointed the agent. If this subject came before the court, unaffected by any previous nomination of a majority of the trustees, it would be referred to the master to report to the court a fit person to execute this office, subject to the exceptions which any of the parties might choose to take. Upon such a reference, the choice of a majority of those whose agent the person appointed was to be, would unquestionably be respected, provided it should appear to the court, that he was in all respects unexceptionable. But no such reference is in this case necessary, since it appears that an agent has been nominated by four-fifths of the trustees, and that he continues to be the object of their choice. The objections stated by one of the defendants to this nomination are not, in the opinion of the court, such as ought to disappoint the wishes of so great a majority of the persons whose duty and interest it is to select a person in all respects fit for this office. A nomination so made ought to be decisive with the court.

4. As to the papers, there is no doubt but that all the trustees are entitled to free access to them, and that the agent ought to be put into possession of such of them as concern the business which he will have to transact. But the court is not disposed, unless it should hereafter appear to be necessary, to order the papers generally to be delivered over to the agent, until the claims of the defendant, who now has the custody of them, against the testator's estate, are settled and discharged.

This cause came on to be heard the twentieth day of April, in the year one thousand eight hundred and twenty, upon the bill, answer, replication and exhibits filed, and was then argued by counsel. Whereupon it is decreed and ordered, that the nomination of John Hare Powel, as agent for the estate of William Bingham deceased, in the bill mentioned by four-fifths of the trustees of the same, be, and the same is hereby confirmed. And it is further decreed and ordered, that the defendant, Charles Willing Hare, do permit the plaintiffs, and the other defendant, Thomas M. Willing, or either of them, and any person authorized in writing for this purpose by them, or either of them, at all reasonable hours, to have free access to the books and other papers in his possession, belonging to the estate of the said William Bingham deceased, for the purpose of inspecting and taking copies of the same if desired; and also that the same access be permitted to the agent aforesaid, and to any person appointed for this purpose in writing by the said agent. And it is further decreed and ordered, that the said Charles Willing Hare do deliver to John Hare Powel, the agent aforesaid, or to his order in writing, such papers of the said estate as may be necessary to enable the said agent to transact the business of the said estate, or as the honourable Richard Peters, one of the judges of this court, may direct to be so delivered, the said agent or person

receiving the said papers giving a receipt for the same to the said Charles Willing Hare; and leave is reserved to the plaintiffs or defendants to apply to this court from time to time for such further order in the premises as may be necessary.

BARK.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the names of the vessels; e. g. "The Bark Princess Alexandra. See Princess Alexandra," Case No. 11,430.]

Case No. 986.

BARKER v. BARKER'S ASSIGNEE.

BARKER v. SMITH et al.

[2 Woods, 87;[1] 12 N. B. R. 474; 2 Amer. Law T. Rep. (N. S.) 386.]

Circuit Court, D. Louisiana. Nov. Term, 1874.

BANKRUPTCY — FRAUDULENT CONVEYANCE BY BANKRUPT — CONCEALMENT OF CONVEYANCE — WHO MAY IMPEACH—CREDITOR WITHOUT LIEN—ASSIGNEE IN BANKRUPTCY.

1. As a general rule, a voluntary conveyance, made by a grantor in easy circumstances and in no pecuniary strait, to his wife or children, cannot be impeached, because voluntary, at the instance of creditors who became such long after the execution of the conveyance.

2. To impeach a conveyance made under such circumstances, it must be shown to have been fraudulent, or made with a view to protect the property conveyed from future debts.

3. A deed not at first fraudulent may become so by being concealed from the public, so that the grantor gets credit by reason of his supposed ownership of the property conveyed.

[See Warner v. Norton, 20 How. (61 U. S.) 448.]

4. The Code of Louisiana gives no effect to an unregistered act of alienation as against bona fide purchasers or creditors.

5. But a general creditor of the grantor cannot proceed to set aside a conveyance, either really or constructively fraudulent, unless he has a lien on the property conveyed, or has reduced his claim to judgment.

[Cited in Re Gurney, Case No. 5,873.]

6. But this rule does not apply to an assignee in bankruptcy. The adjudication of bankruptcy arrests the proceedings of creditors to obtain judgments. The assignee may therefore proceed to impeach a deed of the bankrupt as fraudulent, although the creditors have not reduced their claims to judgment, and although they have no specific lien upon the property conveyed.

[Cited in Re Gurney, Case No. 5,873; Re Werner, Id. 17,416; Miller v. Jones, Case No. 9,575; Lloyd v. Hoo Sue, Id. 8,432; Platt v. Preston, Id. 11,219.]

[See Pratt v. Curtis, Case No. 11,375; Cady v. Whaling, Id. 2,285; Allen v. Massey, Id. 231; In re Dunkerson, Id. 4,156; Smith v. Ely, Id. 13,044.]

[Appeal from the district court of the United States for the district of Louisiana.]

In bankruptcy. This was a bill in equity filed in the district court [by Abraham Barker against the assignee of Jacob Barker, a bankrupt, Samuel Smith, and others, to set aside a sale by the assignee to the defendant Smith,] and brought to this court by appeal. The case was submitted to the circuit court upon the pleadings and evidence for final decree. [Bill dismissed.]

John A. Campbell, for complainant.
A. Micou, for defendant.

WOODS, Circuit Judge. The facts of the case are these: On the 30th of September, 1857, Jacob Barker was seized in fee and was in possession of a certain parcel of real estate in the city of New Orleans. On that day, by his deed of that date, he conveyed the real estate to his son, Abraham Barker, the complainant. Although the deed was absolute on its face, yet the conveyance was made to Abraham Barker in trust for Elizabeth Barker, wife of Jacob Barker, and mother of complainant. The consideration, as claimed by complainant, was $8,000, made up by the cancellation of two notes for $1,300 each, with interest, made by Jacob Barker and held by Elizabeth Barker, the payee, by the payment by the trustee for Jacob Barker of a balance due Barker Brothers, and a credit for the remainder in favor of Jacob Barker on the books of the trustee.

The deed was not recorded until the 14th of July, 1869. In the meantime, about the year 1861, Mrs. Elizabeth Barker died, having provided by her last will that the whole income of her estate, or so much thereof as might be necessary, and, if required, the principal, or some part thereof, should be devoted to the support of the said Jacob, and such members of the family as might, in his discretion, require it.

Both before and after the death of Mrs. Barker, Jacob Barker collected the rents and paid the taxes upon the property, he being a resident of New Orleans, where the property was situated, and Abraham Barker, the trustee, a resident of Philadelphia.

In June, 1867, Jacob Barker was adjudged a bankrupt by the United States district court of Louisiana, and placed upon his schedules, through inadvertence and mistake, as he testifies, the parcel of real estate conveyed to complainant in 1857, and afterwards it was sold by the assignee to the defendant, Samuel Smith.

Jacob Barker, for many years prior to the date of his deed to Abraham Barker, had been a prominent business man and banker in New Orleans, of great reputed wealth, and so continued until the date of his bankruptcy in 1867.

The prayer of the bill is that the sale to Smith may be set aside and the property reconveyed to the complainant, or that he may receive the proceeds of the sale made to Smith.

Samuel Smith, one of the defendants, files an answer, in which he says he is willing to

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

abide by the order of the court in the premises, and if the court shall decide that the sale to him should be annulled, consents thereto on the repayment to him of the purchase money.

The assignee defends against the bill on two grounds: (1) Because the deed to Abraham Barker was simulated and intended to defraud the creditors of Jacob Barker; and (2) Because the failure to record the deed rendered it null and void; and as the assignee was appointed before the deed was recorded, he can, as the representative of the creditors, insist on the invalidity of the deed. These defenses present the points that demand our attention.

First. Is the deed of September 30, 1857, void because executed in fraud of creditors? There is not a word of evidence in the record to show that in 1857, Jacob Barker had a creditor in the world. On the other hand, all the facts in the case are consistent with the theory that, being a man of large means and independent fortune, in no pecuniary strait, and wishing to put in the hands of a trustee trust property held by him for his wife, he made the deed in question. As all the parties were members of the same family, it was not thought necessary to transact the business with the formality and precision usually employed when the transaction is between strangers. Had it really been the purpose of Jacob Barker to defraud his creditors, he would have been careful to see that the deed was executed and recorded in strict compliance with law. But it is not necessary to argue the question of fraudulent intent against creditors, because there is, as just stated, no proof that there were any creditors when the deed was executed and delivered.

Can those who were not creditors at that time, but who became so years afterwards, complain of the deed as fraudulent? It seems clear that generally they cannot. The doctrine established by the supreme court of the United States is, that a voluntary conveyance made by a person not indebted at the time, in favor of his wife or children, cannot be impeached by subsequent creditors on the ground of its being voluntary. It must be shown to have been fraudulent or made with a view to future debts. Sexton v. Wheaton, 8 Wheat. [21 U. S.] 229; Hinde v. Longworth, 11 Wheat. [24 U. S.] 199. See, also, Bennett v. Bedford Bank, 11 Mass. 421.

There is nothing in the record which tends in the slightest degree to show that any of the creditors of Jacob Barker, who are represented by the assignee, were such at the date of the deed to Abraham Barker, nor that the purpose of that conveyance was to defraud any of his present creditors.

If the present creditors have any right to complain, it is not because the deed of 1857 was made in actual fraud of those to whom Jacob Barker was then indebted, but because it was not recorded, and because they have given him credit on the strength of his presumed ownership of the property conveyed thereby.

A deed, not at first fraudulent, may become so by being concealed, because by its concealment, persons may be induced to give credit to the grantor. Sands v. Hildreth, 2 Johns. Ch. 35; Hildeburn v. Brown, 17 B. Mon. 779.

A deed concealed from the public, the grantor remaining in possession and acquiring credit on the strength of his supposed ownership of the property, is fraudulent. Worseley v. De Mattos, 1 Burrows, 467; Hungerford v. Earle, 2 Vern. 261; Leukener v. Freeman, Freem. Ch. 236; Constantine v. Twelves, 29 Ala. 607.

This brings up the second question, whether the failure to record the deed avoids it as to creditors.

The Code of Louisiana gives no effect to acts of alienation as against creditors or bona fide purchasers, unless they have been regularly registered. This is conceded; but counsel for complainant says that the creditors, as against whom an unrecorded deed is void, are those only who have obtained a judgment which created a lien or privilege on the land, and not general creditors. Whether the provision of the law is thus limited is the precise question now for solution.

The general rule is, that a creditor cannot proceed to set aside a conveyance of real estate, either really or constructively fraudulent, unless he has a lien thereon, or has reduced his claim to judgment, and the fraudulent conveyance is an obstacle to a sale on execution. Jones v. Green, 1 Wall. [68 U. S.] 330; Colman v. Croker, 1 Ves. Jr. 160; Brinkerhoff v. Brown, 4 Johns. Ch. 671.[2]

Conceding that a general creditor having no lien or judgment could not file a bill to set aside as void an unrecorded conveyance of real estate, and to subject the property to the payment of his debt, does this rule apply to an assignee in bankruptcy?

In the case of Carr v. Hilton, [Case No. 2,436,] a bill in equity was sustained by an assignee to subject property conveyed by the bankrupt in fraud of his creditors to administration for their benefit. In many other cases this has been done.

It would appear that an adjudication of bankruptcy removes the necessity for a lien or judgment before a bill can be filed to subject the property fraudulently conveyed, or when the transfer is for other reasons invalid. If the rule were otherwise, then no property conveyed by a bankrupt in fraud of his creditors, or by any void or invalid conveyance, unless the creditors had reduced their claims to judgment, could be subjected by the assignee in bankruptcy to the payment of debts. For after an adjudication of

[2] [See, also, Day v. Washburn, 23 How. (64 U. S.) 309.]

bankruptcy, no creditor whose debt is provable is allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the bankrupt's discharge shall be determined. Bankrupt Act, [March 2, 1867, c. 176, 14 Stat. 526,] § 21.

The question under consideration was decided by Woodruff, circuit judge, in Re Leland, [Case No. 8,234,] in the case of an unrecorded mortgage of chattels. The learned judge says: "It is claimed, because the mortgage is valid without being properly filed as against the bankrupts, it is, therefore, good as against their assignee in bankruptcy, and that no creditor but a judgment creditor can impeach or deny its validity.

"The proceedings in bankruptcy arrest the ordinary proceedings of creditors to obtain judgments, and thereby to secure an appropriation of the debtor's property to their use, and the assignee in bankruptcy represents them. He is trustee for them, and whatever right they might assert, if they had obtained judgments, he may, for their benefit, assert, whether it be to set aside conveyances by the bankrupts which are fraudulent and void as against creditors, or which are otherwise as against them invalid."

The case stands thus: Jacob Barker, in 1857, was seized of the real estate in dispute. He attempted to convey it by a deed which his grantee failed to record, and he remained in possession. This failure to record the deed made it inoperative as against subsequent purchasers and creditors. So far as their rights are involved, the title still remained in Jacob Barker until his bankruptcy in 1867. By the adjudication, the rights of the creditors were vested in the assignee. The want of judgments in their favor is supplied by the adjudication of bankruptcy, which authorizes the assignee to file a bill to subject the property to administration, just as if he were a judgment or lien creditor. But the property has been delivered to him without suit, and its proceeds are in his hands for distribution. If it is rightfully thus, if under the circumstances of this case by his bill in equity, he could have subjected the property, then it follows, his rights are superior to the rights of the grantee of the unrecorded deed to the property, and that the bill of the latter to set up his claim is without equity.

The bill must therefore be dismissed.

Case No. 987.

BARKER et al. v. BARKER'S ASSIGNEE.

[2 Woods, 241.][1]

Circuit Court, D. Louisiana. April Term, 1876.

EQUITY—BILL OF REVIEW—THE RECORD.

A bill of review can only be sustained upon the ground of error apparent on the record, and the record consists of the pleadings, proceedings and decree, and does not include the evidence.

[Cited in Irwin v. Meyrose, 7 Fed. 536.]

In equity. Bill of review [by the heirs of Elizabeth Barker against the assignee of Jacob Barker, a bankrupt.] Heard for final decree on bill, demurrer, plea and answer of defendant. The bill of review was filed for the purpose of reversing what was alleged to be an erroneous decree of the district court, after the time for appeal had passed by. The bill of review set out the substance of the original bill, and averred, that after service of process, the defendant had filed an answer which contained a general denial of all the averments of the bill; that upon the final hearing, the court had rendered a decree in favor of complainants against the defendant for the sum claimed by them, to wit, $7,300, and directed the defendant to place the complainants as ordinary creditors upon the tableau of distribution. The bill of review alleged, that Jacob Barker was seized before his bankruptcy of certain real estate in the city of New Orleans, on which complainants had a lien in the nature of a tacit mortgage for the amount of their claim; that the property was sold by the assignee of Barker, and the complainants were allowed by the order of the court to set up their claim to the fund, the proceeds of said sale. The error assigned by the bill of review was, in not recognizing the lien or privilege of the complainants on this fund, and in not directing the claim to be paid out of the proceeds of the property on which the alleged tacit mortgage rested, instead of simply directing them to be placed on the tableau of distribution as general creditors. [Bill dismissed.]

Henry B. Kelly and D. C. Labatt, for complainants.

John A. Campbell, for defendant.

WOODS, Circuit Judge. A bill to review can only be sustained on the ground of error in law, apparent on the record. 1 Spence, Eq. Jur. 393. On a bill of review, nothing can be examined but the pleadings, proceedings and decree, which, in this country, constitute what is called the record. The proofs cannot be looked into as they can on appeal. Putnam v. Day, 22 Wall. [89 U. S.] 60. It is well settled, that a bill of review for error, apparent upon the decree, must be for error in point of law, arising out of facts admitted by the pleadings or recited in the decree itself, as settled, declared or allowed by the court. O'Brien v. Connor, 2 Ball & B. 146; Mellish v. Williams, 1 Vern. 166; Webb v. Pell, 3 Paige, 368; Tommey v. White, 1 H. L. Cas. 160.

The complainants, while conceding these to be the rules governing bills of review, claim that after allowing the debt of the complainant to be a valid claim against the estate of Barker, it was error to refuse to

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

give it a lien and privilege on Barker's real estate, or the fund which was produced by its sale; that upon the record it appears that if the claim were allowed, the lien followed as a matter of law. I cannot assent to this conclusion. The lien upon the real estate of Jacob Barker claimed by the original bill is based upon the averment that the money which was the basis of the claim was the separate, dotal and paraphernal property of Elizabeth Barker, his wife, and as such, came into his hands under the law of Louisiana. This averment is denied by the answer. Besides, it is nowhere directly averred in the original bill that Jacob Barker ever had any real estate to which the tacit mortgage could attach. It is true, it is averred that Norton, his assignee, had sold and disposed of all the real estate in New Orleans surrendered by Jacob Barker. But this averment, and all others of the original bill are distinctly traversed by the answer. While, therefore, the court may have found that Jacob Barker's estate was indebted to the complainants, it may also well have found that he owned no real estate on which the alleged tacit mortgage could rest. We cannot look into the proofs. We must take the bill, answer, replication and decree to see whether there is any error apparent on their face. Excluding the evidence, it is impossible to say that there was any error in the decree. As it does not so appear on the face of the record, and can be made to appear in no other way, the bill of review must be dismissed at complainant's costs.

Case No. 988.

BARKER v. DALE et al.

[17 Pittsb. Leg. J. 19; 3 Pittsb. Rep. 190; 8 Morr. Min. Rights, 597.]

Circuit Court, W. D. Pennsylvania. 1869.

MINING LEASE—FAILURE TO COMMENCE OPERATIONS.

[1. A mining lease "for the sole and only purpose of mining and excavating for petroleum, coal," etc., vests in the lessee a corporeal interest in the premises demised, to recover which he may maintain an action of ejectment.]

[2. A clause in a lease of lands for mining purposes that the lessee "shall commence operations by" a specified date is not a condition the non-performance of which determines the lessee's rights, or works a forfeiture of his interest under the lease.]

[See Price v. Nicholas, Case No. 11,415.]

[3. The time fixed in a mining lease within which the lessee must commence operations is of the essence of the contract, so far as to enable the lessor, after its expiration, to maintain an action against the lessee for the non-performance of his stipulation, but not so as to divest his interest under the lease.]

[4. A lease of land "for the sole and only purpose of mining and excavating for petroleum, coal," etc., subject to the lessor's "use of the same for the purpose of tillage," confers on the lessee the exclusive right of mining on the land for the substances and minerals specified.]

[At law. Action of ejectment by Barker against Dale.] On the 8th day of December, 1865, Alanson Clark leased to the plaintiff the land in dispute by written lease "for the sole and only purpose of mining and excavating for petroleum, coal, rock or carbon oil, or other valuable mineral and volatile substances; * * * to have and to hold the said premises for the said purposes only, unto the said Barker, his heirs, executors, administrators and assigns, for 25 years ensuing the said lease," for which Barker was to deliver to Clark "one half the oil, etc., found;" the said Barker "to commence operations by the first of April, 1866." The lessor warranted the title. Barker never took possession of or commenced to work on the land under the lease. Sometime after this, Clark leased one acre of the said land to Dale, the defendant, who obtained a large producing well, upon learning which Barker brought this suit in ejectment for the land. These facts were in substance conceded. The defendant requested the court to charge the jury in answer to the five following points.

C. B. Curtis, for plaintiff.
Geo. H. Cutler, for defendants.

McKENNAN, Circuit Judge, answered the points as follows:

1st. The right acquired by plaintiff under the agreement of December 8th, 1868, in the premises therein described, was an incorporeal right only, and upon such right ejectment will not lie, and therefore the plaintiff cannot recover.

Answer by the Court.—The first prayer is refused. We are of the opinion that by the lease, dated December 8th, 1865, a corporeal interest in the business therein described was vested in the plaintiff, which is the proper subject of an action of ejectment.

2nd. That the clause in the agreement that the plaintiff was to commence operations by the first day of April, 1866, is a condition subsequent, and his failure to perform this condition determined his right under the agreement, and hence he cannot recover.

Answer by the Court.—This prayer is also refused. The clause by which the plaintiff was to commence operations by the first day of April, 1866, is not a condition, the non-performance of which determined the plaintiff's rights, or worked a forfeiture of his interest under the lease.

3rd. The time mentioned in the agreement within which the plaintiff was to commence operations was of the essence of the contract, and the plaintiff not having commenced operations within that time, he cannot recover.

Answer by the Court.—The time fixed in the lease within which the plaintiff was to commence operations is of the essence of the contract, so far as to enable the lessor, after its expiration, to maintain an action against the plaintiff for the non-performance of his

stipulation, but not so as to divest his interest under the lease.

4th. The agreement in question did not give the plaintiff any exclusive right of mining and excavating for petroleum on said premises, and hence the plaintiff cannot recover.

Answer by the Court.—This prayer is refused. The lease grants to the plaintiff, for a determinate term, the premises in dispute, for the purposes therein stated, subject to lessor's "use of the same for the purpose of tillage;" and this is exclusive of any right of the lessor to mine or excavate within their defined limits, for petroleum, coal, rock oil, carbon oil, or other mineral or volatile substances.

5th. If the jury believe from the evidence, that prior to the lease of September 14th, 1868, to West and another, the plaintiff had abandoned all his rights under the agreement, and all intention of mining or excavating for oil, etc., on the premises therein described, then he cannot recover.

Answer by the Court.—This prayer is allowed. The jury must be satisfied by the evidence that the plaintiff intended to surrender his lease, and to abandon altogether the commencement or prosecution of mining or excavating operations, and that his acts touching such alleged abandonment were perpetrated with such intention.

The jury, after a few minutes' consultation, returned a verdict for the plaintiff, with nominal damages and costs.

BARKER, (DOYNE v.) See Case No. 4,055.

BARKER v. HENRY. See Case No. 989.

Case No. 989.

BARKER v. JACKSON et al.

[1 Paine, 559.][1]

Circuit Court, D. New York. Oct. Term, 1826.

COURTS—FOLLOWING STATE PRACTICE—CONSTITUTIONAL LAW—STATUTES—RETROSPECTIVE ACT.

1. Where a statute of the state of New York, affecting the title to lands, had been in existence for thirty years, and had been uniformly sanctioned by the decisions of the courts of the state: *Held*, that this court was bound by such decisions, it not being objected to the statute that it was repugnant to the constitution, laws, or treaties of the United States, but only to the constitution of the state.

[See Ohio Life Ins. & Trust Co. v. Debolt, 16 How. (57 U. S.) 431.]

2. The act of the state of New York of the 24th of March, 1797, entitled "An act to settle disputes concerning the titles to lands in the county of Onondaga," is in effect only a statute of limitations, and a valid and constitutional law.

3. The commissioners appointed under this act were not a court within the meaning of the 41st section of the constitution of the state. They acted in the character of arbitrators, to hear disputes that should be voluntarily submitted to them; and if their award was not specially agreed to by the parties, it had no binding effect upon the right. It was not necessary, therefore, that they should proceed according to the course of the common law or by jury trial.

4. This act is a law of the land within the meaning of the 13th article of the constitution, although it does not extend over the whole state, but is confined to lands in the county of Onondaga.

5. Being a statute of limitations only, it relates to the remedy and not the obligation of contracts, and therefore is not within the 10th section of the 1st article of the constitution of the United States.

[See Samples v. Bank, Case No. 12,278; Johnson v. Bond, Id. 7,374; Bacon v. Howard, 20 How. (61 U. S.) 22; Sturges v. Crowninshield, 4 Wheat. (17 U. S.) 206.]

6. Not being retrospective, nor taking away any existing rights, it is no sufficient objection that it does in some measure affect such rights. It affects them by hastening a party in the assertion of them. Most statutes of limitation are subject to the same objection.

Error to the district court of the northern district of New York.

At law. This was an action of ejectment brought [by Henry and others against Joseph Barker] to recover the possession of a part of lot number twelve, in the township of Hector. The premises were originally granted by the state as military bounty lands. At the trial in the court below, the jury found a special verdict, containing the following facts: On the 8th of July, 1790, a patent of said lot was granted by the state to John Folliard, a soldier, who conveyed the same to Abraham Nelson, a native of Ireland, who came to the United States in 1778, and resided here until 1798, when he died. The lessors of the plaintiff were his heirs; but they remained British subjects, having never been in this country. On the 12th day of April, 1800, the commissioners, appointed under the act of the state of New-York, entitled "An act to settle disputes concerning the titles to land in the county of Onondaga," passed March 24th, 1797, (1 Rev. Laws, 213,) made the following award: "Having heard the proofs and allegations, and having examined the titles of such of the parties interested in lot number twelve, in the township of Hector, in the county of Cayuga, as have appeared and exhibited claims to the said lot; and having also inspected the records and files remaining in the office of the clerk of the county aforesaid relative thereto, and due deliberation being thereon had, we, the commissioners appointed by and in pursuance of the act entitled 'An act to settle disputes concerning the titles of lands in the county of Onondaga,' do, in pursuance of the authority given us in and by said act, award and determine, that Benjamin Willard is entitled to and stands seised in his demesne, of an absolute estate of inheritance in and to one undivided moiety of said lot; and that Daniel Wells, James Wells, William Wells,

[1] [Reported by Elijah Paine, Jr., Esq.]

and Israel Wells, children of Israel Wells, deceased, are entitled to and stand seised in their demesne, as of an absolute estate of inheritance in and to the other moiety of said lot, subject to the reservations, provisions, and conditions contained in the original grant." Which award was duly entered in a book provided for that purpose, and filed in the clerk's office, agreeably to the provisions of the third section of said act, and to which award no dissent has been entered. The lessors of the plaintiff did not appear personally before the commissioners at the time of making the award, nor did any one appear on their behalf, although duly cited, according to the provisions of the 6th section of said act, by a publication in the newspapers. The defendant was in possession of the premises in question, under a title regularly deduced from the title obtained under the award of the commissioners. The verdict also found the said law of 1797, and the 41st article of the constitution of the state of New-York, adopted in 1777, and the 2d and 5th articles of the bill of rights of that year. The court below decided, that the said law and the acts of the commissioners under it were unconstitutional and void, and gave judgment for the plaintiff.

A. Van Vechten and A. Gibbs for the defendants, contended: That the act appointing the commissioners is unconstitutional, and that all the proceedings under it are null and void.

1. That the act being retrospective in its operation, stands opposed to that part of the constitution of the United States which prohibits individual states from making any law impairing the obligation of contracts.

2. That the act is in contravention of the 13th article of the constitution of New-York, as it deprives the lessors of their freehold without the judgment of their peers, and without being called upon to answer by due course of law.

3. That the act is repugnant to the 41st article of the constitution of New-York, and also is prohibited by the 7th article of the constitution of the United States, as it institutes a new court, whose proceedings are not in accordance with the course of the common law, and inasmuch as it abolishes the trial by jury.

S. M. Hopkins and J. King for the plaintiff, insisted: That the act in question, so far as it regards the present action, is an act of limitation merely; that it only affects the remedy of the lessors of the plaintiff, without necessarily involving the question as to the validity of the award of the commissioners.

[Judgment of the district court reversed, and judgment for defendant ordered.]

THOMPSON, Circuit Justice. This case comes up on a writ of error to the district court for the northern district of this state. The judgment of the court below was given upon a special verdict found by a jury. By which finding and the judgment of the court thereupon, as appearing in the record, the only question presented to this court is, whether the act of the legislature of the state of New-York, entitled "An act to settle disputes concerning the titles to lands in the county of Onondaga," passed 24th March, 1797, (1 Rev. Laws, 213,) and the acts and doings of the commissioners under that law are void, as being repugnant to the constitution of the state of New-York, or of the United States. This act and the proceedings of the commissioners were adjudged by the court below to be unconstitutional and void. If this judgment is to be upheld and sanctioned, and the titles in that part of the state usually called the "Military Tract," again thrown open to litigation, it ought to be called for by the most cogent and unyielding considerations. This act has been in force for nearly thirty years, and the value of the lands settled and held under its provisions is almost incalculable. It is not undeserving of consideration, that this act, before it could become a law, must have received the approbation of the council of revision, composed of the governor, the chancellor, and judges of the supreme court of the state, whose peculiar duty it was to examine and guard against any infringement of the constitution. And what is of still more importance is, that whenever the validity of this law has been in any manner called in question, it has uniformly received the sanction of the courts of justice in this state; and indeed such has been the universal understanding in favour of its validity, that the opposite opinion has not been deemed worthy of an argument. The only case in which the point was directly made, was that of Jackson v. Griswold, 5 Johns. 139, decided in the year 1808. And this case was submitted without argument, and the point passed over by the court as not susceptible of a doubt.

But if the question was doubtful, and even if the weight of argument was against the validity of the law, after the lapse of thirty years, and the uniform sanction of the courts of the state, this court would feel itself bound by the construction of the state courts. This law, in its operation and application to the rights of parties, has never been considered by the state tribunals as any thing more than a statute of limitations; and such decisions upon a local law which forms a rule of property, have always been held by the courts of the United States in the highest respect, and in fact have been considered as having a decisive and controlling influence. This rule is very broadly laid down by the supreme court in the case of Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 159, where it is said, "This court has uniformly professed its disposition in cases depending on the

laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle supposed to be universally recognized, that the judicial department of every government where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal to correct such misunderstanding. We receive the construction given by the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws or treaties of the United States." It is not here said in terms, that the courts of the United States will follow the construction given by the state courts to their statutes, when the objection grows out of a supposed conflict between the law and the constitution of the state, but the principle embraces such a case, and all the reasoning from it necessarily leads to the same result. As, therefore, the settled construction given to this law by the state courts is, that it is merely a statute of limitations, and in no manner repugnant to the constitution, I might dispense with any further examination of the question, so far as the state constitution may be involved; and indeed, if it is only a statute of limitations, the constitution of the United States can have no bearing upon the question. A due respect, however, for the opinion of the judge who has pronounced this law unconstitutional and void, may make it proper that I should give to the question some further consideration.

The principal ground of objection to this law, arises out of the 41st article of the constitution of New-York, by which it is declared, "that trial by jury, in all cases in which it has heretofore been used in the colony of New-York, shall be established and remain inviolate for ever. And further, that the legislature of this state shall at no time hereafter, institute any new court or courts, but such as shall proceed according to the course of the common law." The first inquiry that seems naturally to arise is, whether the board of commissioners appointed and organized under this act, was a court within the sense and meaning of the article in the constitution above referred to. If it was, it is very certain that their proceedings were not according to the course of the common law, and its institution was in violation of the constitution; if it was not a court, the constitution has no bearing upon it. It is very evident that the legislature did not consider it a court, nor that the commissioners were in any sense to be considered officers, any more than arbitrators or referees would be so considered; for they were named and appointed in the act; whereas if they were officers, they must have been appointed by the council of appointment, according to the provisions of the 23d article of the constitution; and to consider this board a court and its members not officers, would be contrary to all legal understanding of the character of the members of a court. Nor does the act in any part of it give to this board the title, or denomination of a court; or vest in the commissioners, the usual and ordinary powers of a judicial tribunal. They had no authority to compel parties to appear before them, nor are they required to give them personal notice; all appearances were voluntary, and optional in the parties interested in the land. The decision of the commissioners is called an award, or determination; and not a judgment or decree. No power is given to the commissioners to enforce their award or determination, by execution or otherwise. They were to cause their award to be entered in a book for that purpose to be provided; and with this ended their functions. And the act declares, that such award or determination shall, after the expiration of two years after the making thereof, become binding and conclusive to all persons, except such as, conceiving themselves aggrieved, shall within the two years dissent from the same, and give notice thereof to the commissioners, or file the same in the office of the clerk of the county of Onondaga; and shall also, if not in the actual possession of the land, within three years after such award, commence a suit either at law or in equity, to recover the land, or to establish his or her right to the same, and prosecute the same to effect; in which case the award shall not operate as a bar to the suit. The suit required to be commenced within the three years, was to establish the right. This of course could not have been settled by the award; nor can this suit so required to be commenced, with any propriety be considered an appeal from the determination of the commissioners. It is not so called in the act; nor is any mode prescribed for the appeal, or any tribunal designated to which it should be made. But an original suit is required to be brought; and if this is done, and the dissent entered within the time limited by the act, the award has no effect upon the rights of the parties.

That these commissioners were acting in the character of arbitrators, to hear and examine disputes and controversies respecting the titles to these military lands, that should

be voluntarily submitted to them, and without any binding effect upon the right, unless specially agreed to by the contending parties, is very evident from the proviso to the 3d section of the act; "That if the parties in any case will enter into an agreement before the commissioners, to abide by their determination, then, and in every such case, the award and determination of the commissioners shall be final and conclusive, as to such parties, and their heirs for ever." Such an agreement entered into before a court, in the exercise of judicial inquiry into the rights of parties, would certainly be an anomaly in the administration of justice. That the award per se has no binding effect on the rights of parties, is further illustrated by the provisions of the 7th section, which declares that, "if the party dissenting shall be in the actual possession of the premises, then the award so dissented from shall, as to the party dissenting, be considered of no effect. And unless the party in whose favour such award shall be made, shall within three years commence a suit either at law or in equity, to recover the land, or to establish his right to the same, and shall prosecute such suit with effect; then such person in whose favour such award is made, and his heirs, shall be for ever barred of all right, title, or claim, to the land so awarded." Here, again, even the party having the award, is required to bring a suit to establish his right, and if he neglects so to do for three years, he is barred of all right. The range of examination which the commissioners were to make, shows they were not acting as a court, and judging upon the rights of parties litigating before them; for where no adverse claim appeared, they were required to make an entry to that effect in their books. They could not be considered as arbitrators, except in the cases coming under the proviso to the 3d section of the act; and are therefore denominated commissioners, to hear, examine, award, and determine, disputes and controversies respecting the titles to these lands. The powers here given are adapted to the various objects of inquiry committed to the commissioners. The peculiar state and condition of the titles to these military lands, rendered some special legislation on the subject indispensable. The evils existing, appear from the recitals in one of the laws in relation to these lands, which required all deeds which had been given for the same, to be deposited in a public office, (Act Jan. 8, 1794:) "Whereas it is represented to the legislature, that many frauds have been committed respecting the titles to the lands granted by this state as bounty lands to the officers and troops, &c. by forging and antedating conveyances, and by conveying the said lands to different persons, and by various other contrivances, so that it has become very difficult to discover in whom the legal title to some of the said lands is now vested," &c. To meet these evils as far as was practicable, the law now in question, among others, was passed; not instituting a court for this special purpose;—the existing courts of justice in the state were amply sufficient, so far as mere judicial proceedings were necessary;—but commissioners were appointed to hear, and examine into, the disputes and controversies respecting these lands; as a kind of preliminary step to the commencement of a suit to try the right. Their award or determination, however, had no influence upon the right, unless the parties entered into an agreement before them, that it should have a binding effect. A dissent suspended the award, and it became operative only in case of neglect to bring a suit within the time limited; and of course, the act is nothing more in its application to these lands than a statute of limitations. If these commissioners did not form a court within the constitutional, and common law sense of such a tribunal, it was clearly no violation of the constitution, that a jury was not called in to pass upon the matters of fact submitted to the commissioners. The constitution secures the trial by jury in such cases only, where it had been used in the colony of New-York. So far as these commissioners may be considered arbitrators, a jury would not be required; no such usage was ever heard of under the colonial government, and so far as respects their powers other than those of arbitrators, the commissioners formed a new tribunal, unknown to the colonial government; and no trial by jury could of course ever have been used in such case under that government.

A still more untenable objection against this law has been taken, as being in violation of the 13th article of the constitution; which declares, that "no member of this state shall be disfranchised, or deprived of any of the rights and privileges secured to the subjects of this state by this constitution, unless by the law of the land, or the judgment of his peers." The objection is, that the law in question is not a law of the land, because it is not general and extending over the whole state; but is confined to lands in the county of Onondaga. There is certainly no colour for this objection requiring any serious consideration. If well founded, it would strike at a great portion of the statutes of the state; and if this is only a statute of limitations, no one is deprived by the award, or has his freehold taken away without the judgment of his peers. All these rights remain untouched, if the suit be brought within the time limited by the act. And this is an answer to the objection, that the right of trial by jury as secured by the constitution of the United States, is taken away. The proceedings of the commissioners are not a trial within the meaning of the constitution. The act expressly requires a suit to be brought to establish the right: and where it

is a suit at law, the right of a trial by jury remains unimpaired by this law.

Nor does this act violate that provision in the constitution of the United States, (article 1, § 10,) which prohibits the states from passing any law impairing the obligations of contracts. Statutes of limitation relate to the remedy, and not to the obligation of a contract. This distinction is well settled by the decision of the supreme court of the United States; and that the state legislature may pass such laws, under such modification as their wisdom should direct,—[Sturges v. Crowninshield,] 4 Wheat. [17 U. S.] 206,—without infringing the constitution of the United States.

No objection can be made to this law, because it does in some measure affect existing rights: It is not retrospective, and does not take away from a party any existing right: It only hastens him in the assertion of such right. But if he brings his suit within the time limited, his title is tried in the same manner as if this law had never been passed. This may be thought to be a rigorous statute of limitations, but that was a matter resting in the sound discretion of the legislature; and with which the courts of justice have no concern. The condition of the titles to the land in the military tract, called for some strong legislative measures. Most statutes of limitation do in some measure affect existing rights. Among others, the law of this state limiting the period for bringing claims and prosecutions against forfeited estates, (Act March 28, 1797, 1 Rev. Laws, 128,) is made in terms to apply to existing rights. It declares, that no persons who now have any estate, right, or title, to land supposed to have been forfeited, &c., shall, after the expiration of five years from the passing of the act, sue, or maintain any action for the recovery of the same. So the act requiring all deeds for military bounty lands to be deposited in the clerk's office, though not a statute of limitation, yet applies to existing deeds. It declares, that all deeds heretofore made for such lands, shall within a limited time be so deposited; and that all deeds not deposited, shall be adjudged fraudulent and void: And many other statutes of a like character might be referred to. Yet the validity of these laws has not been questioned because they affect existing rights: They are all prospective in their application to such rights, and the effect upon them grows out of a neglect to comply with some new duty, required thereafter to be performed.

I am accordingly of opinion, that the judgment of the district court be reversed, and judgment entered for the defendant in the court below.

BARKER, The JOSHUA. See Case No. 7,547.

BARKER v. LADD. See Case No. 17,352.

Case No. 990.

BARKER v. LADD et al.

[3 Sawy. 44;[1] 6 Chi. Leg. News, 280.]

Circuit Court, D. Oregon. May 7, 1874.

ABATEMENT AND REVIVAL—CONTINUATION OF ACTION BY ADMINISTRATOR—LIMITATIONS.

1. The right of an administrator to prosecute an action commenced by the deceased. [judiciary act of 1789,] (1 Stat. 8, [page 90,] § 31,) is upon the condition that the cause of action survives, and that depends upon the local law—in Oregon, upon sections 365 and 366 of the Civil Code.

[Cited in Butler v. Poole, 44 Fed. 587.]

[See Hatfield v. Bushnell, Case No. 6,211.]

2. Section 34 of the Oregon Civil Code, which limits the time to one year, within which the court may allow an action to be continued by the administrator, applies to actions in this court. 17 Stat. 197, § 5, [Act June 1, 1872.]

[3. Cited in Kelly v. Herrall, 20 Fed. 365, to the point that, where an executor voluntarily appears in the action, judgment may be given for or against him with the same effect as if he had been brought in by scire facias.]

At law. On September 11, 1871, Abner H. Barker commenced an action in this court against William S. Ladd, John C. Ainsworth, Simeon G. Reed and Robert R. Thompson, for the recovery of $55,860.96 damages, alleged to have been incurred by him in the sale of his stock in the O. S. N. Co. by reason of the misrepresentations of the defendants concerning the same, while acting as directors of said company, and died on March 14, 1872; and on April 6, 1874, Joseph Simon was duly appointed administrator of said Barker's estate. Upon these facts, on April 16, 1874, said Simon applied for leave to continue the action as administrator of the deceased. [Motion denied.]

Joseph N. Dolph, for the motion.

William Strong, contra.

DEADY, District Judge. This application is opposed by the defendants upon the ground that it was not made within a year from the death of the plaintiff, Barker.

It is admitted that under the law of the state (Code Or. §§ 365, 366), and section 34 of the judiciary act [of September 24, 1789,] (1 Stat. 81, [92,]) that this cause of action survived.

The right of an administrator to maintain an action for such a cause is given by the law of the state; and such law, by said section 34, is made "the rule of decision" in this court.

Section 31 of the judiciary act provides that upon the death of a party to an action in the United States courts, before final judgment, "in case the cause of action doth survive," the administrator of such deceased party may prosecute or defend, as the case may be.

Neither this or any other law of the United States declares what causes of action shall

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

survive; therefore, under section 34 aforesaid, the law of the state furnishes the rule on the subject.

Under this section 31 the representative of the deceased party may voluntarily appear and make himself a party to the suit, and if he neglects or refuses to do so, the adverse party may, if he desire it, have a scire facias against him to compel him to do so. No time is limited within which these proceedings may take place. But the law of the state (Code Or. § 37) also provides that no action shall abate by the death of a party; and that "in case of the death of a party, the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representative."

This provision in relation to the time within which the application must be made, is a rule of practice, and under section 5 of the act of congress of June 1, 1872, "to further the administration of justice," (17 Stat. 197,) governs the practice in this court.

It is clear, then, that this motion comes too late and cannot be allowed. While both the law of the United States and the state authorize the administrator to become a party to the action in place of the deceased party, the law of the state goes farther, and in effect prescribes that this right must be exercised within one year, or else it is taken away or barred. It is a statute of limitations upon the right to maintain or continue this action.

Under a similar provision in the New York Code, (section 121,) in Re Borsdorff, 17 Abb. Pr. 171, it was held that the motion would not lie after the expiration of a year from the death.

The motion is denied, with costs.

Case No. 991.

BARKER v. LAWRENCE.

[Betts' Scr. Bk. 258.]

Circuit Court, S. D. New York. May 25, 1852.

CUSTOMS DUTIES—GOODS OBTAINED BY BARTER—APPRAISAL BY DEPUTY APPRAISER.

[1. Under the customs duties acts of 1842 (Aug. 30; 5 Stat. 548) and 1846, (July 30; 9 Stat. 42.) the principal appraisers must act in person, and upon their own inspection, in every case; and an appraisal made by them on the inspection and certificate of a deputy appraiser only is inoperative and void.]

[Distinguished in Focke v. Lawrence, Case No. 4,894.]

2. In an action to recover back customs duties illegally exacted, it appeared that the importation consisted of goods obtained by barter on the west coast of Africa, for which the master, who had no invoice, made one after his arrival in port, which invoice was received by the customs officers. The deputy appraiser inspected the invoice, and from his knowledge of the articles imported, but without instructions, added more than ten per cent. to the invoiced value, and a penalty of twenty per cent. was consequently added and exacted. The deputy sent the invoice to the regular appraisers, two of whom sanctioned it by endorsement; and in this condition it was returned to the collector, who assessed the duties and imposed the penalty. *Held*, that the appraisal was void as being the act of the deputy and not that of the principal appraisers.

[At law. Action by James W. Barker against Cornelius W. Lawrence, collector of the port of New York, to recover back customs duties illegally exacted. Judgment for plaintiff.]

Before BETTS, District Judge.

This was an action to recover back an extra charge of duty, with penalty upon an importation of barwood and palm oil, made by the plaintiff in the bark Chancellor, from the west coast of Africa, in the month of March, 1849, at a time when Mr. Lawrence was collector of this port. The cargo was obtained by barter with the natives, and the master had not, therefore, any invoice upon his arrival in New York. He made one himself, however, after his arrival home, which was received by the officers of the customs, from the necessity of the case, and an entry of the cargo permitted, without any compliance with the second section of the act of March [1,] 1823, [3 Stat. 729.] The deputy appraiser, Mr. Phillips, upon inspection of the invoice, and from his knowledge of the articles imported, added to their invoiced value 351 dollars on the barwood, and 900 on the palm oil; and, as those sums increased the value of the invoice more than 10 per cent., the penalty of 20 per cent. was added and exacted, together with the regular duty on the increased value; the two sums, principal and interest, amounting to 928 dollars and 68 cents. Upon the trial of the cause. Mr. Phillips, the deputy appraiser, was called as a witness by the plaintiff, and he testified that he himself added the increased values to the invoice without instructions from Mr. Lawrence, the collector; that he (Mr. P.) had then sent it to the regular appraisers; two of them gave it their sanction, by endorsing their initials upon it; and in this condition, and thus perfected, it was returned to the collector, and in his office the duties were assessed, and the penalty imposed. Being asked by the plaintiff's counsel, why he increased the invoice value of the barwood and palm oil, he answered that he did not consider the invoice as exhibiting the fair market value of those articles at the principal markets upon the west coast of Africa, and that he increased the values, in obedience to the requirements of law, in order to bring them up to the usual standard.

The district attorney, in his defence, relied upon the appraisement as conclusive evidence of value, under the acts of 1846 [July 30, 9 Stat. 42] and 1842, [Aug. 30; 5 Stat. 548;] but Mr. Ely, for the plaintiff, contended that the appraisement was void, for irregularity, and that, therefore, the invoice exhibited the only value upon which the duty could be lawfully assessed. That a

deputy appraiser has no authority for making appraisements in any case, and that, in this instance, the principal appraisers merely adopted the appraisement made by Mr. Phillips, the deputy, and that too without any personal examination of any kind by the principal appraisers, who relied exclusively upon the accuracy of the deputy's judgment.

These points having been argued, and the various acts of congress applicable to the subject referred to, by the counsel, His honor, Judge BETTS, ruled that the appraisement in this case was irregular and wholly void, and that Mr. Lawrence was not justified in increasing the value of the invoice, or adding the penalty to the duties. That the supreme court of the United States had decided in the case of Greely v. Thompson, 10 How. [51 U. S.] 225, that the principal appraisers must act in person, and upon their own inspection, in every case, and cannot adopt the certificate of a deputy, whether accurate or not, as their own, without a violation of duty; and, hence, that any appraisement made in this form must be inoperative and void. In this case the judge held that there must be a verdict for the plaintiff to the full extent of his demand. He added to his remarks, also, that under the present requirements of the law, as expounded by the supreme court, it would be generally impossible to assess the duties in this port in any manner, except by invoices. But over this matter, he said, the courts had no power, but, if there was an evil in the way, congress alone could remove it. The district attorney excepted to the ruling of the judge, stating that he would bring the case up for reversal upon a bill of exceptions.

Verdict for the plaintiff, $982.68.

Case No. 992.

BARKER v. MARINE INS. CO.

[2 Mason, 369.] [1]

(Circuit Court, D. Rhode Island. Nov. Term, 1821.

MARINE INSURANCE—SHIPPING—SALES—PURCHASE BY AGENT OF SELLER.

1. A master of a ship who sells a cargo at public auction, after an abandonment to the underwriters, and buys it in at the sale to prevent a loss, does not become owner of the property thereby, so as to acquire thereby an insurable interest.

2. A master of a ship cannot become a purchaser at a sale of the property, which is sold by his authority as agent of the owners.

[Cited in The Tilton, Case No. 14,054.]

[See Glover v. Ames, 8 Fed. 351.]

[See note at end of case.]

3. If property is put up at auction by a master of a ship as agent of his owners, and bid in by him to prevent a loss, it is in contemplation of law no sale of the property.

At law. Assumpsit [by James Barker against Marine Insurance Company] on a policy of insurance dated the 2d of June, 1821, whereby "Robinson Potter for account of James Barker, or Robinson Potter, or both, made assurance," &c. "lost or not lost, arrived or not arrived, 4000 dollars, at and from Bristol in England, to a port of discharge in the United States, on cargo on board the brig Tom Hazard." The loss alleged was a total loss by the perils of the sea, in foundering at sea. Upon the trial of the case upon the general issue, the following facts were admitted or proved. The ship Aristomenes and cargo, belonging 3-4 to Robinson Potter, and 1-4 to Robert Robinson, and commanded by the plaintiff, early in the year 1820, sailed on a voyage from Newport to New-Orleans, where she unloaded her cargo and took on board another cargo for Greenock in Scotland, and there she safely delivered this cargo, and sailed from thence to Stockholm with another cargo, and after delivery of it took on board a cargo of iron for account of the owners, and sailed from thence for the United States. In the course of the homeward voyage the ship met with heavy disasters, and in consequence of distress was obliged to make a port of necessity, and put into Bristol in England, in October, 1820. She was there surveyed, and found so disabled and injured, as not to be worth repairing, and was accordingly condemned and sold for the benefit of the owners and all others concerned. The master set up the cargo of iron for sale at public auction, deeming this the best for all parties, but finding it could not be sold without a sacrifice, he bought it in to prevent a loss by the public sale; and afterwards in April, 1821, shipped it, part in the brig Tom Hazard, and part in another vessel, for the United States. The Tom Hazard foundered at sea on her voyage home, the other vessel arrived safe. The plaintiff wrote to his owners an account of all his proceedings; and they in December, 1820, abandoned to the underwriters on several policies, which had been underwritten on the Aristomenes and cargo; and the abandonments were accepted by the underwriters long before the present policy was underwritten; and they have received on account all the salvage from the Aristomenes and cargo. The iron shipped on board the Tom Hazard was consigned to Messrs. R. Potter and R. Robinson, (the owners of the Aristomenes and cargo) and expressed on the bill of lading to be 3-4ths for the former, and 1-4th for the latter. Upon these facts a verdict was taken for the plaintiff, subject to the opinion of the court upon the question, whether on the facts the plaintiff had an insurable interest. If not, then the verdict was to be amended, and entered for the defendants. [Verdict amended, and entered for defendants.]

Pitman & Webster, for plaintiff.
Hunter & Searle, for defendants.

STORY, Circuit Justice, (after stating facts.) The sole question in this case is,

[1] [Reported by William P. Mason, Esq.]

whether the plaintiff has an insurable interest. It is contended, that the plaintiff has an insurable interest; 1. By virtue of his purchase at the sale at Bristol; 2. As trustee for the underwriters, and having a special interest in the safety, in consequence of his responsibility for the proper management of the property. I lay out of consideration, altogether, the question, whether there might not have been a valid insurance of this property for the underwriters, the abandonment having been accepted by them, and of course the property having vested in them, because this insurance purports only to cover the interest of the parties named in it; and is not made "for whom it may concern."

As to the first point, it appears to me, that the sale wrought no change whatsoever in the title of the property. It was a merely inoperative act, leaving the property exactly where it found it. It is impossible, that a person can at the same time be buyer and seller; and a person, who acts as agent in selling, cannot upon the known principles of law become a purchaser at the sale. This doctrine was acted upon by this court in the case of Church v. Marine Ins. Co., [Case No. 2,711,] and the cases there cited; and I see not the slightest reason to change the opinion then expressed. In truth, it is clear from the facts of this case, that the master did not contemplate this as a purchase on his own private account (which by the rules of law he would be prohibited from making); but as a purchase for the benefit of the owners. He bought in the property with the sole view of preventing a sacrifice of it, and a loss to the owners, whoever they might be. In so doing, he did nothing more than his duty; but it is a misnomer of the transaction to call it a sale; it was the prevention of a sale by the master. The property never passed from the owners; and the case stands exactly the same, as if the property had been bid in by the owners themselves.

Then setting aside all consideration of the sale, how does the case differ from the ordinary case of a master entrusted with the property of his owners. It will not be pretended, that a master ex officio is entitled to make insurance for his owners; and if he is not, I do not perceive, how the case is varied in respect to underwriters, becoming owners by an abandonment in the course of the voyage. It is true, that the master was intrusted with the care of this property for the owners, and was bound to take all reasonable measures to preserve it, and that is exactly his duty in all cases. But, strictly speaking, he has no interest in the property. He is a mere agent, or carrier. If the property is lost in the course of the voyage without his fault, it is the loss of the owners, and not his loss. He has not an insurable interest, because he may be responsible for negligence; for this insurance is not against a liability to actions, but against loss of property. It purports to be an insurance on property; and here the property belonged to the underwriters, and not to the master. The case of a trustee entirely differs from this; a trustee has the legal title to the property in himself. He is the owner at law, whoever may be the cestui que trust beneficially interested.

Having said thus much on the case, the subject is, in my view of it, exhausted. Unless the court were prepared to say, that in all cases a master of a ship has an insurable interest, because he has the custody of it, it is impossible to sustain the plaintiff's claim. The verdict must therefore be amended, and a verdict entered for the defendants.

Judgment accordingly.

[NOTE. See Potter v. Marine Ins. Co., Case No. 11,332, apparently involving the same subject-matter, from which it appears that the owner recovered upon another policy.]

BARKER, (MARKS v.) See Case No. 9,096.

BARKER, (NELSON v.) See Case No. 10,101.

BARKER v. NEWHALL. See Cases Nos. 994, 995.

BARKER, (NORTON v.) See Case No. 10,349.

Case No. 993.

BARKER v. PARKENHORN.

[2 Wash. C. C. 142.][1]

Circuit Court, D. Pennsylvania. April Term, 1808.

PLEDGE—COLLATERAL ATTACK—TENDER.

1. B. pledged a vessel to P. to secure a sum of money loaned, and she was afterwards attached by another creditor of B. in the state of Delaware, and there sold under legal proceedings, P. becoming the purchaser; and after repairing her at some cost, he brought her to Philadelphia, where the plaintiff instituted this action of trover, for her recovery. *Held*, that the regularity of the proceedings in Delaware, under which the vessel was sold, cannot be inquired into in this issue.

2. The tender made by P. [B.] of the amount of the debt and interest, for which the vessel was pledged, without also tendering the expense of her repairs, was not sufficient.

3. If, when a party is about to tender a sum of money, the person to whom it is intended to pay it, declares he will not receive it, it is not necessary that the money should be actually produced.

[See Blight v. Ashley, Case No. 1,541.]

At law. This was an action of trover and conversion, to recover the value of a vessel, pledged by plaintiff with defendant to secure a sum of money loaned. The vessel, after the pledge, and whilst lying in the state of Delaware, where she was at the time she

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

was pledged, was sold under a judgment rendered by a magistrate of that state, upon an attachment of a Mr. Long against the plaintiff, and was purchased by the defendant. He found it necessary, before he could remove her, to lay out a sum of money in her repairs, after which he brought her to Philadelphia. Some time after the money was due to the defendant, the plaintiff came to Philadelphia and demanded his vessel, offering to pay the principal debt and interest due. The defendant insisted upon being paid the money he had expended on her repairs, and some other necessary sums laid out for her. The plaintiff, after some hesitation, said he would pay any legal demand, and called upon the defendant to produce his account, with the bills of what he had laid out. This the defendant refused to do, and left the house, saying he would have none of his money. A tender was made of the debt, but no money was produced by the plaintiff, for the advances of the defendant for the vessel. After this, and before the suit was brought, the plaintiff wrote to the defendant, that he had received his account, and found it extravagant, and requested a meeting on the subject. The meeting either did not take place on that day, or they met and could not agree; but no subsequent tender was made by the plaintiff. The suit was brought, after which the defendant sold the vessel. There was sufficient evidence in the cause to show, that the defendant purchased the vessel for whoever might be entitled to her, and considered himself trustee for the plaintiff.

Levy, for plaintiff, cited Cro. Jac. 245, to show that after a tender of the money due, trover will lie against pawnee. He contended that defendant is to be considered as a trustee for plaintiff, if the sale in Delaware was regular; but he insisted that the justice did not proceed regularly.

WASHINGTON, Circuit Justice. Do you admit that he had jurisdiction of the case?

Levy answered that he had some doubts, but could not prove that he had not jurisdiction.

BY THE COURT. Then you cannot, in a collateral action, object to its regularity, whilst it remains in full force.

Levy, to prove that the defendant was to be considered as a trustee, read 8 Ves. 345. In case of a pledge, if no time be fixed for redemption, pawnee cannot sell, but must obtain judgment, and levy execution on the property pledged. Plaintiff has all his life to redeem. Cro. Jac. 244. 5 C. Rob. Adm. 222. He contended, that a pawnee cannot lay out money on the pledge, so as to charge pawnor with it.

Hallowell, for defendant, admitted his client to be a trustee; but contended that plaintiff could not reclaim the property, without paying the advances made for the use of the property, as well as the original debt; and that a legal tender was not made in this case. [Plaintiff suffered a nonsuit.]

WASHINGTON, Circuit Justice. The most favourable light in which this case can be considered for the plaintiff, is, that the defendant, by the purchase under the execution, became a trustee for the plaintiff; and it is clear, that the plaintiff could not reclaim his property, without paying or tendering, as well all necessary and proper sums advanced by defendant, on account of the trust property, as the original debt and interest. The question then is, did he tender all that was due? He did not, on the first meeting, make a legal tender of anything but the debt and interest, for the money was not produced. But the defendant, by refusing to produce his account of the advances, and declaring that he would not receive the money, dispensed with the necessity of a regular tender; and of course, if the cause rested here, it would be proper to view the case as if a regular tender of all that was due had been made. But, at another day, and before suit brought, it seems that the defendant did furnish the plaintiff with his account, to which the plaintiff contented himself with objecting that it was extravagant, without objecting to opening the transactions of the former day again, and without making a new tender of what was really due, or what he thought to be so. Had he objected, on account of the former tender and refusal, we will not say what would have been the legal effect of it. But he made no such objection; and by his conduct opened the former transaction, and merely questioned the accuracy of the account. Under these circumstances, he ought again to have tendered at his peril, as much as the defendant was justly entitled to receive; and not having done this, he cannot recover in this action. Whatever is justly due to the plaintiff, he may recover in another form of action.

The plaintiff suffered a nonsuit.

BARKER v. SMITH. See Cases Nos. 986 and 987.

BARKER, (SMITH v.) See Cases Nos. 13,012 and 13,013.

Case No. 994.

BARKER v. STOWE.

SAME v. NEWHALL.

[15 Blatchf. 49;[1] 3 Ban. & A. 337; 14 O. G. 559; Merw. Pat. Inv. 169.]

Circuit Court, N. D. New York. July 11, 1878.

PATENTS FOR INVENTIONS — BUCKETS FOR CHAIN PUMPS—EVIDENCE—WAIVER OF OBJECTION.

1. The claims of the re-issued letters patent granted to William C. Barker, July 6th, 1875,

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 337; and here republished by permission. Merw. Pat. Inv. 169, contains partial report only.]

for an "improvement in buckets for chain-pumps," (the original letters patent having been issued to said Barker June 20th, 1871, and re-issued to him May 19th, 1874,) namely, "(1.) An elastic bucket for chain-pumps, adapted to fit and work in the bore of a pump-tube, to raise the water by suction, provided with a suitable orifice or outlet through which the water remaining in the pump-tube above the bucket is allowed to escape down to the source of supply, substantially as and for the purpose set forth; (2.) A solid elastic bucket, having an elastic bearing edge, and its upper portion convex or contracted from said edge, whereby the bucket will readily yield to any irregularities in the pump-tube, and admit of its being easily drawn up, while at the same time it will resist moving downward, substantially as and for the purpose specified," are infringed by the buckets for chain-pumps described in the letters patent granted to Deloraine F. Stowe, February 23d, 1875, for an "improvement in buckets for chain-pumps."

2. Mere applications for patents cannot be considered on the question of novelty, as a defence in a suit on a patent. To make the things described and shown in them available, there must be evidence that such things were actually constructed in working form.

3. The two claims of said re-issued letters patent are void for want of novelty.

4. In the proofs, W. gave evidence as to prior knowledge and use by him of the thing patented. His name and such fact were not set up in the answer. On the taking of the proofs the plaintiff objected to such evidence of W. "as incompetent under the rules of the court" and as "incompetent under the laws and rules governing practice in the circuit courts of the United States." At the hearing the plaintiff sought to exclude the evidence of W. because his name and the facts of his prior knowledge and use were not set up in the answer: *Held*, that the objection was waived because it was not distinctly made when the evidence was taken.

[Cited in Woodbury Patent Planing Mach. Co. v. Keith, Case No. 17,970.]

[See note at end of case.]

[In equity. Suit by William C. Barker against Deloraine F. Stowe, and by the same against Abner C. Newhall, for infringement of reissued letters patent No. 6,531. Bills dismissed. Motions to vacate decrees and reopen causes denied in Same v. Same, Case No. 995.]

George E. Buckley, for plaintiff.

Walter L. Dailey, for defendant.

BLATCHFORD, Circuit Judge. This suit is brought on re-issued letters patent granted to the plaintiff July 6th, 1875, for an "improvement in buckets for chain-pumps," the original letters patent having been issued to the plaintiff June 20th, 1871, and having been re-issued to him May 19th, 1874. The specification says: "Prior to my invention there was not, so far as I am aware, in use an elastic bucket provided with a means whereby the water remaining above the bucket could escape back into the well when the pump was not in use. The great difficulty heretofore experienced in that class of pumps where the water is drawn up by an elastic bucket tightly fitting the bore of the tube. has been the continued freezing in cold weather of the water remaining in the pump-tube when the pump was not in operation, which, in many cases, would split or otherwise injure the wooden tube and the working parts of the pump, to an extent that would render the same wholly worthless. To remedy this evil is the principal object of my invention; and it, therefore, consists in providing the bucket with a suitable outlet or opening, through which the water is allowed to escape from the pump-tube down to the source of supply, when the pump is not in use. My invention also consists of a solid bucket of India rubber or other similarly elastic material, convex or contracted upward from that part of its outer periphery which comes in contact with the interior of the pump-tube, by which I am enabled to present an elastic edge or bearing that will readily yield to any irregularities or slight differences in the interior diameter of the pump-tube, and admit of its being easily drawn up, while, at the same time, it will resist moving downward." The specification states, that the largest circumference of the bucket is somewhat greater than the bore of the pump-tube; that the bucket is convex or contracted upward from that part of its outer periphery which comes in contact with the interior of the pump-tube, thereby forming an elastic edge or bearing surface, that will yield sufficiently to be easily drawn through the tube, while, at the same time, if by any accident the operator releases his hold of the crank over which the chain runs, the bucket will not drop in the tube, but will remain where the accident left it, or, in other words, the shape or form described, together with the fact that its largest circumference is at that point where it comes in contact with the interior of the pump-tube, will readily allow it to be drawn upward, and prevent its being drawn downward, or forced in the latter direction, by the weight of water above it; and that it provides the bucket with an aperture or suitable outlet, so that, when the bucket is stationary, the water remaining above it is allowed to escape back into the well or source of supply, thereby preventing the possibility of the water freezing in the tube and splitting or otherwise injuring the same. The specification then sets forth the arrangement of a button or washer and loop link, to which the bucket is attached, to make it operative with the chain. It then adds: "I am aware that elastic buckets composed of a hollow sphere are not new, and I am also aware that it is not new to provide metal pail buckets with an opening, so that, when standing, any water remaining in them will be allowed to escape, for the purpose of insuring a fresh supply of water from the well when the buckets are raised. I do not, therefore, claim such construction of buckets." The first two claims of the patent are as follows: "1. An elastic bucket for chain-pumps, adapted to fit and work in the bore of a pump-tube, to raise the water by suc-

tion, provided with a suitable orifice or outlet through which the water remaining in the pump-tube above the bucket is allowed to escape down to the source of supply, substantially as and for the purpose set forth. 2. A solid elastic bucket, having an elastic bearing edge, and its upper portion convex or contracted from said edge, whereby the bucket will readily yield to any irregularities in the pump-tube, and admit of its being easily drawn up, while, at the same time, it will resist moving downward, substantially as and for the purpose specified." There are four figures of drawings accompanying, and referred to in, the specification. Figure 1 is a perspective view of the improved bucket, with its loop and button. Figure 2 is a plan view of the button. Figure 3 is a plan of the loop before insertion through the bucket and button. Figure 4 is a vertical section of the bucket, in position for use. The aperture or outlet for the water above the bucket is shown in the drawings as a perpendicular cylindrical passage through the body of the bucket, commencing in the outer curved surface of the bucket, which is shown as a hemisphere, at a point about one-third of the way from the highest point of the curve to its lowest point, the passage being parallel to the upright parts of the link which passes through the bucket. The passage is continued through the button or washer, which is held up against the horizontal face of the bucket by the turned-up lower ends of the loop link.

The defendant has made and sold buckets for chain-pumps described in letters patent granted to him February 23d, 1875, for an "improvement in buckets for chain-pumps." He has an india rubber shell, of a cylindro-conical form, that is, a small portion of the shell extending upwards from the outer lower circular edge is cylindrical, and fits the bore of the pump-tube, and the portion above the cylindrical portion is conical in form, receding upwards from the bore of the pump-tube, and has a hole through its apex. The bottom side of the shell is bevelled inwardly from a circle concentric with the circle forming the outer lower edge, and a short distance inward from it, the bevel extending to the inner surface of the shell. Thus provision is made for inserting in the shell a solid conical metal core, which is closely embraced by the inner surface of the shell, above the inner termination of the bevel, while the free part of the shell below the inner termination of the bevel forms a highly elastic skirting, which accommodates itself closely to the bore of the pump-tube. The skirting is formed substantially of the cylindrical part of the shell. The metal cone has an eye on each end, to attach the bucket to the chain links, and a small up and down passage is made through the skirting, to allow the water in the pump-barrel to pass down when the pump is not in operation. The patent claims the chain-pump bucket described, having the cylindro-conical elastic shell fitted to the solid cone, substantially as and for the purpose set forth.

It is contended by the defendant, that matter is found in the re-issue which is not in the original patent of 1871. The drawings are identical, and there is nothing either in the specification or the claims of the re-issue which is not justified by what is found in the description or drawings of the original patent.

The defendant's bucket infringes claims one and two of the plaintiff's patent. It is an elastic bucket for a chain-pump. It is adapted to fit and work in the bore of a pump-tube, to raise water by suction. It is provided with a suitable orifice or outlet, through which the water remaining in the pump-tube above the bucket is allowed to escape down to the source of supply. The fact that, in the defendant's bucket, the passage for the drip of the water is through the skirting outside of the metal core, or is a notch in the outer edge of the skirting, and thus will drain off more of the water than will be drained in the construction shown in the plaintiff's drawings, does not relieve the defendant's bucket from being an infringement of the first claim of the plaintiff's patent. Nor does the fact that a narrow ring of water below the upper end of the passage way in the plaintiff's bucket may remain between the outer surface of the bucket and the inner surface of the pump-tube, affect the validity of the plaintiff's patent. His object was to get rid of the column of water above the tightly fitting bucket, and he accomplishes that result substantially. It is not shown that, in fact, actual difficulty has resulted from the freezing of the narrow ring of water left in the plaintiff's construction, and, if that had been shown, the cutting of the passage way nearer to the inner surface of the pump-tube is an obvious suggestion, not involving invention, and within the scope of the plaintiff's construction, and to which he is entitled as the result of the practical working of his apparatus. The defendant's bucket is a solid elastic bucket, having an elastic bearing edge, in all the practical respects in which the plaintiff's bucket is a solid elastic bucket having an elastic bearing edge. The defendant's bucket has an elastic bearing edge in the cylindrical part of the india rubber shell, and the conical upper part of the shell is contracted from said edge, so that the bucket readily yields to any irregularities in the pump-tube, and can be easily drawn up, while it resists downward movement. It does not affect the validity of the plaintiff's patent or the question of infringement, that, in practice, the plaintiff's bucket may be used with a ratchet to counteract the downward movement of the bucket induced by the weight of the column of water in the pump-tube, or that, in practice, the defendant's bucket may be used with such ratchet. In each, the tendency and operation of the

bearing edge, when the bucket is left free to descend with the pressure on it of a column of water above it, are, to resist and retard the downward movement.

The plaintiff's patent is attacked for want of novelty. The defendant offered in evidence, under objection from the plaintiff that they were incompetent, five several applications for patents, filed in the patent office—Edwin Gilbert, filed February 10th, 1849, rejected May 21st, 1849; A. G. Babcock, filed September 20th, 1851; J. Powers, filed January 26th, 1852; C. F. Baragar, filed June 30th, 1859; and Orin O. Witherell, filed November 10th, 1866. The defendant also put in evidence letters patent granted to Clark Polley, December 14th, 1852; to Edmund Morris, January 23d, 1855; to Arcalous Wyckoff, April 3d, 1855; to Birdsill Holly, July 14th, 1857; to John D. Clark, December 23d, 1862; and to Emmet R. Austin, October 2d, 1866.

Mere applications for patents cannot be considered on the question of novelty. To make the things described and shown in them available, there must be evidence that such things were actually constructed in working form.

The patent to Polley shows a ball bucket, with no bearing edge and no provision for drip. The patent to Morris shows a ring with no bearing edge and no drip hole. Wyckoff's patent shows no bearing edge and no drip hole. While Holly's pump has an escape for the surplus water, his arrangement is different from that of the plaintiff, and he has not an elastic bucket with a bearing edge, nor has he a water escape through an elastic bucket. Clark's patent shows no bearing edge and no water escape. Austin's patent shows no suction pump and no pump-tube.

I find among the papers a patent granted to Orin O. Witherell, October 13th, 1868. It is not mentioned in the answer, nor can I find that it was introduced in evidence. If it is to be considered, it has no bearing edge and no water escape.

Orin O. Witherell, the same person mentioned above, has given evidence as to pump buckets constructed by him prior to the plaintiff's invention. He introduces an exhibit, A, as representing a form of bucket which he made and sold for five months, in the year 1866. It has a thin india rubber disc placed loosely above a metal disc, and the edge of the rubber disc forms a flange, which extends downward and embraces part of the depth of the metal disc. The rubber disc has a hole in the centre, through which a metal eye, fastened to the upper part of the metal disc, passes. He testifies, that the settling down of the chain, when the pumping was stopped, allowed the water above to escape through the hole in the centre of the rubber disc. His application of November 10th, 1866, and his patent of October 13th, 1868, showed no device such as is shown in Exhibit A. They showed only a rubber or elastic plate, clamped tightly between two metal plates, and thus expanded to fit the pump-tube. Witherell testifies, that he put the buckets like Exhibit A particularly into worn pump-tubes, which had had only the metal plate buckets; that, between April and August, 1866, he put buckets like Exhibit A into between 50 and 100 wells, mostly in the southeastern part of New Hampshire; that he saw one of such pumps in successful operation with them, as late as 1869; that he never used less than three of such buckets for a well, and seldom more of them; that he never knew any of them to freeze; that the back motion of the chain, after pumping was stopped, was sufficient, even when a ratchet was used, to open a central space between the rubber and the metal plate, the rubber adhering to the sides of the pump-tube, and allowing the water to escape down through the centre; that he used the buckets like Exhibit A for the purpose of fitting closely in the tube, so as to cause suction; and that he generally succeeded in establishing a suction, unless the tube was too much worn or defective. There is no testimony in contradiction of this, or throwing doubt upon the truth of the facts testified to by Witherell, or showing that buckets like Exhibit A would not operate as he testifies. Exhibit A shows an elastic bucket for a chain pump, adapted to fit and work in the bore of a pump-tube, to raise water by suction, and provided with a suitable orifice or outlet through which the water remaining in the pump-tube, above the bucket, can escape down to the source of supply. The fact that Witherell made no mention of a structure like Exhibit A in his subsequent application or patent, cannot have the effect, in the present case, to destroy the force of his affirmative direct testimony. Nor can what he did in respect to buckets like Exhibit A be regarded as an abandoned experiment. It appears to have been a successful, practical, working apparatus. If it was an elastic suction bucket, with a drip, it is of no consequence whether Witherell devised it primarily with a view to the drip, or not. Nor is it of any consequence that the hole for the link served also as a drip hole. If it allowed the water to escape, it would do so as effectually as the extra passage in the plaintiff's bucket. It may be, perhaps, that the plaintiff is entitled to some claim in respect to a drip orifice in an elastic suction bucket, but, in view of the Witherell Exhibit A, the first claim of the plaintiff's patent is too broad, and is invalid.

The record states that the plaintiff objected to the testimony of Witherell, so far as it endeavors to set up prior knowledge, manufacture or use of the devices claimed by the plaintiff as his invention, "as incompetent under the rules of the court." Again, the record states that the plaintiff objected to the reception of the testimony of Witherell, on the

ground that the witness is "incompetent under the laws and rules governing practice in the circuit courts of the United States." At the hearing, the plaintiff took the objection that the evidence of Witherell, as to prior knowledge and use, could not be admitted, because the name of Witherell, and the fact of prior knowledge and use by him, were not set up in the answer. The only objection taken on the face of the record is found in what is above referred to. I do not think that is sufficient to direct the attention of the defendant to the point that the objection was based on the omission of the name of Witherell from the answer. An objection of that kind may be waived, and it is waived unless it is distinctly made. The time to make it is when the evidence is taken, and not first at the hearing. Otherwise, the defendant is taken by surprise. The fact that the defendant took the evidence shows that he intended to rely on it, and if he had been distinctly notified on the record that the plaintiff intended to rely on an objection that Witherell was not named in the answer as having prior knowledge, it is to be presumed he would have taken steps to apply for leave to amend his answer.

Witherell also introduced, in his evidence, another form of bucket made by him, Exhibit B. He testifies that he made and sold buckets like Exhibit B, after he made them like Exhibit A, and from the fall of 1866 until the fall of 1873. Exhibit B has a rubber disc compressed between two metal plates by a screw and a nut. By lubricating with oil the iron washer on the lower face of the disc, the lower part of the disc was caused to expand more than the upper part, so as to give to the lower part a bearing edge, with the part above it receding from it inwards. Exhibit B shows such construction. He says that he never used less than three of Exhibit B for a set, and seldom more; that his practice was to have the bucket fit as closely as possible, and not have the pump work too hard; that the object of the bevelled edge was to have the rubber slide easily over any roughness in the tube; that the bucket operated both by lifting and suction; that, when the bucket fitted closely, it resisted the downward run of the chain; that he set them close enough, by expansion, to draw the water up readily, and yet leave room for the water to pass back on the inside of the tube; that the water in the tube, with Exhibit B, never froze, when the bucket was properly adjusted; that he made a considerable number with the bearing edge like Exhibit B; and that he used that form in tubes that were too large to be filled by expanding the disc equally from both of its faces. This Exhibit B is a solid, elastic bucket, having an elastic bearing edge, and its upper portion convex from said edge, whereby the bucket will readily yield to any irregularities in the pump-tube, and admit of its being easily drawn up, while, at the same time, it will resist moving downward. It answers, exactly the second claim of the plaintiff's patent. A provision for the escape of the water is no part of the second claim, and the elastic bearing edge is no part of the first claim. Although Exhibit A has no elastic bearing edge, it anticipates the first claim; and although Exhibit B has no water escape, it anticipates the second claim.

The bill must be dismissed, with costs, and a like decree must be entered in the suit against Newhall.

[NOTE. Patent No. 116,138 was granted to W. C. Barker June 20, 1871; reissued June 6, 1875, (No. 6,531.) For other cases involving this patent, see Barker v. Stowe, Case No. 995; Barker v. Shoots, 18 Fed. 647; Barker v. Todd, 15 Fed. 265, 13 Fed. 473; Barker v. Stowe, 11 Fed. 303.

[In the last-mentioned case, the disposition of the principal case was held to bar a subsequent suit between the same parties for another infringement of the same patent.]

Case No. 995.

BARKER v. STOWE.

SAME v. NEWHALL.

[4 Ban. & A. 485;[1] 16 O. G. 807.]

Circuit Court, N. D. New York. Sept. Term, 1879.

PRACTICE IN CIVIL CASES—SURPRISE—MOTION FOR REHEARING—AFFIDAVIT.

1. A motion for a rehearing, in a suit for the infringement of a patent, cannot be made after the term at which the final decree was entered.

2. The necessary averments of the affidavits, in support of a motion for a rehearing, discussed.

3. The proper practice, in a case where the complainant is surprised by testimony of which no notice has been given in the answer, explained.

[In equity. Suits by William C. Barker against Deloraine F. Stowe, and by the same against Abner H. Newhall, for infringement of reissued letters patent No. 6,531. The bills were dismissed on the trial, (see Barker v. Stowe and Same v. Newhall, Case No. 994;) and plaintiff now moves to vacate the decrees, and reopen the causes for the admission of further evidence. Motion denied.]

George E. Buckley, for complainant.

Walter L. Dailey, for defendants.

BLATCHFORD, Circuit Judge. These are motions to vacate the decrees in these causes and to reopen the causes for the admission of further evidence. The decrees were made in the June term, 1878. The plaintiff makes an affidavit that after the defendants had taken their testimony he "made every effort to obtain rebutting testimony, but was not aware that he could do so; that some time after the rendering of the decision herein he was

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

up in the New England states, and there found the witnesses whose testimony is embodied in the accompanying affidavits;" that "two of the deponents are Mr. Witherill's brothers, and one (Mr. Woodbury) his brother-in-law; one, a former partner of Mr. Witherill—that is, of Orrin O. Witherill—upon whose testimony the bills in the above cases were dismissed; that, finding that the testimony of said Witherill was directly contradicted by all these deponents, he, (deponent,) thinking that Mr. Witherill's testimony must have been misunderstood, went to Mr. Witherill in Ohio, and the said Witherill gave to him the affidavit hereto annexed, which specifically defines all the uncertain facts of his former testimony, sets forth a radically different state of facts, and is such an affidavit as, if entered regularly upon the records of the case by way of evidence, would materially affect and change the judgment of this court;" that "this evidence is newly discovered by deponent;" and that "there was nothing in the evidence of Witherill, when upon the stand, to lead deponent to find this present evidence."

Rule 88 in equity provides that—"No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the supreme court."

These are suits for the infringement of a patent, and, under section 699 of the Revised Statutes, appeals lie to the supreme court in them, without regard to the sum or value in dispute. The next term after the term at which the final decrees were entered was the term commencing the second Tuesday of October, 1878, and the motions now under consideration were not given notice of till March, 1879. These motions are motions for rehearings. This would be a sufficient reason for denying the motions.

But there is a further difficulty. The affidavits now presented by the plaintiff are those of Orrin O. Witherill, Edwin E. Witherill, of Chesterfield, Massachusetts, a brother of Orrin O. Witherill and associated with him, William H. Woodbury, and Otis C. Witherill in the chain-pump business around Plaistow, New Hampshire, Raymond, New Hampshire, and that section; D. L. Tobie, of Lewiston, Maine, who, for fifty-six years prior to 1869, lived in New Gloucester, contiguous to Lewiston, and removed to Lewiston in 1869, and has been engaged in the pump business in and about Lewiston for thirty years; Thomas Clark, of Lewiston, Maine, who was in the pump business in Lewiston for ten years before 1879; William D. Ladd, of Manchester, New Hampshire, who, from 1866 to 1878, resided in Raymond, New Hampshire; Henry S. Clark, of Toledo, Ohio, who went into the chain-pump business there with Orrin O. Witherill in 1868; A. G. Whittier, of Raymond, New Hampshire, who has resided there for fourteen years last past, and is a brother-in-law of Ladd; George W. Sellars, of Toledo, Ohio; Samuel Brackett, of Lewiston, Maine, who has resided there for thirty years last past; William Sellars, of Toledo, Ohio; William H. Woodbury, of Haverhill, Massachusetts, who resided at Plaistow, New Hampshire, when Orrin O. Witherill resided there, and was his agent in the pump business, and his brother-in-law; Otis C. Witherill, of West Hampton, Massachusetts, a brother of Orrin O. Witherill, and associated with him in the pump business from 1865 to 1871 about Plaistow and Raymond, New Hampshire, and at Lewiston, Maine, and all over that section of country; John H. Seaver, of Plaistow, New Hampshire, who has resided there for thirty-eight years last past; and Elbridge G. Tucker, of Plaistow, New Hampshire.

In regard to Orrin O. Witherill's Exhibit A, he testified that he commenced the manufacture of rubber-bucket chain-pumps at Plaistow, New Hampshire; that he used Exhibit A from April, 1866, to August, 1866; that he put it into from fifty to one hundred wells, wholly in the southeastern part of New Hampshire, one place being Raymond, New Hampshire; and that he put in one for a Mr. Ladd at Raymond. In regard to his Exhibit B, he testified that he made that kind at Plaistow, New Hampshire, from August, 1866, to April, 1867; that he then went to Lewiston, Maine, and made and sold them there for a year; that he put one prior to June, 1870, into a pump at Toledo, Ohio, in a hotel kept by one Sellars; and that Otis C. Witherill, of West Hampton, Massachusetts, Edwin E. Witherill, and William H. Woodbury, of Plaistow, New Hampshire, and Joshua Brackett, of Lewiston, Maine, had buckets like Exhibit B.

After this testimony was given there was opportunity and occasion for the plaintiff to make inquiries and investigations at Plaistow, Raymond, Lewiston, and Toledo, and there to obtain the evidence of Mr. Ladd, E. E. Witherill, O. C. Witherill, Woodbury, and Brackett. In the affidavits now produced, those relating to the doings of O. O. Witherill at Plaistow are those of E. E. Witherill, Woodbury, O. C. Witherill, Seaver, and Tucker; those relating to his doings at Raymond are those of E. E. Witherill, Ladd, Whittier, and O. C. Witherill; those relating to his doings at Lewiston are those of Tobie, T. Clark, Brackett, and O. C. Witherill; those relating to the hotel at Toledo are those of H. S. Clark, G. W. Sellars, and W. Sellars.

These comprise all the affidavits produced by the plaintiff except those of himself and of O. O. Witherill. There is nothing to show that the testimony contained in all of them could not have been produced, with reasonable diligence, on the first hearing. All that the plaintiff says is, that "he made every effort to obtain rebutting testimony, but was not aware that he could do so." He does not state what efforts he made, nor that he visited any one of the places named until after

the decision, or saw any one of the persons named in O. O. Witherill's testimony, or caused any inquiry to be made at any one of such places, or of any one of such persons. In regard to the affidavit of O. O. Witherill, produced by the plaintiff, it is supplemented by a subsequent affidavit of his produced by the defendants, in which he says that his evidence, given when he was examined and cross-examined, is substantially true and correct.

If the plaintiff was surprised by the testimony of O. O. Witherill, his proper course was to ask for time to investigate in regard to it, on the ground that no notice of it had been set up in the answer. But he did not do that, nor did he set up in the record the want of notice, in such a way as to make it available to him. He made his election, and took the risk of the decision, and it is now too late, under the settled rules of practice, for him to obtain relief in this suit.

I pass over various defects in the affidavits, such as want of venue, want of notarial seal, verification before a justice of the peace, and verification before the plaintiff's counsel.

The motions are denied.

[NOTE. For other cases involving this patent, see note to Barker v. Stowe, Case No. 994.]

BARKER, (UNITED STATES v.) See Cases Nos. 14,516–14,520.

Case No. 996.

BARKER v. WHITE.

[11 Blatchf. 445;[1] 19 Int. Rev. Rec. 117.]

Circuit Court, S. D. New York. Feb. 13, 1874.

INTERNAL REVENUE—REASSESSMENT OF TAX.

1. Under section 20 of the internal revenue act of June 30th, 1864, as amended by section 9 of the act of July 13th, 1866, (14 Stat. 104,) an assessor has power to make a supplementary assessment, increasing the amount of tax to be paid by a distiller for a given month, even though the return made by the distiller for such month was correct, and the cause of the re-assessment is a mistake made by such assessor in the first assessment, and the amount of tax first assessed was paid.

[Cited in U. S. v. Black, Case No. 14,600.]

2. But, where the tax re-assessed is paid under protest, and a suit is brought to recover it back, the re-assessment cannot be upheld, unless it is shown that the assessor, before making the re-assessment, determined that an error had been committed in the first assessment, the record of the re-assessment not being evidence of that fact.

[At law. Action by James Barker against William B. White to recover the amount of an internal revenue tax paid by plaintiff under protest to the defendant, as collector. Judgment for plaintiff.]

Thomas Harland, for plaintiff.

John A. Goodlett, Asst. Dist. Atty., for defendant.

SHIPMAN, District Judge. This action is brought to recover the sum of $3,773.73, being a tax paid by the plaintiff, under compulsion and protest, to the defendant, as collector of the 6th internal revenue district of New York.

Not long after the act of July 20th, 1868, (15 Stat. 125,) was passed, the plaintiff entered upon the business of a distiller, and, in October, November, and December, 1868, and February, 1869, made the returns to the assessor required by the statute. The assessor made an assessment for these months, and returned to the collector a duly certified list or lists containing said assessment, which was paid by the plaintiff. Subsequently, in July, 1869, the assessor made, under instructions from the commissioner of internal revenue, a supplementary assessment for said months, increasing the tax for October and November, and decreasing it for one or both of the other months. There was a total increase of $3.773.73. It is conceded that the returns of the distiller were correct. The reassessment was made in consequence of the belief of the commissioner of internal revenue that the original assessments upon said returns were erroneous, through a mistake of the assessor. Whether that belief was well or ill founded, does not now appear.

The plaintiff proved that he paid the assessment originally made by the assessor, and contained in the first list returned to the collector, that he paid, under constraint and protest, the re-assessment, and appealed to the commissioner of internal revenue, which appeal was denied, and that this action, to recover the amount last paid, was brought in due season, and here rested his case. The government was able to show simply the reassessment made by the assessor, and duly certified to the collector, but did not show wherein the error in the first assessment consisted, or that it was ever determined or ascertained that there was an error.

Upon these facts, thus proved, two questions have been discussed: (1) Where the taxpayer has made a correct return, and the assessor has made an incorrect assessment thereon, which has been paid, has the assessor, under the statute, power to make a supplementary assessment? The decision of this question depends upon the construction to be given to section 20 of the act of June 30th, 1864, as amended by section 9 of the act of July 13th, 1866, (14 Stat. 104,) which is as follows: "And, in case it shall be ascertained that the annual list, or any other list, which may have been, or which shall hereafter be, delivered to any collector, is imperfect or incomplete, in consequence of the omission of the names of any persons or parties liable to tax, or in consequence of any omission, or understatement, or undervaluation, or false or fraudulent statement

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

contained in any return or returns made by any persons or parties liable to tax, the said assessor may, from time to time, or at any time within fifteen months from the time of the passage of this act, or from the time of the delivery of the list to the collector as aforesaid, enter on any monthly or special list the names of such persons or parties so omitted, together with the amount of tax for which they may have been, or shall become, liable, and also the names of the persons or parties in respect to whose returns, as aforesaid, there has been or shall be any omission, undervaluation, understatement, or false or fraudulent statement, together with the amounts for which such persons or parties may be liable, over and above the amount for which they may have been, or shall be, assessed upon any return or returns made as aforesaid, and shall certify or return said list to the collector, as required by law. And all provisions of law for the ascertainment of liability to any tax, or the assessment or collection thereof, shall be held to apply, as far as may be necessary, to the proceedings herein authorized and directed." It is claimed that this section confers upon the assessor power to make a supplementary list and assessment, only in case there has been an omission in the original list of the name of the person liable to tax, or in case the taxpayer has himself made an omission, or understatement, or undervaluation, or false or fraudulent statement in his return; and that, when the person liable to tax has made an entirely correct return, and the assessor has made an assessment thereon, the assessor is functus officio, and has no power to correct his own errors in his list or assessment. If this construction is the correct one, the statute has omitted to provide any remedy for the mistakes, errors, or frauds of the assessor. The assessment of taxes upon distillers, under the internal revenue acts, requires care, an accurate knowledge of the statutes, and somewhat difficult arithmetical computations. An error might easily be made by an honest assessor, which ought to be corrected. If he has no power to do it, the act is seriously imperfect. I do not think that such imperfection exists. The statute provides, that, if the original list is imperfect, or incomplete, "in consequence of the omission of the name of any persons or parties liable to tax," it can be corrected. This certainly means any omission of the name, either by reason of the oversight of the assessor, or of the neglect of the taxpayer to make a return. The omission need not necessarily be an omission arising on the part of the taxpayer, but is an omission from any cause whatever. The act then provides, that, if the list is incomplete, by reason of "any omission or understatement, or undervaluation, or false or fraudulent statement contained in any return or returns," it may be corrected. The omission, or understatement, or undervaluation, mentioned in this clause of the act, is not necessarily limited to any omission, or undervaluation, or understatement contained in a return. If the incompleteness resulted from any omission, or understatement, or undervaluation, from whatever source it arose, or from whatever cause it happened, the power is given to correct; and if the incompleteness arose from an error in the taxpayer's return, then such incompleteness may be supplied.

But, the correctness of this construction still further appears from the clause of the section following the one already cited. The act provides, that the assessor may enter on any monthly or special list the names of such persons or parties in respect to whose returns there has been an omission, etc., together with the true amounts for which they are liable to tax. The omission, undervaluation or understatement is one in respect to the returns, relating to or growing out of the returns, and not necessarily contained in the returns themselves. The omission or understatement is one made either in the returns by the distiller, or made by the assessor upon or in respect to the returns.

Again, the returns contain no valuations, but a sworn statement of the amount of pounds or gallons of materials used for the purpose of producing spirits, and the number of gallons distilled, placed in warehouse or sold. The valuations in the case of distillers' assessments are made by the assessor. He determines the amount of the tax which ought to be assessed in accordance with the prescribed method of computation. There can, ordinarily, be no undervaluation in the distiller's returns, although there may be omissions, or understatements, or false and fraudulent statements. The undervaluation, so far as distillers are concerned, is an erroneous computation which the assessor has made upon or in respect to the facts stated in the return, or an undervaluation growing out of a false or fraudulent statement contained in the return. In either event, the word has reference to the assessor's, and not to the distiller's acts.

I am thus led to the conclusion that the assessor has power, within the time prescribed by the act, in case of any error committed by himself in his original assessment, to make a supplementary assessment and list, giving the true amount for which the distiller is liable over and above the amount previously assessed.

(2) The second point is, whether the reassessment is presumed to be correct, without affirmative proof, on the part of the government, that there was an error in the original assessment, or, at least, without affirmative proof that, prior to the re-assessment, it had been ascertained by the assessor that there was such error.

The assessor derives his power to make a re-assessment solely from the fact that it has been ascertained that the previous list was incomplete, in consequence of omissions, un-

dervaluations or understatements. The existence of this fact is necessary to give him authority to make the re-assessment. If the fact does not exist, he has no jurisdiction. The assessor, before he can make a new assessment, must investigate and ascertain, at least to his own satisfaction, that the previous assessment is incorrect. It is not to be presumed, from the act of the assessor in making a new assessment, that he had ascertained that there was an error in the prior assessment; for, the existence of a fact necessary to give an officer authority to act, must always be affirmatively shown. The rule, omnia praesumuntur esse rite acta, does not apply to the facts necessary to give the court jurisdiction. King v. All Saints, 1 Man. & R. 663. When an officer has authority to act, he will be presumed to act correctly; but, where the existence of a fact is necessary to give him authority, that fact must be proved. Rudd v. Johnson, 5 Litt. (Ky.) 19.

The distiller makes out his prima facie case by showing that he paid the original assessment for the same months for which he was re-assessed, and by showing his payment of the re-assessment under compulsion, his appeal, and the fact that he brought his suit within the proper time after the appeal was taken. The government, to establish a defence, cannot rely solely upon the record of a re-assessment, but should prove the jurisdictional fact necessary to exist in order to enable the assessor to make a re-assessment. That jurisdictional fact is, in my opinion, the determination or the decision of the assessor that an error had been committed. In this case, by reason of the death of the assessor, or from some other cause, it is not in the power of the government to show either the supposed error in the original assessment, or that the assessor ever ascertained that any error existed.

In the absence of any evidence on the part of the United States, except the record of the re-assessment, let judgment be entered for the plaintiff, to recover $3,773.73, with interest from the date of payment.

BARKLEY, (RONALD v.) See Case No. 12,031.

BARKSDALE, (LEWIS v.) See Case No. 8,317.

Case No. 997.

BARLEY v. CHICAGO & A. R. CO.

[4 Biss. 430.] [1]

Circuit Court, N. D. Illinois. Jan. Term, 1865.

RAILROAD COMPANIES—TRACKS ON PUBLIC STREET—RATE OF SPEED—BACKING TRAINS—LOOK-OUT—MEASURE OF DAMAGES—FORMER RECOVERY.

1. Where a railroad company is rightfully running its trains on a public street, it must do so in such a way as to be consistent with the safety of persons and property on the street.

2. Irrespective of any city ordinance, the speed must be such as to permit the stoppage of the train within a reasonable time, and the train must be provided with all usual means and appliances for stopping.

3. When the engine is backing a train there should be a look-out to give notice of any persons or obstructions.

[See Whiton v. Chicago & N. W. R. Co., Case No. 17,597.]

4. If there is steam or smoke upon the track great care and vigilance is required.

[See Barron v. Illinois C. R. Co., Case No. 1,053; Holmes v. Oregon & C. R. Co., 5 Fed. 75; Maryland v. Baltimore & P. R. Co., Case No. 9,219.]

5. In allowing damages for the killing of a child the jury cannot allow anything for the suffering or wounded feelings of the parents: they can only allow for actual pecuniary loss. If the family is poor, the fact that the boy would probably have early commenced to assist in supporting the family may be taken into consideration.

6. A recovery in a former action for medical attendance, expenses, loss of service and time before his death, does not affect the damages recoverable under the statute for death.

At law. This was an action on the case under the statute by Patrick Barley, administrator of the estate of Benjamin Barley, deceased, [against Chicago & Alton Railroad Company,] to recover damages for the death of said Benjamin by the alleged negligence of the defendant.

The statute of Illinois is as follows:

"§ 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"§ 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next-of-kin of such deceased person, and shall be distributed to such widow and next-of-kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next-of-kin of such deceased person, not exceeding the sum of $5,000: provided, that every such action shall be commenced within two years after the death of such person." 1 Gross, St. p. 60; Rev. St. 1874, p. 582.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

In March, 1863, a train of defendant, consisting of an engine and three freight cars, was proceeding north on Beach street in the city of Chicago, and the son of the plaintiff, a boy between seven and eight years of age, was standing upon the track, having a bag of shavings on his arm. The engine was pushing the cars, and was on the south end of the train, so that the first car struck the boy and he was crushed under the wheels and finally died. [Verdict for plaintiff.]

A. W. Church, for defendant.

DRUMMOND, District Judge, (charging jury.) Under the statute in force in this state, the father, having taken out letters of administration, sues the defendant to recover damages for the loss which has been sustained, in the language of the statute, "by the next-of-kin" in consequence of the death of the child by the alleged negligence of the defendant.

The first question to be determined, therefore, is, Was it the negligence of defendant that caused his death?

Beach street was a public street and the defendant had a track laid on it. No law has been introduced on the subject, but it has been taken for granted that the defendant was rightfully on the street with its engine and cars. It being a public street, however, it is clear that it could be used by the defendant only in such way as to be consistent with the safety of persons and property. While the defendant has a right to use the street, the citizens of the town, and of the country also, have a right to use it in passing over it with their persons and property. There was no particular portion of the street upon which the track of the road was to be laid. The railroad company simply had the right to use it for the purpose of trains which might be going over the road. The right of the user must be consistent with that of the public on the street.

Without undertaking to determine whether the ordinances of the city could prescribe the speed of the engine and cars so as to render it binding upon the public and upon the defendant,—as by declaring that a certain rate of speed was or was not negligence,—still it is clear that in running an engine and cars upon a street, it should be only with such speed as might enable the engineer, in case of obstruction by persons passing, to stop his train within a reasonable time. The train should be provided with the usual means and appliances to stop it; there should be a proper and sufficient look-out kept upon the train, and I think that would be, in such a case as this, a person watching where the danger was. The locomotive was at the rear end of the cars, they preceding the locomotive. I think there should be a person watching the track so as to enable the engineer to know wnen there was an obstruction upon it, so that the train could be stopped in a reasonable time, if it should be such as could not leave the track. To take an illustration: If a person on the train were to see any one walking along the track or crossing, there would be a reasonable presumption that that person would get out of the way of the train, but if there was a drunken man lying on the track, who would not be presumed to get out of the way, in such a case it is clear that the conduct of those having the management of the train ought to be entirely different from what it would be in the other case.

We are to take the facts as they are at the time, in order to prescribe the true rule of diligence on the subject; so if there was a little helpless child on the track, the conduct of those having the management of the train should be different,—there should be greater caution.

The evidence shows that the train was running from seven to eight miles an hour. It seems to be thought that is a reasonable speed, fast enough, at any rate in a populous city, over a frequented thoroughfare. It is as fast as a train ought to be permitted to go, as it seems to me. But it is for the jury to determine whether the train was running at an unusual or improper speed. If it was, then the defendant was guilty of a wrongful act.

So in relation to the look-out. Were those on the train watchful and careful in observing the track? One of the witnesses, who was sitting down upon the top of the car, says he was looking eastwardly—not where the train was going. Another says he was in another car looking north. Was he under such circumstances as to enable him to see, and did he see, what was on the track? If there was negligence in this respect, did it contribute to the accident?

Then, after it was ascertained that there was something upon the track, was there proper skill and diligence used in order to arrest the train as soon as possible, and if not, did that contribute to the result?

These are questions proper for you to determine under all the circumstances of the case.

It is said that there was steam and smoke which shut out the view of those on the train and prevented them from seeing the track as they otherwise would have done. The only remark that the court would make in reference to that is, that if it were so, it was incumbent on them to redouble their diligence and to run the train with greater caution. They ought to know, I think, when they are running upon our streets, where they are going. They ought to see, so far as the circumstances of the case will permit, what they are going to encounter.

The next question is, was the boy himself guilty of any negligence which contributed in any substantial degree to the destruction of his own life?

There is a very embarrassing question in all cases of this kind. It is almost impossible for a court to lay down any fixed or permanent rule to guide you upon a subject such as this. The language of the law is, that the jury shall give such damages as have been sustained by the next-of-kin in dollars and cents by the destruction of the life of the person. It must be with reference to the pecuniary loss—I mean the loss which has been sustained in this case by the next-of-kin—that investigation is to be made and conclusion arrived at.

This was a boy of tender years. The pecuniary injury which was sustained must, of course, be with reference, almost exclusively, to prospective benefits which might have been derived by the continuance in life of the boy. At the time, he probably was rather a burden than a benefit pecuniarily to his family. The court has adverted to various illustrations during the progress of the cause, for the purpose of serving to some extent as guides to you in arriving at a correct conclusion upon the subject; for instance, as to what would be the pecuniary value of the services of a boy like this, taking his intelligence, his health, his chances of life, the amount which he could earn up to the time that he would arrive at the age of twenty-one years. The court refers to this, not as the only element in the case, but as a very important one, which may guide you. Of course this is, after all, a speculative view in relation to it. It is somewhat conjectural and must be in the mind of every man what may be the value of services of a boy like this. The difficulty in this case is that it is almost impossible for you to separate, as it is your bounden duty to do, the suffering and anguish which the friends have sustained; and the suffering which the victim has passed through, from the mere pecuniary consideration of the matter. You cannot allow anything for pain or mental anguish which these parties, or any of them, have sustained. You have nothing to do with that. It becomes simply a question of dollars and cents.

The family, it seems, is a poor family, living by the daily labors of the father. It is probable, in the natural course of things, that this boy, if he had lived, would have been employed by his father toward the support of the family, and it is proper for you to take all this into consideration. Taking into consideration all these various changes and chances of human life, health, sickness, and all these things, it is for you to say how much you think, as reasonable and intelligent men, on your consciences and on your oaths, has been the loss to these parties—the pecuniary loss—by the death of this boy.

As to the other action which was tried, [unreported,] I am of opinion that that does not prevent the plaintiff from recovering in this action. In that case the defendant strenuously resisted the right of plaintiff to recover anything beyond the loss of service for the child during his life and whatever expenses were incurred by the plaintiff, and for the loss of time, and so on; and the court sustained the view of the defendant, and confined the jury in damages to those elements. This action is not brought for the identical cause of action upon which the jury were permitted by the court to pass in that case. This action is brought to recover, as I have already said, the pecuniary loss which these parties have sustained by the death of the boy, and of course the court thinks that the result in that case does not prevent the plaintiff from recovering in this, and I hardly think that it can have any effect by way of diminishing the damages which might be recovered, because the damages in that case were confined to specific things, and the court must presume that the jury found damages in conformity with the instructions of the court. Those were, as appeared by the instructions of the court, for the loss of service of the child from the time of the injury until he died, for medical attendance, funeral expenses and the loss of time of plaintiff and wife, by reason of his accident, from the time of its occurrence until the commencement of the suit. It would not be proper for you to allow anything whatever for any of these things; you are not to take them into consideration at all. They have been allowed by a former jury. You cannot allow them a second time.

Verdict for plaintiff.

NOTE, [from original report.] See, further, as to the great caution required of railroad companies in passing along streets, Bellefontaine & I. R. Co. v. Snyder, 18 Ohio St. 399; Chicago & A. R. Co. v. Gregory, 58 Ill. 226. The law places no restriction upon the rate of speed at crossings; the company has the preference. Warner v. New York Cent. R. Co., 44 N. Y. 465. This was a country crossing. "In crossing ordinary roads, caution and care are chiefly demanded to avoid running against or over anybody else; in crossing railroads, it is exacted to avoid being run over yourself. In the former case the blame attaches prima facie to the party doing the injury; in the latter it attaches, in the first instance, to the party obstructing the track." Telfer v. Northern R. Co., 30 N. J. Law, 188. And as to the company's duty in keeping a lookout, see Bellefontaine & I. R. Co. v. Snyder, supra; Bannon v. Baltimore & O. R. Co., 24 Md. 108. That the same circumstances will create different degrees of negligence and duty, see Boland v. Missouri R. Co., 36 Mo. 484; Chicago, B. & Q. R. Co. v. Dewey, 26 Ill. 255; O'Mara v. Hudson River R. Co., 38 N. Y. 445. Contra, Bannon v. Baltimore & O. R. Co., 24 Md. 108. For authorities as to computing damages, same as in the text, see Telfer v. Northern R. Co., supra; City of Chicago v. Major, 18 Ill. 349. For an exhaustive collection of authorities on the rule of damages in actions of this kind, see Sedg. Dam. 552, note 2. See, also, Brady v. City of Chicago, [Case No. 1,796.]

Case No. 998.

BARLOW v. BARNER.

[1 Dill. 418.][1]

Circuit Court, D. Kansas. 1871.

STATUTE OF LIMITATIONS—WRITTEN ACKNOWLEDGMENT.

The statute of Kansas respecting the written acknowledgment, required to take a case out of the statute of limitations, construed and applied.

[At law.] This was an action on a promissory note apparently barred by the statute of limitations. The statute of the state of Kansas provides, that "In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same shall have been made, an action may be brought in such case within the period prescribed for the same; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby." Gen. St. 1868, p. 634. To show an acknowledgment in writing, of an existing liability, within the meaning of this statute, the plaintiff produced certain letters from the defendant to the plaintiff's attorney, as follows:

First Letter:—"Your favor is at hand. I was somewhat surprised to find you in possession of that somewhat celebrated note. Now have you got possession of that note? and if so, what are your instructions, and what is your authority in the premises? If you have the note, please state for what sum you are authorized to send it to me. Without going into detail, I just say to you that it will never be paid. I might suffer still further to have it up."

Second Letter:—"Yours in relation to Mrs. Barlow's claim is at hand. I have already written you that I would not pay it, but still, was willing to give something. I wrote Messrs. Grant & Smith, attorneys, at one time, that I would give $200.00, which they refused to accept. I thought then, and think now, that was, and is, all I ought to give. If she wants something, why don't she say how much, to be done with it?"

Third Letter:—"Yours of a late date, I found on my return, Saturday night. I leave again this morning, will answer you some of these days, but don't know what I can answer. That note took up a due bill previously given for money to loan for Mrs. Barlow, which was deposited in Cook & Sargeant's bank, just before their failure. I never got to the amount of one cent for it."

[Judgment for defendant.]

D. Brier, for plaintiff.

A. Williams, for defendant.

PER CURIAM, (MILLER, Circuit Justice, and DILLON, Circuit Judge, concurring.) Courts, by their decisions as to the effect of loose and unsatisfactory oral admissions and new promises, had almost frittered away the statute of limitations; and to remedy this, statutes similar to the one in force in this state have been quite generally enacted.

The statute of Kansas requires the acknowledgment to be in writing and signed by the party, and the acknowledgment must be of an existing liability with respect to the contract upon which a recovery is sought. The letters relied on by the plaintiff do not acknowledge an existing liability, but rather repel it.

Judgment for the defendant.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

BARLOW, (UNITED STATES v.) See Case No. 14,521.

Case No. 999.

In re BARMAN.

[14 N. B. R. 125; 3 N. Y. Wkly. Dig. 111.]

District Court, E. D. Michigan. March 29, 1876.

BANKRUPTCY—UNRECORDED CHATTEL MORTGAGE.

[1. An unrecorded chattel mortgage for a sufficient consideration is valid, as between the mortgagor and mortgagee, although possession of the mortgaged property is not taken by the latter.]

[Following Sawyer v. Turpin, 91 U. S. 114.]

[2. A chattel mortgage made more than 60 days prior to bankruptcy, for a present consideration, but not filed for record until within 60 days of bankruptcy, is valid, as against the claim of the assignee in bankruptcy.]

[Cited in Platt v. Preston, Case No. 11,219.]

[See Coggeshall v. Potter, Case No. 2,955; Douglass v. Vogeler, 6 Fed. 53. Contra, In re Leland, Case No. 8,234; In re Eldridge, Id. 4,330; Harvey v. Crane, Id. 6,178; Moore v. Young, Id. 9,782.]

In bankruptcy.

[Petition by Sigmund Rothschild, assignee of a chattel mortgage made by Abram and William Barman to Barnard Barman August 9, 1873, filed December 8, 1873, but possession not taken thereunder until January, 1874, to compel the assignee in bankruptcy of Abram and William Barman to pay over the proceeds realized by sale of the mortgaged property. The bankruptcy proceedings were commenced Feb. 5, 1874. Barnard Barman filed proof of his debt April 27, 1874, and assigned the debt to petitioner June 17, 1875. Petition granted.]

F. E. Driggs, for petitioner.

Don. M. Dickinson, for assignee in bankruptcy.

BROWN, District Judge. It is conceded in this case that the mortgage was given in August, 1873, for a loan of money then made,

and that it would have been valid, if then filed, as against bankrupt proceedings; but it is insisted that, as it was not filed until December, it must be regarded, as against creditors and the assignee of the bankrupt, as taking effect from that date. Had it been given in December, for money loaned in August, the mortgagor then being insolvent, and the mortgagee knowing the fact, it would, undoubtedly, have been void as against the assignee; but the mere failure to file it at the time it was executed would not make it invalid, unless intervening rights had accrued by attachment or subsequent conveyance or incumbrance of the property. I regard the case as settled by the opinion of the supreme court, in Sawyer v. Turpin, [91 U. S. 114,] where the court observes, with reference to a similar instrument: "Having bene executed more than four months before the petition in bankruptcy was filed, there is nothing in the case to show that it was invalid. True it was not recorded, and it may be doubted whether it was admissible to record. True no possession was taken under it by the vendee, but for neither of these reasons was it less operative between the parties. It might not have been a protection against attaching creditors, if there had been any, but there were none. It was in the power of Turpin to put it on record any day, if the recording acts applied to such an instrument, and equally within his power to take possession of the property at any time before other rights against it had accrued." In Mitchell v. Black, 72 Mass. [6 Gray,] 100, the court, in speaking of the registration of mortgages, says: "The time when the record shall be made is not specifically described by the statute, though it must, undoubtedly, precede the possession by others subsequently acquiring an interest in the mortgaged property; to prevent it passing to them, it will be sufficient that the record is made at any time before such possession is taken, though it be long after the execution of the mortgage." It was further held, in the first case above cited, that even if there had been an agreement between the mortgagor and mortgagee that the instrument should not be recorded, but should be kept secret, it would be of no importance. I think this case practically determines the one at bar, and that the prayer of the petitioner must be granted.

[NOTE. In re Oliver, Case No. 10,492, states that In re Barman was decided on the strength of Sawyer v. Turpin, 91 U. S. 114, as the supreme court had not then settled the construction to be given to the word "creditors" in the Michigan statutes, but that, the statute having since been construed in Fearey v. Cummings, 41 Mich. 376, 1 N. W. 946, the court will now follow the construction given by the state court.]

BARNABO, (UNITED STATES v.) See Case No. 14,522.

Case No. 1,000.

Ex parte BARNARD.

[4 Cranch, C. C. 294.][1]

Circuit Court, District of Columbia. March Term, 1833.

CONSTITUTIONAL LAW—EMINENT DOMAIN.

1. The act of Maryland of 1785, c. 49, respecting [the taking of land for] private roads or ways, is not repugnant to the constitution of the United States.

2. And [such act] is in force in the county of Washington, D. C.

[Petition by Robert Barnard and William Morton to condemn land for a private way under Act Md. 1785, c. 49. Surveyor's report confirmed.]

The surveyor having laid out a way according to a former order of the court, and having made his report, and a rule having been served on the possessors of the land through which, &c., to show cause, &c.

Mr. R. S. Coxe, for Mr. Mackall, objected.

The act of Maryland of 1785, c. 49, was passed before the amendment of the constitution of the United States, which forbids the taking of private property for public use without just compensation. The act of 1785 does not provide for just compensation, and being repugnant to the constitution of the United States, is void. But this land is not to be taken for public use. It is to be a private way, for private use; and it is not competent for any legislature to take the property of one man and give it to another, even with compensation. By that act, the court, and not the jury, is to ascertain the compensation; which is unconstitutional. Van Horn v. Dorrance, [Case No. 16,857.] Besides, the petitioners have not made out a case of necessity. The old way cannot now be lawfully stopped. It has been opened and used for forty years, and a grant may now be presumed. Aspindall v. Brown, 3 Term R. 265; 2 Dane, Abr. p. 256, c. 79, art. 4; Alban v. Brounsall, Yel. 163; Chichester v. Lethbridge, Willes, 71; Reignolds v. Edwards, Id. 282; Gayetty v. Bethune, 14 Mass. 49; 3 Dane, Abr. p. 250, art. 13; Campbell v. Wilson, 3 East, 294; Dexter v. Hazen, 10 Johns. 246; 3 Dane, Abr. p. 252, arts. 16, 17; 2 Johns. 424; Cincinnati v. White, 6 Pet. [31 U. S.] 431.

Mr. Redin, for the petitioners, referred to the following act of Maryland respecting streets in Georgetown, namely, 1797, c. 56, § 6, and the acts of congress of March 3, 1805, § 12, (2 Stat. 334,) and March 3, 1809, § 4, (2 Stat. 538.) He also cited Greenwood v. Stoner, 3 Har. & J. 435; Howton v. Frearson, 8 Term R. 50; Dutton v. Tayler, 2 Lutw. 1487; Clark v. Cogge, Cro. Jac. 170; Staple v. Heydon, 6 Mod. 3, 4; 1 Rolle, Abr. p. 936, pl. 10.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Mr. Key, on the same side.

The constitutional objection has been overruled in the cases of the Chesapeake & Ohio Canal Co. The act of 1785 has always been acted upon in Maryland.

THE COURT (nem. con.) confirmed the report of the surveyor, and allowed $130 for compensation, namely, 2½ acres at $30, and $55 for fencing.

BARNARD, (ADAMS v.) See Case No. 45.

Case No. 1,001.

BARNARD et al. v. CONGER.

[6 McLean, 497.] [1]

Circuit Court, D. Michigan. June Term, 1855.

MEASURE OF DAMAGES—CONTRACT OF SALE.

1. Where a person has agreed to deliver a quantity of lumber at specified prices, and he fails to comply with his contract, the plaintiff is entitled to recover in damages the difference in price between the lumber contracted for, and the market price at the place of delivery.

2. If the market price at the place of delivery was as low, or lower, than the price agreed to be paid in the contract, the plaintiff will be entitled to no damages. The rule is, that no damages can be recovered where none have been sustained.

[At law. Action by Barnard and Lockwood against Conger for breach of a contract to deliver certain lumber. Verdict for defendant.]

Mr. Clark, for plaintiffs.

Emmons & Jones, for defendant.

OPINION OF THE COURT. This action is founded upon a contract for the delivery of five hundred thousand feet of lumber, at Albany, in New York, at certain prices stipulated, dated 19th of April, 1854; to be delivered the same year before the close of navigation, of the first and second quality. The defendant was permitted to deliver, at the prices stated, as he might choose. Thirty-two dollars for the clear, per thousand feet, and twenty-four dollars for the second quality. Two hundred thousand feet of said lumber, which may be delivered, shall be counted at two dollars per thousand feet less than the prices above named, in consideration that the said Barnard & Son advanced to said Conger on the contract the sum of three thousand dollars, they charging interest on said advance from the payment, until the money shall be repaid by the delivery of that amount of lumber. The delivery to be made at the plaintiff's wharf in Albany.

It was proved that in the summer and fall of 1854, the market price of clear lumber was thirty-five dollars per thousand feet; twenty-seven dollars per thousand for the second quality. Other witnesses stated that in September and October, 1854, lumber sold, first quality for thirty-four dollars per thousand, and second quality for twenty-four dollars. Boat loads sold, at first quality, thirty-two dollars, second quality, from twenty-two to twenty-three dollars per thousand.

The court instructed the jury, that if lumber embraced by the contract was worth more in the market in Albany than the prices stipulated in the contract to be paid to the defendant at the period within which the lumber was to be delivered, the plaintiff was entitled to recover, by way of damages, the difference. But if the price of lumber in the Albany market was as low or lower than the prices agreed to be paid by the plaintiff, he suffered no damage by the failure of the defendant. If the plaintiff with the money in hand, could, in the market at Albany, purchase lumber at the same price that he had agreed to pay the defendant, he was entitled to no compensation, as he sustained no loss.

A sale of lumber in small quantities or by retail, will not fix the prices in the present case; nor would prices paid for a much larger amount than is named in the contract, fix the price. This would bring down the price too low, while the retail price would place it too high. The true rule will be found in such quantities as provided for in the contract, and if you shall find that a purchase could have been made by the plaintiff, at the time the defendant should have delivered the lumber, at the contract or a less price than that agreed to be paid, at the place of delivery, the plaintiff is entitled to no damages.

The three thousand dollars advanced, with the interest, it is understood will be satisfactorily arranged. The jury found a verdict for the defendant.

BARNARD, (DILLON v.) See Case No. 3,915.

Case No. 1,002.

BARNARD v. FARWELL.

[Cited in Bradley v. Converse, Case No. 1,776. Nowhere reported; opinion not now accessible.]

BARNARD, (GIBSON v.) See Case No. 5,389.

Case No. 1,003.

BARNARD et al. v. HARTFORD, P. & F. R. CO. et al.[1]

Circuit Court, D. Connecticut. Oct. 14, 1878.

EQUITY—PARTIES—ASSIGNEE IN BANKRUPTCY—CROSS BILL.

[1. Under the bankrupt act of 1867, § 2, a circuit court has jurisdiction of a cross bill, filed

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

[1] [Not previously reported.]

by an assignee in bankruptcy in a district other than that in which the decree in bankruptcy was made, to redeem mortgaged property in which the complainant has the legal title to the equity of redemption.]

[2. The jurisdiction acquired by a circuit court sitting in equity, by virtue of the character of the complainant as assignee in bankruptcy, is not lost merely because the complainant has parted with all his title pendente lite; and the court also has jurisdiction of a cross bill filed by a new defendant, irrespective of his residence.]

[3. Where a sole complainant parts with his interest pendente lite, the suit is not thereby forthwith abated, but no further proceedings can be had until his assignee is made a party, either by being cited in, or as successor to one of the original defendants.]

[4. Where a corporation has obtained the title of one of the original defendants pendente lite, it may properly become a defendant, and seek relief by a cross bill, although it has also acquired the sole complainant's title pendente lite, and could come in as complainant.]

[5. Where a cross bill setting up additional facts, and praying for affirmative and independent relief against the other defendants, introduces no distinct and separate matter, a decree dismissing the original bill (the complainant having no longer any interest) does not dispose of the cross bill, and the cross complainant may obtain the relief prayed for therein, notwithstanding such decree.]

[6. Where plaintiffs have lost their title to the equity of redemption of mortgaged property by operation of law, and it has become vested in the corporation which brings the cross bill, the only other party with a substantial interest being another defendant, the mere fact that pendente lite the plaintiffs have lost their interest, and consequently no decree is asked either for or against them, should not prevent the party entitled to redeem from gaining its rights.]

[7. The N. Y. & N. E. R. Co. had the apparent legal title to the equity of redemption of a mortgage on the H., P. & F. R. Co., which was held and operated by the mortgage trustees, and had raised $1,500,000 to pay off the mortgage, and had actually paid and canceled $850,000 of the mortgage bonds, and stood ready to pay the remnant. It also proposed to complete the road, and thereby enhance its value. A suit in equity brought by the stockholders of the H., P. & F. R. Co. was pending in a state court to render void the title of the N. Y. & N. E. R. Co. to the H., P. & F. R. Co. because of fraud. *Held*, that the N. Y. & N. E. R. Co. was entitled to possession pending the said suit as legal owner of the equity of redemption, and as, in equity, the owner of the mortgage which it had paid.]

[In equity. Bill by George M. Barnard, Charles S. Bradley, and Charles R. Chapman, assignees in bankruptcy of the Boston, Hartford & Erie Railroad Company, against the Hartford, Providence & Fishkill Railroad Company, George M. Bartholomew, Calvin Day, and Francis B. Cooley, trustees under a mortgage of the property of said railroad in Connecticut, certain trustees under a mortgage of the property of said railroad in Rhode Island, and William F. Hart and other trustees under a mortgage of all the property of the Boston, Hartford & Erie Railroad Company; praying that the plaintiffs might redeem the Connecticut mortgage, of which the bankrupt road had the equity of redemption. Pendente lite, Hart and his cotrustees, their mortgage having been foreclosed, conveyed to the New York & New England Railroad Company all their rights, including the equity of redemption of the Connecticut mortgage, which company subsequently acquired all the title of the assignees in bankruptcy, and was thereafter made a party defendant. A motion by Bartholomew and his cotrustees to dismiss the bill for lack of jurisdiction had been overruled. Heard on a cross bill by the New York & New England Railroad Company, praying that it might redeem the Connecticut mortgage, and have its title quieted. Decree for cross complainant, saving the rights of the stockholders of the Hartford, Providence & Fishkill Railroad Company.]

Charles E. Perkins, for plaintiffs.

Simeon E. Baldwin, for New York & N. E. R. Co.

John C. Day and Alvan P. Hyde, for trustees under the Connecticut mortgages, and for Hartford, P. & F. R. Co.

George W. Baldwin, for Berdell trustees.

SHIPMAN, District Judge. The Hartford, Providence & Fishkill Railroad Company, a corporation established by the legislature of Connecticut and of Rhode Island, mortgaged to Thomas S. Williams, William H. Imlay and David F. Robinson, as trustees, by deeds dated August 25, 1849, and March 20, 1855, its railroad, franchises, and, with certain exceptions, its real estate then owned, or thereafter to be owned, by it in the state of Connecticut, and also its cars, engines and personal estate then owned, or thereafter to be acquired, to secure certain bonds of said company. In the year 1858, there having been default in the payment of said bonds or of the interest thereon, said trustees or their successors took possession of the mortgaged estate, and either said trustees or their successors in said trust have ever since been in possession and have managed said mortgaged property, and have operated said road for the benefit of the bondholders. Calvin Day, George M. Bartholomew and Francis B. Cooley, all of Hartford, Connecticut, are now, and long have been, the trustees and are the duly appointed successors of the said Williams, Imlay and Robinson in said trust. On September 30, 1878, $1,574,500 of said bonds secured by said mortgage were overdue, outstanding, and unpaid. By a contract, lease and conveyance dated August 28, 1863, authorized by the states of Connecticut and Rhode Island, said company sold, leased and transferred, subject to its mortgages in Connecticut and Rhode Island, all its property and franchises to the Boston, Hartford & Erie Railroad Company, whereby the legal title to the equity of redemption in said mortgaged property passed to and became vested in the last-named company. On March 19, 1866, the Boston, Hartford & Erie Railroad Company mortgaged to Robert H. Berdell,

Dudley S. Gregory, and J. Bancroft Davis, as trustees, all its railroad property, to secure $20,000,000 of bonds, which mortgage is usually known as the "Berdell Mortgage." Said mortgage purported to include and convey, and did convey, the rights and property acquired by the last-named company from the Hartford, Providence & Fishkill Railroad Company. A large amount of bonds were issued and were sold to sundry persons upon the faith of this mortgage. On March 2, 1871, the Boston, Hartford & Erie Railroad Company was duly adjudicated a bankrupt by the district court of the United States for the district of Massachusetts, and on March 18, 1871, George M. Barnard, Charles S. Bradley, and Charles R. Chapman were duly appointed assignees in bankruptcy of said company, and became qualified as such, and received an assignment of its estate in due form of law. On March 15, 1873, said assignees filed in this court their bill in equity against the Hartford, Providence & Fishkill Railroad Company, said Day, Bartholomew and Cooley, as trustees, William F. Hart, Charles P. Clark and George T. Olyphant, the existing trustees under the Berdell mortgage, and the trustees under a mortgage of said company of its real estate and property in Rhode Island, setting up all the foregoing facts, and praying that the Connecticut trustees account to the plaintiffs, and that said assignees might redeem said mortgaged property, and that the Connecticut trustees should be directed to deliver possession of the property which was mortgaged to them to said assignees. All parties appeared save the Rhode Island trustees. The Connecticut trustees, at the April term, 1874, of this court, moved to dismiss the bill, upon the ground that the court had no jurisdiction of the case by reason of the citizenship of the parties; this motion was overruled, for the reason that jurisdiction was conferred upon this court by the second section of the bankrupt act of 1867. Answers were thereafter filed by the defendants.

On July 1, 1870, the Boston, Hartford & Erie Company made default of payment of the interest due upon the Berdell mortgage. On September 13, 1871, the Berdell mortgage trustees took possession of all the property covered by that mortgage so far as they were able to do so, and continued in possession for the period of eighteen months. On April 2, 1872, the principal of the Berdell mortgage bonds became due. At the expiration of said eighteen months, said default continuing, the Berdell mortgage bondholders were duly constituted, agreeably to the terms of said mortgage, a corporation, by the name of the New York & New England Railroad Company, for the purpose of acquiring and holding the title by foreclosure of the mortgaged property. Afterwards, by acts of the legislature of Massachusetts, Connecticut, Rhode Island and New York, this corporation was fully incorporated. On April 24, 1873, the Berdell mortgage trustees, pursuant to decrees of courts having jurisdiction of the subject-matter, said mortgage having been duly foreclosed by said decrees, conveyed to the New York & New England Railroad Company the rights, franchises and estate conveyed by and included in the Berdell mortgage. This corporation thereupon entered into possession of said property, and still continues in such possession. On July 28, 1875, the assignees in bankruptcy of the Boston, Hartford & Erie Railroad Company conveyed to the New York & New England Railroad Company all their right in and to the railroad, rights, franchises and estates of said bankrupt corporation, subject to a proviso that nothing contained in said conveyance should be construed to affect the rights of stockholders, if any, of the Hartford, Providence & Fishkill Railroad Company, and stipulated that such disposition might be made of this bill as should carry out the intent of said conveyance. On September 2, 1878, pursuant to an application dated August 23, 1878, and an order of notice thereon, the New York & New England Railroad Company was admitted as a party defendant to said bill, with liberty to file such plea, answer or cross bill as it might be advised. Said company subsequently filed a cross bill, setting forth all the foregoing facts, and averring that they are ready and willing to pay the principal and interest of all the bonds secured by the Connecticut mortgages of the Hartford, Providence & Fishkill Railroad Company, and to redeem the property covered by said mortgages, and praying that all the parties to said bill save the trustees under the Rhode Island mortgages, who had never been served with process, might answer and show cause why the prayer should not be granted, and that said Connecticut trustees might account to the New York & New England Railroad Company, and might, upon payment of said bonds, deliver up the property covered by the Connecticut mortgages, and make such assurances and conveyances as might be deemed proper, and that its title might be quieted as against all the defendants in the cross bill. All said defendants have answered, and have substantially admitted all the facts hereinbefore stated to be true.

The Connecticut trustees and the Hartford, Providence & Fishkill Railroad Company, in their answer, aver that on or about December 30, 1875, the Boston & Providence Railroad Company, and Earl P. Mason, of Providence, Rhode Island, notified, in writing, Calvin Day, the president of the Hartford, Providence & Fishkill Railroad Company, that they, with others owners of shares in the capital stock of said company, claimed to be the then owners of the rights, property and franchises of said company, subject to certain mortgages thereon, and requested said Day, as an officer of said

company, and in its name, to commence legal proceedings for the redemption of said mortgages, and to invalidate the pretended title of said Boston, Hartford & Erie Railroad Company and all persons claiming under them, which request was not complied with, and that on December 31, 1875, a bill in equity was filed in the supreme court of the state of Rhode Island, by the Boston & Providence Railroad Company, and sundry others, in behalf of themselves and such other owners and holders of stock of the Hartford, Providence & Fishkill Railroad Company as shall come in and contribute to the expenses of said suit, against the New York & New England Railroad Company, and the Connecticut & Rhode Island trustees under the mortgages of the Hartford, Providence & Fishkill Railroad Company; praying that the conveyances by said company to the Boston, Hartford & Erie Railroad company be declared to be void, and that the right and title of the New York & New England Railroad Company to the property and franchises of the Hartford, Providence & Fishkill Railroad Company be declared to be void, and that the plaintiffs be decreed to be entitled to the possession of the property of the last-named company upon the redemption of the valid mortgages thereon, and that said trustees may be restrained from delivering to the New York & New England Railroad Company the possession and control of said property, in which suit the trustees under the Connecticut mortgages were not served with process. Said suit is still pending. On September 30, 1878, a suit in equity in favor of substantially the same plaintiffs against the same defendants was commenced in the superior court for Hartford county in this state. The bill embraces substantially the same allegations and prayers as those contained in the bill which was filed in the supreme court of the state of Rhode Island, and the Connecticut trustees have been served with process. Upon the hearing in this court upon pleadings and proofs, it appeared that on or about July 1, 1878, the New York & New England Railroad Company gave public and general notice, by advertisement and otherwise, that the bonds issued under the Connecticut mortgages would be paid in full at the American National Bank in the city of Hartford on October 1, 1878, with interest to said date, and that interest would thereafter cease; that said company provided itself with funds sufficient to pay said bonds, and on October 1, 1878, commenced said payment at said bank; that about $850,000 of bonds had been presented, paid, surrendered and cancelled on October 9, 1878; that the money due upon about $500,000 of bonds held by the city of Hartford had been tendered its treasurer, who declined to receive the same until authorized by vote of the court of common council of said city; that money sufficient to pay all the outstanding bonds was on deposit for that purpose; and that the outstanding bonds were constantly being presented and paid. Said company offered to deposit in court money sufficient to pay the principal and interest of all said bonds, or otherwise comply with the order of court touching said payment.

Upon the foregoing facts, the trustees under the Connecticut mortgages present two questions for the consideration of the court;

1st. It being apparent that, prior to the conveyance of the assignees in bankruptcy to the New York & New England Railroad Company, the title of such assignees to the equity of redemption had become lost by foreclosure of the Berdell mortgage, and that no decree in regard to redemption or foreclosure is asked for or against the plaintiffs, can the court properly render any other decree than one of dismissal of the bill?

The original bill was brought by assignees in bankruptcy in a circuit court in a district other than that in which the decree of bankruptcy was made, to redeem a mortgage upon property in which the plaintiffs had an equity of redemption. Of this suit, this court had jurisdiction. Lathrop v. Drake, 91 U. S. 516. At the time suit was brought, the assignees had the title to the property subject to the various mortgages thereon, and had the right of redemption. Their title was subsequently lost by the foreclosure of the Berdell mortgage. If a sole plaintiff, suing in his own right, is deprived of his interest in the subject-matter in question by an event subsequent to the institution of the suit, his assignees or those succeeding to or having acquired his rights may have the benefit of the proceedings which have been already instituted by an original bill in the nature of a supplemental bill. Story, Eq. Pl. § 349. If the defendant, in a bill to foreclose or redeem a mortgage, conveys his interest in the property, pendente lite, to a third person, and that person desires to have the benefit of the title so gained for affirmative relief in respect to the matters charged in the original bill, as, for example, to redeem the mortgaged property, he must obtain such relief by filing a bill in the nature of a cross bill. Id. § 351. In this case the title of the plaintiffs became vested by operation of law or by decree of court, pendente lite, in the trustees of the Berdell mortgage, defendants in the original bill, all whose title, both original and that subsequently acquired, became vested, pendente lite, in the New York & New England Railroad Company. This company had a right to become a defendant, as assignee of the title of one of the original defendants, and properly filed a cross bill for relief simply as to the matters charged in the original bill. Inasmuch as it is properly seeking relief because it has succeeded to all the rights of a defendant, it is not important to inquire whether it could also have come in as plaintiff by reason of the acquisition of the plaintiffs' title through the Berdell

trustees. The fact that the plaintiff has parted with his interest, pendente lite, does not forthwith abate the suit, but the assignee must be made a party before the suit can be proceeded with. "The proper course for the defendant, in such a case, if he wishes to have the suit proceeded in or put an end to, is to apply to the court for an order that the assignee file a supplemental bill, in the nature of a bill of review, within such time as shall be prescribed by the court for that purpose, or that the complainant's bill be dismissed." Sedgwick v. Cleveland, 7 Paige, 287. In this case the assignees of the plaintiffs' interest were already defendants, and therefore there was no necessity of citing them in. It does not harm the position of the new defendant that it also became vested by direct conveyance from the original plaintiffs of any shred of title which might have been left outstanding in them. The court has not lost jurisdiction of the case because the plaintiffs, by virtue of whose character as assignees in bankruptcy it obtained jurisdiction, have parted with all their title, pending the suit. "It is quite clear that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that, after vesting, it cannot be ousted by subsequent events." Mollan v. Torrance, 9 Wheat. [22 U. S.] 537; Clarke v. Mathewson, 12 Pet. [37 U. S.] 164. Having jurisdiction of the original bill, it has jurisdiction of the cross bill, which may be filed by a new defendant, irrespective of his residence. The cross bill is auxiliary to the original suit. Jones v. Andrews, 10 Wall. [77 U. S.] 327.

But it is claimed, inasmuch as the New York & New England Railroad Company seek for no affirmative relief against the original plaintiffs, who have no longer any interest in the subject-matter, that no decree can be rendered in the case except that the bill be dismissed. If the decree dismissing the original bill disposes of the whole controversy between all the parties, the cross bill follows the fate of the original bill. Dows v. Chicago, 11 Wall. [78 U. S.] 108. In a very large class of cases, however, the cross bill sets up additional facts, and prays for affirmative and independent relief; in such cases, while the original bill may be dismissed, the defendant may obtain a decree upon his cross bill for the relief prayed for. The trustees claim that a dismissal of the original bill disposes of the cross bill, except in cases where the cross bill prays for relief against the plaintiff. While it is true that usually a cross bill is brought to obtain relief against the plaintiff, it is not indispensable that such should be its purpose. The substance of the authorities on the subject is, that a cross bill is properly brought by a defendant against the plaintiff in the same suit, or against other defendants in the same suit, or against both, as to the matters in question in the original bill. Its purpose is to obtain relief to all parties as to the matters charged in the original bill. New and distinct matters which constitute the subject of an independent suit, not embraced in the original bill, should not be introduced. A litigation between the defendants, with which the plaintiff is not concerned, should not be the subject of a cross bill. "It is auxiliary to the original suit, and a grant and dependency upon it. If its purpose be different from this, it is not a cross bill, though it may have a connection with the same general subject." Ayres v. Carver, 17 How. [58 U. S.] 591; Cross v. De Valle, 1 Wall. [68 U. S.] 1; Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 807. The cross bill in this suit strictly deals with the matters charged in the original bill, and introduces no distinct and separate matter.

But even if the general rule is as contended for by the trustees, the circumstances of this case are sui generis, and exceptional. The plaintiffs have lost their title by operation of law. It has become vested in the corporation which brings the cross bill. The only parties before the court who have a substantial interest in the subject-matter are the New York & New England Railroad Company and the Connecticut trustees. The mere fact that, on account of transfers pendente lite, the original plaintiffs have lost their interest, and consequently no decree is asked either for or against them, should not prevent the party which is entitled to redeem and to the possession of the mortgaged property from gaining its rights.

2nd. It is next urged that no decree should be rendered until the plaintiffs in the suits in the state courts shall have been made parties to this bill, and a determination shall have been had of the validity of their claim.

The suit of the stockholders of the Hartford, Providence & Fishkill Railroad Company is upon the ground that the conveyance to the Boston, Hartford & Erie Company was void by reason of fraud and misrepresentation on the part of said company. The New York & New England Railroad Company has the legal title to the equity of redemption. Whether its apparent title is void by reason of the fraud of its assignor is the subject of controversy. In addition to this apparent legal title, that company has now raised a million and half of dollars to pay the mortgage, has paid and cancelled $850,000 of the bonds, has tendered payment of the amount due the city of Hartford upon $500,000, and is ready to bring into court the sum necessary to pay the remainder. If its title to the equity of redemption shall be set aside, it will still be in equity the owner of the mortgage which it has paid, and will be, upon payment, subrogated to all the rights of the Connecticut trustees, one of which rights is the possession of the railroad for the benefit of the mortgagees. I do not consider in this connection any equitable rights which it may claim to have as the

successor of the Berdell bondholders, but it is eminently proper that the corporation which, having the legal right to redeem, has paid the first mortgage, should have the possession of the property as against persons who have not yet substantiated either legal or equitable title. It is important that it can hardly be contended that serious injury will result to the claimants by reason of the possession of the New York & New England Company, which proposes to complete the western end of the road. If this is done, the value of the franchise and of the property will be enhanced.

Let there be a decree in general accordance with the prayer of the cross bill, but with a proviso that nothing in said decree shall affect or impair the right, title or claim of any person or corporation who claim to be stockholders of the Hartford, Providence & Fishkill Railroad Company. The terms and details of the decree will be settled upon hearing.

Case No. 1,004.

BARNARD v. HERBERT.

[The case cited under this title in Maynadier v. Duff, Case No. 9,349, is the same as Bernard v. Herbert, Case No. 1,347.]

BARNARD, (KELLOGG v.) See Case No. 7,661.

Case No. 1,005.

BARNARD et al. v. MORTON.

[1 Curt. 404.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1853.

CUSTOMS DUTIES—DUTIABLE VALUE—ACT OF 1842—SALT IN SACKS.

1. The sixteenth section of the tariff act of August 30, 1842, (5 Stat. 563,) is not repealed by the tariff act of July 30, 1846, (9 Stat. 42,) and still prescribes the rule for ascertaining the dutiable value of merchandise, procured by purchase, on which an ad valorem duty is imposed.

[Followed in Kriesler v. Morton, Case No. 7,933. Distinguished in Forman v. Peaslee, Case No. 4,941.]

2. The expense of sacks, in which salt is packed for importation from Liverpool, is embraced under the words "all costs" in that section, and is to be added to the market value, to ascertain the dutiable value.

[Cited in Saxonville Mills v. Russell, Case No. 12,413.]

[See U. S. v. Clement, Case No. 14,815.]

At law. This was an action for money had and received [brought] by [George M. Barnard and others, composing the firm of] Barnard, Adams & Co., against Marcus Morton, late collector of the customs for the port of Boston, to recover a sum of money alleged to have been illegally exacted as duties. After introducing witnesses, the substance of whose testimony appears in the opinion of the court, the parties agreed, that, upon this evidence, and the law applicable thereto, the court should direct a verdict. [Verdict directed for defendant.]

Choate & Bell, for plaintiffs.
Hallett, Dist. Atty., for defendant.

CURTIS, Circuit Justice. On the third day of February, 1849, Messrs. Barnard, Adams & Co. entered, at the custom-house in Boston, 2670 sacks of salt, imported from Liverpool. The invoices specified, first, the cost of the salt; second, the number and cost of the sacks in which the salt was imported; third, the charges, consisting of river freight, dock and town dues, mats, cartage of sacks, and filling; and fourth, the commissions. The collector assessed the ad valorem duty of twenty per centum on the footing of the invoice. The plaintiffs protested against so much of the duty as was thus imposed on the cost of the sacks, and, having paid it, this action is brought to recover it back.

The plaintiffs have called witnesses, skilled in the trade, who have testified, that long before the tariff law of 1846, invoices of salt were accustomed to be made as these are made; that the cost of the sacks in which the salt is exported, had not usually or ever been included among the "charges." One witness, who had been extensively engaged in the trade for ten years, and had resided in Liverpool one half that time, testified, that the salt exported from Liverpool is chiefly made in the county of Cheshire; that the manufacturers have agents at Liverpool, who sell it, deliverable either at the works, or at the port of Liverpool. It is sold in bulk, by the ton, and the purchaser directs it to be packed in bleached or half-bleached sacks, the former for fine salt, the latter for coarse. Except some fine salt, known as "factory-filled salt," it comes down the Mersey in bulk, and is filled on board, or alongside the vessel in which it is exported, at the expense of the purchaser. The seller procures the bags for the purchaser, and makes a separate charge to him of their cost; and the invoices make the bags a distinct item. The charges in the invoices are the expenses incident to getting the article on shipboard. The seller of the salt procures the sacks, puts the salt in them, and charges the salt and the sacks to the purchaser; this is the cost of the salt; then the charges are added. The whole constitutes the cost of the cargo. The other witnesses, called on both sides, confirm this statement, so far as their knowledge extends; and they add nothing to it, except the fact that salt in bulk, and bag-salt, is each a distinct and well-known article of commerce in the United States.

Upon these facts, the question is, whether

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

the cost of the sacks is to be added to the cost of the salt in bulk, in ascertaining the dutiable value of salt imported in sacks from Liverpool. The law, under which this duty was exacted, is the act of July 30, 1846, (9 Stat. 42.) This law does not contain any provisions directing the mode in which the dutiable value of articles, upon which it levies an ad valorem duty, shall be ascertained. And the first question raised, and to be determined, is, whether any, and what other law or laws, are so far left in force by this act, as to give the rule for ascertaining the dutiable value of merchandise on which the tariff of 1846 imposes ad valorem duties.

It is argued, by the plaintiff's counsel, that this act has repealed the preceding tariff act of August 30, 1842, [5 Stat. 563,] including the sixteenth and seventeenth sections, which prescribe the mode of ascertaining the dutiable value of merchandise procured by purchase. The act of 1846 contains no other repealing clause than what is found in its seventh section. "That all acts and parts of acts repugnant to the provisions of this act, be, and the same hereby are, repealed." But this act imposes throughout ad valorem duties; and, as already observed, it contains no specific provisions as to the instrumentalities, by means of which the dutiable values of the articles it subjects to duties are to be ascertained, or the times and places in reference to which such values are to be computed, or the items which are to be reckoned as part thereof. Yet such provisions are not only proper, but, as has been shown by experience, are necessary parts of a just and equal system of laws, levying ad valorem duties, and have been so treated since the year 1823 in the legislation of congress. It follows, that the then existing provisions of law on those subjects, so far from being repugnant to this act of 1846, are needful, to carry it into practical effect; and, therefore, could not be considered as repealed by its eleventh section, even if there is found in it no express reference to existing laws, as affording rules on these subjects.

This question of repeal was argued as if it depended on the interpretation to be placed on the eighth section of the act of 1846; and the plaintiffs' counsel insisted, that this section was, throughout, applicable solely to cases of additions made to the invoice cost of imports by the owner, consignee, or agent; and consequently, that the reference made therein to existing laws, adapted them for such cases only. This section is in these words: "That it shall be lawful for the owner, consignee, or agent of imports which have been actually purchased, on entry of the same, to make such addition in the entry to the cost or value given in the invoice, as, in his opinion, may raise the same to the true market value of such imports in the principal markets of the country whence the importation shall have been made, or in which the goods imported shall have been originally manufactured or produced, as the case may be; and to add thereto all costs and charges which, under existing laws, would form part of the true value at the port where the same may be entered, upon which the duties may be assessed. And it shall be the duty of the collector, within whose district the same may be imported or entered, to cause the dutiable value of such imports to be appraised, estimated, and ascertained, in accordance with the provisions of existing laws; and if the appraised value thereof shall exceed, by ten per centum or more, the value so declared on the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected, and paid, a duty of twenty per centum ad valorem on such appraised value." Perhaps this is the true interpretation of the section. But it by no means follows that cases not within it are not to be subject to existing laws, both as to the mode of ascertaining the dutiable value, and the assessment of an additional duty of twenty per centum, in case that appraised value shall exceed the declared value ten per centum or more. It would be strange, indeed, if this penalty were to be inflicted when an attempt was made by the importer to correct the invoice value before entry, and were not to be inflicted when no attempt was made to correct it; and it would be still stranger, if the law pointed out a mode of ascertaining the dutiable value in the former class of cases, but left the latter, probably far the larger class, without any mode of ascertaining that value, save by the invoices made abroad. If, therefore, the eighth section is to receive the interpretation contended for, a point which I do not find it necessary to determine, the inference would be, that having made special provision for a particular class of cases of altered values, it was thought necessary, by express terms, to bring them under the same existing provisions of law, as all other cases were to be governed by; and that therefore it was, that in respect to them, there is an express enactment to that effect; while all other cases are left to be governed by those existing provisions which are not repugnant to the law of 1846, but are necessary to its just and equal execution.

The sixteenth and seventeenth sections of the act of 1842 were not designed to be applicable merely to cases arising under that law. The sixteenth section begins as follows: "That in all cases where there is or shall be imposed any ad valorem rate of duty, &c., it shall be the duty of the collector to cause the actual market value, or wholesale price thereof, at the time when purchased, &c., to be appraised, estimated, and ascertained," &c. And then follows a set of provisions to enable the collector to discharge this duty. This system, digested from former laws, with some alterations, was in force when the ad valorem tariff of 1846 was en-

acted; and the inference is irresistible, that it is to continue to operate upon all cases of ad valorem duties levied on merchandise procured by purchase, under this act of 1846, which has made no new provisions on the subject.

It was argued that, by the act of March 3, 1851, (9 Stat. 629,) congress has, in terms, made it the duty of the collector to cause the dutiable value of articles to be appraised, estimated, and ascertained; and that this shows it was not previously his duty, and proves that there was an omission in the law of 1846, which it was the object of this law of 1851 to supply. But a close examination of this last mentioned law, and of the circumstances in which it was enacted, will lead to an opposite conclusion. Just before this law was enacted, an interpretation had been put by the supreme court on the fifth section of the act of March 1, 1823, (3 Stat. 732,) and on the sixteenth section of the law of 1846, to the effect that the value, at the time of the procurement of merchandise imported from the country of its production, was the value to be ascertained. Greely v. Thompson, 10 How. [51 U. S.] 225; Maxwell v. Griswold, Id. 242. The practice at the custom-house, under instructions from the treasury department, is understood to have been to ascertain the value at the time of exportation. This law of 1851, in its first section, enacted—"That in all cases where there is or shall be imposed any ad valorem rate of duty, &c., it shall be the duty of the collector, &c., to cause the actual market value, or wholesale price thereof, at the period of the exportation to the United States, to be appraised, estimated, and ascertained," &c.

The purpose of congress clearly was, to repeal so much of the fifth section of the act of 1823, and of the sixteenth section of the act of 1842, as fixed the time of procurement as the period, in reference to which the value was to be assessed; and substitute therefor the time of exportation. This clearly implies that congress considered the sixteenth section as still in force. And in this law, also, no means of fixing the value are provided; and there is, therefore, a tacit but clear reference to the modes which theretofore had been provided for that end, by the sixteenth section of the act of 1842, in cases of imports purchased, and by the act of 1823, in cases of imports procured otherwise than by purchase. I say the modes provided by these two laws; because it seems, from the terms of the sixteenth section of the act of 1842, that it can be applied only to imports procured by purchase, and that if procured otherwise than by purchase, it is still necessary to recur to the provisions of the act of 1823, which required proceedings differing materially from those of the act of 1842.

It may be added, that though the question now made concerning the repeal of the sixteenth section of the Act of 1842, has not, so far as I am aware, been distinctly presented before; yet the case of Griswold v. Maxwell, [Case No. 5,838,] proceeds upon the ground that it is not repealed. And it has been treated as in force in many cases. Morlot v. Lawrence, [Id. 9,815;] Norcross v. Greely, [Id. 10,294.] It is a question of so much importance, that after it had been argued at the bar, I thought it proper to consider it somewhat more at large than its intrinsic difficulty, perhaps, required.

This section of the act of 1842 being in force, we must look to it for the rule governing this case, which is one of purchase. It requires the collector to ascertain the dutiable value of this import, by adding to its market value, "all costs and charges, except insurance, and including in every case a charge for commissions at the usual rate, as the true value at the port where the same may be entered, upon which duties shall be assessed." The object of the law is, to ascertain the true value of the article at the port where the same is entered; and the mode of ascertaining that value is, to add to the market price abroad, all costs and charges. The article entered was salt. But it appears there are two kinds of salt known in this market; salt in bulk, and bag-salt. The latter is what the plaintiffs entered. Their entry is, "2670 sacks salt." The question is, whether the price of the sacks is a cost or charge, within the meaning of this law. That it is, in point of fact, one of the expenses incurred, abroad, to give the article the character of bag-salt, is clear.

But it is insisted that it is not one of the charges, within the meaning of this law, because it has never been known as such to merchants. This may be admitted; but is it not one of the costs of the article known as bag-salt? It is argued that "all costs and charges" means no more than all charges. But it is the duty of the court, in construing a statute, to give effect to every word used by the legislature, if an appropriate meaning can be attached to it. And inasmuch as the cost of the bags is in fact one of the costs of the article entered, if it be true that it cannot come under the word "charges," an appropriate effect can be given to the word "costs." Among the items, denominated "charges" in the invoices, are the expenses of carting the bags. It is not denied in the protest, nor is there any ground to deny, that this is properly denominated one of the charges, and is to be added to the market value of the salt. If so, it would be strange, if the expense of the sacks themselves were to be excluded. Take the definition of the word "charges" given by one of the witnesses—the expenses of getting the article on shipboard; if the cartage of the sacks comes into the charges, it must be because the sacks are a component part of the article bag-salt; and if so, the cost of the sacks is one of the costs of that article.

This word "costs" is used for the first time, I believe, in this law, in addition to the word charges. See Acts 1823, (3 Stat. 732, § 5;) Acts 1828, (4 Stat. 273, § 8;) Acts 1832, (4 Stat. 593, § 15.) And I do not perceive any sound reason why it may not be so construed as to cover the expense of packages, in which imports usually purchased in bulk are placed, after the purchase, and before exportation. This expense is strictly one of the costs of the article as imported, and at the same time it does not enter into the market value of the article abroad, which is sold in bulk, as it would, if there sold in such packages. It differs, also, entirely from the case of a duty expressly levied upon the article in such packages, as upon wine in bottles; and from the case of a specific duty upon salt, as under the act of 1832. My opinion is, that the cost of packages, into which articles purchased in bulk are placed, before exportation, by means of which the article, when thus imported, has acquired in commerce a distinct character, as bag-salt, in contradistinction to salt in bulk, is one of the costs of that import, within the meaning of the sixteenth section of the act of 1842; and consequently, that the cost of the sacks was in this case properly included in the sum on which the duty was to be assessed.

Pursuant to the agreement of the parties, a verdict is to be directed for the defendant.

Case No. 1,006.

BARNARD et al. v. MORTON.

[1 Spr. 186.] [1]

District Court, D. Massachusetts. April Term, 1850.

CUSTOMS DUTIES—APPRAISAL—SUGAR FROM CUBA VIA HALIFAX.

1. Sugars were transported from Cuba to Halifax, and thence imported into the United States: *Held*, that under the tariff act of 1842, the duties were to be assessed upon the market value of the sugars in Cuba, at the time when they were shipped from Halifax, with the addition of the usual charges at Halifax.

[See Norcross v. Greeley, Case No. 10,294.]

2. Freight from Cuba to Halifax is not to be added.

At law. This was an action against the collector of the port of Boston. [Judgment for plaintiffs.]

The case came before the court upon a statement of facts, by which it appeared that two invoices of Havana sugars were consigned to the plaintiffs, by merchants residing at Halifax, N. S., subject to an ad valorem duty of 30 per cent. That upon arrival, they were appraised for the assessment of duties, by adding to the market value in Cuba, the charges incurred there, freight from there to Halifax, and the charges at Halifax. The plaintiffs, considering this mode of valuation unauthorized by law, paid the duties assessed, under protest, and brought this action against the collector, to recover so much as was unlawfully demanded.

C. G. & F. C. Loring, for the plaintiffs, contended, that upon a proper construction of the statute, August 30, 1842, § 16 (5 Stat. 563,) the valuation for the assessment of duties, when goods were imported from a place other than that of production or manufacture, should be the market value in the principal market of the country of production or manufacture, at the time of the exportation to the United States, with the addition of the charges at the place of such exportation, or otherwise at the place of production; and that in neither case, should the freight to the intermediate port be added. So that in the present case, the sugars should be taken at their value in Cuba, at the time they were shipped from Halifax, and to this should be added, for the assessment of duties, only the charges at Halifax, or at the place of shipment in Cuba.

Lunt, for the defendant, rested the defence principally upon the instructions of Mr. Walker, when secretary of the treasury, and subsequent confirmatory directions of Mr. Meredith, to whose attention the case was early presented by the plaintiff.

SPRAGUE, District Judge. It is plain, that the time when the valuation is to be made, is that of the exportation to the United States, and the standard, the market value in the country of production, at that time.

The only question is, as to what shall be added to such valuation.

The law says, to this value shall be added the usual cost and charges.

If it were not for the subsequent proviso in the statute, the valuation would be, in all cases, the market value at the place of exportation, which might include the charges at Cuba, and the freight thence; and to this should be added the charges at Halifax. But the proviso alters the standard of value, by declaring that, when the place of exportation is not that of production, the value shall be taken in the place of production, at the time of exportation. Nothing is said about costs and charges in the proviso, and therefore, only the costs and charges at the place of exportation should be added.

The principal question is, whether the freight from Cuba to Halifax can be added. This item constitutes no part of the value of the merchandize in Cuba, and it is not one of the costs and charges incurred at Halifax. If the standard were the market value in Halifax, it might be included; but as the standard is the market value in Cuba, it is necessarily excluded. It is admitted, that if the sugars had been shipped from Cuba to the United States, freight could not be ad-

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

ded, and there is no more reason why it should be added in the present case.

Upon examination of the statute, I cannot resist the conclusion, that the construction which has been given to it by the treasury department, and is now contended for, in behalf of the United States, is erroneous.

This opinion, I understand to be in accordance with the decision of the circuit court of the United States, in the recent case of Grinnell v. Lawrence, [Case No. 5,831.]

In the present case, the duties should have been assessed on the market value of the sugars in Cuba, at the time when shipped from Halifax, with the addition of the usual charges at Halifax; and for the excess, which was unlawfully demanded and paid, the plaintiffs are entitled to judgment.

Case No. 1,007.

BARNARD et al. v. NORWICH & W. R. CO. et al.

[4 Cliff. 351;[1] 14 N. B. R. 469; 3 Cent. Law J. 608; 5 Amer. Law Rec. 361; 22 Int. Rev. Rec. 312.]

Circuit Court, D. Massachusetts. May Term, 1876.

RAILROAD COMPANIES—MORTGAGE—AFTER-ACQUIRED PROPERTY—LEASED LINES.

1. The Boston, Hartford, & Erie Railroad executed a mortgage, called the Berdell mortgage, and issued bonds for certain specific purposes, under which the individual defendants were trustees, and in possession of the leasehold interest. Afterwards the Norwich & Worcester Railroad Co. was leased to the Boston, Hartford, & Erie Co. Afterwards the Boston, Hartford, & Erie was declared bankrupt during the existence of the Norwich & Worcester lease. Bill in equity was brought by the assignees in bankruptcy of the Boston, Hartford, & Erie Road, praying that the trustees under the mortgage might be decreed to pay to the assignees all the profits and moneys received by them, and to deliver the leasehold interest of the said road; and that the Norwich & Worcester Road should pay over all moneys by it received under the lease. *Held*, the prayer of the bill must be denied, because the leasehold interest acquired by the lease passed to the trustees as after-acquired property.

[2. A mortgage of all the property of a railroad company then in its possession or thereafter acquired includes another railroad subsequently leased to the mortgagor, and the title to such leased road is good in the hands of the trustees under the mortgage, as against the subsequent assignees in bankruptcy of the mortgagor.]

3. In equity the rule is, that when parties intend to create a lien upon property, not then in actual existence, it attaches as soon as the person who grants the lien acquires the possession and title of the same.

[In equity. Bill by George M. Barnard, Charles S. Bradley, and Charles R. Chapman, assignees in bankruptcy of the Boston, Hartford & Erie Railroad Company, against the Norwich & Worcester Railroad Company, W. T. Hart, G. T. Oliphant, and C. P. Clark, trustees under a mortgage of the property of the Boston, Hartford & Erie Railroad Company, praying that respondents account for all moneys and profits received by them as lessees and managers of the property of the Norwich & Worcester Railroad Company, and that they be ordered to deliver to complainants their leasehold interests therein, and release and convey to complainants whatever title they may have to such leasehold interests. Bill dismissed.]

The complainants were the assignees in bankruptcy of the Boston, Hartford, & Erie Railroad Co., and the respondents were the Norwich & Worcester Railroad Co., and William T. Hart and Charles P. Clark, surviving trustees, under the indenture known as the Berdell mortgage. The first-named railroad company was incorporated on the 25th of June, 1863, under a law of the state of Connecticut, and by divers other laws of said state, and of the states of Massachusetts, Rhode Island, and New York. The said railroad company, on the 19th of March, 1866, executed the indenture known as the Berdell mortgage, under which the respondents, Hart and Clark, as the surviving trustees created by that indenture, were in actual possession of the leasehold interest which was the subject-matter of the controversy. Twenty thousand bonds, of $1,000 each, were issued by the said railroad company "for the purpose of paying the existing debts of the company and of completing and equipping their road." Interest at the rate of seven per cent. per annum was payable semi-annually on the first days of January and July in each year, on the presentation and delivery of the proper annexed interest-warrants. Payment of the principal was deferred until Jan. 1, 1900. To secure the payment of principal and interest, the railroad company executed an indenture known as the Berdell mortgage, under which the two individual respondents were the surviving trustees. By the terms of the instrument, the grantors conveyed all the railways of the corporation, commencing at the foot of Summer street, Boston, and running to Willimantic, in the state of Connecticut, through Thompson in that state, and commencing at Providence and running to Willimantic, and also commencing on the northerly side of the city of Boston, and running through Woonsocket, in the state of Rhode Island, to Willimantic, and thence through the state of Connecticut and a portion of the state of New York, to the western terminus of the location of the railway of the company on the east bank of the Hudson river, at Fishkill; also, running from Willimantic to New Haven; "also, from a point on said railway, in said Thompson, to Southbridge, in the state of Massachusetts. As said railways are now, or shall be located, constructed, or improved under or by virtue

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

of any powers now granted, or that may hereafter be granted or obtained to locate, construct, or use a railroad on any of said indicated lines, with all the lands that are included, or may be included in the location of said railway, or acquired for the uses of said company within the terminal points aforesaid, but not including the lands at the termini at Boston and at Fishkill, which are outside of the location of said railroad, together with all their lands, tracks, lines, rails, bridges, ways, depots, stations, water-tanks, shops, buildings, piers and wharves, erections, fences, walls, fixtures, privileges, franchises, rights, leases, and charters; also, all the like estate, roads, railroads, and structures, and matters and things pertaining or belonging thereto, that may be hereafter acquired or constructed, or belong to or be controlled by the party of the first part. Together with all the tolls, income, issues, and profits to be had from the same, and all rights to receive and recover the same, and everything necessary for the complete use of the road; also all the locomotives, engines, tenders, cars, carriages, tools, shops, fixtures, and machinery, and all the coal, wood, and other fuel belonging or appertaining to said railroad, or that may at any time hereafter belong or appertain to the same, as it may be changed by use and new acquisitions; also all the estate, real, personal, and mixed, of any of the foregoing descriptions, or of any other kind which may be hereafter acquired by the party of the first part, and used or intended to be used in the construction and operation of the said railroad."

An agreed statement of facts was filed, of which the following are the essential facts, so far as the same is related to the opinion of the court and the view of the case taken therein. At all times since the execution of said lease, the railroad of the Norwich & Worcester Railroad Co. has been used, among other purposes, for the transportation of passengers and freight between Boston and New York, by the line of the Boston, Hartford, & Erie Railroad from Boston to Putnam; thence by the Norwich & Worcester Railroad to Norwich; thence by that portion of the New London Northern Railroad, used under said lease (or by some other track used under said lease) to Long Island sound; and thence by the line of steamboats referred to in said lease; and said line has been used as a continuous through line from Boston to New York, operated by and under the control of the Boston, Hartford, & Erie Railroad Co., or the receivers or the trustees who have been in possession of the property of the Boston, Hartford, & Erie Railroad Co.; and the said leased property also forms a continuous through line from New York to Worcester, and connecting points north. It is also agreed that each of the roads herein referred to forms the usual railroad connections with the roads of corporations not owned by the Boston, Hartford, & Erie Railroad Co., or its successors or assigns, which intersect or touch its line, and among others with the Shore Line Railroad, so called, at New London, leading to New Haven, and there connecting with the New York & New Haven Railroad, forming a continuous line of rail to New York.

It is agreed that on the 21st of October, 1870, a petition was filed in the district court of the United States for the district of Massachusetts by Seth Adams, a creditor, praying that the Boston, Hartford, & Erie Railroad Co. might be adjudged bankrupt. [A motion to dismiss the petition was denied. Adams v. Boston, H. & E. R. Co., Case No. 47.] This petition was opposed, and the questions raised by it were pending in said court until March 2, 1871, when said company was adjudicated a bankrupt in said district, [unreported;] and at the first meeting of the creditors of said bankrupt corporation, held March 18, 1871, the plaintiffs were appointed assignees of said bankrupt's estate, and they derive powers and authority from the proceedings in said cause in said district. A petition in review was brought in the circuit court for said district, March 18, 1871; and the same, after a hearing, was dismissed, Sept. 7, 1871. [Sweatt v. Boston, H. & E. R. Co., Case No. 13,684.] On the 20th day of December, 1870, a petition was filed, seeking to put said Boston, Hartford, & Erie Railroad Co. into bankruptcy, in the district of Connecticut, by James Alden, a creditor of said company; and on the 31st day of December, a like petition was filed in the district court for the southern district of New York by the said Alden, and said corporation was adjudicated a bankrupt in said district of Connecticut, March, 1871; and in said district of New York by a decree filed March 3, 1871, and made, as stated in the opinion of Judge Woodruff, in 9 Blatchf. 409. [In re Boston, H. & E. R. Co., Case No. 1,678.] In the district of Connecticut, the complainants were also appointed assignees; and in the district of New York, the complainants were chosen assignees; but the district judge refused to confirm the election. [In re Boston, H. & E. R. Co., Case No. 1,680.] Petitions in review were filed in the circuit court in each of said districts of New York and Connecticut, asking for a stay of the proceedings therein, on the ground of the priority of the proceedings in the Massachusetts district; and in September, 1871, a decree was entered upon said petition in the district of Connecticut; and on the 22d of February, 1872, upon said petition, in the district of New York, by the circuit judge, sustaining the same, and staying the said proceedings in both of said districts; for a further statement of which, reference may be had to the opinions of Judge Woodruff, in 9 Blatchf. 102, 409, [In re Boston, H. & E. R. Co., Cases Nos. 1,677 and 1,678.]

Some time after the bringing of the bill, Oliphant deceased.

C. S. Bradley and J. J. Storrow, for complainants.

The first question is, whether this leasehold interest is included within the description of the property conveyed by that mortgage. The complainants submit that it is not. A well-known rule of law is, that general language, following clear words of specific description, does not extend beyond items ejusdem generis with those enumerated; it merely cures a defective enumeration of details constituting the class intended to be included in the specific description. Rooke v. Kensington, 2 Kay & J. 753; Jenner v. Jenner, L. R. 1 Eq. 361; City of Philadelphia v. Philadelphia & R. R. Co., 58 Pa. St. 253; Parish v. Wheeler, 22 N. Y. 494. Another rule of ancient origin, but frequently applied to railroads in recent cases, is founded upon the well-known distinctions as to grants of after acquired property. 2 Kent, Comm. 468. A conveyance by a railroad company, prima facie, at least, and in the absence of clear and unequivocal expressions of a contrary intention, will only embrace such after-acquired property as will come to the corporation under the powers conferred by its existing charter, or at most under amendments made to enable it to carry out and perfect the scheme embodied in that charter. Seymour v. Canandaigua & N. F. R. Co., 25 Barb. 284, and cases cited. Bath v. Miller, 53 Me. 308. So a grant to a railroad corporation of a right to use a patent, or of an exemption from taxation, relates only to the line of road within its existing charter, and does not cover extensions acquired by consolidation or otherwise in pursuance of laws afterwards passed. Emigh v. Chicago, B. & Q. R. Co., [Case No. 4,448;] Tomlinson v. Branch, 15 Wall, [82 U. S.] 464.

W. G. Russell and R. R. Bishop, for respondents.

That after-acquired property will pass, when apt words are used for its conveyance, under a railway mortgage, is now settled beyond controversy. For a statement of the principles of law on which this question has been settled, to which we may have occasion to refer in dealing with the construction and effect to be given to the Berdell mortgage, we cite Pennock v. Coe, 23 How. [64 U. S.] 117; Galveston, H. &. H. R. Co. v. Cowdrey, 11 Wall. [78 U. S.] 459; Willink v. Morris Canal & Banking Co., 3 Green, Ch. [4 N. J. Eq.] 377, 402; Phillips v. Winslow, 18 B. Mon. 431; Stevens v. Watson, 4 Abb. Dec. 302; Howe v. Freeman, 14 Gray, 577; Pierce, R. R. 530; Morrill v. Noyes, 56 Me. 458; and especially, as the leading case, in which the true principle has been most fully elaborated by C. J. Perley, Pierce v. Emery, 32 N. H. 484. To the point that subsequent legislative sanction renders valid a railroad mortgage of after-acquired property, Howe v. Freeman, 14 Gray, 577; Shepley v. Atlantic & St. L. R. R. Co., 55 Me. 407.

The lease in question is included and conveyed in express terms in the description of after-acquired property set forth in the Berdell mortgage. The description of the property conveyed first includes "all and singular the railways of said Boston, Hartford, and Erie Railway Company," and proceeds to describe those railways as then chartered and located within certain defined termini and on certain indicated lines; but enlarges the grant beyond their then existing location by adding the words, "as said railways are now or shall be located, constructed, or improved, under or by virtue of any powers now granted, or that may hereafter be granted or obtained, to locate, construct, or use a railroad on any of said indicated lines;" it then conveys all the lands included or which may be included in said locations made or to be made, and all lands which may be acquired within the same terminal points, with one specific exception, the purpose of which is obvious. Next follows what was evidently intended to be a specific enumeration of all the classes and descriptions of property which the railroad corporation might be supposed to own at the time, including and ending with its "privileges, franchises, rights, leases, and charters." Any existing lease held by the corporation then clearly passed under the mortgage. Then follows a less specific, but not less broad and comprehensive, series of terms, evidently intended to take the place of the above enumeration, and to include and apply it to after-acquired property of the corporation; viz. "all the like estate, roads, railroads, and structures, and matters and things pertaining or belonging thereto, that may be hereafter acquired, or constructed, or belong to, or be controlled by the party of the first part." The word "estate" is in itself, perhaps, the most broad and comprehensive word which can be used descriptive of property, the subject-matter of a conveyance, and beyond question includes a lessee's title. Boston v. Dedham, 4 Metc. [Mass.] 178; Bouv. Dict. tit. "Estate." In fact, the true rule of construction of the terms of grant of the after-acquired property is to treat them as a new and repeated enumeration of the terms in which the existing property was described, and therefore as if the word "leases" were again specified. Nor can the word "like" be held to limit and restrict the words which follow it so as to confine their application to property which may be acquired within the terminal limits set forth in the specific description of the existing property. This is apparent when we consider its force as applied to the word "railroads." The specific description already included all roads which were or could be located within those termini. The phrase "like railroads" can therefore only have effect at all by construing it to mean other railroads, which may be acquired or constructed outside the indicated lines and outside the specified termini.

An after-acquired lease is also within the plain and ordinary meaning of the subsequent terms of the grant, viz. "also all the estate, real, personal, and mixed, of any of the foregoing descriptions, or of any other kind which may be hereafter acquired by the party of the first part, and used or intended to be used in the construction and operation of the said railroad." Even if the after-acquired lease of the Norwich and Worcester Railroad was not designated in advance by specific and express terms of description in the mortgage grant, it passed under the general and broad signification which a proper construction will give to the terms used. It cannot be questioned that the words of the grant were intended (with the exception of terminal lands) to pass all the existing property, and, without exception, all the existing franchises of the corporation. It is equally clear that they were intended to include after-acquired franchises. They conveyed, in express terms, railways to be "located, constructed, or improved under or by virtue of any powers now granted, or that may hereafter be granted;" they conveyed "franchises, rights, and charters" and the like "estate, . . . matters, and things" hereafter acquired; and in the later clause of the grant, the right to receive and recover tolls, which is one of the main franchises of a railroad, followed by apt words to extend the grant to like after-acquired franchises. The better considered opinions of the judicial tribunals sustain the title to after-acquired property under railway mortgages upon the principle that an authorized conveyance of the franchise and corporate rights of such a corporation, with its road and other property, vests in the grantee a title to the after-acquired property as an incident and accession to the thing originally granted. "The right to take and hold property being one of the franchises mortgaged, the corporation would have no power to take or hold property, except by virtue of that franchise, and under the mortgage by which the franchise was covered." "If the directors made such a mortgage, as incident to the franchise and corporate rights mortgaged, subsequently acquired property, immediately upon its vesting in the corporation, would, as an incident and by accession, become part of the thing originally mortgaged, and of the mortgage security." Pierce v. Emery, 32 N. H. 484, 517. "But where the corporation, under competent authority, conveys by mortgage its road and all its property, with all its corporate franchises and rights, as one entire thing, including, among its other franchises, the right to acquire future property; and, in effect, conveys the corporation itself, subsequently acquired property will pass to the mortgagee as an incident and accession to the subject of the mortgage. The right to acquire the property being one of the franchises conveyed, it is included within the mortgage; and property acquired afterwards, by virtue of its exercise, is acquired and held subject to the conditions of the mortgage." Pierce, R. R. 530.

This principle has also received the sanction of the supreme court of Massachusetts in Howe v. Freeman, [14 Gray, 577,] cited above, where it is said of a vote authorizing the directors "to execute a mortgage of a road with all its franchises:" "The terms were very sweeping, and indicated a purpose to execute a mortgage of the broadest character." See, also, Phillips v. Winslow, ubi supra; Stevens v. Watson, ubi supra. It is, then, no objection to the title of the trustees under the mortgage, that, at the date when the mortgage was made, the franchise which would empower the Boston, Hartford, and Erie Railroad to hold or acquire the lease in question, did not exist. The corporation had the power and capacity to acquire future-added franchises as well as the power to acquire non-existing property which might come into existence. Neither subject of acquisition can be said to have been definitely and in specie a subject of intention or contemplation at the time of the grant, for neither existed.

But when by legislative grant a new and added franchise came into existence, and was annexed to the corporation, the property acquired and held under it became, by accession, an incident to the franchise, annexed to it and to the original franchise as an accession, and became part of the thing conveyed by the original grant, which included, in its express terms, future-acquired franchises, and by its general tenor the capacity and power to acquire them. Under the broad rule of construction adopted in the cases cited, the mortgage was a mortgage of the corporation itself: it conveyed the road and all its franchises existing, or to be acquired, as one entire thing, and, as an incident and accession, all after-acquired property of the corporation. The legislative sanction given to the lease either presumed or created the franchise to hold it in the corporation; and by that act it passed under the mortgage, if it had not already passed under it at its inception. Act Mass. 1869, c. 406, Record, p. 167; Act Conn. 1869, Record, p. 398; Howe v. Freeman, ubi supra; Shepley v. Atlantic & St. L. R. R. Co., ubi supra. The Boston, Hartford, and Erie Railroad Co., like all railroad corporations of modern date, held its charter subject to amendment, alteration, or repeal by legislative enactment. The legislature saw fit to enlarge its charter and its franchise, giving it an added power, and imposing upon it an added duty. Can it be contended that under a mortgage of its charter and its franchise, which mortgage has itself become part of the statute law, the enlargement of the charter and the franchise does not pass, but becomes severed from the original grant?

If we adopt the theory as to the passing of after-acquired property under railway mortgages, suggested by Mr. Justice Bradley in

Galveston R. Co. v. Cowdrey, 11 Wall. [78 U. S.] 459, 481, viz., that the title passes by estoppel, the rule of construction to be adopted is none the less liberal. The plaintiffs take, and can enforce no better title than the bankrupt corporation could itself claim. Ex parte Dalby, [Case No. 3,540.] And all the considerations presented as to the broad construction of the language used in determining the general intent of the parties apply most strongly against the grantor in the deed.

CLIFFORD, Circuit Justice. Assignees in bankruptcy, except in cases of fraud, take only such rights and interests in the property of the bankrupt as he himself had, and could have himself claimed and asserted at the time of his bankruptcy, and they are affected with all the equities which would affect the bankrupt himself if he were asserting those rights and interests. No person can sell a thing he does not own, unless as the duly authorized agent of the owner. Nemo dat quod non habet. Nor can he convey in praesenti property not in existence, the rule being that every such deed or mortgage is inoperative and void. Authorities to support these propositions are not wanting, but the law will permit the grant or conveyance to take effect upon property when it is brought into existence, and comes to belong to the grantor, in fulfilment of an express agreement, if the agreement is founded on good and valuable consideration, unless it infringes some rule of law, or will prejudice the rights of third persons. Pennock v. Coe, 23 How. [64 U. S.] 117. Whenever the parties by their contract intend to create a lien or charge, either upon real or personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is in esse or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and against all persons asserting a claim to the same under him, either voluntarily or with notice, or in bankruptcy. Mitchel v. Winslow, [Case No. 9,673.]

Tested solely by the words of the instrument above referred to, it might well be contended that the grant must be limited to the railways then chartered and located on indicated lines within certain described termini, but the terms of the indenture go on immediately to enlarge the grant beyond the locations then existing by adding the words "as said railroads are now or shall be located, constructed, or improved under or by virtue of any powers now granted, or that may hereafter be granted or obtained, to locate, construct, or use a railroad on any of said indicated lines." Subsequent locations, if within the indicated lines, are clearly within the express words of the grant. Reasonable doubt upon that subject cannot be entertained, and the indenture proceeds to convey all the lands that are included, or which may be included in those locations, made or to be made, and all lands which may be acquired within the same terminal points, with one exception, to wit, the terminal lands at Boston and Fishkill which are outside the location, which it seems were reserved for a separate mortgage to secure an additional loan. Support to the view that the conveyance was intended to include railways to be located and constructed within the terminal points, of the most conclusive character, is derived from what follows in the same indenture, by which the grantors first enumerate as objects of present conveyance "all their lands, tracks, lines, rails, bridges, ways, depots, stations, water-tanks, shops, buildings, piers, and wharves, erections, fences, walls, fixtures, privileges, franchises, rights, leases, and charters," and then superadd, under the same words of grant, "all the like estate, roads, railroads, and structures, matters and things pertaining or belonging thereto, that may be hereafter acquired or constructed, or belong to, or be controlled by the" granting corporation. Search is made in vain for anything to limit or qualify that language. Instead of that, the succeeding paragraph of the grant confirms the theory that the grantors intended that the mortgage should include after-acquired property of the same kind as that they possessed, as well as everything owned by them, then in possession, belonging to the great enterprise in which they were engaged.

Evidence of that intent is also found in the sweeping paragraph which follows in the same instrument, in which the grantors, after having conveyed all the like estate hereafter acquired, proceed to add, "Together with all the tolls, income, issues, and profits to be had from the same, and all rights to receive and recover the same, and every thing necessary for the complete use of the road. Also, all the locomotives, engines, tenders, cars, carriages, tools, shops, fixtures and machinery, and all the coal, wood, and other fuel belonging or appertaining to said railroad, or that may at any time hereafter belong or appertain to the same, as it may be changed by use and new acquisitions; also, all the estate, real, personal, and mixed, of any of the foregoing descriptions, or of any other kind which may be hereafter acquired by the party of the first part, and be used, or intended to be used, in the construction and operation of the said railroad."

Arrangements of various kinds were made by the said railroad company, and on the 9th of February, 1869, they leased for the term of one hundred years the railway of the Norwich and Worcester Railroad Company, together with all lands on which said railway is or shall be located within the described terminal points, and which are connected with the uses of said railway, and all the rights, easements, franchises, and privileges, in connection therewith, or which

are appurtenant thereto, and all the turnouts, branch tracks, depot grounds, stations, depots, superstructures, erections, and fixtures used therewith and belonging thereto, and the lands and premises on which the same are situate and standing, now used and belonging, and to be used or belonging, or in any wise appertaining to said railroad, together with all and singular the real estate, tenements, hereditaments, and appurtenances of the said railway company, together with and also the right to ask, demand, and receive, for their own use and benefit, all the tolls, profits, income, and rent, and charges which may or can be legally demanded or received, for the transportation of persons or property upon or over the said railroad, or any part thereof, or resulting in any wise from the operations and working of said railroad, or the use and occupation of the demised property, or any part thereof, together with the use of all the personal property of the said company, used or to be used upon or in connection with said leased railroad, with the dividends and profits of the steamboat stock owned by the said railroad company, and "the shares in the stock of said company."

Much discussion of the question whether the Boston, Hartford, and Erie Railroad Company had authority at the time to enter into that indenture is wholly unnecessary, as it is admitted that their act in so doing was fully ratified and confirmed by the laws of the states of Massachusetts and Connecticut. See Laws Mass. 1866, p. 142; Laws Conn. 1869, p. 264. Even the complainants concede that it was competent for the state legislatures to ratify and confirm the lease, and, the court being of the same opinion, the point may be dismissed without further consideration. Tested alone by the terms of the lease, wholly independent of the indenture of mortgage aforesaid, it is clear that the conclusion must be that the right of possession and use of the leasehold estate, real, personal, and mixed, passed to the respondent lessees named in the lease, which is a proposition virtually admitted by both the parties in this controversy. Intervening facts, however, are necessary to be considered in order to a complete understanding of the matters in dispute. Both parties concede that the Boston, Hartford, and Erie Railroad Company was adjudged bankrupt, and that the complainants, on the 21st of October, 1870, were duly appointed assignees of the estate of the bankrupt corporation, and the record shows that the complainants, as such assignees, claim that the estate of every kind acquired by the said lease passed to the corporation whose estate they represent under the bankrupt act. Opposed to that, the individual respondents claim that the leasehold estate, demised and leased to the bankrupt corporation, passed to them as the legal trustees of the bondholders under the indenture known as the Berdell mortgage. Pursuant to the theory of the bill of complaint, the complainants pray that the individual respondents and the respondent corporation may account to the complainants for all moneys, rents, issues, and profits received by them, and that they respectively may pay to the complainants all such sums as shall be found due on such accounting, and that they may be ordered to deliver to the complainants the said leasehold interests, and to release and convey to the complainants whatever apparent or nominal title they may have to such leasehold interests.

Service was made, and the respondents Hart and Clark appeared and filed an answer. They admit that the Boston, Hartford, and Erie Railroad Company was duly incorporated; that the corporation executed the indenture known as the Berdell mortgage; that the individual respondents are the sole surviving trustees under the same, and that the mortgage is a valid mortgage, duly authorized and ratified by the said several states; that the said corporation and the Norwich and Worcester Railroad Company entered into the agreement of lease as alleged in the bill of complaint; that the corporation lessee under that lease was subsequently adjudged bankrupt, and that the complainants were appointed assignees of the estate of the bankrupt corporation. Moneys, it may be assumed, were received by the lessors of that railroad, from the traffic, rents, and profits of the same, but the individual respondents deny that it was the duty of the said lessors to account for or pay over the same to the complainants, and they assert that they claim that the said lease and the benefit thereof passed to the trustees under the said indenture of mortgage, and that they, as such trustees, are entitled to require said lessors to account and pay all such moneys to them, as after-acquired property, under the indenture known as the Berdell mortgage. Other grounds of claim and of defence are set up in the pleadings growing out of the decree of the state court, but, in the view taken of the case, the whole merits of the controversy must turn upon the question whether the leasehold interest acquired by the lease passed to the trustees under the mortgage as after-acquired property. Plainly, if those interests did pass to the trustees as after-acquired property, the bill of complaint must be dismissed, and, if they did not, it is equally clear that the complainants are entitled to a decree, and in that view it follows that the other issues of law may be dismissed without further consideration. Argument to show that the parties intended to create a lien or charge upon property of the kind enumerated subsequently acquired, as well as upon property in existence and in actual possession, is hardly necessary, as the affirmative of the proposition is supported by the express words of the indenture of mortgage, the rule being that when parties intend to create a lien upon property not

then in actual existence, it attaches in equity as soon as the person who grants the lien acquires the possession and title of the same. Mitchel v. Winslow, [Case No. 9,673;] Pennock v. Coe, 23 How. [64 U. S.] 117.

Privileges, franchises, rights, leases, and charters are included in the mortgage, as well as lands, tracks, lines, rails, bridges, ways, depots, stations, water-tanks, shops, buildings, piers, wharves, erections, fences, walls, and fixtures; and the instrument following that specific enumeration proceeds to provide "also all the like estate, roads, railroads, and structures, and matters and things pertaining or belonging thereto, that may be acquired or constructed, or be controlled by the granting party, together with all the tolls, income, issues, and profits to be had from the same, and every thing necessary for the complete use of the railroad." Language more explicit and comprehensive could not well be chosen, and the instrument proceeds to another enumeration, and specifies all the locomotives, engines, tenders, cars, carriages, tools, shops, fixtures, and machinery, and all the coal, wood, and other fuel belonging or appertaining to the said railroad, or that may at any time hereafter belong or appertain to the same as it may be changed by use and new acquisitions. More specific terms of inclusion, it would seem, could not be employed, and yet the grantors, as if to make certainty doubly sure, add as follows: "also, all the estate, real, personal, and mixed, of any of the foregoing descriptions, or of any other kind which may be hereafter acquired by the granting party and be used, or intended to be used, in the construction and operation of the said railroad." Leases are specifically named as matters conveyed by the mortgage, and the express words of the instrument are, that all the estate, real, personal, and mixed, of any of the descriptions mentioned, or of any other kind which may hereafter be acquired by the grantors, or be used or intended for use, in the construction or operation of the said railroad, shall also pass to the mortgagees under the mortgage. Suppose that is so, the rule established by the two leading cases already cited shows that the complainants cannot recover. It must be so, unless the rule promulgated in those cases is overruled, which cannot be done for at least two reasons, (1) because the rule is a sound one; (2) because it is supported by many other decisions, to a few of which only reference will be made. Dunham v. Cincinnati, P. & C. R. Co., 1 Wall. [68 U. S.] 267; Galveston R. R. v. Cowdrey, 11 Wall. [78 U. S.] 481; U. S. v. New Orleans R. Co., 12 Wall. [79 U. S.] 364; Butt v. Ellett, 19 Wall. [86 U. S.] 547; Willink v. Morris Canal & Banking Co., 3 Green, Ch. [4 N. J. Eq.] 395; Smithurst v. Edmunds, 1 McCart, Ch. [14 N. J. Eq.] 411; Pierce v. Emery, 32 N. H. 503.

Many other authorities support the proposition that, whenever parties by their contract intend to create a positive lien or charge, either upon real or personal property, whether owned by the assignor or contractor or not, or, if personal property, whether it is then in being or not, the contract attaches in equity, as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto. Seymour v. Canandaigua & N. F. R. Co., 25 Barb. 284; Curtis v. Auber, 1 Jac. & W. 531; Langton v. Horton, 1 Hare, 556; Field v. Mayor, 2 Seld. [6 N. Y.] 185. Apply the established rule to the case, and it is clear that the complainants cannot recover, and in that view the court is of the opinion that it is not necessary to examine the other questions discussed at the bar.

Decree that the bill of complaint is dismissed, with costs.

BARNARD, (PHILADELPHIA & R. R. CO. v.) See Case No. 11,086.

Case No. 1,008.

BARNARD v. TAYLOE.

[5 Cranch, C. C. 403.][1]

Circuit Court, District of Columbia. March Term, 1838.

PLEADING—TROVER—LIMITATIONS.

Not guilty within three years, is a good plea in trover.

[At law. Action by Frederick Barnard against Benjamin O. Tayloe.] Trover; plea, not guilty within three years. General demurrer. [Overruled.]

Mr. Hoban, for the defendant, contended that the plea should have been actio non accrevit; and cited the case of Union Bank v. Chason, at November term, 1835, (unreported;) Dyster v. Battye, 3 Barn. & Ald. 448; and Richman v. Richman, 3 Hals. [8 N. J. Law,] 55.

Mr. Key, contra, cited the case of Bank of Columbia v. Ott's Adm'r, in this court, [Case No. 879;] Maryland Act of Limitations of 1715; and Evans' Harr. 48.

THE COURT (nem. con.) overruled the demurrer.

BARNARD, (WILKINSON v.) See Case No. 17,669.

BARNARD, The EDWARD. See Case No. 4,291.

BARNER, (BARLOW v.) See Case No. 998.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 1,009.

BARNERT et al. v. HIGHTOWER et al.

[10 N. B. R. 157.]

District Court, N. D. Mississippi. May 29, 1874.

BANKRUPTCY—AMENDMENTS TO LAW—RETROACTIVE EFFECT.

[1. The amendment of the bankrupt law approved June 22, 1874, (18 Stat. 178,) provides that the petition filed in involuntary bankruptcy proceedings shall show that one-fourth in number and one-third in amount of all the creditors join in the petition, failing which the proceedings shall be dismissed; and that this provision shall apply to all cases commenced since December, 1873. *Held*, that this does not include cases in which the order adjudicating the debtor a bankrupt had been passed before the adoption of the amendment, and hence such proceedings will not be dismissed under this section.]

[2. But in so far as the amendment of June 22, 1874, affects any remedies not ripened into fixed rights before its adoption, they will be applied to cases in which the adjudication was passed before their adoption, as well as those since made.]

[In bankruptcy. Petition by Barnert Berry, Reed & Co. against Hightower & Butler. The respondents were adjudged bankrupts, and an assignee appointed. The petitioning creditor and others now petition that the proceedings be dismissed. Heard on demurrers by the defendant and certain creditors. Demurrers sustained.]

R. S. Smith, H. W. Walter, and L. P. Cooper, for petitioners.

H. A. Barr and Robert Taylor, for defendants.

HILL, District Judge. The petition of Barnert, Berry, Reed & Co., was, on the 29th day of May, 1874, filed in this court against the defendants, praying that they might be declared bankrupts and the regular proceedings had, by which they were, by the judgment and decree of this court, duly declared bankrupts on the 4th day of June, upon the charge of having, as merchants, suspended and not resumed payment of their commercial paper within a period of fourteen days. On the 7th day of July, an assignee was selected and a deed of assignment executed, conveying to him the estates of the bankrupts, both that held as copartners and as individuals; who took the same in possession and now holds it, except that portion which he has sold under the order of the court. The petitioning creditor, with other creditors of the copartnership now file their petition, praying that the proceedings be dismissed, upon the allegation that the said Barnert, Berry, Reed & Co., upon whose petition the declaration of bankruptcy was made, did not embrace the one-fourth in number, and whose debt did not embrace the one-third in amount of the debts due and owing by the defendants, as required by the amendments to the bankrupt law approved on the 22d day of June, 1874; and that one-fourth in number and one-third in amount cannot be procured to join in such petition, praying such adjudication. To this petition the defendant and individual creditors have interposed their demurrer, insisting, as cause of demurrer:

First. That congress, by the amendments stated, did not intend to embrace bankrupt causes in which judgments and decrees of adjudication had passed before the amendments went into effect.

Second. That if such had been the intention of the legislation, it would have been an interference with vested rights, and an attempted invasion by the legislative department of the government with that which alone belongs to the judicial department.

The questions thus presented have been ably, I may say exhaustively, argued by the distinguished counsel on both sides; who have read and commented upon a large number of authorities, especially upon the last question stated. These questions are of unusual importance at the present time, as affecting the interest of both bankrupts and creditors, and call for as speedy a settlement as may be consistent with a proper interpretation of the meaning of the amendments, and their proper application, involved in so much doubt and uncertainty, and upon which the ablest members of the profession differ. I have given to the subject all the examination and consideration which the pressure upon my time would permit, with the sole desire to give effect to the intention of congress in the passage of these amendments. It is admitted that the judgment of the court adjudicating the defendants bankrupts, was all regular and binding until the adoption of the amendments; and is still so if unaffected thereby. It is further admitted that as to all involuntary bankruptcies, commenced since the 1st December, 1873, and in which the question of bankruptcy was pending at the adoption of the amendments, they do apply. From the conclusion to which I have arrived, the second ground of demurrer stated, need not be considered only for the purpose of shedding light upon the first.

In considering whether or not congress intended to give a retroactive effect to cases in which judgments of adjudication had passed before the adoption of the amendments, it is necessary to consider the nature and effect of the judgment of adjudication. This involuntary or compulsory feature of the bankrupt law is in its nature a suit brought by the petitioning creditors on behalf of all the other creditors as well as of themselves, against the alleged bankrupt, their common debtor, for the purpose of obtaining judgment against him for the amounts respectively due them, to be satisfied as far as his estate will permit; first, out of the incumbered estate to those holding the incumbrance according to priority, and the remainder to be equally divided between

the general creditors, according to the amount due them respectively. The effect of the adjudication, when made, is such a judgment in favor of the creditors against the bankrupt; the disposition of the estate is only the execution of this judgment.

The assignment made to the assignee relates back to the commencement of proceedings, and is a complete divestiture of the title of the bankrupt to his estate, and a vestiture of the same in the assignee for the benefit of the creditors. It, to my mind, is difficult to conceive any reason why this judgment shall have accorded to it less force and effect than a judgment or decree given or pronounced by a court of law or equity, creating a lien on the property of the defendant. If I am correct in this conclusion, can it be presumed that congress intended to annul and set aside these judgments by this legislation? I cannot believe they did. That body is composed mainly of able lawyers; this is especially so with the distinguished jurists comprising the judiciary committees of both houses, who digested and reported these amendments. Our government is complex in its nature; to give security and permanence, it is in its governing powers divided into three separate, distinct, and independent departments—executive, legislative, and judicial. So long as these different departments keep within their own sphere the government is safe, and the rights of the citizens are secure; but when either shall be permitted to invade and usurp the powers and jurisdiction pertaining to another, there is danger. An assumption of judicial powers by the legislative, or legislative powers by the judiciary, has uniformly met with the strongest condemnation by our wisest and best jurists and statesmen; and I must believe was not intended by those eminent jurists and statesmen who reported these amendments, and those who passed them.

The difficulty arises upon the language used in the section adopted as a substitute for section 39, in the original act [of March 2, 1867, 14 Stat. 536,] which creates the same causes denounced as acts of bankruptcy, as those in the original act, with this exception, that the time allowed the debtor in which to resume the payment of his commercial paper, is extended from fourteen to forty days. Under the original act, to give the court jurisdiction to proceed under the compulsory clause, the petitioning creditors were required to aver in the petition that the alleged bankrupt owed debts to the amount of three hundred dollars or more, and that he owed the petitioning creditor or creditors, provable under the bankrupt law, debts to the amount of two hundred and fifty dollars. These were jurisdictional facts, without the allegation of which the proceedings would be denied in the first instance, and, if averred and denied by the defendant, and not proved, the proceedings would be dismissed without inquiry as to whether the acts of bankruptcy had been committed or not. This amendment upon this jurisdictional question, changes the law in this, that it requires one-fourth in number and one-third in amount of the creditors to join in the petition, and requires that these jurisdictional facts shall be stated in the petition, and, if denied, and a sufficient number and amount shall not be procured within the time limited, the proceedings shall be dismissed. The question is, what proceedings? The answer is, the proceedings to obtain the declaration or judgment of bankruptcy and all the proceedings had, not disturbing rights of others, which may, in the meantime, have attached, growing out of the proceedings. It is provided that the provisions of this section shall apply to all cases commenced since the 1st day of December, 1873; this can well be given to all cases in which the judgment of adjudication had not been had before the adoption of these amendments; no judgment had been pronounced to be revoked, no rights had been fixed, the whole proceedings were in fieri; ample opportunity is given to permit the petitioning creditors to associate with them a sufficient number and amount to bring themselves within the provisions of the law, and also to do justice in relation to any action before that time had; so that it seems to me full effect can be given to the act and the intention of the lawmakers, without in any way affecting either the bankrupts or creditors in cases in which the rights of the bankrupt or creditors were fixed by the judgments and decrees of the court, properly made, before the adoption of the amendments. It is insisted by the present petitioners' counsel that the bankrupt court is constantly in session, and that, from the commencement to the final conclusion of a bankrupt cause there is but one term; that the adjudication of bankruptcy is but an interlocutory order, and may, in the discretion of the court, be set aside at any time, so as to every other order. In a certain sense this is so, but it is a judicial discretion, and must be based upon a proper proceeding and for a sufficient cause and in a proper time, and not by the arbitrary will of the judge or court.

Proceedings in bankruptcy are divided into separate parts, some affecting the bankrupt and the creditors, others affecting the bankrupt alone, and still others the creditor alone, or, rather, some relating to the creditors and bankrupt, and others the creditors alone, as but few questions can affect the bankrupt which do not interest the creditors. The first solemn judgment is the adjudication of bankruptcy, which fixes the status of the bankrupt, with his liabilities and rights as imposed and conferred by the law; this judgment cannot be disturbed or set aside only upon proper judicial proceedings, for sufficient cause, and within a reasonable time. The next is the granting or refusal of the bankrupt's discharge; this judgment, like

the former, is final, unless set aside upon proper judicial proceedings, for sufficient cause, and within the prescribed time, if one is prescribed, if not, within a reasonable time, to be judged of by the court. The allotment of exemptions, the marshaling and disposition of the assets among the creditors, are all, in their nature and effect, judicial judgments and decrees, conferring and fixing rights, final and binding, unless reversed, set aside, changed, or modified by proper proceedings, and for sufficient reasons.. These proceedings are held at different times, and not necessarily dependent on each other, nor subject to the arbitrary will or discretion of the judge or court passing them.

It is further argued by counsel that unless congress intended to embrace adjudicated cases, nothing was meant, and this is not to be presumed; that it must have been known to the legislative mind that nearly all cases in which proceedings had been commenced since the 1st of December, 1873, have already been adjudicated; but such was not the case; under the law as it then stood, when opposition was made and a jury demanded, the cause could only be tried at a regular term of the court, which, in most districts, is held but twice in the year; but it will be remembered that when congress, immediately on assembling, entered into the consideration of the repeal or amendment of the bankrupt law, the house, with unusual haste, passed a bill repealing the entire bankrupt law; the senate, being more considerate and deliberate in its organization and mode of passing upon great national questions, did little else, before the Christmas recess, than to consider the question, which resulted in the passage of these amendments, which went to the house for their concurrence, and which, it was hoped and urged, should be adopted and become a law before the recess; and, had such been the case, very few cases commenced after the 1st of December would have passed into adjudication before the amendments would have gone into operation. These amendments were, to a great extent, produced by the financial panic then pervading over the entire country, and were intended to relieve its victims, either creditors or debtors. Had congress believed they had the power or intended to affect adjudicated cases, it would doubtless have extended it back to the commencement of the panic. These considerations, I am of opinion, answer these objections. These amendments, so far as they affect any remedies not ripened into fixed rights before their adoption, will, upon well settled principles, be applied to cases in which the adjudication was passed before their adoption, as well as those since or hereafter to be made; for instance, in granting or withholding the discharge. Under the former law the bankrupt's assets were required to equal fifty per cent. of the debts proved, or the written assent of the designated number and amount of his creditors, to entitle him to a discharge under the present law; this requisition is dispensed with, so that involuntary bankrupts, if otherwise entitled, will be entitled to a discharge without this requisition, although the adjudication of bankruptcy was passed before the new law went into operation so far as regards all other pending remedies. The discharge is a matter of grace, and not right, until after it is granted. This is so both as it affects the bankrupt and his creditors. The creditor, upon the judgment of adjudication, becomes entitled to his portion of the estate, whatever that may be; any further rights are held in abeyance until the question of discharge is determined; if granted, the debt is discharged; if refused, the creditor still holds his obligation against the bankrupt, to be satisfied out of his acquisitions obtained after the bankruptcy, for any balance due. It is not the province of the courts to determine whether these amendments are wise or unwise, but to determine the intent and purpose of the legislative mind in passing them, and to make a proper application of them according to that intention.

It has been urged with unusual energy by counsel, that the language used leaves the court no room for construction, that it positively and unqualifiedly says it shall embrace all cases commenced since the 1st of December, 1873. This, as a matter of course, would include cases in which the discharge has been granted and the estate closed up, of which there are quite a number in this state; but in reply to this it is ingeniously stated by counsel that this contains a provision that the rights already fixed shall remain; yet the case was commenced since the 1st of December and must be embraced within its provisions, as no excepuon is mentioned. So that in my opinion there is ground for construction, so as to determine what was the legislative meaning and intention; in other words, what class of cases was referred to when it is said "all cases commenced since the 1st of December, 1873." It was, as it appears to my mind, that in which was to be determined the question as to whether or not an act of bankruptcy had been committed. The only change made as to what constituted an act of bankruptcy being the suspension of commercial paper, extending the time necessary to constitute the act of bankruptcy, and this was the class principally desired to be relieved; and as no rights were fixed before the judgment of adjudication, congress could, without any invasion of the judicial department, provide that the party should not be adjudicated a bankrupt unless the suspension had continued for forty days or any other time congress might determine, or any other cause of bankruptcy might have been dispensed with or modified, but no new cause could have been added so as to have a retroactive effect. Having concluded that the cause under con-

sideration is not embraced in the class of cases subject to the retroactive operation of these amendments, renders the consideration of the question as to the power of congress to give a retroactive effect to the amendments unnecessary, and consequently, any consideration of the numerous authorities read and commented upon by the learned counsel on both sides.

The result is that the demurrer must be sustained, the petition dismissed, and the cause proceed, so as to afford to both the bankrupts and creditors their respective rights under the law.

Case No. 1,010.

Ex parte BARNES.

[1 Spr. 133;[1] 9 Law Rep. 314.]

District Court, D. Massachusetts. April Term, 1846.

HABEAS CORPUS — ISSUANCE BY COMMISSIONER — HABEAS CORPUS AD TESTIFICANDUM.

1. A commissioner of the circuit court has not the power to issue a writ of habeas corpus, to take from jail a person committed by authority of the United States, and bring him before the commissioner, for the purpose of giving his deposition before such commissioner, to be used in a cause pending in the district court.

2. Whether a judge of a court of the United States can exercise the power of issuing writs of habeas corpus ad testificandum, in vacation, even for the purpose of bringing witnesses into court at the approaching session—quaere.

This was an application by the marshal to be allowed certain fees for bringing witnesses from jail. The point raised in the case will appear from the opinion of the court.

George T. Curtis, in support of the application.

SPRAGUE, District Judge. The question which has been argued by counsel, in the present case, is, whether a commissioner of the circuit court, has the power to issue a writ of "habeas corpus," to take from jail a person committed by authority of the United States, and bring him before the commissioner, for the purpose of giving his deposition before such commissioner, to be used in a cause pending in the district court. The first statute cited is that of 1812, [2 Stat.] c. 25, § 1, which authorizes the circuit court to appoint commissioners to take affidavits and bail. And the next is the statute of 1817, c. 203, [Story's Laws; 3 Stat. 350, c. 30,] which authorizes such commissioners to "exercise all the powers that a justice or judge of any of the courts of the United States may exercise, by virtue of the 30th section of the judiciary act" of 1789, [1 Stat. 88,] c. 20. By that section, power is given to "any justice or judge of any court of the United States, any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court, or court of common pleas of any of the United States," to take depositions. "And any person may be compelled to appear" before them "in the same manner, as to appear and testify in court."

It is urged, that the clause authorizing the magistrate to compel the appearance of the witness, gives a power to issue a writ of "habeas corpus," to bring a prisoner from jail for that purpose. By the 14th section of the same statute, the supreme, circuit, and district courts of the United States, are authorized to "issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of "habeas corpus," for the purpose of an inquiry into the cause of commitment, with a proviso, that the writ of habeas corpus shall not extend to persons in jail, unless they are in custody under color of laws of the United States, or necessary to be brought into court to testify. By the statute of 1833, [4 Stat. 634,] 2d Sess. c. 57, § 7, further power is given to the justices and judges of the courts of the United States, to issue writs of "habeas corpus."

The question is, whether the 30th section of the judiciary act, gives power to take prisoners from jail and bring them before the magistrate, merely for the purpose of giving depositions. If it does, then all the magistrates therein named, including the state judges, and mayors of cities possess it. And all the prisoners of the United States are subject to it, and may be carried to any part of the district, at the pleasure of the commissioner, or judge of a county court of the state, or the mayor of the city. Considering the danger and inconvenience of such a construction, and that the power to issue writs of "habeas corpus" is given to the courts and judges of the United States by other statute provisions, guarding and limiting its exercise, and that the words of the section relied upon, are satisfied by the usual modes of compelling attendance, I do not think that, by the true construction of the 30th section of the judiciary act, it confers the power to issue writs of "habeas corpus" now contended for. Judge Conkling, in his treatise [on United States Courts,] page 247, intimates the opinion, that the power to issue writs of habeas corpus ad testificandum is confined to the courts of the United States, and cannot be exercised by a justice or judge of such courts in vacation, although for the purpose of bringing witnesses into court, at the approaching session.

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

Case No. 1,011.

In re BARNES.

[10 Ben. 79.][1]

District Court, S. D. New York. Aug. Term, 1878.

CUSTOMS DUTIES—REMISSION OF FORFEITURE—ENTRY OF DECREE.

1. A suit was commenced by the United States against V. & Co., to recover the value of goods alleged to have been entered by them in violation of the 1st section of the act of congress of March 3, 1863, [12 Stat. 737.] While it was pending, proceedings in bankruptcy were commenced against V. & Co., and B. was appointed assignee. Thereafter the attorney for V. &. Co. in that suit withdrew a plea in bar and filed a cognovit that judgment be entered, and it was entered accordingly for $99,951.25. At the first meeting of creditors, the United States district attorney appeared and filed a proof of debt, setting forth that judgment. The assignee excepted to the proof and on the matter being certified to the court, it was held that the claim was provable in bankruptcy, on the basis of the facts out of which the liability arose. The matter was referred to the register to take proof of the validity and amount of the claim. He reported, and on the 18th of August, 1874, the judge decided, that the United States was entitled to prove for the amount of the claim. No formal order to that effect was signed by the judge, but a minute to that effect was endorsed by him on the papers, and from that decision the assignee appealed to the circuit court, which affirmed the decision. The assignee then filed a petition for remission, and an order was made, referring it to a commissioner to inquire as to the facts of the case. After this order a formal order was entered nunc pro tunc, in conformity to the minute of the district judge of August 18th, 1874. The commissioner having made his report, and the same having been certified to the secretary of the treasury for decision, and having been by him returned to the commissioner for revision, the United States district attorney moved for an order dismissing the proceedings on the petition for remission, claiming that it was not competent for the secretary of the treasury to give a remission in the case. *Held*, that, the court having been informed by the judge, before whom the petition for remission came, and by whom the order of reference to a commissioner was made, that substantially the same ground was then taken by the district attorney and overruled by the court, that ruling, having been submitted to and never reversed, must be regarded as the settled law of the court, or at any rate, of the case.

2. That it made no difference that since that time the order had been entered nunc pro tunc on the minute of the judge, of August 18th, 1874.

3. That that minute under the circumstances of this case was to be held to have the same effect as if the order had been then entered on it.

4. That the motion to dismiss the petition must be denied.

5. The district attorney also moved that the petitioner be compelled to make the record of the case a part of his petition. *Held*, that the United States might prove the facts embodied in the record, but that this motion also must be denied.

[Proceeding by Demas Barnes, assignee in bankruptcy of Theodore H. Vetterlein, Bernhard T. Vetterlein, and Theodore J. Vetterlein, for remission of forfeitures incurred by the bankrupts for violation of the revenue laws. A reference was ordered, and the commissioner's report certified to the secretary of the treasury. By stipulation the case has been returned by the secretary to the commissioner for a revision of his findings, subject to an appeal to the district judge. Heard on motion by the United States to dismiss the proceedings. Denied. Heard also on motion by the United States to make the record of the case wherein the forfeiture was decreed a part of the petition. Denied.]

Roger M. Sherman, Asst. Dist. Atty., for the United States.

Henry T. Wing, for assignee.

CHOATE, District Judge. This is a motion to dismiss proceedings brought to procure the remission of penalties claimed to have been incurred by breach of the customs revenue laws.

Theodore H. Vetterlein, Bernhard T. Vetterlein and Theodore J. Vetterlein were partners in business, and were adjudicated bankrupts, upon a petition of their creditors, filed December 28th, 1870. Barnes, the petitioner, was appointed their assignee in bankruptcy, March 1, 1871. Prior to the time of the filing of the petition in bankruptcy, suit was commenced in this court against the Vetterleins, to recover the value of goods alleged to have been entered by them at the New York custom house, in violation of the 1st section of the act of March 3rd, 1863, [12 Stat. 737.] At the time of the bankruptcy the suit was at issue and undetermined. After the bankruptcy the attorney for defendants withdrew their plea in bar of the action, and filed a cognovit that judgment be entered for the amount of the claim, $99,951.25. The United States appeared by the district attorney at the first meeting of creditors and filed proof of the claim, setting forth the judgment as the basis of the claim. Exceptions were filed by the assignee to the proof, on the ground that the claim was not one provable in bankruptcy; but upon the matter being certified to the judge, he held [unreported] that the claim was provable in bankruptcy, but not on the basis of the judgment, and that the proof must be on the basis of the facts out of which the liability grew; and on the 22d of June, 1872, the matter was referred to the register to take proof of the validity and amount of the claim, and to report the evidence to the court. The register reported and the judge of this court decided on the 18th of August, 1874, [unreported,] that the United States was entitled to prove for the amount of the claim. No formal order to that effect was signed by the judge, but a minute to that effect was endorsed by him on the papers. From this decision the assignee appealed to the circuit court, and, after argument, Mr. Justice Hunt affirmed the decision. [In re Vetterlein, Case No. 16,-

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

929.] On the 25th of August, 1875, the assignee filed his petition for remission; and upon notice to the district attorney, and after hearing thereon, the district judge made an order referring it to a commissioner to make summary inquiry into the circumstances of the case.

After this hearing before the judge and this order of reference, a formal order was entered nunc pro tunc as of April 20, 1872, the date of the original proof of debt, in conformity with the decision of the district judge, of August 18, 1874, and the affirmance thereof by the circuit justice.

The commissioner having made his report, and the same having been certified to the secretary of the treasury for decision, the case has by stipulation been returned by the secretary to the commissioner for a revision of his findings of fact on the evidence already taken, subject to the right of appeal to the district judge, if any such right of appeal exists. And the case being thus again before the commissioner, this motion is made by the district attorney.

The point made by the district attorney is, that it is not competent under the acts of congress for the secretary to remit a forfeiture after an adjudication by a court of competent jurisdiction, which necessarily involves a finding of fact against the defendants, that the penalty was incurred by them with actual intent to defraud the United States and not without such intent or gross negligence; that the decision of the district judge that the penalty was incurred necessarily involves, under the act of March 3d, 1863, a finding that they did the acts complained of with this guilty intent, since by the terms of that act, the wrongful entry of the goods must be made "knowingly" by the parties complained of. It is also claimed by the district attorney, that upon this question the United States is not concluded by the order of reference made Sept. 24, 1875, as a determination of the question of jurisdiction, since at that time no formal order had been entered in conformity to the judge's decision, declaring the debt due and subject to proof; that therefore there was at that time no adjudication of the guilty intent, and the question of jurisdiction now raised could not then arise. He also insists that the question of jurisdiction is always open and even if the point could then have been taken, that a motion to dismiss for want of jurisdiction is proper at any stage of the proceedings.

As to the question whether when the petition was first before the district judge, there had been a judicial determination or judgment upon the question of the intent, so far as the finding of the intent is necessarily involved in the judgment that the debt was due and provable, I am of opinion that the parties to this proceeding are estopped to deny that there was such a judgment. While it is true that as matter of practice it is customary in this court, following the analogy of the practice in the courts of the state of New York, always to enter a formal order to be signed by the judge, yet in other jurisdictions and in many of the states of the Union, the mode of entering a judgment or order of the court is to have a brief memorandum of the same minuted on the papers or on a docket by the clerk by the judge's direction, and this is deemed to be and treated as the record of the judgment or order of the court, until an extended record of the same is made by the clerk, often long afterwards, the minute so made serving as a sufficient basis for the issue of execution or other proceeding subsequent to judgment. I should hesitate, therefore, notwithstanding the practice that prevails, to hold that a minute on the papers by the judge, containing in itself the very substance of the order subsequently entered, was not to be deemed a judgment or order in the sense now in question. But, however this may be, both of these parties have in their dealings with each other and with the court assumed the existence of such a judgment or decision. The petition for remission recites such a "decision" by the district judge. The appeal from the decision by the assignee alleged such a decision as the basis of an appeal. The United States appeared and argued the appeal on the merits and procured its affirmance, thereby reasserting the existence of the judgment appealed from. The court must have been led to assume the existence of the judgment, and the entry of the order finally nunc pro tunc after the irregularity of practice was discovered, was made to conform the record to the fact as all parties had up to that time assumed it to be. It would be clearly improper, therefore, to allow either party any benefit from the fact that no formal order had been entered when the petition of remission was first before the court.

I am informed by his honor Judge Blatchford, before whom that petition came, that the point was then made by the district attorney that this was not a case in which it was competent for the secretary of the treasury to remit the forfeiture, substantially on the ground now taken by the district attorney, but that the court refused to hear argument of the question, on the ground, as then stated orally to the counsel, that although the intervention of the district judge at some stages of the case is made necessary by the statute, yet that the design of the statute was to make the secretary of the treasury the real judge in the case as well upon the merits as upon any question of jurisdiction that might arise, and that therefore it was not proper, unless in a case of want of jurisdiction so clear as not to admit of argument, for the district judge to deprive the secretary of his power to decide the case by refusing to entertain the petition or to certify the case for decision, by a deter-

mination against the jurisdiction. To assume such power to dismiss the petition, without any right of appeal to the secretary on that question, would virtually oust the secretary of the jurisdiction to determine the cause given him by the act of congress. See Gallego v. U. S., [Case No. 5,201.]

This ruling was submitted to and has never been reversed. It must be regarded as the settled law of this court, or, at any rate, as the settled law of this case. The motion to dismiss is therefore denied.

The district attorney also moves that the petitioner be compelled to make the record of the case which resulted in the decision that the debt was due and provable, including the testimony taken in that proceeding, a part of his petition, or, in default thereof, that the petition be dismissed. This motion must also be denied. It is true that the petitioner should set forth all the circumstances of the case in his petition. But if this record and the decision made upon this testimony are to be regarded as "circumstances" within the meaning of the statute, which is at least doubtful, yet, in case of a failure to set forth in the petition all the circumstances, the United States may prove them as facts and so have the full benefit of them; and if the petition is so defective as to call for the interference of the court to compel a fuller statement, the application must be made much more promptly than it has been made in this case. For these and other reasons, this motion is denied.

Case No. 1,012.

In re BARNES.

[1 Lowell, 560.] [1]

District Court, D. Massachusetts. March Term, 1871.

BANKRUPTCY—POWER OF ATTORNEY — ACKNOWLEDGMENT—PROOF—ACT MARCH 2, 1867, § 22.

1. A power of attorney to prove a debt in bankruptcy need not be acknowledged though drawn according to form twenty-six.

2. A creditor cannot prove by an attorney testifying upon information and belief, unless the creditor is prevented from giving the affidavit as provided by section 22 [of the act of March 2, 1867; 14 Stat. 527.]

[Cited in Re Watrous, Case No. 17,270.]

[In bankruptcy. In the matter of H. F. Barnes. On the register's certificate.]

LOWELL, District Judge. I understand two questions to be certified: 1. Whether a power of attorney drawn up according to form No. 26, of the general orders in bankruptcy, must be acknowledged? 2. Whether under such a power the attorney may make oath to the deposition in proof of his principal's debt, without showing that the creditor is absent from the United States, or prevented by some other good cause from testifying? I answer both questions in the negative. 1. I know of no law which requires powers of attorney of this sort to be acknowledged, and I can see no possible reason why any such law should ever be passed. It is true that form 26 of a letter of attorney to represent a creditor has a foot-note to the effect that it may be acknowledged before a judge, &c., but I suppose the supreme court would have prescribed some rule upon the subject if they had intended to make such action obligatory. In the form No. 14, which would have been sufficient for the purposes of this case, there is no such foot-note, and it has been decided that no acknowledgment is necessary where that form is used: In re Powell, [Case No. 11,354.] I understand that the forms are largely advisory; and duly executed writing which expresses the essential fact of the appointment of the attorney and the powers confided to him must be respected by the judge or register. Whether the foot-note in question was ordered by the supreme court to be appended to the form I do not know, but if it was, it must have been in anticipation that some question of acknowledgment might arise under the municipal law of some particular state, and it is therefore pointed out that in case of acknowledgment it may be before certain officers named. Section 23 of the act [of March 2, 1867; 14 Stat. 528] provides that any creditor may act at all meetings by his duly accredited attorney, and I cannot believe that the foot-note to form 26 is a rule that the letter appointing such an attorney must be acknowledged, nor even that it must be a deed.

The other question must also be answered in the negative. Section 23, just cited, refers to acts by creditors who have proved their debts, or made the proper deposition to prove them, and provides that all such acts may be performed by attorney; but section 22 [March 2, 1867; 14 Stat. 527] shows when a debt may be sworn to by attorney; and that is when the creditor is absent from the United States, or is prevented by some other good cause from testifying. This cause need not be stated in the letter of attorney, but is to be proved to the satisfaction of the judge or register before whom the debt is offered for proof. If the attorney be acquainted with the facts of his own knowledge, it has been held that he may testify without proving the creditor is absent, &c.; but I am speaking of one who proposes to depose only upon information and belief. The law requires the oath of some person having knowledge, and the creditor himself is presumed to have it, and unless he is absent or in some way prevented from testifying, no one can do so for him, unless it be a person having actual knowledge.

Certificate accordingly to Mr. Conkey, the register.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

Case No. 1,013.

In re BARNES, et al.

[1 Wkly. Notes Cas. 21.]

District Court, E. D. Pennsylvania. Oct. 7, 1874.

BANKRUPTCY—DIVISION OF CLAIM—APPLICATION OF PAYMENTS—SCHEDULES—EXTRA SERVICES—ALLOWANCE.

[1. Where a creditor of a bankrupt proved a claim composed of a merchandise account and an accommodation note, and subsequently received payments from the bankrupt on account of the accommodation note, the creditor cannot divide the proofs into two parts, after objection by the bankrupt's assignee that such creditor had received a preference.]

[2. The book-keeper of a bankrupt should not be allowed compensation for making schedules of the bankrupt while in the employ of the marshall, and in receipt of his usual salary.]

[3. The claim of a bankrupt for rendering extraordinary services, beyond those required to make the property, rights, credits, and effects available, cannot be allowed by the court, but may be allowed by the creditors, of grace.]

[In bankruptcy. In the matter of Barnes, Brother & Herron.]

Exceptions to report of register, (Parsons).

1. J. E. Johnston & Co. proved a claim against the bankrupts; said claim was composed of two items: First, a merchandise account; secondly, an accommodation note for $1,573. After the failure of the bankrupts, and with a knowledge of that fact, J. E. Johnston & Co. accepted certain payments, amounting to over $1,400, on account of said accommodation note. Objection being made by the assignee that J. E. Johnston & Co. had received a preference, they claimed a right to divide said proof into two parts, to wit, merchandise account and accommodation note account. The register held that they could not so separate their account.

Russell, for Johnston & Co., thereupon excepted to the register's decision.

THE COURT sustained register's decision and overruled the exceptions, and quoted In re European Bank, 8 Ch. App. 41.

2. The book-keeper of the bankrupts claimed compensation for services rendered in making out schedules of bankrupt, he being in the employ at that time of the marshal, and in receipt of his usual salary. The register disallowed his claim, whereupon he excepted to the register's decision.

Rothermal, for Zebley, the book-keeper, and Barnes Brother & Herron, the bankrupts.

THE COURT sustained the decision of the register, and dismissed the exception.

3. The bankrupts having made a claim for services rendered the estate, the same was disallowed by the register, whereupon they excepted to the register's decision.

THE COURT said: "As to question of special allowance to the bankrupts, or any of them, the court perceives no sufficient reason for directing such an allowance. This does not, however, necessarily preclude the allowance of something under this head by the creditors, of grace, if the bankrupts have rendered extraordinary services, beyond those required in order to make the property, rights, credits, and effects available."

Case No. 1,014.

BARNES' HEIRS v. BARNES et al.

[3 Cranch, C. C. 269.][1]

Circuit Court, District of Columbia. Dec. Term, 1827.

TRUSTS—UNCERTAINTY—STATUTE OF CHARITABLE USES.

1. A devise in trust, to lay out $200 a year in wood, meal, and clothing, to be distributed among the poor and necessitous widows and orphans within the corporation of Georgetown, is void for uncertainty.

2. The statutes of mortmain are in force in Maryland, but the statute of charitable uses (43 Eliz. c. 4) is not, and was not when the county of Washington was separated from the state of Maryland.

3. If either the object of a legacy, or the person of the legatee or cestui que trust, be so uncertain that no one can show a title to claim the legacy, or to enforce the execution of the trust, the legacy and trust are void; even in case of an executory devise. If it be an executed, not an executory devise, it is void if there be no person competent to take at the death of the testator. An executory devise is void, if it be not necessarily to be executed within a life in being at the death of the testator, or within twenty-one years thereafter.

In equity. This was a bill in equity by Hannah and Susan Duryee, the heirs of John Barnes, late of Georgetown, D. C., against his executors and the corporation of Georgetown, to set aside certain legacies and trusts, given and created by his will. The will is dated 12th March, 1825, and the testator died on the 12th of February, 1826.

After providing for the payment of his debts and funeral expenses, manumitting his two negro women, Abigail and Nelly, providing them with an annuity and bequeathing them some small articles, and making a few specific bequests to some of his friends, he devises and bequeathes all the residue of his real and personal estate to his executors, in trust, for the purposes expressed in the will; with power to sell absolutely, and convey the same, and to invest the proceeds in stocks, at their discretion; with power again, from time to time, to sell and reinvest, &c., to answer the trusts and purposes of his will, as they should "think best, and most for the advantage of his estate, and the parties interested therein, and the objects contemplated by" him. And further, upon trust, to pay out of the interest and yearly dividends, or produce to arise from his estate, the annuities thereinbefore and thereinafter mentioned.

1. He then says:—"1. And I do will and desire that the sum of $200 per annum be yearly, and every year forever hereafter, expended by my executors, or trustees for the time

[1] [Reported by Hon. William Cranch, Chief Judge.]

being, out of the yearly interest, dividends, and produce of my estate, in wood, meal, and clothing, and that the same may be distributed by them, at the most suitable season of each and every year, amongst the poor and necessitous widows and orphans within the corporation of Georgetown."

From the preceding items of bequest it will be perceived, "that no provision is made for Hannah and Susan Duryee, the two daughters of my late grandson, George Clinton Duryee; and I have come to the conclusion of not suffering them, and their stepmother, Hannah Duryee, to partake of my estate, as I had intended they should, and had provided in my will of September last; first, because," &c., stating his reasons at large.

2. "And should my estate, in the course of a few years, after paying the several stipulated sums and charges hereinbefore made thereon, and all expenses attending the same, be such as to enable my executors to extend their views and my wishes to an object of great consideration, namely:—It has often occurred to me that the time was not far distant, (indeed it has already become urgently necessary,) when a poor-house, or bettering-house, for this county or town, (it matters not by what name denominated,) should be established; and, if proposed through the honorable and respectable corporation of Georgetown, I doubt not it would be ultimately successful, and thereby a good foundation would be laid towards perfecting a useful and meritorious work, worthy the enlightened, benevolent, and opulent inhabitants of the district and its vicinity, and the humane at large, of contributing to the comfort and improvement of the suffering objects of such institutions: Whenever any progressive proceedings towards such an end become certain and conclusive, a sum, not exceeding $1,000, as occasionally wanted and demanded, I freely bequeathe towards its establishment; and I do direct my executors, having regard to the bequests hereinbefore contained, to pay the same to the authorities having power and right to receive the same, for such a purpose."

3. "And as to the surplus annual proceeds of my estate, which may not be wanted for the purpose aforesaid, I do request my executors, and trustees for the time being, either to suffer the same to accumulate, and to invest the same from time to time, in bank or other stock, or, in their discretion, to distribute the same annually, or otherwise, amongst such of the poor and needy as may be deserving of the same, either in gifts of money or provisions, fuel or clothing, as my executors, or trustees for the time being may think best, and as they may suppose I would myself have given, or disposed of the same, if living."

4. "And as the establishment of a poor-house, hospital, or bettering-house for this county or town, is an object very near my heart, I do direct that if my executors, or trustees for the time being, shall, in the exercise of the discretion hereby vested in them, suffer the surplus annual proceeds to accumulate, then I give one other $1,000 out of such accumulations, in addition to what I have hereinbefore directed to be applied to that purpose, as aforesaid, in further aid of the establishment and maintenance of such poor-house, hospital, or bettering-house; but neither of such bequests is to be paid or applied until my executors, or trustees for the time being, shall perceive that such proceedings have been begun as will render the final accomplishment and completion of the said poor-house or hospital reasonably certain.

"And when the said several annuitants hereinbefore named shall die, and their said annuities shall sink into my estate and determine, I do hereby direct that my said executors, and trustees for the time being, do and shall stand and be possessed of the whole of the said trust-funds, then unapplied and undisposed of, in trust, to apply and dispose of the whole of the annual proceeds and dividends thereof, in such charities as are hereinbefore mentioned, and so as my desire, as hereinbefore expressed, for and towards the relief of the poor and distressed, and the establishment and maintenance of a poor-house, hospital, or bettering-house may be effected and fully accomplished.

"And I do direct that no part of my estate may be applied to any other than charitable purposes, and to such charitable purposes and objects as I have in this my will named, or as nearly thereto as may be; and that the same purposes may be carried on and continued forever."

After giving $100 to each of his two executors, Mr. Burnett and Mr. English, and rings to several of his friends, and providing for the expenses of the trust, he says:—

"And in order that the trusts, purposes, and charities of this my will may be perpetuated, and forever kept alive and in being, I do hereby direct that whenever either of them, the said C. A. Burnett or David English, shall die, the survivor do and shall immediately associate with himself some proper and respectable inhabitant of Georgetown, to act with him in the said trusts of this my will, and shall, by proper deeds," &c., "convey and assign the said trust property," &c. "And I do direct that the same course may be taken from time to time, whenever any one of the trustees for the time being shall die," &c., "so that the said trusts and charities may forever be preserved and kept alive, and not fail for want of a trustee or trustees at any time or times hereafter."

Mr. Marbury, for the plaintiffs, contended that the trusts for the distribution of "wood, meal, and clothing among the poor and necessitous widows and orphans within the corporation of Georgetown," was void for uncertainty, as to the objects of the bounty. So also the two legacies of $1,000 each, towards

"the establishment and maintenance of a poor-house," and the trust to distribute the annual income of the residue of his estate "among such of the poor and needy as may be deserving of the same;" and that the executors held the same in trust for the testator's heirs, and next of kin. He contended, also, that the English statutes of mortmain are in force, but the statute of charitable uses of 43 Eliz. c. 4, is not in force in Maryland, and in this county; and cited Morice v. Bishop of Durham, 9 Ves. 399, 404–406, and 10 Ves. 522, 527, 528, 535, 537, 543; Pow. Dev. 418, 419; Widmore v. Woodroffe, Amb. 636; Trippe v. Frazier, 4 Har. & J. 446; Dashiell v. Attorney General, 5 Har. & J. 398; Trustees of Phila. Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. [17 U. S.] 1, 33; Case of Charitable School at Hillsborough, [Dashiell v. Attorney General,] 6 Har. & J. 1–4; 4 Com. Dig. 146, tit. "Devise," K. At the time of the death of the testator, the corporation of Georgetown had no authority to raise money to build a poor-house, or even to support the poor of the town, nor were they bound to support them. It obtained such authority afterward, but that does not help their case. It was necessary that there should be a competent cestui que trust at the time of the testator's death. Trustees of Phila. Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. [17 U. S.] 1; Godol. Leg. p. 290, § 2; Id. p. 444, § 4; Mann v. Mann, 14 Johns. 13; Attorney General v. Davies, 9 Ves. 546, 547; Chapman v. Brown, 6 Ves. 407, 410, 411; Declaration of Rights of Maryland, art. 3; Landholder's Assistant, 42, § 12; 32 Hen. VIII. c. 1; 34 Hen. VIII. c. 5; 43 Eliz. c. 4; 2 Bl. Comm. 375, 376; Chitty v. Parker, 2 Ves. Jr. 271; Pickering v. Stamford, 3 Ves. 492, 493.

Messrs. Key and Dunlop, for the corporation of Georgetown, contended that the testator's declaration that the plaintiffs should not have any part of his estate was a disposition of it, so as to exclude them as next of kin. That the statutes of mortmain were only applicable to conveyance of land, and non constat that the corporation of Georgetown, would, under this devise, purchase land to build a poor-house upon. That the bequest of funds for that object was not to take effect at the death of the testator, but only when "in the course of a few years" his estate should be such as to enable his executors to extend their views to the object. That in the mean time the corporation, by an amendment of their charter in May, 1826, obtained the power to raise money for the support of the poor, and thereby became competent to receive the legacy. That the trust cannot result to the next of kin contrary to the declared will of the testator. That if one object of the trust fail, the whole will result to any other valid object, by force of the concluding residuary devise. That if the corporation was not competent to take the legacy for the poor-house, yet the levy court of the county, whose duty it was to provide for the poor, had a right to receive and apply it, to the exclusion of the next of kin. Pow. Dev. 320, 323, 336, 422; Godol. Leg. p. 277.

CRANCH, Chief Judge. The complainants contend that the charitable trusts, intended to be created by this will are void for uncertainty, and that the defendants (the executors) are trustees for the complainants (who are heirs at law, and next of kin to the testator,) as to all the property of which the testator died intestate.

1. The first of these charitable trusts, is to lay out $200 a year in wood, meal, and clothing, to be distributed among the poor and necessitous widows and orphans, within the corporation of Georgetown. This trust seems to be admitted by the defendants to be void, under the authority of Trippe v. Frazier, 4 Har. & J. 446, and Dashiell v. Attorney-General, 5 Har. & J. 398, and I am of the same opinion. I think those cases are decisive, that the statute of Elizabeth (of charitable uses) is not in force in Maryland; and was not at the time of the separation of this part of the district from that state.

2. The second charitable trust is, that if the testator's estate, in a few years, should be such as to enable his executors to extend their views to a poor-house for the county or town; and any "progressive proceedings towards such an end should become certain and conclusive," he bequeathes "a sum not exceeding $1,000 as occasionally wanted and demanded, towards its establishment," and he directs his executors "to pay the same to the authorities having power and right to receive the same for such a purpose;" and he, afterwards, in case his executors should suffer the annual proceeds of his estate to accumulate, gives another sum of $1,000, out of such accumulations, to be applied to that purpose, in further aid of the establishment and maintenance of a poor-house; "but neither of such bequests is to be paid or applied until his executors shall perceive that such proceedings have been begun as will render the final accomplishment and completion of the poor-house reasonably certain." The corporation of Georgetown, who are made defendants to this bill, claim these two legacies of $1,000 each, and contend, that if they were not bound to support the poor of the town at the time of the death of the testator, yet they are now bound to do it, by an alteration of their charter; and, as incidental to that duty, they have power to build a poor-house; and have passed a by-law for that purpose, to which they refer in their answer; and they aver that such proceedings have been begun as render the final accomplishment and completion of the poor-house reasonably certain. The corporation of Georgetown also claims all the residue of the proceeds of the estate after the death of the annuitants Abigail and Eleanor, on the ground that all the other

charitable trusts are void for uncertainty, and the testator has clearly expressed his intention and will to be, that the whole proceeds of his estate should be expended in such charities as he has named, or as near thereto as may be; and that if some of the trusts are void, the good ones shall take the whole fund. The statute of charitable uses (43 Eliz. c. 4) never was in force in Maryland. Trippe v. Frazier, 4 Har. & J. 446; Dashiell v. Attorney General, 5 Har. & J. 398, 403, and 6 Har. & J. 1. The English decisions, therefore, upon that statute are not applicable to the present case. The peculiar doctrines of the English law in regard to charitable devises, are founded altogether upon that statute. Trustees of Phila. Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. [17 U. S.] 33–48. This case, therefore, must be decided as an ordinary case of legacy and trust. If either the object of the legacy, or the person of the legatee, or cestui que trust, be so uncertain that no one can show a title to claim the legacy, or enforce the execution of the trust, the legacy, or the trust, is void, even in the case of an executory devise.

If the bequest for a poor-house is to be considered as an executed, not an executory, devise, it is void or lapsed, because there was no person competent to take, at the death of the testator. If it be an executory devise, it is also void, because it is not necessarily to be executed within a life in being at the time of the testator's death, or within twenty-one years thereafter. There is no limit to the time of its execution. The trust was to continue forever; and an hundred years might elapse before there should be "authorities having power and right to receive the same for such a purpose," and before "such proceedings shall have been begun as will render the final accomplishment and completion of the said poor-house or hospital reasonably certain." The time may never come, and yet the next of kin will be deprived of the property.

The same reason applies to the trust to dispose of the whole of the annual proceeds of the residue of his estate, in such charities as were thereinbefore mentioned, &c., and I think it is equally void for uncertainty.

I am, therefore, of opinion, upon the whole, that these charitable bequests are all void, and that the complainants are entitled to the relief which they have prayed.

THRUSTON, Circuit Judge, concurred. MORSELL, Circuit Judge, did not give an opinion.

Decreed, that all these charitable trusts and bequests are void, and that the executors and trustees shall invest $1,750 in the six per cent. stock of the corporation of Georgetown, in the names of the executors, to pay the annuities to Abigail and Eleanor, and after their death shall transfer the stock to the complainants, and shall transfer all the residue of the estate to the complainants immediately, in equal parts.

No appeal was taken.

Case No. 1,015.

BARNES et al. v. BILLINGTON et al.

[1 Wash. C. C. 29;[1] 4 Day, 81, note.]

Circuit Court, D. Pennsylvania. April Term, 1803.

ACT OF BANKRUPTCY — CONCEALED DEBTOR—SERVICE OF PROCESS — CONFESSION OF JUDGMENT — EXECUTION—LEVY—LIEN.

1. A debtor concealing himself from, and being denied to his creditors, does not constitute an act of bankruptcy under the laws of the United States, unless the service of process is thereby prevented.

2. If the debtor order himself to be denied to creditors and others, and is in consequence thereof denied to an officer who comes to serve process, it is an act of bankruptcy; provided the officer comes to serve the process and not on other business, and the denial has taken place within six months of the issuing of the commission.

3. Giving a bond with warrant to confess judgment, to one creditor, upon the eve and in contemplation of bankruptcy, does not constitute an act of bankruptcy; unless the judgment entered on the bond, and the issuing of the execution was at the instance or by the procurement of the debtor. Such a bond would be a fraud on the general creditors.

4. Denial to an officer, whereby he is prevented serving process, must be really adversary, and not by concert between the creditor and the debtor to bring about an act of bankruptcy.

5. An execution executed upon the estate of the debtor previous to an act of bankruptcy, gives a lien to the execution creditor, provided the levy be real and bona fide.

[See Haughey v. Albin, Case No. 6,222; Goddard v. Weaver, Id. 5,495; Witt v. Hereth, Id. 17,921; In re Wilbur, Id. 17,633; Webster v. Woolbridge, Id. 17,340; In re Bernstein, Id. 1,350; In re Burns, Id. 2, 182.]

[6. The effect of a seizure under an execution is to change the property in the goods, and vest it in the sheriff.]

[Cited in Bayard v. Bayard, Case No. 1,129; Thompson v. Phillips, Id. 13,974.]

7. An execution is not levied so as to give a lien against purchasers or creditors, if the property is permitted to remain with the debtor. The lien is lost by suffering the property to remain with the debtor as his own until a subsequent execution is levied, or a bona fide sale is made.

8. To make a levy effectual, the property seized should be specially designated in the return of the execution, or by reference to a schedule accompanying it.

9. When a certificated bankrupt, and who has released all future claims upon his estate, is a competent witness.

At law. This was an action of trespass brought by [Barnes and others] the assignees [in bankruptcy of M'Claws] against Billington and Corless, at whose suit an execution had issued, and to satisfy which, the de-

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

fendant, Israel Israel, the sheriff, had sold the goods of the bankrupt, after an act of bankruptcy committed, and notice of the title of the plaintiffs.

The case is fully stated in the charge given to the jury by WASHINGTON, Circuit Justice, after a very full argument of two days.

Ingersoll, Lewis, and Dallas, for plaintiffs.
Tilghman and Ross, for defendants.

WASHINGTON, Circuit Justice. The facts in this case, not disputed, are, that on the 9th of August 1800, Billington relieved M'Claws, a trader within the meaning of the bankrupt law, from being taken on a bail piece, by giving his note to the creditor. To secure Billington, M'Claws gave him his bond with a warrant of attorney to confess judgment, which was accordingly entered up on the 12th, on which day an execution issued, and was delivered to the sheriff. On the 13th of January 1801, M'Claws gave his bond to Billington and Corless, with a warrant of attorney to confess judgment, for about 5,400 dollars. This was given to secure them for certain notes which they had, in November and December 1800, given to judgment creditors of M'Claws, at sixty and ninety days, and which relieved him from those creditors. Judgment on this bond was entered up on the 14th of January, on which day an execution issued, which was delivered to the sheriff, and returned in the following words, viz: "levied on goods as per inventory." No inventory however was made or accompanied the return. The goods, by the permission of Billington and Corless, remained in possession of M'Claws, in his store in Chesnut street, where he continued to carry on his trade, buying and selling, until the 31st of May; when the sheriff, under the execution of the 14th of January, took possession of all the goods in this store, and put a lock on the door. On the 1st of June following, a capias issued against M'Claws, at the suit of Goodwin. The property seized by the sheriff to satisfy Billington and Corliss' execution, was advertised for sale on the 1st of June, and was sold on the 8th.

On the 5th of June, a commission of bankruptcy issued against M'Claws. On the 6th, a warrant of seizure was delivered to Hall, the messenger of the commissioners, who, finding the store in Chesnut street locked and in possession of the sheriff, put a padlock on the door, and then executed the same on the goods in the house in Market street, to which M'Claws had removed early in May preceding. At the same time, viz. on the 6th, Hall delivered a notice from the attorney of the general creditors to the sheriff, forewarning him from selling the goods, as they were claimed on their behalf. They were however sold as above mentioned.

Mathews, who was a clerk under M'Claws, swears; that in December 1800, M'Claws was much embarrassed in his circumstances, and gave him general orders to deny him to his creditors, keeping himself in his room; though upon his cross-examination, he admitted that M'Claws went out publicly into the streets in that month, and afterwards as usual. That creditors frequently called, and were denied. That Hartung, a sheriff's officer, called in December, and was denied. That after M'Claws removed to Market street, in May 1801, he kept his front door shut and locked. This was however not the case in Chesnut street, where his store door was open, and business carried on as usual.

M'Claws, the bankrupt, was examined as a witness, and although I admitted him as a competent witness, you will decide as to the credit to be given to his testimony. He states that he was embarrassed as far back as October 1800; that there was then a judgment against him, and an execution taken out and lying in the office. That the defendants Billington and Corless, with professions of friendship, and a desire to serve him, and after an examination of his books, proposed to give their notes at sixty and ninety days to satisfy all his creditors by judgment and execution. That this plan was actually carried into execution in November and December 1800, which produced the effect not only of discharging him from those pressing claims, but enabled him to go on again with his business as formerly, and quieted the alarm which his embarrassments had excited. He admits, that at that time he informed Billington and Corless that he could pay twenty shillings in the pound if he should be fortunate in collecting his outstanding debts. No security whatever was taken by Billington and Corless at that time, but on the 13th of January they pressed him for security, saying that it was desired on account of the wife and family of M'Claws, who were strangers. Though he considered this as giving them a preference, yet his gratitude for the aids they had offered him, induced him to acquiesce. He accordingly gave them, at their request, the bond with a warrant of attorney to confess judgment, as before mentioned. He says, that on the 31st of May he was informed by Billington and Corless, that they had ordered the goods in the store in Chesnut street to be sold to satisfy their execution, issued on the 14th, that he complained of this treatment, and offered to release them from their liability by security, if they would wait twenty days. They were inexorable, and on the same day he gave notice of this proceeding to his principal creditors. On the 1st of June, Suter, (as appears by his deposition) being a sheriff's officer, was applied to by Goodwin to serve a writ upon M'Claws. He desired Goodwin to go to the house and wait for him, and he would join him there in a short time. When he came, he found Goodwin there, the door of the house fastened, and admittance refused

by some person from within, who said M'Claws was not at home. Shortly after, however, M'Claws raised up a window, and informed the officer he could not see him, and that he would not be arrested at that time. Upon quitting the house, Goodwin offered Suter two dollars, at which he was surprised, but at length said "I suspect you want to make M'Claws a bankrupt; if so, the fee on those occasions is eight dollars." Goodwin replied that he should be paid the eight dollars. Some time afterwards he applied to Goodwin for the six dollars, who replied, that M'Claws would pay him. This M'Claws refused to do, and Suter was obliged to warrant Goodwin for it.

Fisher and Stricker, two sheriff's officers, state, that M'Claws was publicly out as usual in December, and so on as long as he lived in Chesnut street; that he frequently came to the sheriff's office, and requested, if any thing should come against him, to let him know, and he would at once give bail; that he spoke of making arrangements to pay Billington and Corless' judgment, which Stricker says led them to postpone the sale of his property, as he thinks. Reed and Jones also speak of seeing M'Claws publicly in the street in December, and up to May, and discovered no difference in his conduct, or any attempt to withdraw himself.

Upon this evidence, the first question is, did M'Claws commit an act of bankruptcy on the 1st of June 1801, or at any preceding period, within six months of the 5th of June, when the commission issued. If he did, then, secondly, what effect would it have upon Billington and Corless' execution of the 14th January?

First. In examining the first question, we must proceed by steps. Did he commit an act of bankruptcy at any time before the 13th of January 1801?

M'Claws and Mathews give evidence of his embarrassments, of his orders to be denied to creditors, and it appears that he actually was denied. Other witnesses say that he went out publicly, and carried on business as usual. But, though it were clear that he did attempt to conceal himself from his creditors, and was denied to them, this would not constitute an act of bankruptcy under the bankrupt laws of the United States, though it would under the bankrupt laws of England. The first class of cases in our statute, which constitutes an act of bankruptcy, is going out of the state, remaining absent therefrom, concealing himself within the state, or keeping his house with intent to delay or defraud his creditors, so that he cannot be served with process. So that concealment from or denial to creditors, is not an act of bankruptcy, if it does not prevent the service of process. But it seems that he was denied to Hartung, a sheriff's officer, in December 1800. As to this, the law is, that if the debtor, with intention to delay or defraud his creditors, shall so conceal himself or keep his house, that he cannot be served with process, this is an act of bankruptcy. Mathews proved that this officer called and was denied, but does not say on what day in December. It is immaterial whether the order of M'Claws to his clerk was to deny him to creditors only, or to them and others; for, if in consequence of concealment from creditors only, a denial was made to an officer, who was thereby prevented from serving process upon him, it would have been an act of bankruptcy.

But there are two reasons why the refusal to Hartung did not constitute an act of bankruptcy: First, because it does not appear that he came to serve him with process, and secondly, if it did so appear, it should also be proved to your satisfaction that the circumstance took place on or after the 5th of December, within six months previous to taking out the commission. As to the first point, it is clear, that unless the officer goes to the house of the debtor to serve process, it cannot be said that the concealment prevented him from serving process. Upon the same principle it is, that in England, where denial to a creditor will constitute an act of bankruptcy, it must be a creditor coming to demand payment of a debt. The officer or the creditor might call as a friend or neighbour, and not with a view to serve process or to demand a debt.

The next period to be noticed is the 13th of January 1801. The bond executed on that day, it is said, was giving a preference to Billington and Corless on the eve of, and in contemplation of bankruptcy. If this were true, yet the preference would not constitute an act of bankruptcy, though it would be void, as a fraud upon the general creditors; but still it would be incumbent on the plaintiffs to establish an act of bankruptcy, to entitle them to recover. It is true, that the execution issued upon the judgment which this bond authorized, might amount to an act of bankruptcy, if it was done at the request, or through the procurement of M'Claws; as if at the time he gave the bond, it was agreed that judgment should be entered up, and execution taken out and levied immediately. But if the entering up the judgment and award of execution were acts of Billington and Corless, unsolicited by M'Claws, or not agreed upon when he gave the bond, it is not an act of bankruptcy. On the one hand, the unwillingness with which M'Claws gave this security, seems to discountenance the idea of his having requested or procured what followed. On the other, considerations of benefit to his family, thrown out by Billington and Corless, might have influenced him to wish it. This, however, is a subject more proper for the decision of the jury than of the court, and therefore it is left to them to say, upon all the circumstances given in evidence, whether the taking the goods of the defendant in execution, was or was not by his procurement.

We now come to the 1st day of June, when, prima facie, an act of bankruptcy was committed. Suter was at the house of M'Claws with process, and was prevented from serving it by the house being locked up, and M'Claws within, refusing admittance to the officer. If the jury should be of opinion that this was a fair, adversary transaction, between Goodwin and M'Claws, then there is no doubt, that on the 1st of June an act of bankruptcy was committed. If on the other hand they are of opinion, that it was a concerted measure between M'Claws and Goodwin, or between M'Claws and some of his creditors, then it is not such an act as will give validity to the commission against creditors not privy to the plot, because it cannot be said that he concealed himself, so that process could not be served upon him, with intent to delay and defraud his creditors, when it was done at the request and by concert with his creditors or some of them. The circumstances attending this transaction are, that on the 31st May, in consequence of Billington and Corless' determination to proceed to the sale of M'Claws' goods, he called that day upon his principal creditors and informed them of it. The next day, Goodwin carried the officer to serve process on M'Claws. Goodwin first got to the house, and had time to apprize M'Claws of the approach of the officer, so that the door might be fastened, if it was a concerted thing. The refusal to open the door; the offer to Suter of two dollars; his suspicions and demand of eight dollars as the fee on such occasions; the implied acknowledgment of the truth of these suspicions by Goodwin, in stating that he should be paid, and referring him to M'Claws for the money, are circumstances, which, taken together, afford strong ground to suspect that the whole was a concerted business. On the other hand, as most of the suspicious circumstances passed between Goodwin and the officer, not in the presence of M'Claws, it does not follow with any degree of certainty, that M'Claws was refused in order to favour the views of Goodwin or of the creditors. Upon the whole, this is a question depending so much upon evidence, that I leave it to the jury to say, whether the transactions of the 1st of June were adversary or concerted. If the latter, the verdict must be for the defendant, unless the jury should be of opinion that the execution of the 14th January was issued and levied by the procurement of M'Claws, in which case the act of bankruptcy will defeat the execution of Billington and Corless, however legal it might be in other respects. But if the jury should be of opinion against the plaintiffs upon that point, and should think that the proceedings of the 1st of June were adversary, the plaintiffs will have established the act of bankruptcy on that day; and then it will be necessary to inquire, secondly, what legal effect it will have upon the execution of Billington and Corless of the 14th of January.

The 31st section of the bankrupt law [of April 4, 1800, 2 Stat. 30] excepts from the general mass of creditors who are to come in pari passu under the commission, those who had obtained a lien by an execution, executed upon the estate of the bankrupt previous to the act of bankruptcy. The question is, was this execution legally executed before the 1st of June? The facts are, that after the execution was levied, the goods remained in the possession of M'Claws, by the permission of Billington and Corless; and he continued to exercise every act of ownership over them, until the 31st of May or the 1st of June.

It was strongly contended at the bar, by the defendants' counsel, that if an execution be once levied, a lien attaches, which will prevail against subsequent executions and subsequent purchasers, although the property seized has been re-delivered to the debtor, has remained in his possession for any length of time, and so continued at the time of such subsequent execution or sale. I was surprised at this doctrine, but the more so when the authority of the supreme court of Pennsylvania was quoted in support of it. I should certainly examine with great caution any question decided by the learned judges of that court, before I ventured to pronounce a different opinion. Although not bound by their decisions, they are and ought to be highly respected; but if there be a question which has long since been settled and at rest; if there ever was a point settled upon correct and solid principles, it is the present; and in direct contradiction of the argument for the defendants. Nothing could be more mischievous, than to permit a dormant execution to rise up, at any distant period, to defeat a subsequent sale fairly made, or a posterior execution. And in what does an execution in the sheriff's hands differ from one which has been levied, and the property redelivered to the debtor; enabling him thereby to acquire a false credit, and to defraud those with whom he may deal? Possession of personal property is the only indicium of property; and for this reason; if the vendor of such property remain in possession, it is fraudulent and void against creditors and purchasers. It cannot be said that an execution is really executed, where the debtor is permitted by the plaintiff to retain possession, and exercise the same acts of ownership over it which he before had done. The effect of a seizure is to change the property in the goods, and to vest it in the sheriff; but no change in this case was produced; no lien created; both were prevented by the fraud which the law implies; where the property being changed, possession remains with the former owner, and that with the consent of the person entitled. I am pleased to find that this opinion corresponds with that of the supreme court of Pennsylvania in the case of Chancellor v. Phillips, [4 Dall. (4 U. S.) 213,] although I do not yield my as-

sent to the distinction, there taken, between household furniture and other goods. The decision in the late circuit courts in the case of U. S. v. Conyngham, [Case No. 14,850,] contains a full and able investigation of this doctrine, and is in perfect unison with the English decisions, and with my opinion. But there is another objection to the title of Billington and Corless under the execution, which is equally fatal, and that is the insufficiency of the levy. The sheriff must always designate the property seized under the execution, either in the body of his return, or by reference to a schedule accompanying it. The reason is obvious; the execution creating a lien, it should be known to others who may take posterior executions, or who may deal with the debtor, what property is affected by the lien, and what is not. In this case, the return is, "levied on goods as per inventory;" but no inventory was made, or returned with the execution. As M'Claws continued from January to June to sell and buy as usual, no person can say whether any, and which of the articles sold on the 8th of June, were levied upon on the 14th January.

Upon the whole, if the jury are of opinion that an act of bankruptcy was committed by M'Claws on the 13th or 14th of January, or on the 1st of June, they must find a verdict for the plaintiffs, notwithstanding Billington and Corless' execution; if otherwise, they must find for the defendants.

Case No. 1,016.

BARNES v. CHICAGO, M. & ST. P. R. CO. et al.

[8 Biss. 514;[1] 8 Reporter, 776; 11 Chi. Leg. News, 399.]

Circuit Court, E. D. Wisconsin. April Term, 1879.[2]

RAILROAD MORTGAGE — FORECLOSURE—EQUITY — PLEADING.

1. Where a railroad mortgage has been foreclosed and bought in for the benefit of the bondholders, most of whom united in organizing and carrying on a new corporation, and afterwards certain creditors by judgments subsequent to the mortgage succeeded in obtaining a decree on a bill filed to set aside the foreclosure and subject the property to payment of their judgments: *Held*, that the decree rendered the foreclosure invalid only as to the creditors who filed the bill; and the bondholders who voluntarily took stock in the new company cannot again claim under the mortgage, nor can the trustee under the mortgage maintain a new bill of foreclosure for their benefit.

[See note at end of case.]

[2. The new bill of foreclosure alleged that certain bondholders yielded under coercion to the demands of one S. and others, and exchanged their bonds for stock in the new company, believing that unless they did so they would forever lose all benefit of their security. *Held*, that the allegations were not sufficiently distinct to require a traverse.]

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

[2] [Affirmed in 122 U. S. 1, 7 Sup. Ct. 1043.]

[In equity. Bill by William Barnes against the Chicago, Milwaukee & St. Paul Railroad Company and others to foreclose two mortgages executed to complainant, as trustee, by the La Crosse & Milwaukee Railroad Company upon property now in possession of respondent. The hearing is now on the sufficiency of the pleas. First plea held valid, and second invalid. A replication was afterwards filed, proofs taken, and a reference ordered. The master's report was confirmed, and the bill dismissed. On appeal this decree was affirmed by the supreme court in Barnes v. Chicago, M. & St. P. R. Co., 122 U. S. 1, 7 Sup. Ct. 1043.]

Joshua Stark, Francis Fellowes, and William Barnes, pro se, for complainant.

John W. Carey, for defendants.

DRUMMOND, Circuit Judge. This is a bill filed by the plaintiff to foreclose two mortgages, executed to him, as trustee, one in June, the other in August, 1858, by the La Crosse and Milwaukee Railroad Company, as still subsisting mortgages upon the property conveyed to secure the bonds issued under them; one mortgage was a supplement to the other.

Prior to the date of these mortgages, the railroad consisted of two divisions, called the Eastern and Western Divisions, and there were incumbrances upon the various parts of the railroad, consisting of mortgages, or deeds of trust, as well as of judgments, so that at the time the mortgages were executed to the plaintiff, there were prior incumbrances upon both divisions. This was a mortgage upon the whole railroad, from Milwaukee to La Crosse, as one entire road, subject of course to the prior incumbrances.

Under an act of the legislature of this state, the plaintiff foreclosed the mortgage, (we can speak of it as one mortgage, because the supplemental mortgage was made simply in connection with the first mortgage.) The act of February 8, 1859, (Laws Wis. 1859, c. 10, § 1,) provided that in case of the sale of a railroad in this state, by virtue of, or on foreclosure of any trust deed or mortgage, the trustee might himself bid a certain per centage on the property, and become the purchaser.

This, of course, was contrary to the general rule of law, which forbids a trustee, except under special circumstances, from becoming the purchaser under a sale made by himself.

But the second section of the law, provides, that, "The estate and title of any trustee named in such trust deed, or mortgage, acquired by purchase at such sale, shall be held in trust for the holders of such outstanding bonds, or obligations, in the same manner as if they had become the purchasers, in proportion to the amount of such bonds, or obligations, severally held by them."

The sale was made by the trustee under the authority of this act, the effect of which was that it operated only as a foreclosure of the equity of the La Crosse and Milwau-

kee R. R. Company, and paid, pro tanto on the debt due to the bondholders, the amount of the bid which was made by the trustee, and instead of holding a title subject to the equity of redemption, he became the owner and had an absolute title to the property, but still as a representative of the bondholders. The case turns upon the validity of this sale made by the trustee, and upon the effect to be given to it upon the allegations in the pleadings.

After the sale was made and the property bought in by the trustee, he and the bondholders availed themselves of another statute (Rev. St. Wis. c. 87, § 1828, par. 10) of this state, which authorized the purchaser at a railroad sale to organize a new company, and gave them the right to construct and operate a railroad, thus creating an entirely new organization springing out of the old one, and the result of the sale that was made.

Accordingly, the trustee and the bondholders under the trust deed of 1858, availing themselves of this act of the legislature, proceeded to organize themselves into a new company, known as the "Milwaukee and Minnesota Railroad Company," and formed a new organization, and as such operated some portions of the road, and it was treated by all parties and by the courts, including the supreme court of the United States, as a duly organized company, clothed with all the rights, franchises and privileges of a railroad corporation, under the laws of the state of Wisconsin.

Sometime [it is not necessary to be particular about dates][1] after this took place, certain creditors of the La Crosse Company, obtaining judgments after the date of the mortgage of 1858, filed a bill in the circuit court of the United States, for the district of Wisconsin, alleging that the sale made by the trustee under the act of the legislature of 1859, was fraudulent and void as against them.

A decree dismissing the bill was rendered by the circuit court, [unreported,] and an appeal taken to the supreme court of the United States, where the decree of the lower court was reversed, and the sale made by the trustee was adjudged fraudulent and void, and the case remanded to the circuit court, with instructions to enter a decree in the case in conformity with the opinion of that court. James v. Milwaukee & M. R. Co., 6 Wall. [73 U. S.] 752. A decree was accordingly entered declaring the sale fraudulent and void as against the judgment creditors; and also, declaring at the same time, in conformity with the opinion of the supreme court, that the mortgage was to remain as a valid security for the benefit of those who were bona fide holders of bonds under the mortgage, the amount being less than two hundred thousand dollars, although the amount claimed as due, and for which the property was sold by the trustee, was a much larger sum.

The supreme court found that a large number of the bonds were fraudulent and void, and for that reason set aside the sale. James v. Milwaukee & M. R. Co., 6 Wall. [73 U. S.] 752. It is because the supreme court rendered this decree, setting aside the sale, that the bill has been filed by the trustee in this case, alleging that the mortgage is in full force, and that he has a right to come in and ask for a foreclosure of it, and to redeem from any prior liens that may exist against the property mortgaged, after proper deductions are made in consequence of the rents and profits which have been received by the parties who hold the property, from the operation of the road and otherwise. As I have said, the Milwaukee and Minnesota Company, operating portions of road, was treated as a corporation, with all its franchises and privileges, and in the proceedings which took place afterwards for the purpose of foreclosing incumbrances upon the property, prior to the date of the plaintiff's mortgage, the Minnesota Company was considered as representing the plaintiff and the bondholders under the mortgage of 1858, and was made a party to all the proceedings which subsequently took place, how numerous soever they were, where it was necessary that a subsequent incumbrancer should be made a party.

The Minnesota Company being thus treated, and regarding itself as clothed with all the muniments and privileges arising from this sale, was called upon at one time to pay a large sum of money, in order to redeem the property from an incumbrance which was upon it, and under the order of the court, paid over four hundred thousand dollars.

This was done before the decree of the supreme court declaring the sale fraudulent and void. After the decision of the supreme court, in James v. Milwaukee & M. R. Co., supra, the Minnesota Company filed a bill for the purpose of having the money which had thus been paid, restored to it, on the ground that as a company it was destroyed by the decree of the supreme court, and that the money had been paid through mistake, and therefore it was entitled to recover it back.

A demurrer was put in to the bill filed in the circuit court of the United States, and the demurrer was sustained and the case taken to the supreme court, and the decree of the lower court was affirmed, the supreme court holding that the Minnesota company could not recover the money back. Milwaukee & M. R. Co. v. Soutter, 13 Wall. [80 U. S.] 517. It is mainly in consequence of these supposed to be conflicting opinions of the supreme court of the United States, that the controversy arises in this case. It is claimed on the part of the plaintiff, that the sale made by the trustee was an absolute nullity as to all the world—that it was the execution of a power in a way not authorized

[1] [From 11 Chi. Leg. News, 399.]

by the mortgage, and therefore was absolutely void, being in violation of the constitution of the United States, as the law. of 1859, passed by the legislature of this state, impaired the obligation of the contract.

It is, perhaps, not necessary, in the view which the court takes of the case, to decide this last question.

I have said that the only effect of the sale was to foreclose the equity of redemption of the La Crosse and Milwaukee Railroad Company, and to pay pro tanto the amount of the debt owing by that company, to the extent of the bid made by the trustee. The trustee and the bondholders had the property which was covered by the mortgage. The sale had no other effect than that indicated.

They were left with an absolute title to the property, instead of having a title subject to the equity of redemption. And it is to be observed that the La Crosse Company has never made any complaint whatever in regard to the sale. No objection has been interposed by it so far as we know, during the twenty years since the sale, and nothing shows in any way dissatisfaction on the part of the La Crosse Company to the mode of foreclosing the mortgage, but it seems to have acquiesced in the proceeding.

These being allegations that appear in the bill, the defendants come in and allege by plea, that upon the sale which was made, the reorganization of the Minnesota Company took place and that the bondholders—all the bondholders—under the mortgage, relinquished their bonds, as they were authorized to do by statute, and took stock of the Minnesota Company in their place, and so that whatever view may be taken of the effect of the sale under some aspects, it was only invalid as against the judgment creditors who filed that bill; that it stood for all other purposes, and that it was entirely competent for the trustee and the bondholders, both agreeing to it, to convert the bonds into the stock of the Minnesota Company; that no one has a right to complain, not even the trustee, and consequently that the Minnesota Company was the proper representative of the trustee and the bondholders, in the litigation which took place in so many forms afterwards; and we think that is a sound position, if the facts are as stated.

If true, however irregularly the sale may have been made by the trustee, however fraudulent it may have been as against the judgment creditors who filed the bill, still, if the bondholders have voluntarily converted their bonds into stock, it is not competent for the trustee to file this bill.

The supreme court of the United States declared in its opinion,—James v. Milwaukee & M. R. Co., [6 Wall. (73 U. S.) 752,] (and the decree of this court conformed to that opinion,) that the mortgage stood as a valid surety for the benefit of the bona fide bondholders; and therefore I think that neither the act of the legislature nor of the trustee, nor the conversion of their bonds into stock by a majority of the bondholders, nor the fact that the trustee transferred all his interest to the Minnesota Company, impaired the validity of the bonds which were held by other parties who did not assent (if any did not assent) to this purchase, and who did not convert their bonds into stock. But it is to be observed, the plea alleges that they all did convert their bonds into stock, and so we hold that, if that be true, it is a valid answer to this bill, for the reasons already stated.

And we hold that the action of the supreme court and of the circuit court for the district of Wisconsin, in setting aside the sale by the trustee, had no other effect than to render it invalid as against the judgment creditors, and consequently if the bondholders all came in and converted their bonds into stock, that put an end to the mortgage.

That seems to be the opinion of the supreme court of the United States, in the case of the Milwaukee & M. R. Co. v. Soutter, [13 Wall. (80 U. S.) 517.]

The ground taken in the argument of that case by the counsel was, that the opinion of the supreme court and the decree of the circuit court following it, rendered the whole sale absolutely inoperative as to all persons, and that the Minnesota company had acquired no right, title or interest, by virtue of what had taken place.

The court said, that "the complainants (the Minnesota company,) are wrong in asserting that the property was not theirs (under the sale.) It was theirs. Their purchase was declared (in James v. Milwaukee & M. R. Co., [supra,]) void only as against the creditors of the La Crosse & Milwaukee Railroad Company.

"In other words, it was only voidable, not absolutely void. By satisfying these creditors they could have kept the property, and their title would have been good as against all the world. The property was theirs; but by reason of the fraudulent sale, it was subject to the incumbrance of the debts of the La Crosse Company. This was the legal effect of the decree declaring their title void. Therefore, they were, in fact, paying off an incumbrance on their own property, when they paid into court the money which they are now seeking to recover back.

"They are wrong also in asserting that they made the payment under a mistake of fact. If it was made under any mistake at all, it was clearly a mistake of law."

So that there is an opinion of the supreme court of the United States, declaring what was the legal effect of the sale, which that court declared to be inoperative and void in [James v. Milwaukee & M. R. Co., supra.]

[4] [The remaining question is whether or not the plaintiff, by proper allegations in the bill, has impaired the effect of the statement

[4] [From 11 Chi. Leg. News, 399.]

contained in the plea. In other words, has it confessed what is stated in the plea, and, by proper allegations in the bill, avoided it, so as to show that the plea is not a valid plea? There are certain statements in the bill, to the effect that some of the bondholders did not relinquish their bonds and take stock of the Minnesota Company, and, so far as those averments are concerned, it must be considered that the statement of the plea is a traverse of the allegations. The plea states that all did convert their bonds into stock. But there is an attempt on the part of the pleader to get rid of the fact which he admits; that some of the bondholders, and, as it is conceded a very large majority, did surrender their bonds and take stock; and it is claimed it is shown that these bondholders, or some of them, who surrendered their bonds and took stock, were laboring under coercion.

[I will read two paragraphs in the bill, in order that we may clearly understand the allegations upon this subject: "And your orator saith, that from and after the said sale and organization, so called, Russell Sage and others, (but who "the others" are, is not stated,) professing to be, and acting as, officers and directors of the said Minnesota Company, had, or claimed to have, entire control and possession of the estate conveyed to him as aforesaid for the security of the said third mortgage bonds, subject to all the legal liens thereon, and excluded the holders of said bonds who had not subscribed said articles of organization, referring to the articles of organization of the Milwaukee & Minnesota Company, and surrendered their bonds, and paid their pro rata share of the expenses aforesaid, from all enjoyment of said estate, or of the fruits thereof, and from all participation in said company as stockholders or otherwise, and demanded that they should surrender their bonds to said company in exchange for capital stock thereof, and pay their said pro rata share, and threatened and declared that unless they should do so they should forfeit all right to said estate as security for said bonds, and be forever debarred from participation in the fruits of said sale supposed to have been made by your orator to said Minnesota Company, and from all benefit to be derived therefrom." "And your orator saith, upon information and belief, that sundry holders of said bonds, supposing and believing that unless they surrendered their bonds as required by the said Sage and others, and paid their said pro rata share, they would forever lose all benefit to be derived from said estate as security, yielded to the demands of said Sage and others, and surrendered their bonds in exchange for capital stock of said supposed company, and paid their said pro rata share of expenses, who otherwise would not have done so, and that in so doing said bondholders acted under coercion on the part of said Sage and others, and now insist, and your orator avers, that by reason of said coercion, and by reason of the facts aforesaid, their title to said bonds and to said estate conveyed to your orator as security therefor, remains unimpaired, and that in equity they are entitled to demand and receive payment of said bonds, and to have said security applied thereto." These are the only allegations in the bill upon this subject, and the question is whether they are sufficiently distinct and of such a character as to warrant the court in saying that the defendants are called upon to traverse them; and we think that they are not.

[It is to be observed that no man's name is mentioned except that of Mr. Sage. Now why should the threats of Mr. Sage affect the rights of other parties, who had nothing to do with them, who had no knowledge of them, and who did not participate in them in any way? It is not stated how many of these bondholders acted under these threats. It says only: "sundry holders of said bonds." If Mr. Sage made these threats, they could have no binding effect upon the bondholders, It was a simple opinion of his. It did not affect, in the slightest degree, the legal or equitable rights of the bondholders. What Mr. Sage said could not deprive them of any of their equities under the mortgage, and it does not necessarily follow, that because he may have used this language, that they did not of their own free will, and after a proper examination of the case, voluntarily surrender their bonds and take the stock. It is to be observed, that this took place before the supreme court had decided upon the effect of the sale. All parties I presume, certainly the trustee, acted in good faith, although he has now filed this bill. He asserts that he acted in good faith, under the authority of the act of the legislature, and under the instructions of the best legal advice. No doubt they all acted in good faith, even if Mr. Sage did not. If he did use threats, was the coercion here used of such a character, and are the allegations so specified that we can say there was a certain number of the bondholders who were compelled by the threats of Sage to surrender their bonds and take stock?

[Other persons besides Sage are interested in the sale, and in the property, and are to be affected by the bill that is filed in this case. They have become owners of the property as the result of the litigation which has been so long continued, and under the decrees which have been so often made. They hold under sales that have been made in foreclosure proceedings under mortgages and judgments, which confessedly were prior liens to the mortgage of the plaintiff of 1858. Under these proceedings the Minnesota Company was a party, and was assumed to represent Mr. Barnes and the bondholders under the mortgage, and those who acquired the property, it is presumed, acquired it in good faith. Mr. Sage is not the only one of

them. There were many others interested in it. And, therefore, upon this allegation, loose, vague and indefinite, about coercion in consequence of something that might have been stated by Mr. Sage, we do not think that we can hold that it is sufficient to bind the parties to this bill. But it will be observed that the supreme court of the United States, in the case already referred to,—Milwaukee & M. R. Co. v. Soutter, [13 Wall. (80 U. S.) 517,] seems to have had its attention called to a state of facts somewhat similar to what is alleged here. The court says, in that case, "It is stated that Russell Sage, one of the defendants, who received a large portion of the money paid into court, was also a large holder of bonds under the Barnes mortgages, and advised and encouraged the sale by Barnes, and participated in the organization of the complainant's company (the Minnesota Company); all these facts may be true, but they do not show, nor is it alleged that Sage was personally a participant in the fraud which was committed in the sale under the Barnes mortgage." Nor does this bill make any such allegations.] [5]

We shall, therefore, without going further into the case, hold, that the first plea is a valid plea to this bill.

But we do not, in so holding, intend to foreclose the rights of any of the bondholders, either those who did not surrender their bonds and take stock, or those who did surrender their bonds and take stock, under the plan to organize the Milwaukee and Minnesota Railroad Company.

Of course it is a question of fact, whether or not they did surrender their bonds and take stock.

[We think that the true construction of this plea is, that they voluntarily—that is, in a legal sense—surrendered their bonds and took stock; that unless it was a voluntary act, it was not binding upon them.] [5]

And we think, as stated before, that those who did not surrender their bonds and take stock, if there are any such, were not bound by what occurred, and that this mortgage is valid as to all such bondholders.

[It will be a question to be determined upon a reference and proofs, whether or not the bonds that have been surrendered, as it is admitted much the greater portion of them have been surrendered, so that they are bound by the surrender. And it will also be a question how many of the bondholders have not surrendered their bonds; and whether or not they are bona fide holders of the bonds. The first plea will be held to be a valid plea, and the second as not being sufficiently full and explicit, invalid, and it will be ordered accordingly.] [5]

DYER, District Judge, concurring.

[NOTE. The supreme court affirmed the foregoing decision on the ground that the bondholders consented to the action of the trustee in their behalf, and that it was immaterial that some omitted to surrender their bonds for cancellation. As to the bonds not actually surrendered and exchanged for stock, Mr. Chief Justice Waite says: "We have no hesitation in deciding that, at the time of the foreclosure, they were held and owned by parties who in law consented thereto, and that the present holders took them with full notice of that fact. * * * Under these circumstances, we cannot do otherwise than decide that the silence of the holders of these few bonds, during all the time the Minnesota Company was acting in their behalf, is equivalent to actual consent to the sale under which the company got the right to represent their interests in the litigation with the prior lienholders. They are the only persons, so far as the record discloses, who did not actually surrender their bonds, and take certificates of stock therefor, and it is now too late for them to say that what their trustee did in their behalf was without authority." Barnes v. Chicago, M. & St. P. R. Co., 122 U. S. 1, 7 Sup. Ct. 1048.]

[5] [From 11 Chi. Leg. News, 400.]

BARNES, (HOWENSTEIN v.) See Case No. 6,786.

BARNES, (INMAN v.) See Case No. 7,048.

Case No. 1,017.

BARNES v. LEE.

[1 Cranch, C. C. 430.] [1]

Circuit Court, District of Columbia. Dec. 18, 1807.

RECORDS—ALTERATION—PLEADING.

1. The record of a cause, is the history of the proceedings in an action made out at full length, and in technical language; and when once made out and written in the record book the power of the clerk over it has ceased. It has become a public document and cannot be altered, unless by order of the court under certain circumstances.

[Cited in U. S. v. Walsh, 22 Fed. 648.]

2. The plea of nul tiel record refers to the time of the plea pleaded, and a subsequent amendment of the record does not affect the issue.

3. A material variance between the record of the recognizance and the recital of it in the scire facias, is fatal.

[At law. Action by John Barnes against David Easton. The hearing is now by the court on a plea of nul tiel record to a] scire facias against Mr. [Edmund J.] Lee, as especial bail for David Easton. [Interlocutory judgment for Lee. The writ was thereafter quashed, with leave to amend the record. Barnes v. Lee, Case No. 1,018.]

Mr. Jones, for plaintiff.

E. J. Lee and F. Lee, for defendant, cited the following authorities:—Com. Dig. tit. "Pleader," L, 3; Id. tit. "Bail," R. 2-7; Id. tit. "Record," C; Coy v. Hymas, 2 Strange, 1171; Vavasor v. Baile, 1 Salk. 52; Kilbourn v. Trot, Cro. Eliz. 855; Shuttle v. Wood, 2 Salk. 564; Ward v. Griffith, 1 Ld. Raym. 83, 84; Knight's Case, 1 Salk. 329, 2 Ld. Raym.

[1] [Reported by Hon. William Cranch, Chief Judge.]

1014; 21 Vin. Abr. 17, tit. "Trial;" Hillier v. Frost, 1 Strange, 401; Grey v. Jefferson, 2 Strange, 1165; 2 Cromp. Pr. 73.

CRANCH, Chief Judge, delivered the opinion of the court.

To this scire facias Mr. Lee has pleaded nul tiel record, upon which an issue is joined, which must be decided by the court upon inspection of the record. If there be such a record as that set forth in the scire facias the judgment must be for the plaintiff. But if there be a material variance between the record and the recital of it in the scire facias the judgment must be for the defendant.

The first question is, what is the record? The record as made up at large in the record-book is in these words: "Whereupon Edmund J. Lee came into court and undertook for the said defendant to satisfy and pay the condemnation of the court, if he should be cast at the trial of this suit, or render his body to prison in execution for the same."

The scire facias states, "Edmund J. Lee heretofore," "to wit, on," &c "came before the court and became pledge and bail for the said David Easton, that if it should happen that the said David Easton should be convicted at the suit of the said John Barnes in the action aforesaid, then the same bail granted that as well the said damages as all such costs and charges as should be adjudged to the said John Barnes in that behalf should be made of the goods and chattels of the said Edmund J. Lee, and to be levied to the use of the said John Barnes, if it should happen that the said David Easton, should not pay the said damages and costs aforesaid, or should not on that account render himself to the prison of our said county."

It is contended, by the defendant, that the undertaking, as stated in the record, is materially variant from that set forth in the scire facias, because the former does not show that the defendant "granted that the damages and costs should be made of his goods and chattels" in case Easton did not pay them or render himself to prison on that account. The undertaking of the defendant, as stated in the record, is only that Easton should pay or render himself to prison; it does not include the usual alternative "or that the bail will pay it for him," which is the very substance and essence of the undertaking upon which the scire facias is grounded. But it is answered, on the part of the plaintiff: 1st. That the obligation of special bail is well known and settled by law, and cannot be altered, and when the record states that he came into court and acknowledged himself to be special bail, it states in substance that he acknowledged himself to be bound by all the legal obligations of bail; and that when the record states that he undertook for Easton to pay or render himself to prison, in execution, it implies that if he did not, the bail would do it for him; so that the record states the substance of the whole legal obligation of special bail, and the scire facias has stated nothing more. 2d. It is also contended that the entry on the minute-book of the day, in these words, "Edmund J. Lee, special bail," authorized the clerk to make up the records of the recognizance of bail in the legal form, and in no other. That the true records of the court are the minutes extended into form, according to their legal import. That if the clerk has erroneously extended the minutes in this case, it is as if he had done nothing; and that the record may now be made up in due form, when it will exactly correspond with the scire facias. There is much ingenuity and seems to be some weight in this argument, and it brings us back to the question what is the record in this case?

The daily minutes, taken by the clerk and sanctioned by the court, are only memoranda to assist the memory of the clerk in making up the records of the court. The record is the history of the proceedings in an action made out at full length and in technical language. When the clerk has once made out this history and written it in the record-book, his power over it ceases. It has become a public document, and cannot be altered unless by order of the court, under certain circumstances. The record therefore to which the court is referred by the issue in this case, I take to be that which is entered at length, in the record-book, and although the court may perhaps order a clerical error to be corrected, yet such correction now made could not affect the issue in this case, which must be decided according to the record as it stood at the time of the plea pleaded. This principle seems to be settled by the cases of Coy v. Hymas, 2 Strange, 1171; Knight's Case, 2 Ld. Raym. 1014, and 1 Salk. 329; Hillier v. Frost, 1 Strange, 401; and Grey v. Jefferson, 2 Strange, 1165. If, then, the record in the record-book is that which we are to compare with the scire facias, the question remains whether there be a substantial variance between them. That there is apparently such variance seems to be admitted; but it is said that when a man undertakes that another shall do a thing, if this other fails to do it, there is an implied obligation on the part of the former that he will do it for him. This may perhaps be true in some cases of contract, and such implied obligation may perhaps support an action; but it does not therefore follow that such implied obligation can arise upon a recognizance, nor that it will authorize an execution to issue without a previous judgment. A recognizance is a solemn acknowledgment upon record, and contains all the terms of the obligation which the party takes upon himself. In the present case the court deems the omission of the usual alternative, ("or that he will do it for him") to be fatal. I have a doubt whether, if the plaintiff chooses to quash his scire facias and then apply to

have the record amended, I should not think it ought to be amended; and that he might then bring a new scire facias upon the amended record. But upon this last point the court has not made up an opinion.

Case No. 1,018.

BARNES v. LEE.

[1 Cranch, C. C. 471.][1]

Circuit Court, District of Columbia. Nov. Term, 1807.

RECORDS—AMENDMENT.

A clerical error in the record may be amended after the term.

[At law. Action by John Barnes against David Easton. A writ of scire facias against E. J. Lee, as special bail for Easton, was adjudged defective. Barnes v. Lee, Case No. 1,017. Heard on Lee's motion to quash the writ. Granted. Also, heard on plaintiff's motion for leave to amend the record. Granted.]

After THE COURT had given an opinion on the law, upon the issue of nul tiel record, [Barnes v. Lee, Case No. 1,017,] but before the judgment thereon was entered on the minutes,—

Mr. Jones, for the plaintiff, moved to quash the scire facias, which THE COURT granted, on payment of all costs. Mr. Jones then moved the court to direct the clerk to amend the record by the minute-book. On certiorari upon suggestion of diminution, the court below will order a clerical mistake to be corrected.

Mr. E. J. Lee, contra. Errors in the office can only be corrected at the next succeeding term. The court cannot correct even a clerical error after the term. The minutes of the district court of Virginia, are full and complete records at length.

Mr. Jones, in reply. This is a misprision of the clerk. The record is not made up during the term. The clerks make them up in vacation from the minutes, hence the minutes are directed by law to be signed. Laws Va. Dec. 12, 1792, § 46, p. 81; Id. § 28, p. 78; Laws Va. Dec. 3, 1792, § 35, p. 89; Norton's Case, Style, 110; Lovell v. Natchford, Id. 120; Frazier v. Crosbie, [Gordon v. Frazier,] 2 Wash. (Va.) 130; Poynes v. Francis, Style, 191; Saunderson v. Raisin, Id. 207; Dawkes v. Payton, Id. 218, 219; Pinder v. Dawkes, Id. 232; Freind v. Baker, Id. 339; Kitchinman's Case, Id. 374; Barker v. Elmer, Id. 412.

Mr. E. J. Lee. The minute-book, in this case, does not describe the form of the recognizance, so that there is nothing to amend by.

THE COURT gave leave to amend.

BARNES v. MILWAUKEE & ST. P. R. CO. See Case No. 1,016.

[1] [Reported by Hon. William Cranch, Chief Judge.]

BARNES, (PHILADELPHIA & R. R. CO. v.) See Case No. 11,087.

Case No. 1,019.

BARNES v. RETTEW.

[2S Leg. Int. 124;[1] 8 Phila. 133.]

Circuit Court, E. D. Pennsylvania. April 14, 1871.

ACT OF BANKRUPTCY — ASSIGNMENT FOR BENEFIT OF CREDITORS — FRAUD — CONSTRUCTIVE AND ACTUAL.

1. A debtor's assignment of all his estate, in trust for distribution among all his creditors equally, tends necessarily "to defeat or delay the operation" of the bankrupt law [of March 2, 1867; 14 Stat. p. 517, c. 176,] and, therefore, if executed after this law (on 1st June, 1867,) went into practical operation, and within the prescribed limit of six months before the commencement of proceedings against him under the 39th section, is an act of bankruptcy.

[See Ex parte Burt, Case No. 2,210; Ex parte Breneman, Id. 1,830; In re Croft, Id. 3,404; Globe Ins. Co. v. Cleveland Ins. Co., Id. 5,486; In re Frisbee, Id. 5,129; Jones v. Sleeper, Id. 7,496; Hutchins v. Taylor, Id. 6,953; In re Mendelsohn, Id. 9,420.]

[Contra, Ex parte Kintzing, Id. 7,833; Smith v. Teutonia Ins. Co., Id. 13,115.]

2. The assignment, though constructively fraudulent with such relation to the bankrupt law, is, in the absence of actual fraud, not void, but voidable, and not voidable otherwise than at the suit of the assignee in bankruptcy.

In equity under the auxiliary jurisdiction conferred by the bankrupt law. The bill, at the suit of the assignee in bankruptcy, of partners who had, within six months before the commencement of the proceedings, made a voluntary assignment to the defendant of all their estate in trust for the equal benefit of all their creditors, prayed an injunction, &c., and a final decree setting aside the assignment. On a motion for an injunction, &c., before answer, the case was heard interlocutorily, upon affidavits, before the district judge holding the circuit court. It was contended, first, that the assignment, being in itself an act of bankruptcy, was, on its face, notice to the party receiving it of its tendency to defeat or delay the operation of the bankrupt law; secondly, that the assignment was tainted with actual fraud, having been executed without consulting creditors, though there had been a previous meeting of them,—and the voluntary assignee having precipitately advertised the whole available effects for sale at auction, without notice to creditors who were proceeding adversarily in bankruptcy.

On the other side, it was urged that the sale advertised would have been a fair and advantageous one, that it had been suspended so soon as any objection to it was known, and that a great number of the creditors had, in writing, approved of the voluntary assignment since its execution. The judge said that the minority of the creditors, or a single dissenting creditor, had rights of which

[1] [Reprinted by permission.]

the others could not thus deprive him, but that if the true interests of the general body of the creditors would be promoted by refusing the injunction, it ought not, in this stage of the case, to be granted; that the present question could not be determined advisedly without an authoritative decision of the question, whether such an assignment was an act of bankruptcy, a point upon which some doubt had arisen from a reported note of two cases in the circuit court for the southern district of Ohio, 2 N. B. R. [Quarto,] 180, 181, [Langley v. Perry, Case No. 8,067; Farrin v. Crawford, Id. 4,686,] and that an argument on this point, ought, if possible, to be postponed until the arrival of the circuit judge, which would probably occur in a few days.

The case therefore stood over, the defendant agreeing to do nothing without the knowledge and supervision of the complainant, who was to have unrestricted access to books, papers, &c. The question, whether the assignment had, in itself alone, been an act of bankruptcy, independently of any question of actual fraud, was afterwards argued before the circuit judge and the district judge, holding together the circuit court.

Mr. Miller, for the defendant, relied on the cases of Sedgwick v. Place, [Case No. 12,622;] Langley v. Perry, [Id. 8,067;] and Farrin v. Crawford, [Id. 4,686;] the last two of which had been mentioned, as above, on the former hearing of the motion. Mr. Miller urged considerations of the hardship and inconvenience likely to result from holding such an assignment, when fairly and honestly made, an act of bankruptcy.

R. C. McMurtrie and James W. Paul, for complainant.

E. Spencer Miller and W. W. Juvenal, for respondent.

Before McKENNAN, Circuit Judge, and CADWALADER, District Judge.

McKENNAN, Circuit Judge. The question is not new to me on the general grounds upon which it has been argued. There may also be special considerations applicable to it in Pennsylvania. Does not the legislation of the state, as to such assignments, tend necessarily to delay the creditors of a bankrupt, and to defeat or delay the operation of the act of congress? And must not the debtor who makes the assignment be legally understood as intending what is thus a necessary tendency of his act? We are desirous to hear whatever can be suggested for the defendant as to the effect of the laws of the state upon the question.

Nothing further was said by the defendant's counsel.

THE COURT said that they did not, at present, desire to hear the counsel for the complainant. The question was held under advisement for some days.

CADWALADER, District Judge. The following opinion is that of Judge McKENNAN and myself:

In England, the statute of 1604 (1 Jac. I. c. 15, § 2) made it an act of bankruptcy for a debtor to execute any fraudulent conveyance or transfer, to the intent, or whereby his creditors should or might be defeated or delayed; the meaning of which was, to the intent that they should, or whereby they might be defeated or delayed: 8 East, 487. This enactment was repealed and supplied by the statute of 1825, (6 Geo. IV. c. 16, § 3,) which simply made it an act of bankruptcy to execute any fraudulent conveyance or transfer with intent to defeat or delay his creditors. It was decided that notwithstanding the substitution of the conciser expression with intent, for the former words to the intent or whereby, the statutes were, in effect, the same, because, if the necessary consequence of a man's act is to delay his creditors, he must be taken to intend it: 1 Cromp. M. & R. 779, 780. The statute of 1849, (12 & 13 Vict. c. 106, § 67,) in force in England at the time of the enactment of the present bankrupt law of the United States, was, in this respect, the same as the statute of 1825. Upon these few words of English legislation, all questions, whether a conveyance or transfer was an act of bankruptcy, have depended. In St. 13 Eliz. c. 5, the same words had been only declaratory of the general law as between debtor and creditor. They had a more extended application in the bankrupt law, to effectuate its purposes, and prevent its intended operation from being frustrated, or impeded.

Conveyances or transfers constructively, though not actually fraudulent, were in general of two kinds; those which, independently of any legislative system of bankruptcy would, from their tendency to delay creditors, have been fraudulent under St. 13 Eliz. c. 5, the leading exposition of which is in Twyne's Case, 3 Coke, 80b, [1 Smith, Lead. Cas. 33,] and those which, in the absence of the legislative system of bankruptcy, would have been unobjectionable, but were fraudulent as against its manifest policy of equal and speedy distribution under the prescribed course of peculiar summary procedure. A sub-division of those of the latter kind was into, first preferences of favored creditors, and secondly, such dispositions of property as, though neither preferences, nor in themselves fraudulent under St. 13 Eliz. alone, put the property, nevertheless, "into a different course of distribution from what the bankrupt laws directed." There was no express enactment as to preferences, except the requirement of equal distribution. But the policy of equal distribution was founded in part upon a theory that equality is equity, and, in great part also, upon a motive to prevent the overtrading which would be inevitable where a failing debtor could at pleasure prefer a favoring or a favored creditor. Such a pref-

erence was therefore a fraud upon a bankrupt law. So the legislation was silent as to dispositions by a failing trader of property which put it out of the prescribed course of distribution in bankruptcy. But they were fraudulent as intended to delay or impede such distribution, because this was their inevitable tendency.

There were thus conveyances constructively fraudulent, which might have been classed under three heads: 1, conveyances fraudulent under St. 13 Eliz. alone; 2, fraudulent preferences; 3, conveyances in derogation of the prescribed jurisdiction. If this classification is, for certain purposes, adopted, it must not be forgotten that the first head is a general one, and the second and third are sub-divisions of another general head.

A failing debtor's disposition of his whole available estate for the benefit of one or more, but not all of his creditors, must be a preference, or partake of the nature of one, if the word is used in its popular sense. But such a conveyance or transfer may not be a fraudulent preference, that is to say, may not under the second of the three heads, be objectionable in bankruptcy as a preference, and yet may be an act of bankruptcy. It is one, if it either stops his business, or, without stopping it, puts his available means beyond his own legal control. Ex parte Bailey, (Ct. App.) 3 De Gex, M. & G. 534; Smith v. Cannan, (Exch. Chamber,) 2 El. & Bl. 35. His other creditors are necessarily delayed in either case; and whether the act should be classed under the first or under the third head, or under each of them, may depend upon circumstances.

As to a voluntary assignment of his whole estate for the equal benefit of all his creditors, the question was different. Such a disposition of the estate was not in any case a preference; and, except in reference to the bankrupt laws, did not objectionably delay creditors. 3 Maule & S. 371. The disposition, if an act of bankruptcy, was therefore to be classed under the third head. That it constituted an act of bankruptcy was, in Lord Eldon's opinion, settled beyond a doubt by decisions of which he recognized the reason to be that such an act placed a failing debtor's property under a distribution different from that ordained by the bankrupt laws. But Lord Eldon said that the direct and immediate object of such a deed was not to delay but to satisfy creditors. He thought that these decisions had therefore carried the reason to an extravagant length, although he acquiesced in their authority. (A. D. 1809,) 16 Ves. 148; (A. D. 1809–10) 17 Ves. 197. As to the soundness of his criticism of them, subsequent opinions have differed. If the voluntary assignment would, in effect, have promoted a speedy disposal and collection, and a prompt distribution, through the officer of a commercial tribunal who was always under its immediate supervision and summary control, it might have been a sound criticism. But the voluntary assignee was chosen by the debtor; and was, except under the general contentious equitable jurisdiction of trusts, an independent private functionary. The assignee in bankruptcy, on the contrary, was chosen by the creditors, and was an officer of the court of bankruptcy, (1 Atk. 91,) whose jurisdiction of all matters between him and the creditors was summary (Id. 88) and simple, with a peculiar consolidation of business otherwise judicially regarded as multifarious. In the contentious administration of the trusts of the voluntary assignment under a bill in equity, all parties interested might indeed, sooner or later, be represented or protected. But this expensive and formal, and comparatively complex proceeding would have been dilatory until the decree to account, and, in some respects, afterwards; and would, in every stage, be incongruous to the prescribed jurisdiction of the commercial tribunal. The judges whose decisions were criticized by Lord Eldon, had, therefore, with relation to this prescribed jurisdiction, considered such a voluntary assignment an act whose tendency was necessarily to delay creditors.

It was decided by Lord Mansfield, at nisi prius, in 1767, that an assignment by a debtor of all his effects, to two of his creditors, in trust for themselves, and all his other creditors, in consequence of a proposition made by him at a meeting of his creditors, and accepted by them, was an act of bankruptcy, as a fraud on the bankrupt laws, unless every creditor had concurred. Kettle v. Hammond, Cooke, Bankr. Law, 111, (100.) Seven years later, Lord Mansfield said, extra-judicially, that a debtor could not assign his effects even to be equally divided amongst all his creditors, because he could "not take his estate out of that management which the law puts it into." Cowp. 123. In 1799, and again in 1803, such an assignment was decided by the court of king's bench to be an act of bankruptcy: 8 Durn. & E. [8 Term R.] 140; 4 East, 230. All bankruptcies were then, in form, involuntary. But they were seldom such in fact. A concerted act of bankruptcy was indeed condemned. But a friendly proceeding in bankruptcy was not. The most experienced commissioner of the period wrote that ninety-nine out of one hundred bankruptcies were willing or friendly: 1 Christ. Bankr. Law, (2d Ed.) 188. It was then a frequent practice for a debtor to make such an assignment with an expectation of being, in consequence of it, adjudged a bankrupt upon the petition of a creditor, perhaps not unfriendly. The assignment was, in itself, only constructively fraudulent; and was, of course, in the absence of actual fraud, no objection to the bankrupt's obtaining a discharge from his debts, in the proper subsequent stage of the proceedings.

The revised statute of 1825 (6 Geo. IV. c. 16, §§ 6, 7) introduced the voluntary system of bankruptcy, by allowing a trader, with or

without concert with a creditor, or other person, to become a bankrupt by filing a declaration of insolvency at the bankrupt office. The enactment of this statute, as to fraudulent conveyances or transfers, has been quoted. The court of exchequer, in 1835, decided that a trader's assignment in 1832, of all his property, in trust for the benefit of his creditors, was an act of bankruptcy, though there was no evidence of the intent to delay them except the deed itself. Lord Wensleydale said. "When a man assigns all his property, and puts it into a different course of distribution from what the bankrupt laws direct, he commits an act of bankruptcy." Stewart v. Moody, 1 Cromp. M. & R. 777. The statute of 1825, § 4, provided that such a deed of trust for the benefit of all the creditors should not, if certain prescribed conditions were observed, be deemed an act of bankruptcy, unless a commission should issue within six months, and the statute of 1849, § 68, provided similarly unless a petition for adjudication should be filed within three months, from the execution of the deed. These were legislative recognitions that it was, in itself, an act of bankruptcy, under the previous and continuing description of a conveyance with intent to delay creditors. This was the state of the English law upon the subject when the present bankrupt law of 2d March, 1867, [14 Stat. 517, c. 176,] was enacted by congress. Its words were, in most parts of it, wisely taken from the English statutes of 1849 and 1861, and from the insolvent law of Massachusetts. These were the acts of legislation which had undergone the most careful revision, on the respective sides of the Atlantic. In applying the rule that the interpretation of a law forms part of it, the construction of a statute by the courts of the country whose legislature enacted it is adopted. The supreme court has, more than once, applied this rule of decision where an American statute had been taken from a prior English one; and has followed its English construction where the meaning might otherwise have been doubtful. The rule thus often furnishes a useful standard of uniform authority throughout the United States; and, where the construction was prior to the declaration of independence, an undeviating standard.

The 39th section of the present bankrupt law, in defining or describing acts of involuntary bankruptcy committed by conveyances, transfers, or assignments, first specifies those made by a debtor with intent to delay, defraud, or hinder his creditors. If the section had contained no further specification, the enactment would, under the English judicial precedents, have been understood as applicable to conveyances or transfers under all of the above three heads, including, under the last of them, the assignment in question. But the enactment goes further. It adds words, which, if not those of English decisions, are of equivalent import, expressly specifying cases under the second and third heads. These additional enactments are, by prefatory words, restrained in their application to debtors, bankrupt or insolvent, or acting in contemplation of bankruptcy or insolvency; and provide, that any such debtor making, within the previous period limited, any conveyance or transfer, either "with intent to give a preference," or "with the intent, by such disposition of his property, to defeat or delay the operation of this act," shall be adjudged a bankrupt. If the previous words, "with intent to delay creditors," are impliedly limited so as to include only dispositions of property which would be actually or constructively fraudulent under the Statute of 13 Eliz. c. 5, if no bankrupt law were in force—this is so only because those general words are here followed by the twofold express enactment which covers what they would otherwise have additionally included. As the intent of the assignment in question is legally inferred from its necessary tendency, the additional words "with intent to delay or defeat the operation of this act," include such a conveyance. They are words of like import with "puts his estate into a course of distribution different from that prescribed by the act," which had been the substance of the language of Lords Mansfield, Eldon and Wensleydale. But congress decided the question legislatively, not leaving it to judicial construction, as had been done in England. This appears to have been a very general opinion throughout the United States: 2 N. B. R. [Quarto,] 69, cols. 2, 3, dictum; 3 N. B. R. [Quarto,] 4, 5, 41, 61, 62, 98, 127; 4 N. B. R. [Quarto,] 124; [Grow v. Ballard, Case No. 5,848; In re Randall, Id. 11,551; In re Goldschmidt, Id. 5,520; In re Pierce, Id. 11,141; In re Smith, Id. 12,974; Spicer v. Ward, Id. 13,241; In re Stubbs, Id. 13,557.]

There is nothing whatever to the contrary in the decision that such a voluntary general assignment is not invalidated, through the mere existence of the bankrupt law, where no proceeding in bankruptcy has been instituted, either by or against the debtor: 33 Conn., [Hawkins' Appeal, 34 Conn. 548.] The same remark applies to cases in which the debtor had been adjudged a bankrupt, but the proceedings in bankruptcy were not commenced until more than six months after his execution of the voluntary assignment; and the bankruptcy was voluntary, or, if involuntary, was for some other act. In these cases the limitation of time in the 39th section prevented the question from arising at all. The decisions were that the voluntary assignment, unless it had been actually fraudulent, or constructively fraudulent under St. 13 Eliz. c. 5, independently of the bankrupt law, could not be set aside under any proceeding at the suit of the assignee in bankruptcy: 1 N. B. R. [Quarto,] 195, 204,

cols. 2, 3. [In re Arledge, Case No. 533; Sedgwick v. Place, Id. 12,622; Same v. Menck, Id. 12,616.] Nor is the question affected, in any wise, by the numerous cases in which bankrupts, who had made assignments within six months before the commencement of the proceedings, have nevertheless been discharged from their debts. A conveyance or transfer, not actually, but only constructively fraudulent, though an act of bankruptcy, is not a bar to a discharge. In England, an assignment like that in question, though an act of bankruptcy, has been considered morally unobjectionable, and sometimes an honorable act, as affording to any creditor an option to proceed in bankruptcy, or to all the creditors a right of obtaining a distribution without any bankruptcy: 1 Christ. Bankr. Law, (2d Ed.) 187–189.

These various cases have been stated, because, under a jurisdiction which is, in this country, novel to the present generation of lawyers, the questions have often been confounded with the one which is here properly to be considered. It should also be observed that, in the absence of actual fraud, the assignment in question, though constructively fraudulent under the bankrupt law, is not void, but voidable, and is voidable only at the suit of the assignee in bankruptcy. In a case like the present, if an injunction, with or without a receiver, is required in order to prevent the purposes of the bankrupt law from being frustrated, or impeded, the necessary interlocutory order may, of course, be made. The ordinary disability of a receiver to sell may create no embarrassment, because the trust of each opposing litigant is to sell and collect and distribute among the same beneficiaries in the same proportions. Sales may therefore be made by the assignee under the direction of the court, through a master, in a preliminary stage of the cause. The register having charge of the case in bankruptcy, may sometimes, perhaps, be appointed a special master in this court; and either the complainant, or the defendant, if a trustworthy person submitting himself to the jurisdiction, may be the receiver, or they may be joint receivers, with or without another. The estate cannot ordinarily be suffered to remain, even temporarily, under the control of the voluntary assignee, if the rights of distributees depend upon the litigation of questions peculiarly cognizable either in bankruptcy, or under the special auxiliary jurisdiction. Where no such conflict of right is apparent, a preliminary injunction, &c., will ordinarily be granted upon affidavit, after notice, unless the defendant will speed the proceedings in equity, by filing an early answer, so as to enable the complainant to set down the case for an early final hearing, on bill and answer, if he should be so advised. Until answer filed, it is, in this district, the practice to use any affidavits on file in the court of bankruptcy, without their being resworn. The defendant may answer immediately; and if, on answer filed, the complainant cannot safely dispense with testimony, the court will not, without great caution, interfere interlocutorily.

But, before answer, it is by no means, of course, to make, on motion, an order for a preliminary injunction. Cases have occurred in which the voluntary assignment protected equities which, without it, could not be protected under the bankrupt law itself. In one case, a judgment binding the debtor's land had, by due course of law, been obtained against him, between the execution of the voluntary assignment and the commencement of the proceedings in bankruptcy. In another case, the bankrupt's father, who was the largest creditor, had, with his own concurrence, been expressly excluded from the benefit of the voluntary assignment, which had created a trust for all the other creditors. In each case, the voluntary assignment had been an act of bankruptcy, but the assignee in bankruptcy, asking the aid of equity, was not, in either case, at liberty to disregard the palpable existing equities which could not be made available without the aid of the prior assignment. In such cases, if the defendant is not an untrustworthy person, whatever may be the proper decree at the final hearing, his trust may be usefully administered, in the meantime, in his own name. Of course it would not be administered without the permission and supervision of the court, or independently of supervision by the complainant, to whom, as the assignee in bankruptcy, the defendant must primarily or ultimately account. But the defendant's disposal of the estate, and collection of the assets, ought not, in such cases, to be embarrassed. Whether he should be permitted to make the distribution may be a different question. But, in every stage of proceedings, the pendency of the suit must, if the assignee in bankruptcy fulfils his duty, preclude any risk of sacrifice of property, or other loss by the creditors, or of delay. Lis pendens renders the sanction of the court necessary to enable the defendant even to dispose of the estate effectually. Where disposal by him is allowed, but distribution prohibited, he ordinarily receives, in this district, his reasonable charges, including an equitable proportion, usually one-half, of the commission which would otherwise be fairly chargeable.

Where no such specifically definable equity is thus protected by the previous assignment, its trusts may, nevertheless, have been so far executed, in good faith, and beneficially, that their further execution should not, in the primary stage of the cause, be impeded abruptly, if at all. In one case, this court suspended granting an injunction, and appointing a receiver, until the completion of a beneficial sale of real estate, which had been previously made by the defendant, who had already partly succeeded, and afterwards

completely succeeded, in removing defects of title. In Sedgwick v. Place, in the circuit court for the southern district of New York, before Judge Nelson, the debtors had failed in business, and made the general assignment, in November, 1867. They became bankrupts voluntarily in February, 1868. The previous assignees having, in execution of their trust, collected a large amount of money which was in deposit, awaiting distribution, the case being untainted with any actual fraud, a motion for a preliminary injunction was denied: [Case No. 12,622.]

Enough has been said to explain that this decision, which was one of those relied on by the defendant's counsel in the present case, does not apply to the particular question, whether such an assignment was an act of bankruptcy. This question has been since answered affirmatively by the respective district judges in the northern and southern districts of New York, who certainly intended no disregard of any opinion of Judge Nelson. The other cases relied on by the defendant's counsel were decided, in the circuit court for the southern district of Ohio, by Judge Swayne. To understand the first of them it is necessary to recur to the 50th section of the bankrupt act of 2d of March, 1867, providing that the act should commence and take effect, as to the appointment of the officers, and the promulgation of rules and general orders, from the date of its approval, but that no petition or other proceeding under the act should be filed, received, or commenced, before June 1st, 1867. A judgment was obtained by a creditor, in a proper court of Ohio, on June 1st, 1867, which, under a statute of that state, was a lien upon the debtor's land from 27th May, 1867, which was the first day of the term. On the 25th of May, 1867, the debtor executed a general assignment for the benefit of his creditors. The judgment creditor, without offering to waive his lien, filed, on 17th of July, 1867, a petition that the debtor should be adjudged a bankrupt, on the ground that, by the assignment, he had committed an act of bankruptcy. The avowed theory and purpose of the proceeding was that an assignee in bankruptcy might afterwards annul or set aside the assignment, and hold the estate, not discharged of this creditor's lien, but subject to it. Judge Swayne was of opinion that such an assignment, unless made with intent to delay, defraud or hinder creditors, within the meaning of St. 13 Eliz. c. 5, or with intent to defeat or delay the operation of the bankrupt law, was not an act of bankruptcy, and that, upon the proofs, it had not been made with either intent, and was not an act of bankruptcy: Langley v. Perry, [Case No. 8,067.] We would have been of the same opinion. The purposes of the bankrupt law would have been frustrated unavoidably, and its operation defeated, by the petitioning creditor's judgment, if the prior assignment had not been executed. On 25th May, 1867, this law was not in operation for the purposes of the question whether the assignment had, in the absence of actual fraud, been an act of bankruptcy.

In the other case the question was different in respect of the time of the act. The debtor's assignment was executed on 4th December, 1868; and the adversary proceeding of creditors to make him a bankrupt was commenced in the following month. He was adjudged a bankrupt; first, because he had not, in the meantime placed all his monies, credits and effects, unreservedly in the possession or control of the assignee, which omission made the assignment fraudulent under St. 13 Eliz.; and secondly, because the payment of certain creditors just before the assignment, had been preferences. Under the first head, the judge is reported to have said: "I do not mean to impute any intention to defraud, or do any wrong, to either party; but here are the facts, and the legal result is inevitable." But this result was, according to the report, arrived at only through the consideration that "all assignments by debtors" are "subject to the general rule contained in the statute of Elizabeth, exemplified in Twyne's Case, [3 Coke, 80; 1 Smith, Lead. Cas. 33,] and the many other subsequent decisions following it, all of which render void, as to creditors, all assignments at all tainted with fraud." The judge is, however, reported to have emphatically held, that such an assignment, as this purported to be, was "valid and proper when made in good faith," though it was "to be subjected to the sharpest scrutiny." He said that "any badge of fraud that attaches itself, in the light of extraneous circumstances, will unless fully explained, be fatal to its validity, and the arm of the bankrupt law will sweep it away, and subject the person and the estate to its own provisions:" Farrin v. Crawford, [Case No. 4,686.]

Neither of these cases, on the point which was decided in it, affects the present question. If, however, the dicta, as well as the decisions, are correctly reported, and the dicta are to be followed, such an assignment would not, without actual fraud, be considered an act of bankruptcy. If so, very complex litigations on the question of fraud, would frequently arise. This, in itself alone, would not be a sufficient objection to following the dicta. They have, however, for other reasons, been deliberately disregarded in subsequent cases, in district courts elsewhere. The reasons probably were, that if the only conveyances or transfers, not actually fraudulent, which constitute acts of bankruptcy, are cases constructively fraudulent under the statute of Elizabeth, and intentional preferences,—English decisions, beginning more than a century ago, will be disregarded, and there will be no apparent subject matter for the application of the words "with intent to

defeat or delay the operation of the act of congress."

In the United States, the reasons for considering such a general assignment an act of bankruptcy, are stronger than those which prevailed in England. During more than three-quarters of a century, since the constitution had enabled congress to establish uniform laws on the subject of bankruptcies throughout the United States, there had not been such a law in force except in two short intervals; and the usages and legislation as to voluntary assignments for the benefit of creditors, had, in the meantime, become various in the several states. The abrogation of such local differences, at the election of any non-assenting creditor, was an essential part of "an act to establish a uniform system of bankruptcy throughout the United States." In Pennsylvania there was, and, except as to a failing debtor who has been adjudged a bankrupt, still is, a peculiar legislative system, under which, as the supreme court has said, it is difficult to define the character of the procedure: [Shelby v. Bacon,] 10 How. [51 U. S.] 70. That court has said, that it "is not in the nature of a bankrupt or insolvent procedure:" Id. 71. Under the present bankrupt law of the United States, [Act March 2, 1867, 14 Stat. 517, c. 176,] there must, in the primary stage of the proceedings, be a carefully analyzed and explained schedule of debts. It afterwards undergoes revision by the assignee; and, independently of the required general notice by publication in newspapers, a special notice to every known creditor must be served, in a prescribed mode, in the primary stage, and in certain ulterior stages of the proceedings. The legislation of Pennsylvania requires no schedule whatever of debts; and does not prescribe any special notice even to creditors who are known. The omission of such a notice by the assignee, may, perhaps, on general principles, be considered a breach of trust; but, be this as it may, many estates have been finally distributed, and the assignees discharged, without any other notice than a publication in newspapers; and the adjudication of distribution of funds, or of discharge of the assignee, when made, is, in the local tribunals, considered conclusive. The trust may, at all events unquestionably be administered without any sworn, or other schedule of the assignor's debts by himself. Such an administration of such a trust, if independent of the jurisdiction in bankruptcy, would tend manifestly to defeat the operation of the act of congress. More manifest is the tendency of the Pennsylvania system to delay the operation of this act. The act requires a sworn inventory of the estate in the primary stage of the proceedings, and the normal course of distribution is a dividend in three months or earlier, and a final dividend in six months, or sooner; the funds to be, in the meantime, from the receipt of them by the assignee, deposited or invested under the control of the court of bankruptcy. Under the Pennsylvania system, the assignment need not be recorded, nor any inventory exhibited, nor security given, for thirty days, though the voluntary assignee may act unrestrictedly in the meantime. He is not compulsorily accountable for the extraordinary period of a year. The distribution of a deceased intestate's insolvent estate by the administrator, may, for necessary reasons, be thus delayed. But there is no proper analogy to the estate of an insolvent living debtor. It is observable that the auxiliary jurisdiction of the circuit and district courts of the United States, under the 2d section of the act of congress, cannot be exercisable unless there can be an adjudication of bankruptcy. If, as in Shelby v. Bacon, 10 How. [51 U. S.] 56, the jurisdiction of the circuit court in equity could be invoked by an alien, or a citizen of another state, this would be as objectionable as the general jurisdiction of the English chancery; indeed, much more so, because, except through the operation of the bankrupt law, the legislation of Pennsylvania could not be disregarded in a court of the United States. A Pennsylvania creditor could not sue there at all, and yet his rights in bankruptcy would be the same as those of such a complainant.

In Pennsylvania the assignment must, therefore, at all events, be deemed an act of bankruptcy. But it would have been one, in the opinion of the court, if there had not been any legislation of the state upon the subject. See the next case, [Burkholder v. Stump, Case No. 2,165.]

Case No. 1,020.

BARNES et al. v. RYDER et al.

[3 McLean, 374.] [1]

Circuit Court, D. Illinois. June Term, 1844.

NEGOTIABLE INSTRUMENTS — DUTY OF HOLDER — PARTNERSHIP—PERSONAL LIABILITY.

1. The holder of a bill of exchange, after the demand of the acceptor and notice to the drawer, is not bound to active diligence.

2. An administrator is not bound to pay over money to a creditor of the deceased partner of the person on whose estate he administers.

3. Had such a payment been made, the administrator could not have set up such payment in a suit brought by the representatives of the deceased.

[At law. Action on a bill of exchange by Barnes and Robinson against Ryder & Co. and others. Heard on demurrer to pleas. Demurrer sustained.]

Hardin & Smith, for plaintiffs.

Davis, Strong & Martin, for defendants.

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

OPINION OF THE COURT. This action was brought on a bill of exchange drawn by Ryder & Co. on Julius Varrin, for six thousand five hundred eleven dollars and forty cents, payable to Reel, Barnes & Co., or order, four months after date. The bill was dated 10th January, 1837. Varrin accepted the bill. The defendants pleaded that Varrin had their funds in his hands to meet the bill when he accepted it, and also when it became due; that he was at all times during his life, liable to pay the bill, and that his executors since his decease, at the commencement of this suit were liable. That at his decease he left a large amount of assets, after paying all debts except this bill. That among other assets he left an unsettled co-partnership concern of Varrin & Reel, which partnership consisted of the said Varrin and one John W. Reel, who at the time of his death was a partner in the firm of Reel, Barnes & Co. That Barnes was duly appointed administrator of the estate of Reel, and as administrator settled the co-partnership of Varrin & Reel, paying the debts thereof; and that after paying the debts of that concern, and before the commencement of this suit, a large amount of money, to wit, the sum of $30,000, remained in the hands of said Barnes, of which he made distribution, by paying over one half, to wit, the sum of $15,000, to one Justus Varrin, executor of Julius Varrin, and retaining the other half as part of the estate of Reel. That the said Barnes, previous to paying over the said sum of $15,000, made no provision to pay said bill of exchange.

A second plea, substantially the same as the above, and in which it is averred "that before the commencement of this action the executor of Varrin directed the said Barnes in writing, to apply any funds in his, the said Barnes's hands, belonging to the estate of Varrin, deceased, in payment of the said bill of exchange; and that the funds are still in the hands and at the disposal of the said Barnes," &c. To the above pleas the plaintiff demurred. The money stated in the first plea came into the hands of Barnes as administrator of Reel, and could not have been appropriated in paying this bill, for which the estate of Julius Varrin, who had been the partner of Reel, was liable. Had the executor of Varrin sued Barnes as administrator of Reel for money in his hands, he could not have set up this bill due the partnership in his defence. And in regard to the second plea, with the consent of the executor, Varrin, the money in the hands of Barnes might have been applied to the payment of the bill, but as the plea states it was not so applied. Nor can the failure of Barnes to make this application prejudice his co-partners. In no sense was it a payment, and it is not pleaded as such. Barnes was not bound to active diligence. On the whole we think the demurrer must be sustained to both pleas.

Case No. 1,021.

BARNES et al. v. STEAMSHIP CO.

[25 Leg. Int. 196;[1] 6 Phila. 479.]

Circuit Court, E. D. Pennsylvania. June 19, 1868.

COLLISION—LIABILITY—MEASURE OF—ACT MARCH 3, 1851, c. 43.

1. The appointment of nautical assessors in collision cases approved.

2. The personal liability of owners of vessels in causes of collision measured by the value of their vessel immediately before collision and freight pending.

3. The owners [are] not exempted from such liability by loss of their own vessel in consequence of the collision.

4. Foreign attachment in admiralty lies in cases of tort.

5. The provisions of the 4th section of the act of congress of March 3, 1851, [1851, (9 Stat. 635, c. 43,)] authorizing ship owners to transfer their interest in the ship and freight to a trustee for claimants does not apply to a loss to another vessel by collision nor to injuries to cargo on board the vessel in fault by reason thereof.

[Cited in Wright v. Norwich & N. Y. Transp. Co., Case No. 18,087.]

[Appeal from the district court of the United States for the eastern district of Pennsylvania.

[In admiralty. Libel for collision by Barnes and others, owners of the schooner Pequonnock, against Steamship Company, owner of the steamer Westchester. Maltritz, Baird & Company, owners of the steamer's cargo, brought suit, and attached certain policies of insurance which were paid into court. The district court entered decrees (nowhere reported) for both sets of libellants, allowing them to share proportionately in the fund. Barnes and others appeal. Decree giving appellants priority in their claim upon the fund.]

M. P. Henry, for the Pequonnock.

Charles Gibbons, for the Westchester.

J. Warren Coulston, for Maltritz, Baird & Company.

GRIER, Circuit Justice. The points involved in this case are well stated by the counsel of libellants. On the night of July 20, 1866, the schooner Pequonnock, owned by Barnes and others, was sunk by a collision with the steamer Westchester, owned by the respondent, off the coast of New Jersey. Shortly afterwards the steamer was found to be sinking and was run ashore on the coast of New Jersey below Absecom. She was insured in several offices in Philadelphia in valued policies in the aggregate amounting to $20,000. The vessel was abandoned to the underwriters. Very little in value was saved. The owners of the Pequonnock brought suit on the 3d August, 1866, and attached these policies. On the 21st August, 1866, Maltritz, Baird & Company, owners of cargo on board the West-

[1] [Reprinted by permission.]

chester, brought suit and attached the same policies. After decree for libellants, the policies, amounting to $17,863.07, were paid into court. The decree for Barnes et al. amounted to $14,825.00. The decree for Maltritz, Baird & Company amounted to $4,898.00. In decreeing these amounts the court below allowed the libellants to share proportionately in the fund.

The questions are: 1. The liability of the owners of the respective vessels for the collision. 2. The claim of the owners of the Westchester to be discharged from all liability by reason of the loss of their vessel. 3. The right of the owners of the Pequonnock to priority of payment out of the fund. As it is intended to take this case by appeal to the supreme court, I do not feel called upon to vindicate my decision by any argument on the subject, but shall merely state the results of a careful examination of the case and the authorities cited.

1. Notwithstanding the objections, urged by the learned counsel for the respondents to the report made by the nautical assessors, on examination of the testimony I find it to be a clear and correct statement, both of the facts and questions of law involved in the case. It is a very judicious practice of the district court in this district, to supply the want of "Trinity Masters," by using the nautical experience and judgment of intelligent masters of vessels who have retired from the service, and judging from the able reports made by those persons in this and other cases, that court has been peculiarly fortunate in its selection. We fully concur in their report, and hold that the Westchester was in fault. The proceedings in this case throughout are in accordance with the established practice in courts of admiralty. Process of attachment in admiralty is governed by its own rules and principles, and is not borrowed from the custom of London.

2. The owners are responsible for the injuries occasioned by a collision to the extent of the value of their interest in the vessel and freight. The owner is not exempted from liability when by the same collision his own ship instantly founders. This liability is measured by the value of the vessel immediately before the collision. 14 Gray, 288; 15 Mees. & W. 391; Pars. Mar. Law, 391; 3 W. Rob. Adm. 101.

3. The owners of the Pequonnock have a right to priority of payment out of the fund without any deduction for or on account of bottomry, mortgage, pilotage, towage, seaman's wages, or other contracts of the master or owners of the Westchester.

4. If the property attached is more than sufficient to pay the Pequonnock, the libellants, Maltritz, Baird & Taylor will be entitled to the remainder, if any.

5. The 4th section of the act of congress of March 3, 1851, c. 43, [9 Stat. 635,] "to limit the liability of ship owners," has no application to either of these claims. 14 Gray, 288. Opinion of Judge McGrath, 8 Amer. Law Reg. 206, [In re Sinclair, Case No. 12,895.]

Let a decree be drawn with this difference from that in the district court, that the Pequonnock be entitled to its whole claim with interests and costs, the residue, if any, to be applied to the claim of Maltritz, Baird & Company.

Case No. 1,022.

BARNES v. STRAUS.

[9 Blatchf. 553;[1] 2 O. G. 62; 5 Fish. Pat. Cas. 531; Merw. Pat. Inv. 204.]

Circuit Court, S. D. New York. May 23, 1872.

PATENTS FOR INVENTIONS — CORSET SPRINGS—INFRINGEMENT.

1. The invention described in reissued letters patent granted to Frances L. Barnes, executrix of, &c., of Samuel H. Barnes, deceased, August 31st, 1869, for an "improvement in corset-springs," the original patent having been granted to said Samuel H. Barnes, as inventor, July 17th, 1866, is, the arrangement in a pair, combined by clasps, on a corset, of two springs, each spring consisting of two metallic plates, placed one upon another, and fastened together at their centres, but so connected, at or near each end, that they can play or move upon each other in the direction of their length, and be prevented from sliding off each other laterally.

2. Such arrangement did not exist before the invention of Barnes.

3. The claims of such reissued patent are valid, and claim, under the expression, "a pair or set of corset springs," two corset-springs connected by clasps, each spring being constructed as above mentioned.

4. The invention held not to have been anticipated by a carriage spring which existed before, or by a single corset-spring, composed of two plates, with provision for play, but with no means for combining it with a second spring.

5. The combination, consisting of the two springs connected by the clasps, exists, pro tanto, so as to be an infringement, when the springs and clasps are made, ready to be inserted in the corset.

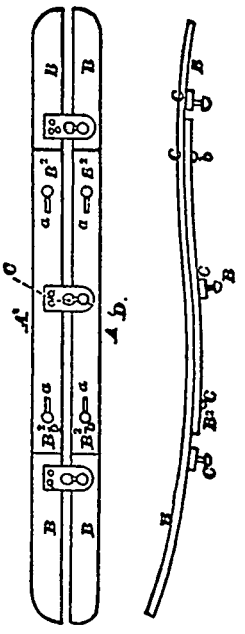
[In equity. Bill by Frances Barnes, executrix of Samuel H. Barnes, deceased, against Ferdinand Straus, for infringement of letters patent. Decree for complainant.]

George Gifford, for plaintiff.

Charles F. Blake, for defendant.

[Final hearing on pleadings and proofs. Suit brought upon letters patent for an "improvement in corset-springs," granted to Samuel H. Barnes, July 17, 1866; reissued to plaintiff as executrix of said Barnes, May 12, 1868; again reissued June 29, 1869; and again August 31, 1869. The nature of the invention and claims are fully set forth in the opinion.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. Syllabus from 9 Blatchf. 553, and statement from 5 Fish. Pat. Cas. 532. Merw. Pat. Inv. 204, only contains partial report.]



[In the foregoing engravings, B represents the lower plate, and B^2 the upper; the two being connected by pins in slots, a, and the two parts of the corset-spring being connected by clasps, C, and buttons, D.] [2]

BLATCHFORD, District Judge. This suit is brought on reissued letters patent granted to the plaintiff August 31st, 1869, for an "improvement in corset-springs," the original patent having been granted to Samuel H. Barnes, as inventor, July 17th, 1866, and reissued to the plaintiff, May 12th, 1868, and again June 29th, 1869. In the specification it is stated that Barnes invented "a new and improved corset-spring." The specification says: "The present invention consists in forming the springs of corsets of two or more metallic plates, placed one upon another, and fastened together at their centre, but so connected, at or near each end, that they can play or move upon each other in the direction of their length, as the springs are bent, whereby their flexibility and elasticity are greatly increased, while at the same time much strength is obtained, and the springs rendered much more durable than the springs for corsets now in general use." There are two figures in the drawings, one giving a front view "of the two springs of the corset," that is, one spring of two plates on one side of the vertical opening in the corset, and another spring of two plates on the other side of such opening, "having the ordinary clasps for fastening the corset about the waist of the person who is to wear it." The specification states that the drawings represent two springs of a corset, properly bent in the direction of their length, to conform to the body or waist of a person, each spring composed of two metallic plates, placed one upon the other, the under one a little longer than the upper one, and secured at their centres, or midway between their two ends, this being done, in one of the springs, by the rivet which secures the ordinary corset clasp to the spring, and, in the other one, by a headed rivet on which such clasp is interlocked by its eye; that, at or near each end of each short plate, is a short slot, extending in the direction of its length, through which projects the rounded end or head of a pin fixed in the under plate; and that, by means of these slots, as the corset-springs are bent, the plates constituting the same can play or move, the one upon the other, the heads of the pins preventing the plates from springing apart from each other or sliding off laterally. The specification proceeds: "From the above description, it is plain to be seen, by forming the corset-springs of two plates, (one or more may be used, if desired, laid one upon the other, but so connected together, that the several plates constituting such springs can freely play upon each other in the direction of their length,) that the flexibility, pliability or elasticity of the springs is much increased, without in the least degree impairing their strength, rendering them much more durable and serviceable than the ordinary corset springs now in general use—an advantage and result of the utmost importance and utility. Although the springs have been herein above explained as formed of two metallic plates, laid one upon the other, and secured together as described, three or more may be used, but two are sufficient for ordinary corsets, it being distinctly understood that this invention is not limited to any particular number of plates which may be employed to form the springs, whether one or more, it simply consisting in so securing the several plates constituting the springs, to each other, that they can freely move or play upon each other. It may be stated that the terms "corset-steel," "corset-spring" and "corset-clasp," are each and all employed by the trade to designate a pair of springs, steels or stiffeners, connected by suitable clasps, whereby they are not only adapted to stiffen the front of the corset, but to fasten the two edges of the same together." The claims are these: "(1.) A pair or set of corset springs, each spring consisting of two or more metallic plates, placed one upon another, and fastened together at their centres, but so connected, at or near each end, that they can play or move upon each other in the direction of their length, and be prevented from sliding off each other laterally. (2.) A pair or set of corset springs, each spring composed of two or more metallic plates, placed one above another and fastened together at their centres, and so connected, at or near each end, that they can move or play upon each

[2] [From 5 Fish. Pat. Cas. 532.]

other in the direction of their length. (3.) A pair or set of corset-springs, each spring consisting of two or more metallic plates, placed one upon another, and fastened together at their centres, but so connected, at or near each end, that they can play or move upon each other in the direction of their length, and be prevented from sliding off each other laterally, the clasps by which the springs are combined, except the centre one, being attached to only one of the plates."

The patent is attacked for want of novelty. The evidence shows that the arrangement in a pair, combined by clasps, on a corset, of two springs, each spring consisting of two metallic plates, placed one upon another, and fastened together at their centres, but so connected, at or near each end, that they can play or move upon each other in the direction of their length, and be prevented from sliding off each other laterally, did not exist before the invention of such arrangement by Barnes. The arrangement is useful, and Barnes invented it. Was the invention a patentable one, in view of what existed before?

The "ordinary" springs for corsets, referred to in the specification as "in general use," consisted of two springs, one on each side of the vertical opening in the corset, each formed of a single metallic plate, and the two springs being combined by clasps, the same as are referred to in the specification as the "ordinary corset-clasp," consisting of a clasp with an eye on one spring and a head on the other spring. The whole arrangement and combination constituted, as the specification says, a "corset-spring," embracing the two springs, one on each side of the vertical opening in the corset, connected by the clasps. In this arrangement, Barnes substituted, for the single-plate springs, double-plate springs. By having two plates he secured greater strength. But, in order to maintain the flexibility of the spring, and prevent danger of fracture to the metal, in the bending of it, in use in the corset, he fastened the two plates together at their centres, and made lengthwise slots in the upper plate, near its end, through which headed pins, fastened to the lower plates, projected, which allowed the two plates to slide along each other lengthwise, when bent, while the headed pins prevented the plates from slipping by each other sidewise or springing apart from each other facewise. This provision was necessary in order to develop the advantage of a spring made of two plates; and, in order not to prevent such sliding action of the plates, it was further necessary that the clasping devices, other than those at the centre of the length of the spring, should not be fastened through both plates. All this Barnes did, and this, in fact was his real invention. He did not merely substitute two plates for one plate.

It being thus seen what Barnes did, the claims of the patent must be construed, if that can properly be done, so as to cover his real invention. Although the specification, in one place, speaks of the invention as consisting in making a spring of two plates which can play upon each other in the direction of their length, as the spring is bent, and, in another place, speaks of it as consisting in so securing the plates constituting the springs, to each other, that they can freely play upon each other, yet, in view of the whole specification, and of the fact that it says that the term "corset-spring" is employed, by the trade, to designate a pair of springs, connected by suitable clasps, and thus adapted not only to stiffen the front of the corset, but to fasten its two edges together, the expression, "a pair or set of corset-springs," where it occurs, in each one of the three claims, cannot be construed to mean anything else but two corset-springs connected by the clasps referred to, each spring being constructed in the manner described. In this view, the claims of the patent are all of them valid.

A spring existed before, used in a carriage, which consisted of several metallic plates, placed one upon another and fastended together at their centres, the shorter ones above the longer ones, but so connected at or near each end, by headed pins playing in and through slots, that they could move upon each other in the direction of their length, and be prevented from sliding off each other laterally. I think the evidence shows that there was something more than the mere new use of an old article, and more than the mere use of an old article for a new purpose, and more than the mere use of two springs, one of which had been used before, in making the combination which Barnes made. The carriage-spring differed from the corset-spring in not having that flexibility at the centre of its length which the corset-spring has and must have, and in not curving in one direction at one end and in the other direction at the other end, as the corset-spring is shown in the drawings of the patent to do. In other words, the carriage-spring was not a corset-spring, and could not be used as such, without such a change as involved invention.

The French corset-spring put in evidence was a single spring, not a combined pair of springs; and, although it was composed of several metallic plates, placed one above another and fastened together at their centres, and free to move or play upon each other in the direction of their lengths, yet it had no such provision as the slots and fixed pins with heads, which Barnes introduced, nor any other provision for preventing the plates from becoming disengaged facewise or laterally. The French spring had no means of combining it with a second spring, when the two should be used one on each side of the vertical opening in a corset.

The pair of springs of the patent, that is, the two springs connected by the clasps, con-

stitute, as a whole, a patentable combination. The two springs and the clasps connecting them are all required to make the article, as "a corset-spring," at all useful, in performing the functions which it performs when the springs are actually combined by the clasps when the corset is worn. The combination does not have its full effects developed until it is used in the corset, yet it exists pro tanto, so as to be an infringement, when the springs and clasps are made, ready to be inserted in a corset. The elements which make up the combination called "a corset-spring" co-operate mechanically to a common mechanical end, which end is developed in the use of the springs and clasps in the corset when worn. The fact that the clasps were used before with the single springs, does not destroy the novelty and patentability of the combination and arrangement made by Barnes.

There must be a decree for the plaintiff, for a perpetual injunction and an account, with costs, as the infringement is not denied.

[NOTE. Patent No. 56,345 was granted to S. H. Barnes, July 17, 1866; reissued August 31, 1869, (No. 3,624;) reissued January 7, 1873, (No. 5,216.) For other cases involving this patent, see Egbert v. Lippmann, Case No. 4,306; Egbert v. Lippmann, 104 U. S. 333.]

Case No. 1,023.

BARNES v. UNITED STATES.

[The case reported under this title in 12 N. B. R. 526, is the same as In re Vetterlein, Case No. 16,929.]

BARNES, (UNITED STATES v.) See Case No. 14,523.

BARNES v. VETTERLEIN. See Case No. 16,929.

BARNET v. DAY. See Case No. 836.

Case No. 1,024.

In re BARNETT.

[3 Pittsb. Rep. 559; 15 Pittsb. Leg. J. 73.]

District Court, W. D. Pennsylvania. 1868.

BANKRUPTCY—AFTER-ACQUIRED PROPERTY.

[Crops planted by a bankrupt after the filing of a petition in bankruptcy, under Act March 2, 1867, (14 Stat. 517, c. 176,) do not pass to the assignee as assets for the use of creditors.]

[See In re Patterson, Case No. 10,815; In re Levy, Id. 8,296.]

[In bankruptcy. In the matter of Joseph Barnett.]

Opinion by JOHN N. PURVIANCE, Register of the 23d Congressional District:

The question upon which the opinion of the register is desired, is whether the crop raised by the bankrupt in the year 1868, after the filing of his petition in bankruptcy, passes as assets to the assignee for the use of the creditors of said bankrupt. The petition in bankruptcy in this case, was filed on the 3d day of March, 1868, by the petitioner. The said Barnett was adjudged a bankrupt on the 8th day of April following. Assignment of his assets was duly made on the 15th day of May, 1868, to the assignee chosen by the greater part in number and value of the creditors who have proved their debts; said bankrupt has not been discharged. The 14th section of the bankrupt act [of March 2, 1867, (14 Stat. 522,)] providing inter alia for the assignment of bankrupt's effects and estate, is specific in its terms, in this, that it provides for the assignment and conveyance to the assignee of all the estate, real and personal, of the bankrupt, of which he was possessed, or in which he was interested, or entitled to have on the day of the date of filing his petition in bankruptcy, and declares that "such arrangement shall relate back to the commencement of said proceedings in bankruptcy." The assignment, therefore, does not relate to or take effect upon after-acquired property, earned by labor, as in this case. The whole proceedings as provided for by the law and as indicated in the forms prescribed, seem to contemplate the true condition of the bankrupt, as to his means and liabilities, at the time of the commencement of the proceedings in bankruptcy. Therefore, after-acquired property earned by labor or otherwise, pending proceedings in bankruptcy, and before final discharge, forms no part of the assets which under the bankrupt law passed by assignment to the assignee for the use of the creditors. Taking the facts to be as stated in the paper hereto attached, "that after the petition in bankruptcy was filed that Joseph Barnett, the bankrupt, put in a spring crop, consisting of corn, oats, buckwheat and potatoes," the register is of opinion that the said grain, &c., raised by the bankrupt after the filing of his petition, does not pass to the assignee as assets for the use of the creditor.

McCANDLESS, District Judge, confirmed the register's report.

BARNETT v. HIGHTOWER. See Case No. 1,009.

Case No. 1,025.

BARNETT v. LUTHER.

[1 Curt. 434.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1853.

ADMIRALTY—JURISDICTION—NOMINAL DAMAGES.

The admiralty will not entertain suits for merely nominal damages in cases of personal torts, not involving any subject-matter beyond such a claim for damages.

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

[Appeal from the district court of the United States for the district of Massachusetts.

[In admiralty. Libel by Andrew Barnett against Daniel B. Luther for assault. The district court gave a decree for respondent, (unreported.) Libellant appeals. Affirmed.]

This was an appeal from the district court by the libellant, in a cause of damage. The libellant was a seaman on board the bark Mary R. Barney, and alleged in his libel an assault by the master and mate of that vessel, for which he claimed damages. The facts appear in the opinion of the court.

CURTIS, Circuit Justice. It appears, from the evidence in this case, that the libellant had been engaged in painting the mizzenmast head, and when he came down to dinner, left the paint-pot so carelessly secured, that by the motion of the vessel the paint was thrown down on the house. The master ordered the man to be called from the forecastle; and when he came on deck, the mate ordered him to go aloft and take his paint-pot down. The man went; but as he passed aft, he used insolent language towards the officers, who were all on deck. The master ordered him to be silent, and told him he would flog him if he did not obey; but he continued to grumble, as the witness expresses it, until he came down to the deck, and then he passed over to the weather side, where the master was standing, and stopped near him, looking at him, as the only witness who describes the occurrence says, with an insolent look. The master took the top-gallant brace, and struck him with the end of it over the shoulder; the man instantly seized the master, and they fell together on the deck. The man put his hand back, as if feeling for his sheath-knife; but he had left it below. The second mate then interfered; the master got up, the man rose to his feet, and immediately struck the second mate, who returned the blow; they seized each other, the second mate threw him down, and while down, struck him once or twice in the face. The man was then put in irons until the next morning, but not deprived of his food. The next day he was set at liberty.

This case has been argued upon the ground that a technical assault by the master is made out by the evidence; and that, since the act of congress of September 28, 1850, (9 Stat. 515,) abolishing the punishment of flogging in the navy and in vessels of commerce, the master cannot justify his act of striking the seaman, even though his insolence deserved punishment. And it was stated by the counsel for the libellant, that this appeal had been brought here to try that question. To determine what is the precise effect of this act of congress upon the authority of the master of a vessel to inflict punishment upon the crew, is a matter of no small difficulty, and of very great importance. It is a question which should be settled only after great consideration, when it shall become necessary to do so. This case does require it. For if it were admitted that in an action at law, this seaman could recover nominal damages for the blow inflicted by the master, it does not follow that the admiralty will award him nominal damages. A court of admiralty is a court of equity acting on marine affairs. As such, it regards and protects only substantial rights. Merely nominal claims, which do not amount to any substantial right, and are not so connected with any substantial right as to be necessary to its vindication, are not subjects of relief here. It is true that a claim for nominal damages may be so connected with a substantial right, as to present the only means of trying and vindicating it. And in such a case, though the damages are nominal, the subject-matter of the suit may be important, and a fit subject of litigation. Cases in which, by acquiescence for a length of time, an adverse right may be gained, are of this description. And at the common law, the prevailing party having a legal right to costs, which is of itself a substantial right, it is necessary to decide claims to nominal damages upon strict legal principles, even where nothing but a question of costs is involved. But in the admiralty the costs are in the discretion of the court, and do not depend upon the question whether the libellant recovers one dollar or nothing.

In this case, the libellant was, throughout, in the wrong. He was negligent, in not properly securing the paint-pot. He was grossly in fault for his insolence to the master, and his disobedience of his order to be silent; and still more for confining the master, and striking the second officer. He amply deserved quite as much punishment as he received. And if, which I do not intend to decide, there was a departure by the master from the strict line of his authority, when he struck the libellant with a rope, the provocation was so great, the blow so slight, and the conduct of the libellant so insubordinate and violent, that he could in no event recover more than nominal damages. These, for the reasons already suggested, I do not feel bound to award to him.

The decree of the district court is affirmed.

Case No. 1,026.

BARNETT v. MUNCIE NAT. BANK.[1]

[1 Cin. Law Bul. 45.]

Circuit Court, S. D. Ohio. March, 1876.[2]

USURY—PENALTY—NATIONAL BANKS—ACT JUNE 3, 1864.

[1. The words "legal representatives," as used in Act June 3, 1864. (13 Stat. 108,) § 30, pro-

[1] [The title of this case should be Muncie Nat. Bank v. Barnett, but, as it has been cited as Barnett v. Muncie Nat. Bank, it is here published under that title.]

[2] [Affirmed in 98 U. S. 555.]

viding for the recovery of twice the amount of usurious interest from a national bank by the "legal representatives" of the person paying such interest, must be construed strictly, and not to include the assignees in bankruptcy of such person. Barnits v. First Nat. Bank of Hamilton, Case No. 1,034, followed.]

[Overruled in Wright v. First Nat. Bank of Greensburg, Case No. 18,078.]

[Contra, see Crocker v. First Nat. Bank of Cheopta, Case No. 3,397; Barbour v. Nat. Exchange Bank, 45 Ohio St. 133, 12 N. E. 5.]

[See note at end of case.]

[2. The indorser of a bill of exchange is not the "legal representative" of the one for whose benefit the bill was discounted, and consequently is not entitled to be subrogated to his rights arising under Act June 3, 1864, (13 Stat. 108,) § 30, from the payment of usurious interest, on such bill.]

[Contra, see National Bank of Auburn v. Lewis, 75 N. Y. 516, 81 N. Y. 15; National Exch. Bank of Columbus v. Moore, Case No. 10,041; Cake v. First Nat. Bank of Lebanon, 86 Pa. 303.]

[See note at end of case.]

[At law. Action by the Muncie National Bank of Muncie, Ind., against David Barnett, the drawer, Barnits & Whitesides, acceptors, and Robert Marshall, the payee and indorser, of a bill of exchange for $4,000. dated November 18, 1873. David Barnett and Isaac E. Craig, assignees of Barnits & Whitesides, intervened. Heard on demurrer to the defenses and cross-petitions of the several defendants. Demurrers sustained, except as to one of the defenses of Robert Marshall and the second defense of the assignees, which was "that the bill in suit was the last of eight renewals; that illegal interest was taken upon the series to the amount of $1,116, which it was claimed should be applied upon the bill in question." Upon this issue the case was tried by a jury. Verdict for plaintiff, $4,080.31.

[Subsequently the case was taken to the supreme court on writ of error, and the judgment of this court affirmed. Barnet v. Muncie Nat. Bank, 98 U. S. 555.]

Hogans & Broadwell, for plaintiff.

Miller & Gilmore and Wilson & Craig, for defendants.

Before EMMONS, Circuit Judge, and SWING, District Judge.

This was a suit upon a bill of exchange drawn by David Barnits, and which had been accepted by Barnits & Whitesides, and indorsed by Robert Marshall, the payee, for $4,000, and which had been negotiated by Barnits & Whitesides with the Muncie National Bank. The assignees of Barnits & Whitesides came in, by leave, and set up, by way of defense and cross-petition, that they had had fifty-one transactions with the plaintiff, in which Barnits & Whitesides had paid to the bank $6,324, by way of interest, and which was more than the legal rate, and that they were entitled to recover back, therefore, under the provisions of national banking act, [Act June 3, 1864; 13 Stat. 108, § 30,] double that amount, and asked judgment that the bill sued on be liquidated out of that amount, and that they recover the balance against the plaintiff. The court made the same holdings with respect to this defense as in the Hamilton and Eaton National Bank Cases, reported above. [Barnits v. First Nat. Bank of Hamilton, Case No. 1,034.]

Robert Marshall, the indorser, set up, by way of defense, that the bill sued on was the last of a series of seven renewals, and that, under the said 30th section of the national banking act, he had a right to be credited with the forfeiture of the amount of the entire interest reserved on that series of renewals, on the ground of alleged usury in the transactions. To this defense a demurrer was interposed, which the court overruled, without deciding the question argued by counsel whether, under that section of the act which provides for a "forfeiture of the entire interest which the note, bill, or other evidence of debt, carries with it, or, which has been agreed to be paid thereon," Marshall had a right to a credit for a forfeiture of the entire interest reserved on the series of the seven discounts, or the interests reserved merely on the bill sued on, leaving the plaintiff to plead for the purpose of raising that question.

But another defense that Marshall made was that the bank, in the fifty-one transactions with Barnits & Whitesides, had received unlawful interest; that Barnits & Whitesides were entitled to recover under the act double the amount thereof, to wit, $12,648; and asked to be subrogated to their rights to an amount sufficient to discharge his liability on the bill. To this defense was also interposed a demurrer by the plaintiff, which was sustained, on the ground that the law conferred only on the person or his legal representatives, who had the transactions with the bank, the right to avail himself of the provisions of the act.

[NOTE. This case was taken to the supreme court by the assignees, where this judgment was affirmed, but upon entirely different grounds. Mr. Justice Swayne, in delivering the opinion of the court, did not touch upon the questions decided by the circuit court, but said that "the remedy given by the statute for the wrong is a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties. While the plaintiff, in such cases, upon making out the facts, has a clear right to recover, the defendant has a right to insist that the prosecution shall be by a suit brought specially and exclusively for that purpose, where the sole issue is the guilt or innocence of the accused, without the presence of any extraneous facts which might confuse the case, and mislead the jury to the prejudice of either party." Barnet v. Muncie Nat. Bank, 98 U. S. 555.]

Case No. 1,027.

BARNEWALL et al. v. JONES et al.

[14 N. B. R. 278.]

District Court, S. D. Alabama. June Term, 1876.

BANKRUPTCY—ASSIGNEE—SETTING ASIDE CONVEYANCES.

[1. An assignment by one member of a firm of all his individual property for the benefit of his individual creditors, and with directions to distribute the balance, if any, among partnership creditors, if made within six months before the filing of a petition in bankruptcy against the firm, may be set aside at the suit of the assignee in bankruptcy, under the thirty-fifth section of the bankrupt act. (Rev. St. § 5129; 14 Stat. 534,) as being made with intent to prevent the distribution of the property under that act.]

[2. Such an assignment does not come within that clause of the thirty-fifth section of the act, (Rev. St. § 512; 14 Stat. 534,) which allows only four months for the setting aside an assignment made with a view to give a preference to a creditor who knows the debtor to be insolvent.]

[Cited in Crump v. Chapman, Case No. 3,455.]

[3. The rights of the assignee in bankruptcy under this thirty-fifth section (14 Stat. 534) are not affected by the amendments thereto of June 22, 1874, (18 Stat. 180,) when the adjudication of bankruptcy was passed before the amendments were adopted.]

[Cited in Warren v. Garber, Case No. 17,196.]

[In bankruptcy. Proceedings by Henry Barnewall and William C. Gaynor, assignees of Crawford, Walsh, Smith & Co. and Walsh, Smith, Crawford & Co., and others, against William G. Jones, William D. Dunn, and James Crawford, to recover property passed by assignment by Crawford to Dunn and Jones, in trust—First, for the benefit of his creditors; and, second, for the benefit of the creditors of Crawford, Walsh, Smith & Co. and Walsh, Smith, Crawford & Co., of which firms he was a member. Heard on bill, answer, and agreement of counsel. Decree for complainants.]

E. H. Grandin, for complainants.

R. H. Smith, for defendants.

BRUCE, District Judge. The case is submitted for final decree upon bill, answers of defendants, Wm. D. Dunn, Wm. G. Jones, and James Crawford, and the agreement of counsel in writing, by which the complainants dismiss their bill as to the other defendants named therein, and no exception is taken to such dismissal or to the want of proper parties.

The important facts to be borne in mind are stated in agreement of counsel on file, and are, that the proceedings in bankruptcy were filed June 3, 1874, and the deed of assignment referred to in the bill of complainants was made, executed, and recorded January 31, 1874. The bankruptcy proceedings were commenced upon the petition of Henry Hall, against Crawford, Walsh, Smith & Co., of Mobile, and Walsh, Smith, Crawford & Co., of New York, of both of which mercantile firms James Crawford was a member, and an order of adjudication of all the persons composing said firms, bankrupts, followed upon the 12th day of June, 1874. The complainants were subsequently duly appointed and qualified as their assignees in bankruptcy.

The character of the indenture or deed of assignment of James Crawford to Dunn and Jones will be best determined by a reference to the instrument itself, which is found as an exhibit to the bill. It is clearly an assignment of the individual property and estate of James Crawford (except such as is by law exempt from execution) to said Dunn and Jones, in trust and for the uses and purposes therein mentioned. The question is as to what this transaction was in legal effect. It is not important, in the view I take of the case, to inquire what these parties intended. However good the motives of James Crawford in making the transfer, or of Messrs. Dunn and Jones in receiving it, and however free they may have been from any intention to commit an actual fraud upon any one is not material here. The question, however, remains as to the legal quality and effect of the transfer here in question. That James Crawford was insolvent at the time this transfer was made, and that it was made in contemplation of insolvency, is clear from the terms of the transfer itself, and William D. Dunn and William G. Jones, the transferees, must be held to notice and knowledge of everything stated in and plainly inferable from the terms of the instrument itself.

On the 3d of June following this conveyance or transfer of property, and about four months and three days thereafter, a petition in involuntary bankruptcy was filed in the district court of the United States for the southern district of Alabama, followed by an order of adjudication and the appointment of assignees, as before stated. The provisions of the bankrupt act contemplate a distribution, not only of the partnership property and assets of the bankrupts, but a distribution also of the individual property of each member of said mercantile firms. Section 36, Bankrupt Act, [14 Stat. 534.]

By the judgment of the court adjudicating James Crawford a bankrupt, the title to all his property, both real and personal, partnership and individual, except such as was exempt by law, vested, by operation of law, in his assignees in bankruptcy for the benefit of his creditors, both partnership and individual, and the conveyance or assignment by the register in bankruptcy related back to the filing of the petition in bankruptcy, to wit, June 3, 1874. See section 14, Bankrupt Act, [14 Stat. 522.] This then is the date at which the rights of the creditors of James Crawford attached to his property and became fixed and vested; and this brings me to the effect of the provisions of the 35th section of the bankrupt act, [14 Stat. 534,] upon the transfer or conveyance of the property in question.

The complainants' bill was filed December 6, 1875, long after the passage of the amendatory act of June 22, 1874, [18 Stat. 180,] but it was filed to assert the rights of the creditors under the bankruptcy proceedings which were instituted June 3, 1874. If the assignees, as the representatives of the creditors, have any rights here at all, they accrued June 3, 1874, and the question as to when they filed their bill to assert their rights is unimportant to this inquiry. If then the transfer or conveyance in question is void, under the provisions of the 35th section of the bankrupt act, then the assignees may recover the property or the value thereof as the assets of the bankrupt. There are two clauses in section 35 of the bankrupt act which may be designated as the four months' clause and the six months' clause, and it is important to inquire under which of these clauses this conveyance and transfer falls; for, if it falls within the four months' clause, it is protected because the transfer was made more than four months anterior to the institution of the proceedings in bankruptcy. If, however, this transfer falls within the six months' clause, it is not protected, because less than six months had elapsed from the making of the conveyance to the filing of the petition in bankruptcy; in fact, only a few days over four months had elapsed. How, then, shall we determine under which clause this transfer or conveyance falls? for it is admitted that it falls within one of them.

An analysis of the two clauses is necessary. In the four months' clause these words are used: "If any person, being insolvent or in contemplation of insolvency, within four months of the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him * * * makes * * * any assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, assignment, transfer, or conveyance, or to be benefited thereby * * * having reasonable cause to believe such person is insolvent, and that such * * * assignment or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it or so to be benefited." Now, the prominent idea here is that insolvent persons shall not prefer one creditor over another. If, however, they do it, the creditor takes the risk of losing what he has so acquired if proceedings in bankruptcy are instituted within four months from that time. If not instituted, he is protected in his right, though he got it by way of preference. This clause certainly contemplates transfers of property to particular persons for particular debts or liabilities, and does not contemplate such an assignment of property as we have in this case, which is a general assignment of the bankrupt's individual property for the equal benefit of his individual creditors first, and the excess, if any, to be applied to the payment of his partnership creditors.

This is an assignment with a view to a distribution of the bankrupt's property, providing for the means and mode of the distribution, which is a very different thing from a preference to a creditor or person having a claim against him, or who is under any liability for him, such as is implied by the language of the clause under consideration. It is claimed for the defendants that the case of Gibson v. Warden, 14 Wall. [81 U. S.] 244, is conclusive on this point, and settles the question that this conveyance falls within the four months' clause. It is to be first observed that no such instrument or assignment was before the court in that case as there is here. The transaction was entirely and essentially a different one. It was a claim secured by mortgage, and the court decided that it was valid under the laws of Ohio, and that being founded upon a past consideration, it fell within the first (or four months') clause of the bankrupt act, and was thereby protected. In that case the court says: "The language employed in the first clause (the four months' clause) imports clearly that the consideration must be one growing out of a former transaction, and that the recipient must stand in the relation thus created to the other party. It is equally clear that the second clause, enlightened by this construction of the first one, must be limited to cases where the transaction was original and complete in itself at the time it occurred, and had no reference for its consideration to anything between the parties which had gone before it."

In the case before us there is no pretense even of a preference to Dunn and Jones; there was no past consideration as to them, for the relation of debtor and creditor did not exist between them and the bankrupt. So far as they were concerned, the transaction was original and complete in itself at the time it occurred, and had no reference for its consideration to anything between them (the parties) which had gone before. If, then, this assignment does not fall within the four months' clause, it does fall within the six months' clause, as a very brief examination will show.

The language of the six months' clause is much the same as the language of the four months' clause. There is the difference as to time anterior to the filing of the petition in bankruptcy, at which transfers of the kind described are protected; also the idea of preference of a creditor by the bankrupt is not in the six months' clause; but sales, assignments, transfers, to persons other than creditors are within its provisions. The prominent and distinct feature, however, of this six months' clause which brings this case within its provisions, will be seen by a reference to the language used, as follows: "And

that such payment, sale, assignment, transfer, or other conveyance, is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of the act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may receive the property, or the value thereof, as assets of the bankrupt."

Apply that language to this case in hand. Has not the insolvent in contemplation of insolvency sought to prevent his property from being distributed under the bankrupt act? He ignores the act altogether. He seeks to prevent his property from coming to his assignee in bankruptcy, by the appointment of his own trustees. It is a clear case of an attempt to defeat the object of the act, to delay the operation of and evade the provisions of the act. And such a transaction the statute denounces as void. "And when not made in the usual and ordinary course of business of the debtor (which is the case here), the fact shall be prima facie evidence of fraud."

These two clauses of the 35th section of the bankrupt law [14 Stat. 534] have a common purpose to prevent fraudulent transfers of property by an insolvent, the object being to secure the equal distribution of the property and assets of the bankrupt among his creditors, which is the prime purpose and object of the bankrupt law. But while they have a common purpose, they have distinctive differences, which may be thus stated: The four months' clause has reference to transfers with a view to a preference of one creditor of an insolvent over another, which implies a past indebtedness. The six months' clause has reference to transfers of property by an insolvent to persons other than creditors, with a view to prevent his property from being distributed under the act, and with a purpose to defeat its operation and evade its provisions.

In this case, while, as to Dunn and Jones, there was no past indebtedness, yet as to the creditors for whose benefit the transfer purports to have been made, its consideration was past indebtedness; but the distinctive feature of the transfer and that which takes it out of the four months' clause and places it in the six months' clause, is that it is a general assignment of the insolvent's individual property for the benefit of his creditors, and contemplates a distribution of his property otherwise than as provided by the bankrupt law, and is an attempt to defeat its operation and evade its provisions, and is a fraud upon the bankrupt law.

The only remaining question which I deem it necessary to consider is the effect of the amendatory act of June 22, 1874, to the bankrupt law [18 Stat. 180] upon the questions here involved. This suit was brought within two years from the time the cause of action accrued. So that no question arises under the statute of limitation for the bringing of suits by assignees, which is limited to two years, by section 2 of the bankrupt act. If the assignees have any rights at all they accrued at the time of the filing of the petition in bankruptcy, as already stated, June 3, 1874, which was followed by an order of adjudication of June 12, 1874. The amendatory act was passed June 22, 1874. And the amendment to section 35 is prospective in its terms. Courts will not give a retrospective operation to a statute, unless it clearly appears from the language used that the law-making power so intended.

I am cited to the cases of Singer v. Sloan, [Cases Nos. 12,899 and 12,898,] decided by Judge Dillon, in which he holds that section 11 of the amendatory bankrupt act of June 22, 1874, amending section 35 of the original act, applies to cases brought after the amendatory act took effect, although the instrument creating the alleged preference was executed before June 22, 1874. He says: "Rights wholly given by statute are taken away by its unconditional repeal." This view of the subject and statement of the law are not satisfactory to my mind. A more correct statement of the legal proposition is found in Hamlin v. Pettibone, [Case No. 5,995,] thus: "Statutes affecting substantial rights divesting causes of action which have fully accrued, are not without express declaration or the strongest implication to be applied to past transactions."

The rule of law upon this subject is thus stated: "Where a right arises under, or is given by a statute, and it has been so far perfected that nothing remains to be done by the party, the repeal of the statute does not affect it, or an action for its enforcement."

In the head notes of the supreme court of the state of Alabama, in the case of State v. Moody,[1] December term, 1875, this is found: "The adjudication of bankruptcy is in the nature of a statute execution for all the creditors, and the assignee, as their representative, may enforce against the debtor every right a judgment creditor could enforce."

I conclude that the rights of the creditors of the bankrupt James Crawford, as represented by the assignees in bankruptcy, arose and became vested rights prior to the passage of the amendatory act of June 22, 1874, and stand independent of it, and unaffected by it. This suit is brought to assert their rights as to the property described in the transfer or conveyance to Dunn and Jones. And it appearing by the terms of the transfer that it was made by an insolvent, and in contemplation of insolvency, of which the transferees must be held to notice, the transfer is void under the 35th section of the bank-

[1] [This citation is probably intended for Steele v. Moody, 53 Ala. 418.]

rupt act. The decree is for the complainants, and will be drawn in accordance with this opinion.

Case No. 1,028.

The BARNEY EATON.

[1 Biss. 242.] [1]

District Court, D. Wisconsin. Oct. Term, 1858.

SALVAGE—WHO ENTITLED TO — PRIOR TO OTHER LIENS—MORTGAGEE MAY CLAIM SALVAGE.

1. Where the owners of a stranded vessel have abandoned all efforts to save her, and at their request a third party, at his own risk and expense, gets her off and repairs her, his claim is in the nature of salvage, and takes precedence of prior maritime liens.

2. The fact that the salvor held a mortgage upon the vessel not due, the mortgagors being the owners and in possession, does not deprive him of this preference. He cannot be considered in the light of an owner.

In admiralty. The libellant built this schooner and afterwards sold her to Peter Weber and Edwin Churchill, taking a chattel mortgage for the principal portion of the purchase money, leaving the mortgagors, the purchasers, in possession. They ran the vessel during the season of 1857; and in the month of November of that year, she was stranded on the Michigan shore of Lake Michigan. The owners failed in an effort to get her afloat, and so informed the libellant, who procured men and advanced funds in an effort to save her, and in the month of May following, he brought her to the port of Milwaukee. There she was repaired at his expense, with the consent of the owners, but soon afterwards libelled by several parties for debts contracted for supplies during the time Weber and Churchill were sailing her. This libel is subsequent to those libels, and a preference is claimed out of the proceeds of sale for the expenses and services incurred in getting the vessel afloat, and bringing her to Milwaukee, and for putting her in order for service. When she lay on the Michigan shore she was valueless, and she was so badly damaged as to require a thorough repair, both of the hull and rigging.

The owners, Weber and Churchill, make no defense. The other libellants object to the demand of this libellant, on the ground that being mortgagee, he was protecting and securing his own interest, by getting the vessel afloat and repairing her. And also that he by virtue of his mortgage is to be viewed in the light of an owner.

Emmons, Van Dyke & Hamilton, for libellant.

Butler, Buttrick & Cottrell, for respondents.

MILLER, District Judge. The questions are:

1st. Whether the nature of the demand is such as to give this libellant a preference.

2. Whether the fact of the mortgage to him defeats his claiming a lien on the vessel.

The vessel was abandoned by the owners after they had failed in getting her afloat, and after they had exhausted their means in the effort. At their instance the libellant succeeded, after a large expenditure of money and labor. When she lay on the Michigan shore of the lake, in her broken and wrecked condition, she was probably not worth the demands of those prior libellants. At all events they did not attempt to make their money out of her by a sale, or make an effort to put her afloat by the expenditure of time, money, or labor. They lay by from November, 1857, to this time, without making one effort to collect their debts, either from the owners or the master, or out of the vessel, until she has been got ready for service and made of value by the means and labor of this libellant. Now after she is brought to an accessible port, and restored to value equal to their demand, without any effort or merits on their part, they attempt to have appropriated the proceeds of her sale to their own demands. The demand of this libellant is for services in the nature of salvage service, and is entitled to a preference.

At the time the vessel was stranded, the owners, Weber and Churchill, were in possession. The libellant's mortgage was not then payable. He did not enter upon the work on his own account, but after the owners had abandoned the vessel and applied to him to undertake it. The vessel while lying on shore a wreck was liable to the admiralty liens created and contracted for by the owners; which were paramount to the mortgage. As against them the mortgage was of no legal validity. Until the mortgagee was put into possession under his mortgage he had no control over the vessel, nor could he be considered in the light of an owner. Abb. Shipp. 45 et seq.

A passenger may lawfully, except under peculiar circumstances, depart the ship. Should he voluntarily remain on board, at the risk of his personal safety, to assist her in her distress, he may be entitled to remuneration for his services. Abbott, 560. And part of a crew of a vessel who remain on board after abandonment by the master and the rest of the crew, and under such circumstances that the abandonment was justifiable, are entitled to salvage compensation, if they perform valuable services. The passenger's personal safety required him to work to save the vessel; and the contract of a sailor excludes salvage compensation; but in extreme cases salvage compensation may be allowed both these descriptions of persons. Such, I apprehend, should the libellant's demand be considered. The vessel was actually abandoned by crew and owners, and not libelled in her wrecked and disabled condition by maritime creditors. The

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

libellant had no right or claim to possession, but at the instance of the owners he discharged the services propounded for in the libel. He procured men to get the vessel afloat. Those men could libel the vessel for their services. So could those whom he employed to tow the vessel into port. So could those who repaired her and restored her to value. Instead of all those persons filing libels, this libellant filed one in his own name, which is by no means objectionable.

I am of the opinion that, under the circumstances, this libellant should not be deprived of the admiralty process and jurisdiction in enforcing his demand against this vessel. And I further think that equity and justice should postpone those libellants, who attached this vessel for debts contracted, while she was sailed by Weber and Churchill, her owners. The libellant should be considered entitled to recover for services as a salvor.

Decree accordingly.

NOTE, [from original report.] For cases on salvage and the measure of compensation, see Bee, 139, 170, 175, 178, 193, 201, 226, [Schultz v. The Nancy, Case No. 12,493; Stephens v. Bales of Cotton, Id. 13,366; Deliessline v. The Friendship, Id. 13,807; British Consul v. Twenty-Two Pipes, etc., Id. 1,900; Cross v. The Bellona, Id. 3,428; Bass v. Five Negroes, Id. 1,093; Jerby v. One Hundred and Ninety-Four Slaves, Id. 7,288;] 2 Bouv. Law Dict. 494; 2 Pars. Shipp. & Adm. 260–321. [See, also, Baker v. The Slobodna, 35 Fed. 537, and cases there cited.]

Case No. 1,029.

BARNEY v. BALTIMORE.

[1 Hughes, 118.] [1]

Circuit Court, D. Maryland. March Term. 1863.[2]

COURTS — JURISDICTION — DIVERSE CITIZENSHIP — REAL PARTIES — PARTITION — DEDICATION.

1. Under the clause of the judiciary act of [September 24,] 1789, [1 Stat. 73,] giving United States circuit courts jurisdiction of certain causes between a citizen of the state where the suit is brought and a citizen of another state, citizenship of one of the suitors in the District of Columbia does not give jurisdiction.

[See note at end of case.]

2. Conveyances of the interests of non-residents made merely for the purpose of giving these courts jurisdiction, do not suffice that purpose.

[See note at end of case.]

3. Before complainant's bill for a partition of property can be entertained by a court, his title must be clear to the portion to be received from the partition.

[See note at end of case.]

4. Where an owner of land exhibits a map of it in which a street is defined, though not yet opened, and sells building lots with front or rear on the street, and makes no express reservation, he dedicates the street for public use; and. if in a city, surrenders it for all public purposes, and if the street runs to or binds on a river or bay, surrenders it for use as a wharf where vessels may load and unload; but yet the fee simple will not pass to the city.

[See note at end of case.]

[In equity. Bill for partition of land, by Mary Barney against the mayor and city council of Baltimore, William C. Ridgely, and others. Bill dismissed upon consideration of the merits. Subsequently, on complainant's appeal to the supreme court, the decree was reversed, and the case remanded to this court, with directions to enter a decree dismissing the bill for want of jurisdiction, and without prejudice. Barney v. Baltimore, 6 Wall. (73 U. S.) 280.]

GILES, District Judge. This cause is submitted for final decree on bill, answer, evidence, and admissions filed. The counsel for the respective parties have been fully heard, and in the very learned and able arguments that have been made, almost every case has been cited that could in any way sustain the positions and views of the respective parties. The original bill in this cause was filed on the 26th September, 1848. Various changes have taken place since, in reference to the parties, by death or otherwise, which it will not be necessary to notice; as on the 28th of June, 1860, this court passed the following order: "that the complainant have leave to file an amended and supplemental bill and bill of reviver, as prayed for by her petitions filed 5th July, 1859, and 16th June, 1860; said bill to be filed on or before the first Monday of July next; all questions touching the jurisdiction of this court, in this court, in the said case, either on the original bill or on the bill which may be filed under this order, and also all questions as to the complainant's right of relief in this proceeding, are reserved under the final hearing." The amended bill under this order was filed on the 30th of June, 1860, and the answer of the mayor and city council of Baltimore thereto, on the 21st July, 1860; and it is on the issues which this amended bill and answer present, that this cause has been argued, and upon which I am now to decide. The bill alleges in substance, that the complainant, as one of the heirs of Judge Samuel Chase, is tenant in common with the other defendants, his grandchildren, and with the mayor and city council of Baltimore, grantees of Samuel and Thomas Chase, sons of Judge Chase, of the fee in the bed of West Falls avenue (formerly called "Liffy Street,") and of the City Block, and as such, that she is entitled to a share of the wharfage collected by the city on the west side of Jones's Falls and on the City Block, and to one-sixth part of the City Block. And the bill prays for an account and for a partition between the parties entitled. The bill also states that three of the defendants, to wit, William G. Ridgely, Ann Ridgely, and

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

[2] [Reversed in 6 Wall. (73 U. S.) 280.]

Matilda Ridgely are residents of the District of Columbia; that since the filing of the original bill in this case, to wit, on the 8th day of June, 1858, they had conveyed all their interest in the property in question to their brother, Samuel Chase Ridgely; that said Samuel Chase Ridgely has since died, and by his last will and testament devised the said property so conveyed to him by his said brother and sisters back to them. All of the defendants, except the mayor and city council of Baltimore, have filed a joint answer admitting the facts stated in the said bill of complaint. The mayor and city council of Baltimore file a plea, demurrer, and answer, in which they allege that the conveyance made by the said William G. Ridgely and others to Samuel Chase Ridgely was without consideration, colorable and fictitious, and was executed with the intent to give jurisdiction to this court. And that the said grantors in said deed have no legal standing as devisees of Samuel Chase Ridgely to be parties to this bill.

There are also filed in the cause two papers, stating in detail the several facts which have been admitted by the parties. These relate principally to the relationship of the said parties to Judge Chase, and contain the agreement, that either party may offer in evidence the record of the ejectment suit brought by the complainant for this property against the mayor and city council of Baltimore in Baltimore county court; and that the plats, deeds, and evidences may be read from the record in said case, as evidence in the trial of this cause. The only parts of these admissions which it becomes necessary for me to notice particularly, are the following: "It is admitted in this case, that the deed of the 8th of June, 1858, to Samuel Chase Ridgely from William G. Ridgely and others, was made without valuable consideration, and to enable the court to dispose of the case, as if the grantors in the deed had no interest in the matter in question in the cause; it being further understood, that on request of the grantors, the property conveyed by that deed should be passed to the grantors."

Also, "the said William G. Ridgely, Ann C. Ridgely, and Matilda L. Ridgely executed a deed of all their property in Maryland to John G. Proud, Jr., bearing date the 5th of October, 1859; and it is admitted that no consideration was paid by Proud for the grant to him in said deed, but that the same was executed to remove a difficulty in the way of the exercise of the jurisdiction of this court." It is also admitted that Samuel Chase Ridgely died in the summer of 1859. John G. Proud, Jr., is not made a party to the amended bill. The first difficulty which we encounter on the threshold of this case is that in reference to the jurisdiction of this court. The bill shows that three of the defendants are residents of the District of Columbia, and this was also one of the allegations of the original bill. Resting on that statement, if these defendants are indispensable parties to the cause, the case would be one clearly without the jurisdiction of this court; for, by the eleventh section of the judiciary act of 1789, the circuit courts of the United States have jurisdiction in civil suits at common law or in equity only where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiff or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state. And the supreme court, as early as 1806, in the case of Strawbridge v. Curtiss, 3 Cranch, [7 U. S.] 267, decided that where there are two or more joint plaintiffs or defendants, each of them must be capable of suing or being sued in the courts of the United States to give the court jurisdiction. And this doctrine has never been departed from; for in 1854, in the case of Shields v. Barrow, 17 How. [58 U. S.] 141, the supreme court, in speaking of the act of congress of February 28, 1839, which had been supposed to have altered the rule, say, that "this act does not affect any case where persons having an interest are not joined, because their citizenship is such that their joinder would defeat the jurisdiction." And the court again affirm what they had before decided in Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 167, that, "if the case may be completely decided as between the litigating parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such a party be a resident of another state, ought not to prevent a decree upon its merits. But if the case cannot be completely decided, the court should make no decree." And this seems to have been the opinion of the learned counsel for the complainant, for in July, 1859, they file a petition, stating the execution of the deed from William G. Ridgely and others to Samuel Chase Ridgely, and praying that the bill may be dismissed as to them; and by their subsequent petition, filed after the death of Samuel Chase Ridgely, they pray to make the three residents of the District of Columbia parties to the cause, as the devisees of Samuel Chase Ridgely.

Taking these facts, in connection with the written admission (to which I have referred) of the character and objects of this deed to Samuel Chase Ridgely, it shows, beyond any doubt, that the learned counsel felt that unless they could remove this difficulty they could hope for no relief in this court; for this is a bill for partition, and for an account of wharfage received by the mayor and city council of Baltimore. The complainant claims as tenant in common with the defendants. Judge Story, in his treatise on Equity Pleading, section 159, says: "So tenants in common must all sue or be sued in cases touching their common rights and interests;" and as this property, of which a partition is

now claimed, was made at the sole expense of the mayor and city council, if complainant had any interest therein as tenant in common with the city, in making partition the city would be allowed for all expenses of said improvement. For, says the same learned author, in volume 1 of his treatise on Equity Jurisdiction, section 655, in speaking of a case where one party has laid out large sums in improvements on the estate, "Although, under such circumstances, the money so laid out does not in strictness constitute a lien on the estate, yet a court of equity will not grant a partition without first directing an account, and compelling the party applying for partition to make due compensation."

Now, is the question altered by the deed to Samuel Chase Ridgely of the 8th of June, 1858? It was, without consideration, made for the sole purpose of removing, if possible, this difficulty of want of jurisdiction, and with the understanding that Samuel Chase Ridgely was to reconvey the property to the said grantors whenever they requested him so to do. Now, the supreme court has decided that the conveyance of the interests of non-residents to give the circuit court jurisdiction must be real and not fictitious. For this principle, see McDonald v. Smalley, 1 Pet. [26 U. S.] 624; Smith v. Kernochen, 7 How. [48 U. S.] 216. In this last case the supreme court says: "The true and only ground of objection in all these cases is, that the assignor or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name being used merely for the purpose of jurisdiction. The suit is then, in fact, a controversy between the former and the defendants, notwithstanding the conveyance; and if both parties are citizens of the same state, jurisdiction, of course, cannot be upheld."

Now, the admission is, in effect, that such is the character of this deed, and that the real parties to the cause remained the same. It will not be necessary for me to notice a similar deed made by these parties since the death of Samuel Chase Ridgely to John G. Proud, Jr., as the counsel have not relied on the same, and Mr. Proud has not been made a party to the cause. But even if this difficulty did not exist, and the courts, from the residence of the several parties interested, had jurisdiction of the case, there is another objection to the court's passing any decree of partition or for an account of wharfage at this time. The title of complainant is disputed, and that being a question of law this court would not undertake to decide it, but its duty would be either to dismiss the bill or retain it for a reasonable time, to give the complainant an opportunity to have it decided at law. In Adams, Eq. (Last Ed.) p. 519, in a note treating of partition, the rule is stated as follows: "But the title of the complainant must be undisputed, otherwise the bill will be dismissed, or else retained until the title is settled at law;" and in support of it the learned annotator refers to many authorities. In Boone v. Boone, 3 Md. Ch. 497, Chancellor Johnson says: "The court does not sustain a bill for partition unless the title be clear." In Straughan v. Wright, 4 Rand. [Va.] 493, the rule is given in the following language: "Where, in a bill for partition, if complainant's title is denied, and it depends upon doubtful facts or doubtful questions of law, a court of equity will either dismiss the bill or retain it until the right is decided at law." To the same point will be found the following cases: Wilkin v. Wilkin, 1 Johns. Ch. 111; Manners v. Manners, 1 Green, Ch. [2 N. J. Eq.] 384; Bruton v. Rutland, 3 Humph. 435; Hosford v. Mervin, 5 Barb. 52; and Cox v. Smith, 4 Johns. Ch. 271. Now all must concede that the title of complainant depends upon doubtful questions of law. I am justified in saying this because her title has already been submitted to a court of law of her own selection, and which court decided against her, and its judgment was affirmed by the highest court of the state. I speak of the decision of Baltimore county court in the ejectment case of Barney v. Mayor, etc., the record of which has been given in evidence in this case. It was an action brought to recover the identical property, of which a partition is now sought by the bill filed in this cause.

The defendants, in the trial of the case, presented several prayers to the court. The fourth is as follows: "The defendants, by their counsel, pray the court to instruct the jury that if they shall find from the evidence in the case that Samuel Chase, the elder, under whom the plaintiffs claim, made and executed and delivered the several leases and deeds offered in evidence by the defendants, and shall further find from the evidence in the case that at the time of the execution and delivery of the deed from Samuel Chase, the elder, to Samuel Chase, Jr., and Thomas Chase, no part of said street called Liffey street was made south of the southerly line of Lee street, and that no part of the City Block was then made, then the plaintiffs have no right in the suit to recover upon the evidence in the case any portion of Liffey street lying south of the southerly line of Lee street, nor any part of the property located on the City Block." On this prayer the court indorsed, "Granted, but not for the reasons therein stated, but because the plaintiffs have not shown any title to the City Block, and because, although they have shown title to Liffey street, yet, as it is a public highway by dedication and contract with the city, ejectment will not rely to recover it."

Now, as the court of appeals gave no opinion in the case, we do not know whether that court sustained all or what instructions of the lower court, which were fatal to the plaintiff's case; but this is clear, as a part of the block was not used as a highway, ejectment would have lain for that part; and the court of appeals must therefore have sustain-

ed the instruction of Baltimore county court, that as to that part, the plaintiff had shown no title. Now, in this cause, we have no evidence that was not before Baltimore county court, and if I had full jurisdiction in the case, I should feel it to be my duty to dismiss this bill, as it has been filed with full knowledge that the title of the complainant was disputed by the city, and after a court of competent jurisdiction had passed adversely upon the title to a part, if not to all of the property in question. But if the cause was free of these preliminary difficulties, from a careful investigation of the several grounds upon which the complainant's counsel have placed her claim to a share of the property in dispute, I am of the opinion that that claim cannot be sustained either at law or in equity.

Now, what are the facts of this case? Originally the waters of the northwest branch of the Patapsco river swept around the most western point of Fell's Point (east of where the drawbridge now stands), and first turning northeast ran until within about one hundred feet of Bond street, thence turning northwesterly ran nearly up to Wilk street, continuing westerly, passed on to Jones's Falls some distance above where Pratt street now crosses that stream, and thence flowed on westwardly to some distance beyond what is now Light street wharf. That on or about 1796, from the deposits of mud and sand brought down by Jones's Falls and deposited near its intersection with the river, the water of the basin only flowed at high water up to the south side of Pratt street at its intersection with Liffey street, but at low tides the ground was bare for some distance below. It was in this year that Judge Chase received his deed from Daniel Bowly for a lot of ground beginning at the intersection of the south side of Water street with the west side of Jones's Falls, extending south on the west side of the falls to the south side of Barre street, with a width of one hundred and seventy-three feet. Judge Chase then being the owner in fee and riparian proprietor of this lot, fronting one hundred and seventy-three feet on the water of the basin, under permission from the mayor and city council of Baltimore, granted by ordinance passed March 23d, 1802, extended his said lot to the south side of Lee street; and in 1804 he obtained the further permission from the corporation to extend his said lot from the south side of Lee street south three hundred and fifty-five feet, so as to include a bar which had been made by natural causes in the river, opposite to his wharf. This last extension was never completed by Judge Chase. Judge Chase being then the proprietor of this lot binding on the west side of Jones's Falls, laid out into lots first, that part lying between Water and Pratt streets; and subsequently, that part lying between Pratt and south side of Lee street, and along the whole eastern fronts of the lots, he so laid out and leased, and between said front and the west side of Jones's Falls, he laid out a street or wharf, which below Pratt street he called "Liffey Street." In his lease to James Clarke, in 1798, in describing the lot laid, he calls it "a public wharf" (forty feet wide), and the lines of the lot run to and bind on it. In his lease to Lewis Hart made in 1806, he described the lot leased "as running with Pratt street thirty feet to the west side of a street forty feet wide, laid off by the said Samuel Chase from Pratt street and adjoining the water, heretofore called Jones's Falls, to the south side of Lee street." And in his deed to Samuel Chase, the younger, in 1808, conveying to him in fee five lots, fronting one hundred and fifty feet on this street at the distance of ninety feet south of Pratt street, he describes them as binding on this (Liffey) street, which was delineated on the plat made by him of his said ground. Hart proves, that prior to 1811, he used a part of the head of Liffey street, below Pratt street, as a lumber-yard, and put a gate across it to protect his lumber, although it was then used as a public way; that in 1814 his gate was removed, and it is not denied that since that period it has been used as a public highway and street of the city. That, as it at present exists as a street and wharf, with the large space called the "City Block" at its southeastern extremity, it has been made by the city under various ordinances for the improvement of the "Cove," between the years 1817 and 1836.

There is also in evidence a deed from Thomas Chase and Samuel Chase, two of the children of Judge Chase, to the city in 1818, for the bed of Liffey street, as laid out by their father, Samuel Chase, the elder; but in the view I take of the law in this case, this deed is wholly immaterial, and I shall not further notice it. Now, the first question that presents itself is, was Liffey street ever dedicated to public use as a highway by Judge Chase? Of this I have no doubt. Such dedication may consist in a simple acquiescence, or in positive and unequivocal acts, signifying the owner's intention to give up the soil to this object. Where the dedication is claimed by mere acquiescence on the part of the owner, the use by the public must have been at least twenty years; but a less period will be sufficient where there is any positive assent on his part, showing an intention to appropriate the soil to that purpose. For this, see 3 Kent. Comm. 450, and 2 Smith, Lead. Cas., with Hare & Wallace's Notes, p. 142, the case of Dovaston v. Payne. In the note to this case all the authorities upon the subject are cited. They will be found to maintain this proposition: that if one owning land exhibit a map of it on which a street is defined, though not as yet opened, and building lots be sold by him with a front or rear on that street, this is an immediate dedication of that street for public use. Now the evidence in this case shows that Judge Chase laid out his property

into lots, and bounded them on Liffey street, which he marked out on the plat as a street, and sold and leased his lots with that description. And Baltimore county court (Judge Archer), with the same evidence before it, decided that they constituted a dedication of this street to public use, which will appear by reference to the fifth instruction granted by that court in the ejectment case to which I have referred. Now the important question arises, To what extent is this dedication made? I grant it does not carry the fee to the public, for that remains either in the original owner (which I think is the true rule), or (as some authorities seem to maintain) to those who have purchased lots binding on it. Is it a dedication of only the bare easement of passing over the soil? I am of the opinion that where, in a city, a street which is laid out to bind on or run to the river, is dedicated or surrendered to the public use, it gives the public the right to use it for any purpose for which public streets are used in that city. It makes it public for all purposes, unless some express reservation is made in the act of dedication. Binding on the river it gives the public the right to use it as a wharf and to permit vessels to be loaded and unloaded at it. Angell, in his treatise on Highways, section 301, says: "At common law, a highway is simply an easement or servitude, carrying with it as its incidents the right to use the soil for the purposes of repair and improvement, and in cities for the more general purposes of sewerage, the distribution of light and water, and the furtherance of public morality, health, trade, and commerce."

The supreme court, in the case of City of Cincinnati v. Lessee of White, 6 Pet. [31 U. S.] 437, says: "All public dedications must be considered with reference to the use for which they are made; and streets in a town or city may require a more enlarged right over the use of the land, in order to carry into effect the purposes intended, than may be necessary in an appropriation for a highway in the country." So the right to pass water and gas under the surface of streets, and to lay down railroads on them, has been sustained. Now I propose to show, that wharfage at the ends or sides of public streets belonged to the corporation of Baltimore, except in some few cases where, by the acts of assembly authorizing the improvement, the right to collect the wharfage was given to the parties making the said improvement.

By section 12 of the act of assembly of 1783, c. 24, it was enacted, "that the port wardens of Baltimore town shall be and they are hereby authorized to make such regulations from time to time respecting wharves and wharfage," etc., etc., and the city, which was incorporated in 1796, was vested with all the powers which had heretofore been given to the port wardens; and by the 8th section of the act of incorporation, among the general powers granted, was one to regulate the station, anchoring, and moving of vessels, and to provide for deepening and cleaning the basin and docks. I suppose that the right to regulate and to deepen and clean the docks would carry with it the right to collect wharfage, as a necessary means to give effect to and to enable the corporation to exercise the power especially granted. Whether this be or not, certain it is that the city exercised that right at a very early day in its history. For, by an ordinance passed on the 24th April, 1797 (not quite four months after the act of incorporation), which is entitled "An ordinance to preserve the navigation of the harbor of Baltimore, and to provide for the exercise of the powers heretofore vested in the Port Wardens by the act of assembly," it is enacted and ordained (by its 8th section) that the following wharfages shall be collected for the articles hereafter enumerated, landed at any public wharf within the city limits, etc., etc. And to show what was meant by the term "public wharves," by an ordinance passed March 19th, 1798, it is enacted, "that all wharves made out into the basin or harbor in front of any street or part of a street, and which street was heretofore laid out in the plan of the town as extending to the water, are hereby declared public wharves, and subject to the wharfage imposed and laid by the ordinance of 1797." And this power the city continued to exercise until it was taken away by the act of 1813, but it was restored to the corporation by the act of 1827, c. 162, by which the city was authorized to collect wharfage "on any wharf or wharves belonging to the said mayor and city council, or on any public wharf in said city, other than the wharves belonging to and rented by the state, and that part of Pratt street wharf heretofore used by the citizens of the state." Now there are certain public wharves in the city on which the proprietors of the adjoining property or other individuals collect wharfage, but in those cases the right to do so was expressly reserved to the parties making the improvement.

This was the case in reference to the making of Light street wharf; for by the act of 1796, c. 45, §§ 3, 5, the right to charge wharfage on said wharf was given to the parties, proprietors of lots binding on the same, whose duty it was to fill up and perfect the said improvement. And by the act of 1817, c. 148, in which provision is made for the improvement of Jones's Falls, by its 11th section it is enacted, "that should the mayor and city council succeed in rendering Jones's Falls navigable, they are authorized to collect wharfage upon vessels navigating the same or lying at the public wharves opened or constructed on its banks, provided, that the right to wharfage on Liffey street shall not accrue to the said mayor and city council until they shall have engaged to wharf and fill up said street and deepen said

Falls on the side thereof adjoining said street, if the said street be given up to the said city." This proviso does not say, "if the fee in said street be conveyed to the said city," but, as I read it, if it be surrendered as a highway to said city.

This, I have endeavored to show, had already been done, and the city complied with its part of the said proviso, by filling up and wharfing at said street, and by deepening the said Falls. Now am I right in the view I have taken as to the effect of a dedication of a street to the public, where that street either runs to or binds on navigable water? Is it not reasonable? The corporation of Baltimore is bound to regulate and repair all the public wharves. The natural fund to defray this necessary expenditure is the wharfage, an income derived from those who enjoy the benefit of this expenditure. I am not without authority to sustain me. In the case of City of Newport v. Taylor's Ex'rs, [16 B. Mon. 699,] the right of the town to charge wharfage at the wharf erected at the side of the common, and to establish a ferry from that point across the Ohio, became the subjects of dispute. The common had been set apart for the public use when the ancestor of the defendant had laid out the town, and it was bounded by the Ohio river.

The court of appeals of Kentucky decided that the town of Newport had no right to establish a ferry, as the right to do so was a franchise grantable by the legislature, but that the dedication of the common extending to the Ohio river included the right of constructing wharves and charging wharfage. See court's opinion in this case, 16 B. Mon. 804. The great case of City of New Orleans v. U. S., reported in 10 Pet. [35 U. S.] 662, involved the rights of the city to the made ground in its front on the banks of the Mississippi. The city claimed the same by virtue of the fact that all the space of ground which existed between the front line of the houses of the city and the river Mississippi was left by the king of France, under the name of quays, for the use and benefit of the inhabitants, as appeared by authentic copies of the original plans of the foundation of the city. The supreme court, in their opinion, say, on page 717: "If the dedication of this ground to public use be established by the principles of the common law, is it not of the highest importance that the accumulations of the vacant space, by alluvial formations, should partake of the same character, and be subject to the same use, as the soil to which it becomes united? If this were not the case, by the continual deposits of the Mississippi the city of New Orleans would, in the course of a few years, be cut off from the river. If the city can claim the original dedication to the river, it has all the rights and privileges of a riparian proprietor." Now does the case of Dugan v. Mayor, etc., in any way come in conflict with these authorities or with the view I have taken of the effect of the dedication of a street binding on the water? I think not. That was a contest between the parties in reference to which of them the right belonged to charge wharfage on the sides of the dock below Marsh market space, which sides were public streets.

The court of appeals, (5 Gill & J. 374,) decided that it belonged to the city, and (as I read the report of the case) on two grounds: 1st. Because "over wharfage collected at private wharves, or wharves other than those owned by the city, or made at the ends or sides of public streets, lanes, and alleys, the city officers have no power or control. Its imposition and collection is the exclusive privilege of the wharf-owners; with it the officers of the city have no control. It is otherwise with wharfage collected at wharves owned by the city, or at the ends or sides of streets, lanes, and alleys. All these are called public wharves, are common highways, free for the use of the public, but at which tolls were collected by the town, now city, officers." And 2dly, because the commissioners of Baltimore town, who (as proprietors of the market-house lot) had consented to the making of this improvement by Dugan and McElderry, on the express condition "that the said canal wharves and streets on each side of the said canal be a common highway, free for the public use, but subject to such regulations as the commissioners and their successors shall from time to time establish," were not to be held to have relinquished their right to charge wharfage on said wharves. That they meant only that the use of said wharves should be free as all the other public wharves of the city, and did not intend to surrender any right which belonged to them, either as proprietors or as trustees for the public, of charging wharfage on these wharves. Now if the right to regulate, carried with it the right to collect, wharfage, then that right was expressly reserved to the town commissioners in the permission. Again, the public by this dedication is the grantee, and the city for this purpose being its representative, could impose any incumbrance upon the rights of the public within the chartered power of the corporation. And the right of the city to make such a charge is admitted by the act of 1813. In the subsequent cases of Wilson v. Inloes, 11 Gill & J. 351, and Casey v. Inloes, 1 Gill, 430, no question arose in reference to the city's right to collect wharfage on the city dock. The city had made and filled up the property in dispute under their various ordinances for the improvement of the Cove, and the question was, to whose benefit these improvements enured, whether to the holders of parts of "Mounteney's Neck," or to the holders of parts of "Fell's Prospect?" The court of appeals decided that the right to improve this property, under the act of 1745, vested in those holding under the eldest patent (Mounteney's Neck), and

that the improvement made by the corporation, under the ordinance of 1823, must enure to their benefit. But both of these cases decide a very important principle in reference to the act of 1745, which, in my opinion, shuts out the complainant from any part of the City Block. Judge Dorsey says, on page 368, 5 Gill & J., in speaking of the act of 1745: "The improvements authorized and encouraged were those made by improvers in front of their own lots, not of their neighbors." And Judge Stephen, in Wilson v. Inloes, 11 Gill & J. 358, quotes the language of Judge Dorsey in the former cases as announcing the settled law of the court. Now it appears from the plat in this case, that the City Block lies entirely east of the east line of Liffey street, and in no part in front of Judge Chase's original lot as purchased from Bowly, and which original lot he was authorized to extend in a southerly direction by the two permits from the city authorities.

I cannot for one moment suppose that, having extended his lot southerly according to the permission (even if he had completed his improvement), he would have any right to change his front and claim to extend his lot in an easterly direction. In this case such an extension would be for a large part of it in front of the lots on the east side of Jones's Falls. And it appears by one of the plats filed in this cause that, by the first plan proposed for the improvement of the Cove, the Falls was to have run south directly out into the basin, as it had always done, and a pier and drawbridge were to have been made at the foot of Albemarle street, but as this plan would have carried all the deposits of Jones's Falls out into the basin, and would rapidly fill the docks and water at its mouth, to the injury of all the property in that neighborhood, the plan was adopted of turning Jones's Falls eastwardly, connecting the Block with the side of Liffey street, and making the drawbridge at its present site. This plan saved the harbor, and was of great benefit to all those owning property on Liffey street. Now on the plot filed in this case, the line on the west side of Jones's Falls and east side of Liffey street, from the old port wardens' line to the basin, is shown by a line which runs from D to I. Judge Archer, in granting the 7th instruction, asked for defendants in the ejectment case, says: "The court believes that the plaintiff would acquire no right by permission to any land not in front of his lot, and therefore could not have title to the land east of the line from D to I." If, therefore, Baltimore county court was right in this instruction, and of this I have no doubt, the question is asked, In whom then is vested the title to this Block? Let the act of assembly of 1836, c. 63, § 2, answer. That act says "that the mayor and city council of Baltimore shall be and they are hereby vested with the right and title to any land made or to be made out of the water in making and completing the improvement of the city dock according to the plan heretofore adopted by them, provided nevertheless, that nothing in this act contained shall be construed to interfere with the vested rights of individuals." For these reasons I will sign a decree dismissing the bill filed in this case with costs.

[NOTE. On complainant's appeal, the supreme court reversed this decree, and remanded the case to the circuit court, with directions to enter a decree dismissing the bill for want of jurisdiction, and without prejudice to complainant's right to bring any suit she may be advised in the proper court. In the course of the opinion of the court, Mr. Justice Miller said: "If the conveyance by the Ridgelys, of the district, to Samuel C. Ridgely, of Maryland, had really transferred the interest of the former to the latter, although made for the avowed purpose of enabling the court to entertain jurisdiction of the case, it would have accomplished that purpose. McDonald v. Smalley, 1 Pet. (26 U. S.) 620, and several cases since, have well established this rule. But, in point of fact, that conveyance did not transfer the real interest of the grantors. It was made without consideration, with a distinct understanding that the grantors retained all their real interest, and that the deed was to have no other effect than to give jurisdiction to the court. And it is now equally well settled that the court will not, under such circumstances, give effect to what is a fraud upon the court, and is nothing more. In the case of Smith v. Kernochen, 7 How. (48 U. S.) 216, this court said: 'The true and only ground of objection in all these cases is that the assignor or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name being used merely for the purpose of jurisdiction. The suit is, then, in fact, a controversy between the former and the defendants, notwithstanding the conveyance.' And the court cites McDonald v. Smalley, already mentioned; Maxwell v. Levy, 4 Dall. (4 U. S.) 330; Hurst v. McNeil, Case No. 6,936."

[It was further held that the circuit court should render no decree on the merits of the case without having rightfully before it some person representing the interest of the Ridgelys. Barney v. Baltimore, 6 Wall. (73 U. S.) 280.]

BARNEY, (CAMPBELL v.) See Case No. 2,354.

BARNEY, (CATEAUX v.) See Case No. 2,511.

BARNEY, (COX v.) See Case No. 3,300.

BARNEY, (DALE v.) See Case No. 3,541.

Case No. 1,030.

BARNEY v. The D. R. MARTIN.

[11 Blatchf. 233:[1] 18 Int. Rev. Rec. 55; 5 Chi. Leg. News, 535; 8 Alb. Law J. 54; 8 Amer. Law Rev. 169; 21 Pittsbg. Leg. J. 10.]

Circuit Court, E. D. New York. July 2, 1873.[2]

CARRIERS—EJECTMENT OF PASSENGER—TRANSACTION OF PRIVATE BUSINESS ON PUBLIC CONVEYANCE.

1. A person who had, on board of a steamboat, which was a common carrier, pursued,

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

[2] [Appeal dismissed by supreme court in 91 U. S. 365.]

against the remonstrance of the carrier, the business of an express agent, on board of such steamboat, came on board of her again for that purpose, having purchased a ticket for passage, and refused to desist from such business, when requested by officers of the boat, and was removed from the boat, by such officers, without unnecessary force: *Held*, that the removal was justifiable.

2. A common carrier is not bound to permit a business which interferes with his own interests to be transacted on his vehicles.

3. A carrier who waives his rights, in that respect, in regard to one person, is not bound to waive them in regard to another person.

4. The sale or leasing to individuals, by a carrier, of rights to transact on his vehicle such business as may be done thereon, and the exclusion of others therefrom, are reasonable regulations, which the courts are bound to enforce.

[5. Cited in The T. A. Goddard, 12 Fed. 184, to the point that a carrier by water is responsible for due care and diligence as to goods received on board his vessel independently of any bill of lading.]

[Appeal from the district court of the United States for the eastern district of New York.

[In admiralty. Libel by David F. Barney against the steamboat D. R. Martin, her tackle, etc., (the Oyster Bay & Huntington Steamboat Company, claimants,) for damages for the ejection of the libellant. Decree for libellant (unreported) for $500. Claimant appeals. Reversed. Subsequently, libellant appealed to the supreme court, but his appeal was dismissed for want of jurisdiction. The D. R. Martin, 91 U. S. 365.]

J. M. Guiteau, for libellant.

Thomas Young, for claimants.

HUNT, Circuit Justice. On the trial before the district judge, the libellant recovered the sum of $1,000 as his damages, for ejecting him from the boat, on the morning of October 23, 1871. On an application subsequently made to him, the district judge reduced the recovery to the sum of $500. A careful perusal of all the testimony satisfies me that the libellant was pursuing his business as an express agent on board the boat; that he persisted in it against the remonstrance of the claimants; and that it was to prevent the transaction of that business by him on board the boat, that he was ejected therefrom by the claimants.

The steamboat company owing this vessel were common carriers between Huntington and New York. They were bound to transport every passenger presenting himself for transportation who was in a fit condition to travel by such conveyance. They were bound also to carry all freight presented to them in a reasonable time before their hours of starting. The capacity of their accommodation is the only limit to their obligation. A public conveyance of this character is not, however, intended as a place for the transaction of the business of the passengers. The suitable carriage of persons or property is the only duty of the common carrier. A steamboat company or a railroad company is not bound to furnish travelling conveyances for those who wish to engage on their vehicles in the business of selling books, papers, or articles of food, or in the business of receiving and distributing parcels or baggage, nor to permit the transaction of this business in their vehicles when it interferes with their own interests. If a profit may arise from such business, the benefit of it belongs to the company, and they are entitled to the exclusive use of their cars for such purposes. This seems to be clear both upon principle and authority. Story, Bailm. § 591a; Jenckes v. Coleman, [Case No. 7,258;] Burgess v. Clements, 4 Maule & S. 306; Fell v. Knight, 8 Mees. & W. 269; Com. v. Powers, 1 Amer. Ry. Cas. 389. These cases show that the principle thus laid down is true as a general rule.

The case of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 356, shows that it is especially applicable to those seeking to do an express business on such conveyances. It is there held, in substance, that the carrier is liable to the owner for all the goods shipped on a public conveyance by an express company, without regard to any contract to the contrary between the carrier and the express company. Although they may have no custody or control of the goods, they are liable to the owner in case of loss, if they allow them to be brought on board. It is the simplest justice that they should be permitted to protect themselves by preventing their being brought on board by those having them in charge. This rule would not exclude the transmission as freight of any goods or property, which the owners or agents should choose to place under the care and control of the carrier.

That persons other than the libellant carried a carpet bag without charge, or that such bag occasionally contained articles forwarded by a neighbor or procured for a friend, does not affect the carrier's right. The cases where this was proved to have been done were rare and exceptional, and do not appear to have been known to the carrier, nor does it appear that any compensation was paid to the agent. They were neighborly and friendly services, such as people in the country are accustomed to render for each other.

But, if the services and the business had been precisely like that of the libellant, the rule would have been the same. The rights of the carrier in respect to A. are not gone or impaired for the reason that he waives his rights in respect to B., especially if A. be notified that the rights are insisted upon as to him. If Mr. Prime was permitted to carry a bag without charge on the defendants' boat, or to do a limited express business thereon, this gives the libellant no right to do such business, when notified by the carrier that he must refrain from it. A carrier, like all others, may bestow favor where he chooses. Rights, not favors, are the subject of demand by all parties indiscriminately.

The incidental benefit arising from the transaction of such business as may be done on board a boat or a car belong to the carrier, and he can allow the privilege to one and exclude it from another at his pleasure. A steamboat company or a railroad company may well allow an individual to open a restaurant or a bar on their conveyance, or to do the business of boot blacking, or of peddling books and papers. This individual is under their control, subject to their regulations, and the business interferes in no respect with the orderly management of the vehicle. But, if every one that thinks fit can enter upon the performance of these duties, the control of the vehicle and the good management would soon be at end.

The cars or boats are that of the carrier, and I think exclusively are for this purpose. The sale or leasing of these rights to individuals and the exclusion of others therefrom come under the head of reasonable regulations, which the courts are bound to enforce. The right of transportation, which belongs to all who desire it, does not carry with it a right of traffic or business.

It is insisted that the libellant could not legally be ejected from the boat for any offence or violation of rules committed on a former occasion. It is insisted also, that having purchased a ticket from the agent of the company his right to a passage was perfect. Neither of these propositions is correct. In Com. v. Power, 7 Metc. [Mass.] 596, the passenger had actually purchased his ticket, and the chief justice says: "If he, Hall, gave no notice of his intention to enter the car as a passenger and of his right to do so, and if Power believed that his intention was to violate a reasonable subsisting regulation, then he and his associates were justified in removing him from the depot."

In Pearson v. Duane, 4 Wall. [71 U. S.] 605, Mr. Justice Davis, in giving the opinion of the court, held the expulsion of Duane to have been illegal, because it was delayed until the vessel had sailed. "But this refusal, he says, should have preceded the sailing of the ship. After the ship had got to sea, it was too late to take exception to the character of a passenger as to his peculiar position, provided he violated no inflexible rule of the boat in getting on board." The libellant in this case refused to give any intimation that he would abandon his trade on board the vessel. The steamboat company, it is evident, were quite willing to carry him and his baggage, and objected only to his persistent attempts to continue his traffic on their boat. He insisted that he had the right to pursue it, and the company resorted to the only means in their power to compel its abandonment, to wit: his removal from the boat. This was done with no unnecessary force, and accompanied by no indignity.

In my opinion, the removal was justified, and the decree must be reversed.

BARNEY, (ECHEVERRIA v.) See Case No. 4,262.

BARNEY, (FABER v.) See Case No. 4,601.

BARNEY, (FALLECK v.) See Case No. 4,625.

Case No. 1,031.

BARNEY v. GLOBE BANK.

[5 Blatchf. 107;[1] 2 Amer. Law Reg. (N. S.) 221.]

Circuit Court, N. D. New York. Nov. Term, 1862.

REMOVAL OF CAUSES —ORIGINAL JURISDICTION OF FEDERAL COURTS—ACT OF SEPT. 24, 1789—ORIGINAL PROCESS — FOREIGN CORPORATION — "A SUIT."

1. A suit commenced by summons in a state court of New York, under the one hundred and thirty-fifth section of the Code of Procedure of that state, against a foreign corporation having property in that state, followed by a warrant of attachment issued under section 227 and the following sections of the same Code, against the property of the defendants in that state, and duly served by attaching property, is "a suit," within the meaning of the twelfth section of the judiciary act of September 24th, 1789, (1 Stat. 79,) providing for the removal of suits into this court.

[Cited in Erwin v. Walsh, 27 Fed. 579.]

2. This court has jurisdiction of such a suit, if properly removed, although it could not, by reason of the provisions of the 11th section of the same act, have compelled the defendants, by compulsory process, to submit to its jurisdiction in a suit originally brought against them in this court.

[Cited in Winans v. McKean Railroad & Nav. Co., Case No. 17,862; Sands v. Smith, Id. 12,305; Warner v. Pennsylvania R. Co., Id. 17,186; U. S. v. Ottman, Id. 15,977; Moynahan v. Wilson, Id. 9,897; Kelly v. Virginia Protection Ins. Co., Id. 7,677; Eaton v. Calhoun, 15 Fed. 156; Fidelity Trust Co. v. Gill Car Co., 25 Fed. 740; Erwin v. Walsh, 27 Fed. 580; Rosenbaum v. Bauer, 120 U. S. 458, 7 Sup. Ct. 637; Kansas City & T. R. Co. v. Interstate Lumber Co., 37 Fed. 6.]

[See New England Screw Co. v. Bliven, Case No. 10,156.]

3. Such a suit can be removed by the foreign corporation under the provision of the said 12th section, which gives the right of removal to a defendant who is a citizen of another state than that in which the suit is brought.

[See New England Screw Co. v. Bliven, Case No. 10,156.]

4. A suit to recover damages from a corporation for its breach of an implied contract, in neglecting to protest and give notice in regard to certain drafts forwarded to it by a correspondent bank, such suit being brought by an assignee of the right of action, is not within the meaning of the 11th section of the said act, a suit to recover the contents of a chose in action in favor of an assignee.

[Cited in Simons v. Ypsilanti Paper Co., 33 Fed. 194.]

5. After the removal of a suit into this court from a state court under the said 12th section, an attachment of property of the defendant, made before the removal of the suit into this court, under a warrant of attachment issued by the state court after the commencement of the suit, will continue to hold the property to

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

answer the final judgment of this court in the suit, as being, within the meaning of said 12th section, an attachment of such property by "the original process."

[See Act March 3, 1875, (18 Stat. 471,) § 4.]

[See note at end of case.]

At law. This was a suit originally brought in the supreme court of the state of New York. The plaintiff [Danforth N. Barney] was a citizen of that state, and the defendants were a corporation [the president, directors, and company of the Globe Bank of Boston] located in the state of Massachusetts. The action was brought by the plaintiff, as assignee of the Merchants' Bank, of Cleveland, Ohio, to recover damages for an alleged breach of an implied contract arising out of the course of business between the two banks. The alleged breach consisted in the neglect of the defendants to protest and give notice in regard to certain drafts, &c., forwarded to them by the Merchants' Bank. The action was commenced by summons, under the 135th section of the New York Code, which provides for the bringing of suits against foreign corporations having property in the state of New York. The defendants being non-resident and out of the state, no service could be made on them, except by the publication of the summons as provided for in that section. Subsequently, according to the provisions of the same Code, (sections 227 et seq.,) the plaintiff obtained a warrant of attachment against the property of the defendants in New York, which was duly served and property was attached. Afterwards, the defendants entered an appearance in the state court, and filed their petition, under the 12th section of the judiciary act of September 24th, 1789, (1 Stat. 79,) for the removal of the case into this court. The order of removal having been granted by the state court, and the case entered in this court, the plaintiff now moved to remand the case to the state court, for want of jurisdiction.

Benjamin D. Silliman, for plaintiff.

Augustus F. Smith, for defendants.

SHIPMAN, District Judge. It is supposed, by the parties to this controversy, that the national and state courts have laid down different rules of law, and come to different conclusions, in cases of like character, and that the result in this case may, therefore, depend to some extent upon the particular tribunal in which it shall be finally determined. This, although not affecting the grounds upon which it must be decided, renders, in their judgment, the disposal of this motion of unusual importance to the parties themselves. In coming, therefore, to the result which I have reached, I have not failed attentively to consider the very learned and elaborate argument presented in support of the motion. The more prominent features of this argument are:

1. That this is not "a suit," within the meaning of the 12th section of the judiciary act, but a mere special statutory proceeding in rem, and therefore not within this section providing for a removal;

2. That if it be such a suit, still it is not subject to removal, because no cases can be removed from a state court to the circuit court except such as could have been originally brought in the latter, and that this does not fall within that class of cases:

3. That the defendant, the Globe Bank, is not a citizen within the meaning of the 12th section of the judiciary act, and, therefore, cannot exercise the privilege of removal;

4. That the plaintiff sues as assignee of the Merchants' Bank, of Cleveland, Ohio, which latter could not have maintained a suit in this district against this defendant; that the plaintiff can bring no suit in this court as assignee, which his assignor could not have brought; and that, therefore, the jurisdiction fails.

Upon the first of the series of propositions I have enumerated, it may be remarked, that the proceeding by which the action was commenced in the state court, was, substantially, one of foreign attachment, the object of which is to take the property of a non-resident which is within reach of the process of the court, and apply it to the satisfaction of the claim that may be judicially established against him, although his person may be beyond the reach of that process. The form of the proceeding under which the attachment was made in this case differs somewhat from that used in some of the other states. The warrant of attachment did not form a part of, or accompany, the summons, when that was issued, but was subsequently granted, on application of the plaintiff. This, however, was merely optional with the plaintiff. The Code provides, that he may have the warrant "at the time of issuing the summons, or at any time afterwards." Now, there is a certain popular sense in which this may be said to be a proceeding in rem, inasmuch as it deals with the things or property of the defendant, whether it reaches his person by legal process or not. So is every proceeding by which the property of a defendant is attached and appropriated to the satisfaction of his debts. But how is this done, in actions at law? In all cases, by a judgment of a court of law pronounced in the progress of the cause, adjudging him liable to the plaintiff on the cause of action set out in the declaration. The judgment is against him, in personam, and not against a specific piece of property, or thing, like a decree against a ship, or a bale of goods, in a court of admiralty. The liability of the defendant does not rest upon the fact that he is the owner of certain specific articles of property proceeded against, out of which springs an obligation against him, to be enforced by a seizure and condemnation of the things, in a proceeding strictly in rem. The only substantial difference between the character or legal effect of

a judgment obtained through process of foreign attachment, and one obtained after personal service, is, that the defendant is not concluded by it. The proceeding by foreign attachment is a suit, and a suit at law, within the meaning of the act of congress under consideration. The exemption of the defendant from being personally concluded by it is one which he can waive by appearing in the suit and pleading to the issue. His appearance does not change the nature of the action. It enlarges the legal effect of the judgment, so as to preclude him from further contesting it, except by way of revision, in the same, or some appellate tribunal.

The principle contended for in the second proposition, namely, that no case can be removed from the state court to the circuit court unless it could have been originally brought there, is not of universal application.

It is contended, that the Globe Bank, being neither an inhabitant of, nor found within, the district, at the time of serving the writ, could not be sued in the circuit court. This objection rests upon a clause in the 11th section of the judiciary act, which provides, that "no civil suit shall be brought before either of said courts" (circuit or district) "against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." A preceding clause of the same section confines the jurisdiction to suits "between a citizen of the state where the suit is brought and a citizen of another state." No question arises under the latter clause, in this part of the case. The plaintiff is a citizen of this state, residing in this district. The Globe Bank is an inhabitant of the state of Massachusetts, and was not found in this district at the time of serving the writ. It is clear that no compulsory process could force the Globe Bank into this court. The very object of the statute was to exempt parties defendant, who are non-resident and out of the district at the time of serving the writ, from liability to be sued in districts other than those of which they are inhabitants, or in which they are present at the time when suit is brought. The reason of this provision is, obviously, to prevent a plaintiff from subjecting a defendant to a litigation in a distant jurisdiction, within which he neither resides nor enters. Any other rule would be oppressive, in a country of such vast territorial extent as the United States. But this rule is established for the protection of the defendant, and is a personal privilege, which he can always waive. He may waive it in a suit of foreign attachment as well as in any other. Toland v. Sprague, 12 Pet. [37 U. S.] 330, 331. It follows that, although the Globe Bank could not have been brought into this court by any compulsory process, it being non-resident and without the district at the time of serving the writ, yet, if this very suit had been originally instituted in this court, and the defendant had appeared and pleaded to the issue, it would have cured the error. The jurisdiction of this court would then have been complete over the person of the defendant, as it certainly would have been over the subject matter of the action.

But, the validity of this removal is to be tested by the 12th, instead of the 11th, section of the act in question. And it has been decided, by very eminent authority, that the objection that the defendant is not an inhabitant nor found in the district at the time of serving the writ, cannot avail in a case where he has appeared in the state court, and removed the cause to a circuit court. Sayles v. North Western Ins. Co., [Case No. 12,421.] This was an action brought in the supreme court of Rhode Island against a foreign corporation. The corporation was neither an inhabitant of, nor found within, the district, at the time of serving the writ. But its property was attached in the suit in the state court. Thereupon it appeared in the state court, and, by petition, in the usual manner, removed the case into the circuit court. It then moved to dismiss the case for want of jurisdiction, which motion was denied. Mr. Justice Curtis, in delivering the opinion of the court, says: "But the jurisdiction over this case does not depend upon the 11th, but on the 12th, section of the act. If it be a suit which that section authorized the defendant to remove, it empowers this court to take jurisdiction over it when removed. The question, therefore, really is, whether the suit was rightfully removed. If it was, the motion to dismiss must be overruled; if it was not, the action must be remanded to the state court." The result arrived at was, that the case was rightfully removed, and that the jurisdiction of the circuit court over it was complete. The motion to remand in that case was made by the defendant, who had procured the removal; and, in the present case, it is made by the plaintiff, who would have resisted the motion in the state court, had the proceedings on the removal not been ex parte. But this circumstance does not distinguish the legal grounds upon which the two motions rest. In both, the objection to proceeding in the circuit court is an alleged want of jurisdiction. It is true, that the consequences of allowing defendants to remove cases from the state to the federal tribunals, and then procure their dismissal from the latter for want of jurisdiction, would be of a different character from those which would result from allowing plaintiffs to prevent the removal of cases brought against non-residents who should not be personally served with process, but they would be equally mischievous and oppressive. In the former class of cases, the state laws, which provide for the attachment and sequestration of the property of non-resident debtors upon whom no personal service can

be made, would be rendered inoperative whenever the sum demanded exceeded five hundred dollars. In the latter, every non-resident debtor, not served personally, and who has property in the district where his creditor resides, would be denied the privilege of transferring such a suit to the courts of the United States. The privilege sought by the act of congress to be secured, by giving the option of selecting the tribunal to the non-resident party, would be reversed. The resident party would possess that option, and thus the prime object of the statute authorizing the removal would be defeated, in a large class of cases. See, to the same effect, Bliven v. New England Screw Co., [Case No. 1,550.]

The third proposition, that the Globe Bank, a corporation, is not a citizen, within the meaning of the 12th section of the judiciary act, and, therefore, not entitled to the privilege of removal, is untenable. No good reason can be perceived upon which to rest a distinction of that kind. On the contrary, the reasons for holding corporations to be citizens, within the meaning of both the 11th and the 12th sections of that act, are stronger now than when the supreme court overruled the doctrine that they were not citizens under the 11th section. Corporations have largely multiplied; the capital of the country has, much of it, become merged in these artificial persons; and an immense amount of business is now transacted through their agency. This business is not confined to the particular states in which they were created, and where they are located, but is distributed over the whole country, in the same manner as the business of natural persons. To establish a distinction between their right to sue and their liability to be sued in the federal courts, and their right to remove to those tribunals suits brought against them in the state courts, resting upon no solid considerations, would produce only inconvenience and confusion.

The fourth consideration urged against the jurisdiction of this court, rests on the clause of the 11th section of the judiciary act which provides, that no district or circuit court shall "have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made." If no assignment of the right of action upon which this suit is founded had been made, the Merchants' Bank of Cleveland alone could have sued upon it. That corporation could have maintained no action upon it in this district. No federal courts, except those of Ohio and Massachusetts, would have jurisdiction of such a suit. This, of course, follows from that clause of the 11th section of the judiciary act which limits the jurisdiction of the courts of the United States, in this class of cases, to suits "between a citizen of the state where the suit is brought and a citizen of another state." The two corporations being citizens, within the meaning of that section, one can sue the other only in the district where one or the other is located. Neither of them being located in New York, no suit could have been maintained in this court by the Merchants' Bank against these defendants. Can the plaintiff, as assignee of this right of action, maintain it? This presents the real and only question involved in this point, which is: Is this suit, by the plaintiff, as assignee, which is founded upon the original right of the Merchants' Bank to recover damages from these defendants for their neglect to protest and give notice in regard to the drafts, &c., in question, "a suit to recover the contents of a chose in action?" This right of the Merchants' Bank, which they assigned to the plaintiff, is, undoubtedly, a chose in action. So would a right to recover possession of the drafts in question, or damages for their detention, be equally a chose in action. But a suit to enforce either of these two latter rights would not be one to recover the contents of a chose in action, within the meaning of this prohibition of the statute. The case of Deshler v. Dodge, 16 How. [57 U. S.] 622, is decisive on this point. The word "contents," in the statute, is significant, and its true import is to be sought in the connection in which it is found. The only choses in action (a term of broad and somewhat indefinite meaning) specifically designated in the act, are promissory notes and foreign bills of exchange, the former being included within the prohibition, and the latter excepted out of it. The word "contents" is easily understood, when applied to these instruments. It designates the specific sums named therein, and payable by the terms of the instruments themselves. The effect of the case of Deshler v. Dodge, 16 How. [57 U. S.] 622, already cited, is to confine the meaning of the term "chose in action," as employed in this section of the act, within narrower limits than those in which it is generally used. What choses in action, then, fall within the prohibition of the statute? We think those only are included in it, which may be properly said to have "contents." These are not mere naked rights of action, founded on some wrongful act, some neglect or breach of duty to which the law attaches damages; but they are rights of action founded on contracts, which contracts contain within themselves some promise or duty to be performed. A suit to compel the performance of that promise or duty, by securing to the plaintiff that which is withheld by the defendant, is a suit to recover the "contents" of the chose in action. Grant that, in the case before us, there was an implied promise or duty, the performance of which, the law merchant, as applied to the course of business between the parties, cast upon these defendants; but this suit is not brought to

enforce the performance of that promise or duty. It is not to secure the protest and notice of this commercial paper. It is to recover damages for the failure of the defendants to take the proper steps to preserve its value. This suit, therefore, being founded, not on a chose in action, for the purpose of recovering its "contents," but upon a mere right of action to recover damages imposed by law for a delinquency, is not within the prohibition of the statute, and this objection to the jurisdiction of this court fails.

It was suggested, on the argument, that the clause of the 12th section of the judiciary act, which provides, in case of the removal of a suit from a state to a circuit court, that "any attachment of the goods or estate of the defendant, by the original process, shall hold the goods or estate so attached, to answer the final judgment, in the same manner as, by the laws of such state, they would have been holden to answer final judgment, had it been rendered by the court in which the suit commenced," would not protect the attachment made in this case. The suit was commenced, as already stated, by summons, and the warrant of attachment was issued afterwards. It is urged, that the warrant of attachment not having issued at the same time with the summons, it is not the "original process," and that, therefore, the lien on the goods will be lost if the jurisdiction of this court is maintained. But this view of the matter arises out of an erroneous interpretation of the term "original process." It does not refer merely to the first notice, or precept, by which the suit may be initiated, but includes, also, any mesne process issuing out of the state court, by which the property is seized, before the case is removed into this court. This attachment, therefore, comes within the saving clause of the statute, and will hold the goods attached, to answer final judgment in this court. See, contra, New England Screw Co. v. Bliven, [Case No. 10,156.]

The motion to remand the cause is, therefore, denied, on all the grounds.

[NOTE. The case of New England Screw Co. v. Bliven, Case No. 10,156, is referred to as holding that an attachment issued after the summons by which the suit was commenced is a separate and not an "original process," within the meaning of the twelfth section of the act of September 24, 1789, (1 Stat. 79.) This case was decided in 1854. The act of March 3, 1875, (18 Stat. 471,) § 4, provides that "when any suit shall be removed from a state court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed."]

BARNEY, (ISELIN v.) See Case No. 7,103.
BARNEY, (KAUPE v.) See Case No. 7,628.

Case No. 1,032.

BARNEY v. KEOKUK et al.

[4 Dill. 593.] [1]

Circuit Court, D. Iowa. Oct. Term, 1876.[2]

DEDICATION OF STREETS — MUNICIPAL CONTROL — RAILWAY TRACKS AND DEPOT BUILDING IN STREET — STEAMBOAT DEPOT BUILDING ON WATER STREET.

1. The owner of lots in the city of Keokuk, fronting on Water street, owns the fee in the street to the river, subject to the public easement.

2. The same rule applies to the original street and the newly made portions thereof reclaimed from the river.

3. Under the legislation of Iowa, as construed by the supreme court of the state (which construction was followed by this court,) a railway company, with the assent of the municipal authorities, has the right to lay down its tracks over and upon Water street, in front of the plaintiff's lots, without the plaintiff's consent; but this right does not extend to the erection in the street of a permanent and substantial railway depot building in front of the plaintiff's lots, to the plaintiff's injury.

4. In view of the location and purpose of the dedication of Water street and the charter power of the city, it was held that the city might authorize a steamboat company to erect, for the shipment and receipt of merchandise, a building on or near the bank of the river in front of the plaintiff's lot, reserving municipal and police control over such structure.

5. Right to maintain ejectment subject to the public easement, quaere?

At law. Action in the nature of ejectment to establish plaintiff's right in Water street, Keokuk, subject to the public easement therein. The plaintiff, in his petition, described the locus in quo, as follows: "All the land lying and being in front of lots five and six, in block three, in the city of Keokuk, and extending from the front line of said lots to the Mississippi rivers, the full width of said lots." The plaintiff is the owner of said lots five and six, block three, which front on Water street, and he claims to be the owner of the street in front thereof, subject to the rights of the public.

The defendants are the city of Keokuk and several railway companies and the steamboat packet company, that respectively occupy the street in front of the plaintiff's lots, under the authority of the city. All the railway companies occupy part of Water street by railway tracks, but only one of the defendants (the Keokuk and Des Moines

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 94 U. S. 324.]

Railway Company) has erected any building on the street.

The packet company use the street at the water line as a landing, and have erected on the street, as widened near the bank, in front of the plaintiff's lots, a building, in which to receive, shelter, and store merchandise received from or to be shipped on their boats. In the contract of the packet company with the city, dated March 28, 1870, it is provided that "the packet company shall not use and occupy said premises, otherwise than is customary for landing for steamers and storing merchandise, for shipping purposes, without reward, for the convenience of shippers and commerce, and said merchandise shall remain on said leased premises only for a reasonable time, to be governed by the police regulations for the government of the levee, according to the ordinances and resolutions now in force or that may hereafter be adopted and passed. Said building to be removed at the expiration of the ten years, at cost of packet company. In consideration thereof, the packet company agreed to fill in with earth the space leased and macadamize the same, under the direction of the city engineer, and to receive at par the wharf bonds of Keokuk in payment therefor."

The city of Keokuk, by its charter, has the usual municipal power over streets and their uses; but there is no special provision in the charter as to railway companies occupying the streets. This subject is regulated by the general legislation of the state, known as the right of way act, which has been frequently construed by the supreme court of the state to authorize railway companies to lay their tracks longitudinally upon the public highway (although the fee thereof is in the adjoining proprietor), and upon the streets of cities, without compensation to the abutters or adjoining owners.

As to wharves, the amended charter of January 22, 1853, section 7, provides as follows: "The said city council of Keokuk shall have the power to establish and regulate a wharf or wharves in said city, and more particularly to use the whole of Water street for said purpose, and to fix rates of landing and wharfage of all boats, rafts, water crafts, goods, wares, merchandise, produce, and other articles that may be moored at, landed, or taken from any landing, wharf, or wharves that have been or may be hereafter established by said city."

The other facts were mainly agreed upon, and appear in the report of the case on error, in [Barney v. Keokuk,] 94 U. S. 324, and are here omitted to save space.

The case was submitted to the circuit judge, originally, upon written arguments; after considering which he made the following order:

"In view of the important and difficult questions in this cause, it is ordered that it be set down for oral argument at the next term, upon the following points:

"1. Is the fee of the locus in quo in the plaintiff? And herein, whether there was any valid dedication of Water street, as respects the plaintiff's lots, prior to the decree of partition, and particularly whether the Galland map operated as an effectual dedication? And herein, as to the effect of the deeds of Marsh, Lee, Delevan, Galland, and others, of June 14, 1837, for lots on Water street, including a lot in block three, and elsewhere, in the town of Keokuk, 'as per plat thereof,' in connection with the fact that Marsh, Lee, and Delevan, trustees, afterwards drew the lots now owned by the plaintiff? Is the plaintiff estopped by these facts to deny a dedication of Water street prior to the decree of partition? Counsel will furnish an abstract of title of the plaintiff's lots from the beginning.

"2. If there was such prior dedication, what was the effect of it as respects the fee of the street, under the statutes then in force in that regard? And herein, see construction of statutes in Schurmeier v. St. Paul & P. R. Co., 10 Minn. 82 et seq., [Gil. 59,] affirmed [St. Paul & P. R. Co. v. Schurmeier,] 7 Wall. [74 U. S.] 272; and what has been the construction of the statutes, in this regard, in Michigan, Wisconsin, Illinois, and Iowa? And if the construction in Iowa is in conflict with the case in [St. Paul & P. R. Co. v. Schurmeier,] 7 Wall. [74 U. S.] 272, which construction should be applied in this case?

"3. If there was no effectual dedication prior to the partition decree, or none binding upon the plaintiff, and supposing that to leave the fee in Water street in the adjoining lot owners, subject to the public easement, can the city authorize the uses which have been made of Water street by the several railway companies and the packet company?

"4. If the right is with the plaintiff, is ejectment a proper remedy to enforce it?"

George W. & A. J. McCrary, J. L. Rice, and W. B. Collins, for plaintiff.

Craig & Collier, Gillmore & Anderson, Ingersoll & Puterbaugh, Seaton & Spaan, W. S. Bush, and John Gibbons, for defendants.

Before DILLON, Circuit Judge, and LOVE, District Judge.

DILLON, Circuit Judge, (LOVE, District Judge, concurring,) announced that the court had reached the following conclusions:

1. There was no completed statutory dedication of Water street under the town plat act of 1839, prior to the decree of partition, for the reason, among others, that all of the proprietors, i. e., the half-breed owners and their grantees, did not join in making a plat or in selling lots according to the Galland or other plat. What was done prior to the decree, was at most a common law dedication by those who platted or recognized the plat, and it was, therefore, competent for the decree of partition to provide, as it did, that

"lots on Water street should include all the land in front of the lots to the Mississippi river." This seems to have been the accepted view of the question. Milburn v. City of Cedar Rapids, 12 Iowa, 246; Haight v. Keokuk, 4 Iowa, 199. This leaves the fee of the land in Water street in the adjoining lot owners, including the plaintiff, subject to the rights of the public.

2. The additional ground made by filling in Water street by the city, outside of the original water line, partakes of the same character as the original street. The fee of the newly made ground in front of the plaintiff's lot is, therefore, in the plaintiff, but it is subject to the same public uses as the original street. Haight v. Keokuk, 4 Iowa, 199, 214; Wood v. San Francisco, 4 Cal. 190; New Orleans v. U. S., 10 Pet. [35 U. S.] 662.

3. Under the legislation of Iowa, as construed by the supreme court of the state, railroad companies, certainly with the assent of the municipal authorities, have the right to lay down their tracks in the streets of a city, whether they were dedicated under the statute or as at common law—that is, whether the fee be in the city or in the adjoining proprietor. The cases in relation to railway tracks in common highways, and those relating to railways in streets in Dubuque and Burlington, establish this. Milburn v. City of Cedar Rapids, 12 Iowa, 249; Clinton v. Cedar Rapids & M. R. R. Co., 24 Iowa, 455; Tomlin v. Dubuque, B. & M. R. Co., 32 Iowa, 106; Chicago, N. & S. R. Co. v. Newton, 36 Iowa, 299; Cook v. Burlington, 36 Iowa, 357; Clinton v. Clinton & L. H. Ry. Co., 37 Iowa, 61; Ingram v. Chicago, D. & M. R. Co., 38 Iowa, 669. The court should adopt as a rule of decision, on such a question, the exposition of the state statutes by the supreme court of the state. Suydam v. Williamson, 24 How. [65 U. S.] 427; Leffingwell v. Warren, 2 Black, [67 U. S.] 599, 603; Christy v. Pridgeon, 4 Wall. [71 U. S.] 196; Nichol v. Levy, 5 Wall. [72 U. S.] 433; Shipp v. Miller, 2 Wheat. [15 U. S.] 316; Jackson v. Chew, 12 Wheat. [25 U. S.] 162; Swift v. Tyson, 16 Pet. [41 U. S.] 17.

4. This, however, does not give the railway company, even with the assent of the municipality, the right to erect a permanent and substantial depot building in the street. The right of way act of 1853 has never been thus extended by any judicial exposition of the state supreme court, nor, in our judgment, ought it to be, at least in cases where the fee is in the abutting lot owners.

5. In view of the location and situation of Water street, and the presumed intention of the dedication thereof to the public, and guided by the opinion of the supreme court of the state in this regard, in Haight v. Keokuk, supra, and the power of the city as to wharves, and the use of Water street for that purpose, given by the act of 1853, Water street may be used for levee and wharf purposes under municipal management and control. The building erected by the packet company, under the contract with the city of March 28, 1870, for the purposes therein mentioned, for the receipt and temporary shelter and storage of goods, etc., subject to municipal control, is a reasonable use of Water street as a wharf or levee as incidental to the requirements of navigation and shipping, and does not infringe the plaintiff's rights. Illinois & St. L. R., etc., Co. v. St. Louis, [Case No. 7,007.]

6. We have some doubt as to the right to maintain ejectment in such a case as this, but, under the practice in this state, we can adjudge the right even though we could not issue a writ of possession. The plaintiff may take a judgment as respects the railway depot building in such form as he prefers. Judgment accordingly.

NOTE, [from original report.] The judgment in this case was affirmed, [by the supreme court,] on all points, at the October term, 1876. [Barney v. Keokuk, 94 U. S. 324.]

Mr. Justice Bradley, delivering the opinion of the supreme court, makes this important statement concerning a distinction which has often been made the basis of measuring the extent of the rights of the abutting proprietors: "On the general question as to the rights of the public in a city street, we cannot see any material difference in principle with regard to the extent of those rights, whether the fee is in the public, or in the adjacent land owner, or in some third person."

In view of the facts of the case, this observation cannot fairly be considered as obiter, for the plaintiff's case essentially rested upon the proposition that he was the owner of the fee of the street in front of his lots, and that this gave him the right to recover—a right which it was clear, under the laws of Iowa, he did not otherwise possess. But whether the principle stated in the above extract was actually in judgment or not, it is the sound doctrine as applied to streets in cities and incorporated places, and will, eventually, be acknowledged as such, wherever the legislative will is silent and the courts are not tied down by previous decisions.

In St. Paul & P. R. Co. v. Schurmeier, 7 Wall. [74 U. S.] 272, (which, for a better understanding of it, should be read in connection with the same case below,—10 Minn. 82, [Gil. 59,]—which was similar to the principal case in all essential respects, a different result was reached. The supreme court of Minnesota held that the use of the "landing" and streets by the railway company was an additional servitude, of which the adjoining lot owner could not be deprived without compensation to him; and Mr. Justice Clifford, in the concluding part of his opinion, [Railroad Co. v. Schurmeier,]—7 Wall. [74 U. S.] 289,—seems to assent to the correctness of this view. In Schurmeier's Case, the result was that the railroad company was enjoined, at his instance, from constructing its road on the landing and streets in front of his lots. But in Barney's Case the railroad company was held to have the right thus to use the street. These opposite results, under statutes substantially the same, are in consequence of the supreme court of the United States adopting in each case, as a rule of decision, the conflicting construction of the state legislation by the supreme courts of Minnesota and Iowa.

BARNEY, (LATHAM v.) See Case No. 8,102.
BARNEY, (MOKE v.) See Case No. 9,698.
BARNEY, (MORRIS v.) See Case No. 9,826.

BARNEY, (NAPIER v.) See Case No. 10,009.

BARNEY, (OELRICHS v.) See Case No. 10,443.

BARNEY, (OGDEN v.) See Case No. 10,454.

BARNEY, (PARROTT v.) See Case No. 10,773.

BARNEY, (POWERS v.) See Case No. 11,361.

BARNEY, (RUSSELL v.) See Case No. 12,152.

BARNEY, (SCHMEIDER v.) See Case No. 12,462.

BARNEY, (TROOST v.) See Case No. 14,185.

BARNEY, (UNITED STATES v.) See Cases Nos. 14,524 and 14,525.

Case No. 1,033.

BARNEY v. WASHINGTON CITY.

[1 Cranch, C. C. 248.] [1]

Circuit Court, District of Columbia. July Term, 1805.

PARTIES—MISNOMER—PENALTY—JUDGE—DISQUALIFICATION—INTEREST.

1. A warrant to recover the penalty of a by-law, must name the plaintiffs by their corporate name, and must describe the offence with reasonable certainty.

2. The mayor of Washington cannot exercise jurisdiction in a case in which he is a party.

[Cited in Hall v. Washington, Case No. 5,953.]

At law. Appeal from a justice of the peace on a judgment for a penalty for running a hack, not licensed.

Messrs. Key and Morsell, for appellant, contended, 1st. That the warrant to take Barney to answer to the "corporation," (not calling them by their corporate name,) is void. 2d. That the warrant ought to have stated that Barney was a person residing within the jurisdiction of the corporation.

Mr. Hewitt, for appellee, relied on the seventh section of the act of congress of May 3, 1802, (2 Stat. 195, charter of Washington,) and on the appearance of Barney, without objecting to the jurisdiction, or to the misnomer of the plaintiff.

The warrant was in these words: "District of Columbia, Washington County, to wit:—"You are commanded to take John H. Barney before me, or some other justice of the peace for said county, to answer unto the corporation for running a hack without license, and hereof make return on the 13th day of July. Given under my hand and seal, this 9th day July, 1805. Thomas Peter. (L. S.) To any constable in said county." Indorsed, "July 13th, 1805. Judgment is given in favor of the corporation for $20, and costs 33 cents. Robert Brent. Issue an execution on the above. Robert Brent. The Clerk of Washington County."

[1] [Reported by Hon. William Cranch, Chief Judge.]

The judgment was reversed with costs, because the words "the corporation" are too uncertain; because the defendant is not stated to be the owner of a hack; because the offence is too generally laid; because the judgment is for a double penalty; because the day of the return is not certain, and because judgment was rendered by the mayor of the city of Washington, in a case in which he is a party.

BARNEY, (WESTFALL v.) See Case No. 17,447.

BARNEY, (WILLIAMS v.) See Case No. 17,713.

BARNEY, (WOODRUFF v.) See Case No. 17,986.

BARNEY EATON, The. See Case No. 1,028.

BARNHARDT, (UNITED STATES v.) See Case No. 14,526.

BARNITS v. FIRST NAT. BANK OF EATON. See Case No. 1,034.

Case No. 1,034.

BARNITS v. FIRST NAT. BANK OF HAMILTON.

SAME v. FIRST NAT. BANK OF EATON.

[1 Cin. Law Bul. 45.]

Circuit Court, S. D. Ohio. March, 1876.

USURY—PENALTY—NATIONAL BANKS—ACT JUNE 3, 1864.

[The words "legal representatives," as used in Act June 3, 1864, (13 Stat. 108, § 30,) providing for the recovery of twice the amount of usurious interest from a national bank by the "legal representatives" of the person paying such interest must be construed strictly, and not to include the assignee in bankruptcy of such person.]

[Followed in Barnett v. Muncie Nat. Bank, Case No. 1,026.]

[Contra, see Wright v. First Nat. Bank of Greensburg, Case No. 18,078, and note to Barnett v. Muncie Nat. Bank. Id. 1,026; same case, on appeal, 98 U. S. 555.]

[At law. Two actions by David Barnett and Isaac E. Craig, assignees of Barnits & Whitesides, one against the First National Bank of Hamilton, and the other against the First National Bank of Eaton, under Act June 3, 1864, (13 Stat. 108, § 30,) to recover double the amount of usurious interest alleged to have been paid on loans. Judgment for defendants, dismissing the causes.]

Miller & Gilmore and Wilson & Craig, for plaintiffs.

Mr. Brown, for First Nat. Bank of Hamilton.

Hogans & Broadwell, for First Nat. Bank of Eaton.

Before EMMONS, Circuit Judge, and SWING, District Judge.

These two cases were heard together upon questions arising upon the pleadings. The question determined arose upon the construc-

tion of the 30th section of the national banking act, [Act June 3, 1864; 13 Stat. 108.] Barnits & Whitesides had large lines of discount, principally with the National Bank of Eaton, upon which it was alleged Barnits & Whitesides paid, and the banks received, more than the legal rate of interest. The section of the national banking act referred to, provides that "the person by whom greater than the legal rate of interest has been paid, or his legal representatives may recover back in an action in the nature of an action of debt, twice the amount of interest thus paid from the association receiving or taking the same." After these transactions, Barnits & Whitesides made an assignment for the benefit of their creditors under the state law; and their assignees (the plaintiffs) brought these suits to recover double the amount of the alleged usurious interest so paid and received, amounting to several thousand dollars. The plaintiffs claimed that they were the legal representatives of Barnits & Whitesides, and therefore entitled to recover. But the court held that the term "legal representatives" must be defined according to the legal signification of the words; that under the national bankrupt act, which vests in the assignee all the estate of the bankrupt, it might well be that such assignee could maintain this action, but that no such consequence followed under the state laws; that inasmuch as this was a penal statute, and therefore to be construed strictly, the popular or other signification of these words could not be adopted, contrary to their strict legal acceptation; and that the definition claimed by the plaintiffs could nowhere be found in the law dictionaries, or in any decided cases, but that such authorities as were cited to the court very clearly omitted such description of a legal representative as that claimed. The counsel for the banks cited the case of Rice v. White, 8 Ohio, 216, where it was held that the words "legal representatives," in the act defining the duties of county auditors, meant the heir of a deceased person, and vested in him, and not the administrator, the title of a tax certificate. And EMMONS, Circuit Judge, who delivered the opinion of the court, sustained the views of the defendants' counsel by rendering a judgment to dismiss the causes.

Case No. 1,035.

BARNS et al. v. OMALLY et al.

[4 McLean, 576.] [1]

Circuit Court, D. Michigan. June Term, 1849.

EQUITY PRACTICE—DISMISSAL OF BILL WITH COSTS.

1. A bill filed which the complainant can not sustain will be dismissed, at his costs.

2. No grounds of equity, real or supposed, at the filing of the bill can authorize the court to tax the costs against the defendant.

[In equity. Creditors' bill by Barns & Pharo against C. M. Omally and others. Bill dismissed.]

Barstow & Lockwood, for complainants.
Mr. Abbott, for defendant.

OPINION OF THE COURT. This was a creditors' bill alleging fraud against the defendant, in covering, by assignment, the property of C. M. Omally, against whom a judgment was obtained and execution returned, nulla bona. The answer denies the material allegations of the bill; and the plaintiff declines a further prosecution of the suit, and is willing that the bill shall be dismissed; but he insists that under the circumstances, the bill should be dismissed at the costs of the defendant. That there was reasonable ground for the creditors' bill. The court held that this could not be distinguished from an ordinary bill, where the plaintiff could not sustain it; and that it must be dismissed at plaintiff's costs.

BARNUM, (DIXON v.) See Case No. 3,928.

Case No. 1,036.

BARNUM v. GOODRICH.

Circuit Court, N. D. Illinois. July 2, 1873.

[Cited in Allis v. Stowell, 16 Fed. 788, and in Birdsell v. Hagerstown Agr. Imp. Manuf'g Co., Case No. 1,437, to the point that, to prevent a multiplicity of suits, the court may require the prosecution of suits between the patentee and the mere user of a patented machine to be suspended, and await the result of a suit pending between the patentee and the principal infringer, from whom the user purchased the machine.]

[In equity. Bill by Isaac W. Barnum against Herman B. Goodrich for infringement of a patent and for an accounting. Upon defendant's application, plaintiff was enjoined from prosecuting suits commenced, and from commencing new suits, against defendant's vendors, for other infringements, pending final disposition of the case at bar.]

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

BARNUM, (HOPKINS v.) See Case No. 6,685.

BARNUM, (WILSON v.) See Cases Nos. 17,786 and 17,787.

BARQUE.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the names of the barques; e. g. "The Barque Unadilla. See The Unadilla." Cases Nos. 14,332 and 14,333.]

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

Case No. 1,037.

BARR v. GALLOWAY.

[1 McLean, 476.][1]

Circuit Court, D. Ohio. July Term, 1839.

CURTESY—SEISIN DURING COVERTURE—ENTRY ON WILD LAND—PROFITS—STATUTE OF USES—ADVERSE POSSESSION—DEED—PRESUMPTION—VALIDITY.

1. By the common law seisin during coverture must be shown, to entitle the husband to claim as tenant by the curtesy. To this rule there are certain exceptions.

2. The law does not require that to be done which is unreasonable or impracticable.

3. In this country an entry on wild land is not necessary, to enable the husband to claim as tenant by the curtesy.

[See Davis v. Mason, 1 Pet. (26 U. S.) 503.]

4. A perception of the esplees is evidence of seisin, but this is presumed under a deed.

5. Under the statute of uses an entry was not essential to a complete title.

6. The party who seeks to invalidate or avoid a deed must impeach it. If there was an adverse possession at the time the deed to the defendant was executed, it is incumbent on the plaintiff to show it.

7. The court will not presume facts against a deed which, upon its face, has all the legal requisites to make it a valid instrument.

At law.

Scott & Leonard, for plaintiff.

Stansbury & Bond, for defendant.

OPINION OF THE COURT. The plaintiff [David Barr's lessee] gave in evidence a patent from the United States to Charles Bradford for the land in controversy, dated the 14th May, 1796. The patentee died without issue, leaving Henry G. Bradford, Charles H. Bradford, Elizabeth J. Bradford, and Fielding M. Bradford his heirs at law. Henry and Charles died intestate and without issue. Elizabeth intermarried with John Finley. They had two children, Henry Heath Finley and Elizabeth J. Finley. The latter intermarried with David Barr, the lessor of the plaintiff, and is now deceased. The plaintiff also gave in evidence a deed to him for the land from Henry Heath Finley, and here he rested his case.

The defendant [James Galloway, Jr.,] gave a deed for the land in evidence from Fielding M. Bradford and John Finley, the husband of Elizabeth J. Bradford, and father of Henry Heath Finley, and of the wife of the lessor of the plaintiff; which was executed the 29th November, 1815. The wife of the grantor John Finley, died before the execution of this deed. Possession was taken by the defendant a short time after the date of this deed, and there is no proof of a prior possession.

In the argument of the case it was insisted, that no interest passed under the deed from John Finley to the defendant; as it was made subsequent to the death of his wife, and there is no evidence of actual seisin, which is necessary to be shown by the husband to enable him to claim the land conveyed, as tenant by the curtesy. And it is also insisted by the plaintiff, if seisin in fact, by the husband, during the life of his wife, were not necessary, yet it is incumbent to show that at the time of the conveyance there was no adverse possession.

Before deeds or feoffments were used for the conveyance of land, livery of seisin was the only evidence of title. And this livery was required to be made by entering upon the land, and there in the presence of the vicinage to deliver the possession. The notoriety of the act afforded the only evidence of title, for the whole rested in the memory of the witnesses, called to observe the ceremony. And after the invention of deeds and other written evidence of title, the ancient principles of the common law were only departed from so far as to consider the instrument, not as the title itself, but as the evidence of title. And that it authorized an entry on the land, without which the grantee could not convey the land, nor bring an action against a trespasser. Nor would it descend to his heirs on his decease. Without an entry, except in cases which shall be hereafter noticed, he could not bring an action on the title of the land. 1 Co. Litt. p. 29, c. 4, § 35. "Tenant, by the curtesy of England, is, where a man taketh a wife seised in fee simple, or in fee tail general, or seised as heir in tail special and hath issue by the same wife, male or female born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the laws of England." "And first of what seisin a man shall be tenant by the curtesy. There is in law a twofold seisin, viz: a seisin in deed, and a seisin in law. And here Littleton intendeth a seisin in deed, if it may be attained unto, as if a man dieth siesed of lands in fee simple or fee tail general, and these lands descend to his daughter, and she taketh a husband and hath issue and dieth before any entry, the husband shall not be tenant by the curtesy; and yet in this case she had a seisin in law; but if she or her husband had during her life entered he should have been tenant by the curtesy." "But if a man seised of an advowson or rent in fee hath issue a daughter who is married and hath issue and dieth seised, the wife, before the rent became due, or the church became void, dieth, she had but a seisin in law, and yet she shall be tenant by the curtesy, because she could by no means obtain to any other seisin. But a man shall not be tenant by the curtesy of a base right, title, use, or of a reversion or remainder expectant upon an estate of freehold, unless the particular estate be determined or ended during the coverture." 1

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

Coke, 123. By the common law lands or tenements cannot pass but by solemn livery, or matter of record, or by sufficient writing, if the thing lies in grant.

The wife at common law was endowable where there had been no actual possession, and the reason is, that during coverture she could not take possession of the lands of her husband. 2 Co. Litt. p. 358, § 681. "For tenant in freehold in land is he who, if he be deprived of the freehold, may have an assize, but tenant in freehold in law before his entry, in deed shall not have an assize. And if a man be seised of certain land, and hath issue, a son who taketh wife and the father dieth seised, and after the son dies before any entry made by him into the land, the wife of the son shall be endowed in the land, and yet he had no freehold in deed, but he had a fee and freehold in law."

Under the common law, actual seisin was necessary, to enable the husband to claim as tenant by the curtesy. But this rule was not inflexible. It yielded to circumstances, as in the case of an advowson or rent, or where an entry is prevented by force. 2 Co. Litt. §§ 417, 418. In like manner if a man have a title of entry into lands, but dare not enter for fear of bodily harm, and he approach as near the land as he dare, and claim the land as his own, he hath presently, by such claim, a possession and seisin in the lands, as well as if he had entered in deed. 2 Co. Litt. § 419. And, under some circumstances, living within view of the land, will give the feoffee a seisin in deed, as fully as if he had made an entry. 1 Co. Litt. p. 29, c. 4, § 35. If an estate of freehold in seignories, rents, commons, or such like, be suspended, a man shall not be tenant by the curtesy, but if the suspension be but for years, he shall be tenant by the curtesy. As if a tenant make a lease for life of the tenancy to the seignories who taketh a husband and hath issue, the wife dieth, he shall not be tenant by the curtesy, but if the lease had been but for years he shall be tenant by the curtesy. And in 3 Atk. 436, the court say, lands on which there were leases for years existing and a rent incurred, descended on a wife as tenant in tail general, who survived three months after the rent day occurred, though she made no entry, nor received any rent during her life, yet this was such a possession in the wife as made the husband tenant by the curtesy. In Barwick's Case, 5 Coke, 94, it was held that letters patent under the great seal, do amount to a livery in law, and must give actual seisin. As where a livery is made of one parcel of land in the name of others in the same vicinity.

No livery of seisin is necessary to perfect a title by letters patent. The grantee in such a case takes by matter of record and the law deems the grant of record of equal notoriety with an actual tradition of the land in the view of the vicinage. The contrary is the fact as to feoffments. The deed is inoperative without livery of seisin. Green v. Liter, 8 Cranch, [12 U. S.] 229.

A perception of the profits, or, in more technical language, a taking of the esplees is evidence of seisin, but if seisin be established, this is presumed. Under the statute of uses the bargainee without entry or livery of seisin, has a complete seisin in deed. Harg. Co. Litt. 261, note. In most of the states of the Union statutes have been adopted, if not in the same language, to the same effect, as the statute of uses. The delivery of the deed is substituted for the ancient form of livery of seisin. And this is held to be a seisin in deed, where there is no adverse possession at the time.

The question in the present case is, whether wild and unappropriated lands, patented by the government, can descend, to a female out of possession so as to invest her husband, after her decease, with a tenancy by the curtesy, where there was no entry during coverture, either by the wife or husband. The reason on which livery of seisin was instituted, fails in this case. And it is a sound maxim that where the reason of the rule fails the rule itself can have no application. Why should a formal entry be made on land situated in a wilderness, remote from human habitation? Such an entry could not be notorious, as there is no vicinage to witness the act, or preserve the fact. If the law requires nothing in vain, it cannot require an entry under such circumstances. If an entry is dispensed with, where there is a lease for years, an advowson or rent, or where force is used to prevent, as above stated, is not the reason as strong, to excuse an entry on land in an uninhabited country? The law can never require an individual to do that which is either impracticable or unreasonable. And what could be more unreasonable or absurd than to require an entry on wild lands, to vest a complete title in the grantee?

In the case of Green v. Liter, [8 Cranch, (12 U. S.) 229,] above cited, the court held emphatically, that an entry was unnecessary. And the same doctrine is laid down in 4 Day, 294. And in the case of Jackson v. Sellick, 8 Johns. 208, the court say, where a feme covert is the owner of wild and uncultivated land, she is considered in law, as in fact, possessed so as to enable her husband to become a tenant by the curtesy. An actual entry or pedis positio by the wife or husband, during the coverture is not requisite to the completion of a tenancy by the curtesy. This is believed to be the correct rule as generally recognized in this country. Adhering to what they conceive to be the common law on the subject, the court of appeals of Kentucky hold that to sustain a writ of right, it is necessary for the demandant to show a pedis positio. And on this point that court holds a different doctrine from the supreme court of the United States. Applying this rule to all cases and under all circumstances, as the

court of appeals are understood to do, they are unquestionably wrong. For it has been shown that there are exceptions to the rule. But it must be admitted that the rule is of general application, only subject, like most other general rules, to certain exceptions. And it is believed that wild and uncultivated lands in this country form as strong a case, for an exception to the rule, as any above stated. But admitting the rule here laid down as correct, the counsel for the plaintiffs insist that it is incumbent on the person claiming under a deed, to show, if not a pedis positio, at least that the land conveyed was wild and uncultivated, and that there was no adverse possession, when the deed was executed. That these being essential to the validity of the deed, the party who claims under it, must prove them.

An adverse possession cannot be presumed against a deed. If it exist, it must be shown by the party who impeaches the deed and endeavors to avoid it. In the case of Holt's Heirs v. Hemphill's Heirs, 3 Ham. [3 Ohio,] 238, the court say we have always held that a complete title may be executed, without an actual entry and where the grantee may never have been within hundreds of miles of the property granted. The delivery of the deed has been considered as giving possession in contemplation of law, and the grantor is presumed to have entered, unless that presumption is rebutted by facts wholly inconsistent with it, as where the premises at the time of the grant, are in the actual seisin of a third person claiming title adverse to the grantor. In the case of Green v. Watkins, 7 Wheat. [20 U. S.] 27, the supreme court observe, where the demandant shows no seisin by a pedis positio, but relies wholly on a constructive actual seisin, in virtue of a patent of the land as vacant land, it is competent for the tenant to disprove that constructive seisin, by showing that the state had previously granted the same land to other persons with whom the tenant claims no privity. And again in the same case, the court say in a writ of right, the tenant cannot give in evidence the title of a third person, with which he has no privity, unless it be for the purpose of disproving the demandant's seisin. In the case of Bush v. Bradley, 4 Day, 298, the court held that proof of an adverse possession does not prevent the estate by the curtesy from attaching. But it is unnecessary to consider this point, as it does not arise from the facts in the case.

We think that the four requisites to constitute a tenancy by the curtesy, which are marriage, seisin, birth of a child, and death of the wife, have been sufficiently shown by the defendant to sustain the deed from Finley to him. Indeed none of the requisites, except that of seisin, are disputed. And we are clearly of the opinion that there was seisin in deed in this case, which gave Finley a right to claim as tenant by the curtesy; and consequently that his deed to the defendant conveys a life estate in the premises in controversy.

NOTE. [from original report.] After the court had made up their opinion in this case, they were informed that the counsel had agreed to continue the cause to await the decision of the state court, in a case in chancery between the parties, which involves the validity of the contract between the heirs of Bradford and the defendant. But as the court had examined the case, and made up their opinion on it, it was thought proper to publish the opinion.

Case No. 1,038.

BARR et al. v. SIMPSON.

[Baldw. 543.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1832.

COURTS—JURISDICTION—ACTION ON JUDGMENT OF STATE COURT—CITIZENSHIP.

This court has jurisdiction of an action of debt on a judgment obtained in a state court by a citizen of another state.

At law. The declaration in this case, was on a judgment obtained by the plaintiffs [Barr and Auchincloss] against the defendant, in the district court for the city and county of Philadelphia, to which there was a general demurrer and joinder in the demurrer. The only question raised was, whether this court had jurisdiction of the case. It was contended on the part of the defendant, that if there was a concurrent jurisdiction in both courts over the original cause of action, the plaintiffs were bound by having elected to sue in the state court, and could not proceed to enforce payment in any other, otherwise they could proceed by execution from both courts.

BY THE COURT. The subject matter of the suit in the state court, was a note which by the judgment became merged in the higher security. In this court, the subject of the suit was a judgment, which was conclusive evidence of a debt due the plaintiffs, who being citizens of New York, have a right to sue in this court, on any cause of action within its cognizance. We cannot discriminate between a debt due by judgment, or in any other way. An action of debt on a judgment is not like a scire facias, which must issue from the same court which rendered the judgment.

The demurrer is therefore overruled and judgment rendered for the plaintiffs.

BARR, (UNITED STATES v.) See Case No. 14,527.

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

Case No. 1,039.

BARRAS v. BIDWELL.

[3 Woods, 5.][1]

Circuit Court, D. Louisiana. Nov. Term, 1876.

PLEADING—EXCEPTION TO PETITION — LOUISIANA PRACTICE — ANSWER — JUDGMENT OF ANOTHER STATE — ACTION ON—FRAUD — RECONVENTION—PRIOR ADJUDICATION.

1. Under the jurisprudence of Louisiana, an exception to the petition of a plaintiff who sues as administrator, to the effect that the plaintiff is not administrator, must be pleaded in limine litis; it cannot be pleaded after judgment by default or after the filing of a defense to the merits.

2. Such an exception cannot be embodied in the answer, and by the rule of the court it must be verified by affidavit.

3. The same rules apply to the exception of lis pendens.

4. Fraud practiced in the recovery of a judgment cannot be pleaded in an action on the judgment, prosecuted in another state, unless such defense could be made in the courts of the state where the judgment was rendered.

[See Westerwelt v. Lewis, Case No. 17,446; Hampton v. McConnel, 3 Wheat. (16 U. S.) 234.]

5. It is a good ground of exception to a claim in reconvention, that it has been substantially adjudicated in another suit between the same parties in another state, where it was pleaded as a counter-claim.

6. The fact that the claim in reconvention is somewhat broader than the counter-claim, though founded on the same contract, will not relieve it from the exception. The whole might and should have been litigated and decided in the issue raised on the counter-claim.

7. A claim in reconvention should be pleaded with the same precision and detail as an original cause of action.

Heard upon exceptions of the defendant [David Bidwell] to petition of the plaintiff [Hiram D. Barras] on plaintiff's motion to strike out defendant's answer, and on plaintiff's exception to the defendant's claim in reconvention.

W. W. Howe, for plaintiff.
R. De Gray, for defendant.

WOODS, Circuit Judge. I. The defendant has incorporated in his answer an exception to the plaintiff's petition whereby he denies that the plaintiff is or ever was the administrator of the estate of Charles M. Barras, and avers that he never has been appointed, recognized or qualified as such in the state of Louisiana, and, therefore, cannot maintain this action in this state. This exception cannot stand for several reasons. First, it is pleaded, as the record shows, after a judgment by default, which is forbidden by article 333, Code Pr. Second, even if there had been no default, it comes too late, for it should have been pleaded in limine litis: Id. Third, it is waived by the filing of defenses on the merits: Wingate v. Wheat, 6 La. Ann. 241. Fourth, it is embodied in the answer, which is expressly forbidden by article 333, Code Pr.: Pecquet v. Pecquet, 17 La. Ann. 232. Fifth, it is not verified as required by rule 6 of this court. The exception is, therefore, overruled. The second exception is lis pendens. This is open to the same objections as the exception just considered. It is also conceded not to be well founded in fact. It is, therefore, dismissed.

II. The action of the plaintiff is based on the record of a judgment recovered in a cause between the same parties in the superior court of the city of New York, on Feb. 2, 1876. One of the defenses to the action is, that the judgment was obtained by fraud and improper practices on the part of the plaintiff; that defendant had a good and valid defense against the claim on which the judgment was rendered, which had been made known to his attorney, and proof thereof put in his possession, with instructions to make said defense, and the plaintiff fraudulently and corruptly induced defendant's attorney to withhold said defense and absent himself from the trial of the cause, and withhold the evidence in his possession, and permit the plaintiff to obtain said judgment against the defendant. The plaintiff moves to strike out this answer. The question is thus presented, whether fraud practiced in the recovery of a judgment can be pleaded in an action on the judgment. Article 4, § 1, of the constitution of the United States, declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Pursuant to this constitutional provision, congress has prescribed how the records and judicial proceedings of the courts of the states and territories, shall be authenticated, and has declared that "the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken:" Rev. St. § 605. From this statement of the law, it is clear that the plea that judgment was obtained by fraud, cannot hold unless it would be good in the courts of the state where the judgment was rendered. See Hampton v. McConnel, 3 Wheat. [16 U. S.] 234; Christmas v. Russell, 5 Wall. [72 U. S.] 290; Maxwell v. Stewart, 22 Wall. [89 U. S.] 77; Mills v. Duryee, 7 Cranch, [11 U. S.] 481; Hockaday v. Skeggs, 18 La. Ann. 682; McLaren v. Kehler, 23 La. Ann. 80. In the state of New York, in whose courts the judgment sued on was rendered, it is held that "the judgment or decree of a court possessing competent jurisdiction is, as a general rule, final not only as to the subject matter thereby actually determined, but as to every other matter which the parties might liti-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

gate in the cause, and which they might have had decided:" Embury v. Conner, 3 N. Y. 522; Le Guen v. Gouverneur, 1 Johns. Cas. 436; Etheridge v. Osborn, 12 Wend. 399; Gardner v. Buckbee, 3 Cow. 120; Burt v. Sternburgh, 4 Cow. 559; Wood v. Jackson, 8 Wend. 1; Wright v. Butler, 6 Wend. 284; Lawrence v. Hunt, 10 Wend. 80. As we are required to give the same force and effect to their judgment as would be given it by courts of the state of New York, and as the defense here set up could not be made against the judgment in those courts, it cannot be made here.

III. The defendant, assuming the character of plaintiff in reconvention, sets up a claim to damages for the violation, by the plaintiff, of the same contract upon which the plaintiff's suit in the superior court of New York city was founded. The claim in reconvention alleges that the defendant contracted with the plaintiff, in consideration of certain sums of money, for the exclusive right to exhibit, within certain specified territory, a spectacular drama called the Black Crook, of which the plaintiff's intestate was the owner, and that the plaintiff, in violation of his said contract, both exhibited said drama himself and caused others to exhibit it within the territory for which the defendant had the exclusive right under said contract—whereby the defendant sustained damages in the sum of ten thousand dollars, for which sum he asks judgment against the plaintiff. To this claim in reconvention the plaintiff has filed three exceptions. First, that the same cause of action was set up by way of counter-claim, in a suit between the same parties, in the superior court of the city of New York, and decided by the final judgment rendered in said cause on the 23d of December, 1876, and, second, that said reconvention is the same set up in the answer of the same defendant to a suit by this plaintiff, in a case No. 8,053 in this court, [unreported,] which reconvention was excepted to by this plaintiff on the same grounds above specified, and said exceptions were sustained and the said answers in reconvention dismissed by this court; and, third, that said reconvention is not pleaded with sufficient particularity and detail. In support of the first and second exceptions, the records of the cause in the superior court of the city of New York and of this court are produced. The only difference between the counter-claim, set up in the suit in the New York superior court, and the reconvention set up in this case is, that the former avers that the plaintiff wholly neglected to protect and secure to the defendant the exercise of the sole right to exhibit said drama within the territory named in the contract, but on the contrary, permitted it to be performed in said territory by others, and the latter charges that both the plaintiff and his intestate themselves exhibited said drama and caused others to exhibit it within the same territory.

Now, whether these two causes of action, to wit, the counter-claim set up in New York and the reconvention set up in this suit, are precisely the same, it is not necessary to determine. The claim in reconvention may be somewhat broader than the counter-claim, but it might and should have been litigated and decided in the issue raised upon the counter-claim in the superior court of New York city. The defendant is, therefore, concluded by the judgment upon the counter-claim in that case: Embury v. Conner, supra; Voorhees v. Bank of U. S., 10 Pet. [35 U. S.] 449; 2 Smith, Lead. Cas. tit. "Estoppel," 455, note; Outram v. Morewood, 3 East, 346. The claim in reconvention set up in the suit in this court, No. 8,053, and dismissed, is substantially the same as the one just passed on, and what has been said applies to it. It was also substantially disposed of by the judgment of the superior court of the city of New York. The reconvention under consideration appears to have been pleaded in too vague and general a manner: McMasters v. Palmer, 4 La. Ann. 381; Wilcox v. His Creditors, 11 Rob. (La.) 347; Jonau v. Ferrand, 2 Rob. (La.) 216. We think all the exceptions to the claim in reconvention, as pleaded, are well taken, and the reconvention must be dismissed.

BARRELL, (EDMONDSON v.) See Case No. 4,284.

Case No. 1,040.

BARRELL v. LIMINGTON.

[4 Cranch, C. C. 70.][1]

Circuit Court, District of Columbia. May Term, 1830.

DEPOSITION—NOTICE—ACT OF 1789—ATTORNEY.

Notice of taking a deposition under the act of 1789, § 30, directed to the party himself, may be served on his attorney-at-law.

Mr. Coxe, for the defendant, objected to a deposition taken on the part of the plaintiff, that the notice, directed to the defendant himself, was served only upon his attorney-at-law in the cause.

THE COURT, however, (nem. con.,) overruled the objection.

Case No. 1,041.

BARRELL v. SIMONTON.

[2 Cranch, C. C. 657.][1]

Circuit Court, District of Columbia. May Term, 1826.

MALICIOUS PROSECUTION — PLEADINGS—TERMINATION OF PROCEEDINGS—DEMURRER.

In an action for maliciously arresting and holding the plaintiff to bail without probable cause, the affidavit to hold to bail must aver that the suit in which the plaintiff was so mali-

[1] [Reported by Hon. William Cranch, Chief Judge.]

ciously holden to bail was determined; and a declaration for such malicious arrest and holding to bail must contain such an averment, or it will be bad on general demurrer.

At law. Action on the case for maliciously causing the plaintiff to be arrested, imprisoned, and held to bail in Baltimore, without probable cause. Neither the declaration nor the affidavit to hold to bail contained any averment that the suit in Baltimore, upon which the arrest was made, was determined.

Mr. R. S. Coxe, for the defendant, moved for leave to enter his appearance without special bail, and contended that this was a local action, and would lie only in Maryland; and that the affidavit was insufficient in not averring that the action in Baltimore was determined, for until that suit was at an end no action would lie for the malicious arrest. That fact constitutes a necessary part of the plaintiff's title to recover. Morgan v. Hughes, 2 Term R. 232; Fisher v. Bristow, 1 Doug. 215; 1 Sell. Pr. 57; Sinclair v. Eldred, 4 Taunt. 7; Woodford v. Ashley, 11 East, 508; 8 Went. 319; Selw. N. P. 935; Farmer v. Darling, 4 Burrows, 1971; Rodriguez v. Tadmire, 2 Esp. 719; Kirk v. French, 1 Esp. 80; 1 Sell. Pr. 107, a, 2; 2 Chit. Pl. p. 225, note d, pp. 291, 299; Morgan's V. M. 404; Stennel v. Hogg, 1 Saund. 227; Selw. N. P. 936, 942; 2 Phil. Ev. c. 9, pp. 110, 116; Imlay v. Ellefsen, 2 East, 453; Archb. Civ. Pl. 52; Reynolds v. Kennedy, 1 Wils. 232.

Mr. Lear and Mr. Barrell, contra. It is only necessary to show a prima facie cause of action. There is a difference between an action for malicious prosecution, and for a malicious arrest. "Prosecution" means criminal prosecution. The courts have been more strict in the former than in the latter, because the former tends to prevent the punishment of crimes. In actions of conspiracy the declaration followed the writ, which contained the words, "legitimo modo acquietatus," and actions upon the case, in nature of conspiracy, followed, without reason, the same form. Malice, and the want of probable cause, are the gist of the action for malicious arrest. The determination of the prior action in favor of the present plaintiff, would be only a circumstance tending to prove the want of probable cause. The want of the averment of the determination of the former suit is aided by a verdict; and it is doubted whether it would be fatal on demurrer. Skinner v. Gunton, 1 Saund. 228, note; Smith v. Cattle, 2 Wils. 376. At this stage of the cause, the question, whether the former suit was determined, ought not to be raised. It is not necessary to aver it in the declaration. If the writ, upon which the arrest was made, was not issued by the proper clerk, or not returnable to the proper court, the plaintiff never could show that the suit was determined; and if the averment is necessary the declaration may be amended; and if the former suit should be determined in favor of the present plaintiff, before the pleadings in this cause are made up, it would be sufficient.

Mr. Coxe, in reply, admitted that these actions, for malicious arrest and for malicious prosecution, grew out of the old action of conspiracy; but no distinction is taken between actions for malicious prosecution and for malicious arrest. In either the declaration must show that the former suit has been determined in favor of the plaintiff. It is true, that after verdict the fact shall be taken to have been proved at the trial, because the plaintiff could not recover without that proof; but the same authorities show that the want of the averment is fatal upon the demurrer. The affidavit to hold to bail must show all the facts necessary to entitle the plaintiff to recover.

THE COURT took time, and upon full consideration of the following authorities, was of opinion, (THRUSTON, Circuit Judge, doubting,) that the affidavit to hold to bail was insufficient, because it did not state that the suit in Baltimore had terminated in favor of the present plaintiff. Waterer v. Freeman, Hob. (17 Jac.) 267; Skinner v. Gunton, 1 Saund. 228; Stennel v. Hogg, Id. 226, note 1, by Serg. Williams; Martin v. Lincoln, Esp. N. P. 527; Farrel v. Nunn, Bull. N. P. 13; Parker v. Langly, 10 Mod. 145, 209; Brownl. Rediv. 61; Reg. Brev. 134, a; Shotbolt's Case, Godb. 76; Fisher v. Bristow, 1 Doug. 215; Morgan v. Hughes, 2 Term R. 225; Lewis v. Farrel, 1 Strange, 114; Lil. Ent. 15, 23, 35; Sutton v. Johnstone, 1 Term R. 497, 498.

The defendant was permitted to appear without special bail. At a subsequent term, he filed a general demurrer to the declaration; and at May term, 1827, the suit was struck off by order of the plaintiff.

Case No. 1,042.

BARRELL v. SIMONTON.

[3 Cranch, C. C. 681.][1]

Circuit Court, District of Columbia. Dec. Term, 1829.

DEPOSITION—REASONABLE NOTICE.

Notice at Washington to defendant's counsel, on Thursday, the 31st of December, that a deposition would be taken in Baltimore on the 2d of January, was not reasonable notice.

Mr. R. S. Coxe, for the defendant, moved the court for a continuance of the cause until the next term, because a deposition had been taken on the part of the plaintiff, in Baltimore, on Saturday, the 2d of January, upon notice given to the defendant's counsel here in Washington, on Thursday, the 31st of December, at eleven o'clock, A. M.

[1] [Reported by Hon. William Cranch, Chief Judge.]

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that the notice was not reasonable, and continued the cause.

BARRELS OF.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the quantity or number of barrels; e. g. "Barrels of Rectified Spirits. See Ninety-Two Barrels of Rectified Spirits," Case No. 10,275.]

Case No. 1,043.

In re BARRETT.

[2 Hughes, 444;[1] 2 N. B. R. 533, (Quarto, 165;) 1 Chi. Leg. News, 202; 2 Amer. Law T. Rep. 182; 11 Int. Rev. Rec. 21; 1 Amer. Law T. Rep. Bankr. 144.]

District Court, D. West Virginia. Dec. Term, 1869.

BANKRUPTCY — ASSIGNEE — PARTNERSHIP—POWER TO BIND FIRM—VOTING FOR ASSIGNEE.

1. An attorney for a creditor of the bankrupt may be assignee of the bankrupt's estate.

2. One member of a firm or copartnership, on behalf of the firm, may execute a power of attorney to some third person, authorizing him to cast the vote of the firm in the choice of assignees.

[Cited in Re Sauls, 5 Fed. 719.]

[In bankruptcy. Joseph Barrett was adjudicated a bankrupt on the petition of Wynne & Co., of Cincinnati, Ohio. At a meeting of the creditors, Abraham Burlew, Esq., attorney for the petitioning creditors, cast the votes of a majority of the creditors in number and interest for himself for assignee, by virtue of a power of attorney, duly executed and acknowledged, on behalf of each of the respective creditor firms, by one member thereof. Burlew was declared elected assignee by the register. Heard on exceptions to this ruling. Decision of the register sustained.]

JACKSON, District Judge. In this case the register certified the following questions for the decision of the judge: First. Can the attorney for the petitioning creditor act as assignee? It appears from the certificate of the register that Abraham Burlew, Esq., the attorney for the petitioner, was the choice of a "greater part in value and in number of the creditors" who proved their debts, and that he is fully competent to discharge the duties of the position.

The first clause of the thirteenth section of the bankrupt act [of March 2, 1867, (14 Stat. 522,)] provides for the first meeting of the creditors and the election of an assignee. The party selected must be the choice of "the greater part in value and in number of the creditors who have proved their debts," otherwise he cannot act. This seems to be the only limitation prescribed by the statute, no particular qualification being required. It is obvious that the authors of the act supposed that creditors, in selecting an assignee, would, from prudential considerations alone, always select a capable and suitable person to discharge the duties of the position; hence it was not deemed necessary to require any particular qualification or to impose any other limitation than the one just referred to. The fourth clause of the same section invests the judge with the discretion to order a new election, but this discretion is to be exercised only when "needful or expedient," or, in other words, for cause. Should no cause exist, it is clearly the duty of the judge to confirm the selection made by the creditors. What, then, is cause sufficient to justify the judge in withholding his consent in such a case? Manifestly it must be for want of capacity or integrity in the party selected. In this case, all parties concede both capacity and integrity to Mr. Burlew. It may be suggested whether interest will not disqualify a party for the position of assignee. I think not, unless the interest of the assignee was or might become, in the progress of the proceedings, adverse to the general creditors, or that he was in a situation and manifested a purpose to use his position to their disadvantage. Ordinarily, the assignee who has an interest in the bankrupt estate cannot promote his own or injure that of another without being called to account for it at once. He is under the control of the court, and his conduct is always open to its supervision.

Under the provisions of the eighteenth section, for good cause he may be summarily removed. For these reasons I cannot see why a creditor of a bankrupt might not act as assignee; and such, I think, has been the practice in the courts. If a creditor can act, certainly his attorney may act, as far less objection exists to him on the ground of interest. The eighteenth section also declares who shall be ineligible as assignee, and in express terms inhibits any person from acting who has received any preference contrary to the provisions of the bankrupt act. There is no other provision in the act rendering a person ineligible for this position. It is not contended that the objection provided for in this section exists in this case. For the reasons stated I see no valid objection to the ruling of the register upon the first point.

Second. The power of attorney under which the said Burlew acted as attorney in fact, was not executed and acknowledged according to law. It should have been signed and acknowledged by each member of the firm, who are a creditor firm. It is a general and familiar principle that a partner cannot bind his copartner by a contract under sale, without his previous assent to a subsequent ratification. The principle is well established by authority, both in England and in this country. It does not ap-

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

pear, from the certificate of the register, whether the non-subscribing partners were aware of the execution of the power in this case, or whether they afterwards adopted it, knowing that it would bind them; nor do I regard this assent as necessary. The rule in bankruptcy seems to be different, and may properly be regarded as an exception to the general principle just stated.

Courts of bankruptcy invariably recognize the right of one partner to bind another for special purposes, such as proving debts and voting in the choice of an assignee. This exception grows out of the necessity of the case. It is often inconvenient to bring together all the members of a firm to execute a deed of this character. The general rule is relaxed to facilitate business, and if such were not the law, great injury might result to a firm in prosecuting their claims against a party in failing circumstances, when it was important to proceed without delay. In the proof of debts by a creditor firm composed of several members, it is to be treated as one creditor, any one of which may act for all in proving the debt or voting for an assignee. If, therefore, any one member of the firm may act and bind his copartners for these purposes, it is equally competent for him to delegate his powers for the same purposes and bind his copartners. Such has been the rule in the English bankrupt courts. In the case of Ex parte Mitchell, 14 Ves. 597, Lord Eldon lays down the rule that one partner may act for another in bankruptcy for various purposes, such as "to prove debts," "to execute powers of attorney for voting in the choice of an assignee." And the same judge, in the case of Ex parte Hodgkinson, 19 Ves. 292, reaffirms the opinion just cited, and states the law to be that "one partner, on behalf of all, may prove a debt, vote on choice of an assignee, and sign the certificate." No reported case from our own courts has been produced that rules the particular point in question; but as bearing upon it, we refer to a recent case before Judge Giles, who held that in the case of "joint creditors" who were partners, either party can vote the full amount of the debt, thus adopting the rule that prevails in the English bankrupt courts. See In re Purvis, [Case No. 11,476;] and as bearing upon this question, we refer particularly to 15 Johns. R. 159; 11 Pick. 400; Colly. Partn. [5th Ed.] 429.

For these reasons I am inclined to follow the learned judge in the case of Ex parte Mitchell. The law as there expounded has ever since been the established rule in the English bankrupt courts, and being so long sanctioned, I see no reason for departing from it at this day. I am therefore of opinion that the power of attorney being signed and acknowledged by only one member of a creditor firm, is sufficient to bind all of its members, and was therefore properly executed. The third point referred, being answered by the decision of the first and second points, it is unnecessary to notice it further.

Case No. 1,044.

In re BARRETT.

[11 N. B. R. 527; 1 Cent. Law J. 556.]

District Court, E. D. Texas. Oct. 22, 1874.

VOLUNTARY BANKRUPTCY—DISCHARGE OF BANKRUPT—TIME LIMITATION.

[A bankrupt whose estate has no assets cannot be discharged from his debts, under Act March 2, 1867, § 29, (14 Stat. 531,) unless he applies "for a discharge after the expiration of 60 days, and within one year from the adjudication of bankruptcy."]

In bankruptcy.

MORRILL, District Judge. The question for adjudication is whether the bankrupt, whose estate had no assets, is entitled to a discharge from his debts if he shall have neglected to apply for such discharge for more than one year from the time he was adjudged a bankrupt. The first paragraph of section 39 [29] of the bankrupt act [of March 2, 1867, (14 Stat. 531,)] provides: "That at any time after the expiration of six months from the adjudication of bankruptcy, or * * * if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts." The statute contemplates in this section two classes of bankrupts, the difference between them being the having, and not having, assets. To one class no limit is assigned as to the time the bankrupt may apply to the court for a discharge after the expiration of six months from the adjudication of bankruptcy; to the other it is provided that "he may apply at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy."

It must be considered that, as the bankrupt act does, by its provisions and effects, impair the obligations of contracts, and would, on that account, be unconstitutional, if not expressly provided by the constitution, the construction to be given to this act must be strict; and certainly, when the act expressly provides the way and manner, and within what periods of time a bankrupt may be discharged, the only question that can arise is, does the applicant come within the provisions. In this case the applicant seems to have realized the fact that he has not applied within the proper time, and has stated the causes and reasons for delay. If the act authorized a judge to extend the time in consequence of the sickness or other disability of a party, there would be a different case presented from the one now before the court. As the case now stands, since the statute says that "the bankrupt may apply for a

discharge after the expiration of sixty days and within one year," and does not authorize the application to be made at any other time, a court cannot consider an application made at any other time than as provided by the statute. The court cannot extend, enlarge, or contract the evident and express provisions, meaning, and intent of the statute. The court has no more power to discharge an applicant who fails to comply with one provision of the act than another, or all others. The application is refused.

Discharge refused.

Case No. 1,045.

BARRETT v. APLINGTON.

[1 West. Law Month. (1859,) 53.]

Circuit Court, D. Illinois.

SUNDAY—USURY.

At law. This was an action [by Merriam E. Barrett against Zenas Aplington] on a promissory note for $875. The defendant pleads usury, and that the note was made on Sunday, to which plaintiff demurred.

S. A. Irwin, for plaintiff.

Geo. Scoville, for defendant.

Before DRUMMOND, District Judge.

1. THE COURT decided that the 4th section of the act of 1857, in relation to interest, absolutely repeals all conflicting laws, and all laws inflicting penalties. See Sess. Laws [Ill.] 1857, pp. 45, 46.

2. That therefore all forfeitures accruing under all acts prior to the one above cited, are inoperative and cannot be enforced;

3. That by the act of 1857, any person taking, or contracting to take, since the passage thereof, any higher interest than ten per cent., forfeits the whole amount of interest reserved.

In relation to the making of a note on Sunday, the court decided that it was not, for that reason, void—that the good order and peace of society were not disturbed thereby.

[See, also, King v. Fleming, 72 Ill. 21, and Richmond v. Moore, 107 Ill. 429.]

BARRETT, (BROWN v.) See Case No. 1,991.

Case No. 1,046.

BARRETT v. GODDARD.

[3 Mason, 107.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1822.

SALE—DELIVERY—VENDOR'S LIEN.

Where goods were sold, lying in the vendor's warehouse, on a credit of six months, for which a note was given, and the goods were sold by marks and numbers, and it was a part of the consideration of the purchase, that they might lie, rent free, in the warehouse, at the option of the vendee, and for his benefit, until the vendor should want the room; held, that there was a complete delivery of the goods, so that, on the insolvency of the vendee, they would not be stopped by the vendor.

[Cited in Gibson v. Stevens, Case No. 5,401. Overruled in Parker v. Byrnes, Id. 10,728.]

At law. This was an action of trover, [by Charles Barrett against Nathaniel Goddard,] to recover fifty-one bales of cotton, alleged to have been converted by the defendant on 27 May, 1822. The cotton was part of an importation of eighty-two bales, numbered from 1 to 82, which the defendant had imported from New Orleans, in February, 1822. In the early part of March, the defendant employed a broker (Mr. Peter Coffin) to sell the cotton for him. The broker accordingly sold one half, viz. forty-one bales, consisting of the bales marked with even numbers, to a Mr. Perrin, at the cost and charges, on a credit of six months, with interest from 7th February preceding, that being the time of the purchase at New Orleans. The remaining forty-one bales, consisting of the bales with odd numbers, the broker sold on the 15th March, 1822, to one Silas Bullard, at the cost and charges, on a like credit of six months. At the time of the sale, the whole eighty-two bales were lying in the defendant's warehouse, near his dwellinghouse in Boston, being piled together without any regard to the numbers. During the negotiation for the sale, and as an inducement to the purchase, the broker stated to Mr. Bullard, that the cotton might lie in the warehouse of the defendant, free of storage, as long as Bullard might wish, unless the defendant should want the room for the storage of other goods, which event was not likely to happen until the ensuing summer. Upon the faith of this representation, and the understanding, that Bullard meant to avail himself of this privilege, the bargain was completed. Mr. Bullard gave his note for the amount of the cotton, dated 7th February, 1822, payable to defendant or order in six months, with interest, which was accepted by the broker, who thereupon gave him a bill of parcels, dated 15th March, 1822, which stated the numbers of the bales sold to Bullard, and acknowledged a receipt of payment by the note. The note was afterwards received without objection by the defendant. At the time of the sale, Bullard did not go to the warehouse of the defendant to examine the cotton, but he bought upon the examination of a few bales, which he saw on the wharf, while it was landing, and of samples of the other bales. The cotton remained in the same warehouse of the defendant, promiscuously piled up, until the month of June, when Mr. Perrin began to take away, as he wanted them, the bales purchased by him.

[1] [Reported by William P. Mason, Esq.]

They were, of course, then separated from the general mass of the bales.

On 25th May, 1822, Bullard became insolvent, and stopped payment; and on that day an indenture of three parts was prepared between Bullard of the first part, the plaintiff, who was a creditor of Bullard, of the second part, and Benjamin Rich and others, creditors of Bullard, of the third part; but it was not executed by the plaintiff till the morning of the 27th of May. The indenture conveys to the plaintiff, for the benefit of himself and other creditors, among other things, the forty-one bales of cotton, purchased by him of the defendant, by the description of "41 Bales N. O. Cotton at N. Goddard's store, Summer street." The failure of Bullard was not generally known until the morning of Monday, the 27th of May. On the same morning, after the execution of the indenture, the defendant went with the note aforesaid, to Bullard's countinghouse, and informed him, that in consequence of his failure, he, the defendant, would not deliver the cotton unless the note was paid or secured; and he offered to rescind the sale, and deliver up the note; and he then tendered the note to Bullard, who declined receiving it, or doing any thing. Immediately after this interview, and in the same countingroom, the plaintiff saw the defendant, gave him notice of the assignment, and demanded the cotton from the defendant. The defendant made the same offer to the plaintiff, that he had made to Bullard, but the plaintiff declined it; and the defendant then refused to deliver the cotton, as the note was unpaid, and said he should not give it up without a lawsuit. The note aforesaid became due since this action was commenced, and has not been paid. Bullard has continued insolvent ever since 27th May.

In August, 1822, the broker sold the forty-one bales of cotton in controversy, by the order and on account of the defendant, without any authority from the plaintiff. The cotton, up to the time of the sale, remained in the defendant's warehouse. The value of the cotton on the 27th of May, the day it was demanded by the plaintiff, was $3,011.60. No other delivery of the cotton took place, than what is to be inferred by law from the preceding facts. At the time of the purchase, Bullard was understood to be at full liberty to take away the cotton when he pleased; and there was no proposition made that the defendant should retain it as security for the note. Upon this evidence a verdict was, by consent, taken for the plaintiff, for the sum of $——, subject to the opinion of the court, upon the question, whether upon this evidence the defendant had a right to retain the cotton, or stop the delivery thereof, until the note of Bullard was paid or secured to be paid; either party to be at liberty to turn the case into a special verdict within —— days after the judgment was rendered by the court.

Mr. Bliss, for plaintiff.

Mr. Shaw, for defendant.

STORY, Circuit Justice. The right of the defendant to retain the cotton in this case, so as to defeat the action of the plaintiff, has been placed at the argument upon two grounds. 1. That there was no actual or constructive delivery of the cotton to Bullard, and the defendant retains a lien for the price. 2. That the defendant has a right of stoppage in transitu, which has been lawfully exercised by the defendant, in consequence of the insolvency of Bullard.

When a contract for the sale of goods is completed by the assent of both parties, the property in the goods is transferred to the vendee, and the price is due to the vendor; but the vendee cannot take the goods until he tenders the price agreed on. And if the price is tendered, and the vendor refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. Such is the doctrine laid down by Mr. Justice Blackstone, in his excellent Commentaries. 2 Bl. Comm. 448. The principle here stated must apply with equal force, whenever the terms of the sale are completely complied with on the part of the vendee. Therefore where goods are sold to be paid for by a note on time, and the note is given to the vendor, the property in the goods passes to the vendee in the same manner, and under the same circumstances, as it would if the contract were for cash, and the cash were paid. But this doctrine, however, is applicable only in cases where the goods are clearly designated and separated from all others, and according to the sense of the contract, are then deliverable, without any farther act on either side, and are in a state capable of delivery. But if there remains any thing more to be done to designate the particular property, or to complete the rights of the vendee, then the property does not pass, until such acts are done. In short, in such cases there can be no absolute delivery of the goods.

The principal question, in cases of this sort, is to ascertain, whether there has been an actual or constructive delivery; the latter is just as effectual as the former, and may be inferred from circumstances, as well as established by direct proof. In the case of Hanson v. Meyer, 6 East, 614, Lord Ellenborough laid down the true line of distinction. There the vendee agreed to purchase all the starch of the vendor, then lying at the warehouse of a third person, at so much per cwt. by a bill at two months; which starch was in papers, but the exact weight not then ascertained, but was to be ascertained afterwards; and fourteen days were to be allowed for the delivery; and the vendor gave a note, addressed to the warehouse

keeper, directing him to weigh and deliver to the vendee all his starch; and the question was, whether the absolute property in the starch vested in the vendee before weighing. Lord Ellenborough delivered the opinion of the court in the negative. He said, that by the terms of the contract, two things in the nature of conditions or preliminary acts, on the part of the vendee, necessarily preceded the absolute vesting in him of the property contracted for; the first was the payment of the agreed price; the second was, the act of weighing, which, from the terms of the contract, was the means of ascertaining the amount of the price. The weight must therefore be ascertained, in order that the price might be known and paid; and unless the weighing preceded the delivery, it could never, for these purposes, effectually take place at all. And he proceeded to lay down the general doctrine, that "if any thing remain to be done on the part of the seller, as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer." And he distinguished the case then before the court from that of Hammond v. Anderson, 4 Bos. & P. 69, because there the bacon was sold for a fixed price, and the weighing, there, was for the buyer's satisfaction, and formed no ingredient in the contract between the buyer and the seller. The doctrine of this case has never been denied. It may have been misapplied in Whitehouse v. Frost, 12 East, 614; but it was recognized and acted upon in the fullest manner in Austen v. Craven, 4 Taunt. 644, and White v. Wilks, 5 Taunt. 176, 1 Marsh. 2, and Busk v. Davis, 2 Maule & S. 397. The converse doctrine necessarily flows from the same principle; and that is, that if no farther act remains to be done on either side, and the thing sold is separated and distinguished from all others, as soon as the terms of the contract are completed and complied with, the property passes. See Rugg v. Minett, 11 East, 211; Stoveld v. Hughes, 14 East, 308; Lucas v. Dorrien, 7 Taunt. 278.

If we apply these principles to the present case, it seems to me, that they establish, that there was a complete delivery of the cotton to Bullard. Nothing remained to be done on either side. The bales were all marked and numbered, and sold by their marks and numbers. They were perfectly distinguishable from all the others; and the terms of the contract on the other side were fully complied with. The payment was made in the mode agreed on, by giving a note, payable at a future time. Neither party contemplated any farther act to be done. The vendee contracted for an immediate possession at his own option as to time and place; and the vendor sought no retainer. But it is argued, that the plaintiff never parted with the actual possession, and therefore there was no constructive delivery of the cotton to Bullard, because it remained under the plaintiff's care in his warehouse. If the warehouse had belonged to a third person, there would be no pretence to say, after notice and assent by the warehouse man, that the delivery was not complete in construction of law. For such a purpose no manual actual possession is necessary. It is sufficient, if, in the intent of all the parties, the one parts with, and the other receives the property, although there is no change of place. Thus, putting a mark on the goods bought, was in Ellis v. Hunt, 3 Term R. 464, held a delivery. So, weighing the goods by the vendee was held, in Hammond v. Anderson, 4 Bos. & P. 69, to be a complete delivery. In that case the goods were at the wharf of a third person, and the vendor was bound to pay the charge of warehousing for fourteen days after the sale, and before the end of the fourteen days the vendee failed. The court thought there was clearly a delivery. Mr. Justice Heath said, "though the goods continued in the warehouse of the defendant (the wharfinger) after the sale, they were no longer in the possession of the vendor for any purpose whatsoever." Mr. Justice Chambre said, "the payment of the warehouse room by the vendor can make no difference." See, also, Greaves v. Hepke, 2 Barn. & Ald. 131; Spear v. Travers, 4 Camp. 251. So the change of mark, from A to B, on bales of goods in a warehouse, by direction of the parties, has been held by the house of lords, to operate as an actual delivery of the goods. See Stoveld v. Hughes, 14 East, 308, 312.

There is nothing in reason or principle to make the present case different, simply because the bales of cotton remained in the plaintiff's own warehouse. It was a part of the bargain, that they should so remain, and a part of the consideration of the purchase. The warehouse must be deemed, after the purchase, to be virtually the warehouse of Bullard, for this purpose, or so much storage as virtually hired by him. In Stoveld v. Hughes, 14 East, 308, the goods had never been removed from the wharf of the vendor; but the court held, that this was not a circumstance obstructing a constructive delivery. In Elmore v. Stone, 1 Taunt. 458, where a horse was purchased and left in the stable of the vendor on livery, the court thought the delivery complete. Whether that case, upon its own circumstances, can be supported, or is open to the doubt suggested by Mr. Justice Bailey, in Howe v. Palmer, 3 Barn. & Ald. 321, is not material; the principle on which it was decided, is sound; that is, that a continuance of the possession of the vendor does not prevent the delivery being complete, if nothing farther remains to be done on either side, and the possession is by mutual consent. The case of Hurry v. Mangles, 1 Camp. 452, is in point. There the oil, which

was purchased, to be paid for by an acceptance of six months, remained in the vendor's warehouse after the sale, and the vendee paid warehouse rent for it. Lord Ellenborough said, that the acceptance of warehouse rent was a complete transfer of the goods to the purchaser. If I pay, said he, for a part of a warehouse, so much of it is mine. So in Phillimore v. Barry, Id. 513, where goods were purchased at auction, which were in the warehouse of factors, for sale, and they agreed to give storage room for thirty days, Lord Ellenborough held, that the property vested absolutely in the purchasers from the moment of sale, the agreement, as to storage, being introduced for their benefit, and being part of the consideration for the purchase money. This last circumstance pointedly applies to the present case. Green v. Haythorne, 1 Starkie, 447, is to the same effect. The goods remained in the vendor's warehouse by consent, but the court held, that from the time of the sale, the defendant's warehouse was the warehouse of the purchaser. The case is exceedingly strong, as to the law of constructive delivery. See, also, Hunn v. Bowne, 2 Caines, 38; Allen v. Smith, 10 Mass. 308; Damon v. Osborn, 1 Pick. 476. White v. Wilks, 1 Marsh. 2, 5 Taunt. 176, proceeds upon the admission of the correctness of the same doctrine. I forbear to go farther into the cases, because there is no authority, that attempts to overthrow the doctrine.

Now what distinction can there be between the case of payment of rent, and an agreement for warehouse room for the benefit of the vendee, forming a part of the consideration of the purchase? Certainly none in point of law; and I, for one, am not prepared to admit, that if, in the case at bar, the agreement for warehouse room had been after the purchase, without charge, for the mere accommodation of the vendee, and without any agreed right of retainer by the vendor, it would have made any difference in point of law. My judgment accordingly is, that the delivery here was complete, and the property absolutely vested in the vendee.

The other point, as to the lien and right of stoppage in transitu, may be disposed of in a few words. The very contract itself repels the notion of a lien. The goods were deliverable immediately, at the option of the vendee. The payment was by a note on time. Now, giving such a credit for the price, under such circumstances, is decisive against any implied right of retainer or lien for the price. How then can the court assert one, when it is inconsistent with the very terms of the bargain? Besides, if the delivery was complete, there is necessarily an end of the lien. The transit would be ended, and the right of stoppage in transitu, once gone, could not be reassumed. Judgment must therefore be entered for the plaintiff.

Judgment accordingly.

Case No. 1,047.

BARRETT et al. v. HALL et al.

[1 Mason, 447;[1] 1 Robb, Pat. Cas. 207.]

Circuit Court, D. Massachusetts. Oct. Term, 1818.

PATENTS FOR INVENTIONS—JOINT PATENT—PATENTABILITY—COMBINATION—SEPARATE IMPROVEMENTS—METHOD NOT PATENTABLE.

1. A joint patent may well be for a joint invention, but not for a sole invention of one of the patentees. If each of the patentees obtain separate patents for the same invention, as his exclusive invention, and afterwards both obtain a joint patent for the same, as their joint invention, they are estopped by the joint patent to assert any title under the several patents.

[Cited in Butler v. Bainbridge, 29 Fed. 143.]

2. A patent may well be for a new combination of machines, whether the machines be old or new. But one patent cannot, at the same time, include an exclusive right in the combination and in each of the machines; and it is no infringement of a patent for the combination, to use either of the machines separately.

[Cited in Tyler v. Deval, Case No. 14,307; Olcott v. Hawkins, Id. 10,480; Smith v. Downing, Id. 13,036; Brooks v. Norcross, Id. 1,957; In re Boughton, Id. 1,696; Stimpson v. Woodman, 10 Wall. (77 U. S.) 126; Rees v. Gould, 15 Wall. (82 U. S.) 194; Craig v. Smith, Case No. 3,339.]

3. There must be several patents for several improvements of distinct machines.

[Cited in Wyeth v. Stone, Case No. 18,107; Emerson v. Hogg, Id. 4,440; Sessions v. Romadka, 21 Fed. 132.]

[4. Cited in Hogg v. Emerson, 6 How. (47 U. S.) 483, as supporting the point that patents may be united if two or more, included in one set of letters, relate to a like subject, or are in their nature or operation connected together.]

5. A patent for an improved machine must show in the specification, in what the improvement precisely consists; and the patent be limited to those improvements. If not specified, the patent is void for ambiguity; if broader than the improvements, it is void on other grounds.

[Cited in Hogg v. Emerson, 6 How. (47 U. S.) 483; Blake v. Stafford, Case No. 1,504.]

6. Where a combination of machinery exists up to a certain point, and the patentee makes an improvement, he should not include in his patent the whole machinery; but only the improvement.

[Cited in Hovey v. Stevens, Case No. 6,746; Potter v. Holland, Id. 11,330; Seymour v. Osborne, 11 Wall. (78 U. S.) 549; Hopkins & D. Manuf'g Co. v. Corbin, Case No. 6,695.]

[Cited in Ex parte Berry, Case No. 1,353, as to what constitutes a combination.]

7. If a party make an improvement on an existing machine, or invent a new machine, his patent should not be for a method, but for his machine, or improved machine.

[Cited in Potter v. Holland, Case No. 11,330; Rees v. Gould, 15 Wall. (82 U. S.) 187.]

[8. Cited in Valentine v. Marshall, Case No. 16,812a, and Smith v. Downing, Cases Nos. 13,035a and 13,036, to the point that the character of an infringement, as such, is not affected by a mere alteration in form and proportion, so as not to materially affect results, nor by the substitution of mechanical equivalents to attain the same end.]

[1] [Reported by William P. Mason, Esq.]

[9. Cited in Keene v. Wheatley, Case No. 7,644, to the statement that the doctrine of patents constitutes the metaphysics of the law.]

[10. Cited in Earth Closet Co. v. Fenner, Case No. 4,249, to the point that, on application for a provisional injunction in a patent case, proper expert demonstration of the patents or articles involved should, in the discretion of the court, be applied in the solution of the necessary questions of law governing the case.]

At law. Case for the infringement of a patent granted for "A new and useful improvement, being a mode of dying and finishing all kinds of silk woven goods," [by William Barrett and Abner Stearns against Hall and others.] Plea, the general issue, with a specification of special matter of defense. [Verdict for plaintiffs. Heard on motion for new trial. Granted.]

The patent was granted on the 9th day of September, 1818; and after reciting, that the plaintiffs had alleged, that they had invented "a new and useful improvement, being a mode of dying and finishing all kinds of silk woven goods," granted to the plaintiffs "the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said improvement, a description whereof is given in the words of the said Abner Stearns and the said William Barrett themselves, in the schedule hereto annexed, and is made a part of these presents," for the term of four years from the 12th day of May, 1818. The specification, annexed to the letters patent, contained a description of two machines; one a reel, on which spirally to wind and secure the silk, and put it into the dye; the other, a frame for the purpose of extending and finishing the silk, after it is dyed.[2] At the trial it was admitted, that the infringement of the plaintiffs' patent, if any, was by the use of the reel only; and that the defendant did not use the silk frame, either in connexion with, or separately from, the reel. The plaintiffs stated their improvements to consist, 1. In the spiral winding of the silk on more arms than four arms, so as to assume the shape of a circular spiral, instead of a square spiral. 2dly. In the use of small pins, obliquely placed on the arms of the reels, to hook the selvages of the cloth, and hold it in a spiral form. 3dly. In separating the opposite arms gradually, by the means of a screw, and thus gradually extending the silk. 4thly. In the use of side bars to sustain the screw, and prevent it from turning with the machine, when it was not wished. It appeared in evidence, that reels with four arms had been used before the granting of the patent, with tenter hooks (instead of pins) to wind the silk on in a square spiral. And the use of a screw, for the purpose of gradually separating the opposite arms, was described in a book printed in London, in the year 1789, entitled the "Art of Dying Cotton and Linen Thread; together with the Method of Stamping Silk, Cottons," &c. p. 501.—"Square vats are therefore constructed, about six feet deep, and three and a half wide, and about three feet in the ground, for the conveniency of the dyer. The cloth is then fixed by the selvages to two wooden frames, each composed of four bars, and of such a length, as to be easily moved backward and forward in the vat. These frames are held together by means of a screw, so as to be easily let out or taken in, according to the breadth of the cloth. The cloth is supported by little iron

[2] Specification. The reel is designed to extend the silk, when immersed in the dye-stuff, so that this may pass freely and come in contact with the whole surface of the silk or material to be dyed, and yet the silk, or material, shall occupy the smallest possible or convenient space in the dye-tub. This machine consists of two sets of arms, each resembling in form the hub and spokes of a wheel, without the rim or fellies. In the hub of one is formed a female screw; in the other, a smooth cylindrical hole, in which one end of the axle may freely turn. The axle consists of a male screw, except that one end thereof is turned smooth to adjust to the hole of the hub that is smooth, and the other end is for an inch or two square, to receive the eye of a winch or crank. It is about three or five feet long. The male screw of the axle is cut, to fit the female screw in the hub, having the same therein. The two sets of arms are besides connected with each other by two square bars of wood or metallic substance like the axle. One end of each is securely fixed to the hub having the smooth hole, and the other ends are adjusted to square holes made in the other hub, through which they slip or pass as the hubs or set of arms are made to approach each other, and thus prevent the hubs from turning, as the screw axle is turned round for the purpose of approximating or withdrawing the sets of arms, to or from each other. Thus it is easy to perceive, that with one set of arms held on to the smooth cylindrical end of the axle, by a pin and washer or otherwise, so that the axle may freely turn therein, or in the hub thereof; the other set of arms, having the female screw, will be made to approximate to or recede from this, as the screw axle may be turned to or from, by a handle or winch affixed to the square end of the axle. The utility of this movement will presently appear. The hub of the sets of arms may be made of any convenient size. The dimensions adopted in practice at present are as follows:—The material any metal or metallic composition. The last, however, has been adopted in practice. The hub is about five inches in diameter, and two inches through; is morticed to receive the arms, which are flat square about sixteen inches long, but tapering from the hub to the end; and upon the sides of these arms or spokes are secured small brass pins, which are so set in grooves, cut into the sides of these arms transversely and diagonally, that the pins point inward and upwards, and divergently from the axle. The distance between these pins is quite small, about three-sixteenths of an inch. The mode of applying the silk and immersing the same, is as follows:—Both sets of arms, being placed on the axle as above represented, the machine is supported by the axle on two standards outside of the arms horizontally. The set with the female screw is then approximated by turning the winch to a distance from the other, a little less than the width of the material to be dyed. One end of the silk is then attached by the operator to opposite arms upon the pins therein nearest to the axle, and then the operator turning the machine a little for himself, the silk is further attached to the next arms by the pins nearest to the axle, and so on successively till the whole is attached and wound round upon the machine in a spiral

hooks, passed through the selvage at the opposite sides, to keep it as it were in folds throughout the piece. The whole thus arranged is suspended with a pulley over the vat, by means of cords fixed to each corner of the frame, and uniting in the middle, so that by slackening the pulley, the linen is dipped without being rumpled. When necessary to air and ungreen, by drawing the pulley the frame rises, and the cloth drains into the vat."

The witnesses at the trial gave different opinions as to the exact form of the machine, which was intended in this description; and all seemed to think it somewhat ambiguous. But the fact, that the screw was to be used, as in the plaintiff's reel, was agreed on all sides. The reels, in fact, used by the plaintiffs had eight arms. The reels used by the defendants had ten arms. Instead of pins, the defendants used on their reels staples, with a short barb to catch the silk in the first instance; and the silk was then secured on the reels by a rod running through the selvage, and through the holes in the staples. Instead of a screw, the defendants used a rack and pinion (which, it was admitted on all sides, was a different mechanical power) to separate the opposite arms after the silk was on the reel. In the spiral winding of the silk, the reels of the plaintiffs and the defendants were alike. Some of the witnesses were of opinion, that the reels were alike in what they called principle; others were of an opposite opinion. All of them, however, agreed as to the specific agreements and differences between them. It farther appeared in evidence, that in the year 1809, the plaintiffs severally obtained patents from the department of state for the same invention, each of them then claiming and swearing, that he was the sole inventor; and neither of these patents had ever been repealed. Stearns v. Barrett, [Case No. 13,337.]

The jury found a verdict for the plaintiffs.

And a motion for a new trial was made by Gallison and Prescott, for defendants, upon the following grounds:

1st. Because if the patent, which is declared upon in this action, be construed as a patent for the entire machine, called a reel, described in the specification, then the same includes parts, which at the trial were proved, and in the said specification are admitted to have existed, in combination in a machine for similar purposes, long before the supposed invention of the plaintiffs, to wit, in the reel composed of four arms, or two cross pieces, on which it was admitted, that the cloth was wound in a square spiral, which reel is described in said specification as before in use; and the judge, who charged the jury at the trial of said issue, did direct them, that merely increasing the number of arms was not an invention, that would in law entitle the plaintiffs to a patent, no certain number of arms being claimed in said specification; and did also direct them, that as it respected this patent, if the former square reel was believed to have been in use

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form. Then turning the screw axle by the winch, the set of arms having the female screw therein, recedes by a regular motion susceptible of the most accurate adjustment to the width of the silk; and thus it is held perfectly extended between the arms and by the selvages, in such a manner as not to be in contact with itself, but to leave free passage for the dye-stuff to apply itself equally to every part of the whole surface; and in this state of tension it is immersed by operation of a tackle and fall attached to one end of the axle until it is properly saturated or dyed.

It is obvious, that the silk by this means may be most conveniently rinced, and most readily drained. Also it is apparent, that the position of the pins on the arms, they inclining upwards and bending a little from the operator, as he applies the silk, must facilitate both the application of the material for dying, and the disengagement thereof after this operation is performed.

There has been, it is said, a reel heretofore in use for like purpose; but this, if it ever were so used, consisted of four arms or two cross pieces, adjusted to a square axle, and the set of arms were kept separate or fixed upon the axle, not by a screw, but by pins passing through holes in said axle. Instead of pins affixed to the arms, there were common tenter hooks driven into the inner side of the arms, and the whole so constructed as to be utterly inapplicable to the purpose of dying silk or other goods, without great injury. The machine for which these applicants claim a patent, is, in all material respects, an improvement upon this.

The design of the silk frame is to extend the silk for drying and finishing; and it is contemplated to use it for all kinds of goods, which, in the operation of dying, require to be so extended.

It is a wooden frame, consisting of fourteen posts, about four feet or more in height, connected by rails in such a manner, as to be perfectly solid and firm. The opposite posts are connected by two strong rails of about eight feet in length, one at the bottom, and one within a few inches of the top, well morticed and tenanted into the posts; while two strong pieces of plank lying upon the bottom connecting rail, leaving a space of about two feet more or less between them, one firmly secured to these said bottom rails. A strong rail is fastened to the posts throughout the whole length of the frame, and thus gives it all the requisite solidity and firmness. Upon the upper rail connecting the opposite posts, which are placed at a distance of ten feet from post to post along the length of the frame, are lain two pieces of plank sixty feet long, and about eight or ten inches wide. These are made to move or slide in these upper rails, so that when the silk is attached to their inner edges, they may be withdrawn from each other, till the requisite degree of tension is obtained.

The mode, in which the silk is attached to the edges of these cheeks, and then the cheeks withdrawn, is as follows:—The inner edges of the cheeks are covered by a thin plate of copper, about half an inch wide, nicely attached thereto. Sixty pieces of wood, cut from board or plank, say, from an inch to an inch and a half, or two inches thick, about a foot long on one side, and cut up in a triangular form, are adjusted to each cheek. The base being, as above, one foot in length, it is attached by hinges to the superior surface of the cheeks, in such manner, that the edge of the base will coincide exactly with the inner edge of the cheek,

before the invention claimed in this patent, the defendants had a right to use the reel-head, resembling the hub and spokes of a wheel, and also the spiral form of winding the cloth; and that the said patent, if it extended to the whole machine, and went to secure the exclusive right to every part thereof, as the invention of the plaintiffs, was broader than their invention, and therefore void. And therefore the said jury, upon this construction of the patent, in returning their said verdict, must either have found, that the said square reel did not so exist, which is against the admission of the specification, and the admissions and evidence of the plaintiffs at the trial; or, admitting the above fact, they must have gone upon the supposition, that notwithstanding such prior use, the same might be secured by patent to the plaintiffs; and that their said patent was not thereby rendered void; in which case their said verdict is against the direction of the judge in the matter of law.

2dly. Because, if the said patent be construed as a patent for an improved machine, or for a certain combination, consisting of the machine known and used before, as set forth in the specification, and of certain improvements added thereto by the plaintiffs, then the right of the plaintiffs under their said patent, must be confined to that precise combination; and it was necessary, in order to support the plaintiffs' case, and the judge, who tried the cause, did so direct the jury, that the machine used by the defendants should, in all material and essential respects, be like the machine described in the plaintiffs' specification; otherwise the combinations would not be identically the same, and therefore there would be no infringement; and that, if the rack and pinion was an essentially different mechanical power from the screw, then there appeared a substantial difference between the two machines, which destroyed their identity; and therefore, inasmuch as it was evident on inspection, that the rack and pinion was employed in the defendants' machine to produce the same effect, for which the screw is employed in the plaintiffs' machine, and it was also proved by divers witnesses on both sides, and was not contradicted, that the rack and pinion is a mechanical power essentially different from the screw, the said jury must have returned their verdict in this particular, either against the evidence or against the direction of the judge, in the matter of law.

3dly. Because, at the said trial, it was clearly proved by the testimony of Allan Pollock, by the admission of the plaintiffs and by a public work, that hooks of different form and sizes, and of different degrees of finish and fineness, according to the nature of the cloth, had been used for the purpose of extending cloth upon frames, many years before the pretended invention of the plaintiffs; and this evidence was not contradicted by any other evidence in the cause. And it was also proved by the said public work, and by witnesses produced, both by plaintiffs and defendants, to show the meaning of the description contained in the said public work,

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when the piece rests on its base. On this too there is a copper edging, and thus, this copper edging, when these pieces are raised upon their basis, comes closely in contact with the copper edges along the line of the inner edges of the cheeks, and by firm pressure are made to hold the selvages of the silk, &c. To the outer side of these pieces, which are called lap-joints, are attached some iron stays, about six or eight inches long, being a little longer than the lap-joints are wide or high. These stays are attached by a staple, or eye, to the upper part of the lap-joints, and the foot of each is made to slide into a groove, cut in the superior surface of the cheek, and lined with copper, so that by forcing the foot of the stay into the groove, the lap-joint is made to press firmly upon the selvage of the silk, when lain upon the copper edge of the cheek. The silk is first secured by one selvage to one cheek; then the other cheek being approximated sufficiently, the operator in like manner applies the selvage to the other cheek edge, and secures it by successively raising up and securing the lap-joints. The former cheek is fastened to the upper rail by strong iron pins passing through this and the said connecting rails of opposite posts. The other cheek, which is called the front cheek, is then gradually withdrawn till the silk is perfectly extended. The mode of withdrawing the front cheek is thus: To this cheek opposite to each post, all of which, on this side, rise two feet above the cheeks, are attached several pieces of iron, long enough to pass through the posts, on which pieces of iron are cut screw threads, so that nuts, being set in wheels and applied to said pieces of iron, by the turning of all the wheels simultaneously and with equal velocity, the whole front cheek is gradually withdrawn till the proper degree of tension in the silk is obtained. These wheels are put in motion by a chain band carefully adjusted, so that the links thereof embrace projections in the periphery, and the power is applied indifferently to either wheel, by a pin six or eight inches long thereto attached, to serve as a handle or winch.

There may be other modes of withdrawing the front cheek, but the special subject of patent, for which letters are claimed, is the mode of securing the silk as above described by lap-joints, and the gradual and exact tension obtained by the withdrawing of the whole front cheek simultaneously and equally at one operation as aforesaid. In these and in all material respects, this frame is an improvement upon the pin frame formerly in use, and also a frame, that was constructed to hold the selvages by pieces of board lain flat upon the cheeks, and pressed by wooden screws attaching them to the cheeks. The copper edges being a very considerable improvement on this last mentioned frame, which had become useless by reason of the absorption of the dye-stuffs in the wooden edges of the cheeks, and slabs or boards above mentioned.

The silk being thus extended, the ends thereof are secured by a cross bar set with pins, or by a piece of wood split so as to hold the ends, and the whole is ready for the operation of drying and finishing, which is done thus: Upon the pieces of plank, which are described as fastened upon the lower cross rails, that connect opposite posts, is placed a moveable car running on four wheels, which is made to contain coals and move at pleasure beneath the silk, as the operator proceeds in the finishing. This being accomplished, the silk is delivered from the lap-joints by removing or sliding away the stays, and may be immediately folded for use.

and was not contradicted by any other evidence in the cause, that many years before the said supposed invention of the plaintiffs, the screw axis was known, and had been used and applied for the purpose of moving one frame from or towards another, according to the width of cloth attached to said frames to be dyed. And it also appeared, and was admitted by the said plaintiffs in their specification, that before their said supposed discovery, a reel was in use for like purpose, consisting of four arms or two cross-pieces; and it also appeared and was admitted, that on such reel the cloth was wound in a square spiral, by means of tenter-hooks set upon the arms; and there were no other improvements claimed to have been made in any essential parts upon the said square reel, admitted by the said specification to have been before in use, excepting only the increasing of the number of arms, (which the said judge directed the jury was not an invention, that would in law entitle the party to a patent, no certain number being set out in said specification; and as to which, it appeared from inspection of the machine used by the defendants, that it consisted of eight arms only, while the machine produced by the plaintiffs consisted of ten,) the using of finished curved hooks, placed diagonally in the sides of the arms instead of tenter-hooks formerly in use, and the aforesaid application of the screws. And the said judge directed the jury upon these facts, that if any or all of these improvements had been used by the defendants, yet if none of the same was new in its principle or mode of application, the plaintiffs could not, in point of law, support their action for such use; and therefore the said verdict, in this respect, is either against the evidence, or against the direction of the judge in the matter of law.

4thly. Because it appeared in evidence as aforesaid, and was not contradicted by any testimony, that the screw had been applied for stretching cloth between two frames, in the same manner as in the plaintiffs' machine, long before the supposed discovery of the plaintiffs; and the said judge directed the jury, that, taking this fact to be true, if the said patent was construed as a patent for the improvements made in said square reel by the plaintiffs, then the said patent included, what was not invented by the plaintiffs, to wit, the said application of the screw, and, therefore, upon this construction of the patent, the said verdict is against the evidence, or against the direction of the judge in the matter of law.

5thly. Because at the said trial it was proved by an inspection of the machines, that the power, which moved the moveable frame or reel-head in one was a screw, and in the other a rack and pinion; and it was also testified, and was not contradicted, that these are essentially different mechanical powers. And it also appeared, by inspection of said machines, and from divers witnesses, whose testimony was not contradicted, that the cloth upon the defendants' machine is secured to the arms by rods passing through staples, and through the selvages of the cloth; and that the purpose and design of certain small barbs, cut upon said staples, is merely to hold the cloth until the rods are pushed through; and it also appeared, that said staples and barbs resembled more the tenter-hooks admitted to have been long in common use, than the hooks or pinion of the plaintiffs' machine; and it also appeared, that in the plaintiffs' machine the cloth is attached and secured by means of curved hooks, or pins passing through the selvages, and holding the cloth through the whole operation of dying; and it also appeared, that these two parts of the machine were the only essential parts, which had been improved by the plaintiffs, no other improvement being set out in their specification. Wherefore the said verdict is against the weight of evidence and also against law, in finding the said defendants guilty of an infringement of the plaintiffs' rights.

6thly. Because the said judge, in charging the jury, did direct them, for the purposes of this trial, that the existence of two prior patents for the same thing, granted to the same patentees respectively, although both of said patents be still in force, did not affect the validity of the patent declared on. And did also direct them, for the purposes of this trial, that the oaths of said plaintiffs respectively made when they obtained the said prior patents, that they severally believed themselves to be true and original inventors of said machine, did not conclude them to show a joint invention of the same machine, and to claim as joint patentees therefor, both which directions the said defendants respectfully submit are incorrect in point of law.

7thly. Because the said jury, upon the whole weight of evidence produced at the trial, and upon the matters of law, in which they were instructed by the judge, ought to have returned their verdict, that the defendants were not guilty; yet, against the said weight of evidence, and against the said directions in matters of law, they have returned their said verdict, that the said defendants are guilty.

G. Sullivan, for plaintiffs, argued e contra.

Our statute differs materially from the statute of James. Under the statute of James the inventor applies for, and obtains a patent, in which is contained a description, comprehending his whole invention. But a proviso is inserted in the patent, requiring the inventor to file in chancery a specific and minute statement of what he claims as his invention. This specification is matter of record in chancery; and whether this describes less than is contained in the patent, may

well be considered, in many cases, as mere matter of law. Hence it happens that the question, whether the patent is broader than the invention, is sometimes in England decided by the court. So also, under the statute of James, the court determines what is principle, or that character, which essentially constitutes the difference or identity of machines. But in both these particulars, the patent law of the United States makes express provision. In respect to the principle of a machine, the statute expressly defines principle or character to be that thing, what ever it may be, whether it be found in structure or operation, or modes of operation, whereby the alleged invention may be distinguished from all others. Hence the courts of the United States are not required to define principle. Nay, they have no power to direct the jury, that this, or that, or other structure, constitutes the character of a machine, whereby it is distinguished from all other inventions. The judges, as I apprehend the law, must admit all evidence offered by either party, from witnesses acquainted with the particular art or machinery in question, whereby the true character or distinguishing principle of the machinery may be proved. And then they are to put it to the jury as a mere matter of fact, to determine upon evidence, what constitutes the distinguishing principle of the machines in question before them, and whether that distinguishing principle, be it in structure, operation, or mode of operation, do or not exist in both machines, so as to constitute them essentially the same or different. If this were not so, the judges would draw to themselves the decision of matters of fact; for surely the question, what it is that constitutes the distinctive character of a machine, whereby it is distinguished from all others, is plainly matter of fact; and it cannot be disputed, that whether this same principle do or not exist in the plaintiffs' and defendants' machines, is also mere matter of fact. So, whether the patentee have invented any thing that is new and useful, is merely a question of fact; for otherwise the court must determine, what has existed before; for what has existed before must be shown in evidence, or the court must be presumed, nay required to know; and surely what has existed, is, beyond all controversy, matter of fact. Suppose the defendants insist, that the patent is claimed for a bare philosophical principle. This in like manner must be referred to the jury, unless mechanical philosophy be law, and as such be presumed to exist in the breast of the court. So if there be a question, whether the description specified be sufficient to enable artists to manufacture the machine, the sufficiency or insufficiency is matter of fact to be given in evidence by artists, or the court must assume to itself a paramount knowledge of all arts and manufactures, and in doing so, assume the decision of mere matter of fact. Nay, as I apprehend the law, if there be evidence on both sides, the court have not the power to determine on which side the weight of evidence appears, this being exclusively within the province of the jury; and the court have no power in such a case to set aside a verdict, merely because they think the verdict is against the weight of evidence. So also if there be a patent for an improvement in a patented invention, and the question arise under the second section of the patent law, whether the alleged improvement be simply a change in the form or proportions of a machine, this is clearly a question of fact to the jury. In like manner, all the questions arising under the sixth section, whether the specification do or not contain the whole truth relative to the discovery; whether it contains more or less than is necessary to produce the described effect, and so made for the purpose of deceiving the public; whether the thing described in the patent was or not originally discovered by the patentee, or had been in use before; whether the invention had been described in some public work, anterior to the supposed discovery of the patentee; all these are mere questions of fact, and such the statute expressly makes them, when it denominates the subject of these questions special matter, and provides that it may be given in evidence, if notice thereof be filed thirty days before the trial. Thus it appears, that whatever may be the practice of the English courts under the statute of James, in relation to the extent of the patent beyond the invention, it is clearly matter of fact here, whether the patent contain more than the invention, that is, in the English technical phraseology, whether the patent be or not broader than the invention. And this brings us to the other point of difference, between our act of congress and the statute of James, which respects the power of the court to decide, if the patent is broader than the invention. And here it is only necessary to remark summarily after what is said above, that if the decision of the question is drawn to the court in England, it is merely a question of fact in this country, and as such to be determined by a jury upon evidence.

In this place it may be pertinent to consider, what evidence is to be received, touching the difference or identity of machines. Certainly it is not to be expected, that the court should be informed upon all the principles of mechanics, nor, if they were, is it to be allowed, that their direction to the jury on these matters of fact can be regarded as more imperative than in other cases of fact. If there be a question of seaworthiness of a ship, the court may well lay down the rule, that the vessel must be capable of performing the voyage insured. But after it is proved the vessel was defective in certain of her timbers, it surely is competent to both parties to adduce evidence to show, that these defects do or not render the ship incapable of performing the voyage. And whatever

may be the private opinion of the court, they must submit the question to the determination of the jury, upon the evidence produced. So in questions of deviation, and many others of the like kind.

Now in the case before the court, the question of the identity of the machines was a mere matter of fact. It was testified, that they had the same character, and were in principle the same. There was evidence to this point on both sides, and the jury found their identity. They were in fact the same. The substitution of the rack and pinion, it will appear, when the nature of mechanical powers is considered, makes no difference. What are mechanical powers? They are only the means of augmenting the force applied, and this is uniformly done in the inverse ratio of the velocity of that force. These powers are common to the whole mechanical world, and no patent can be obtained for the application of them as powers. But the patent goes for that new and useful structure of constituent parts, whereby the powers being applied, certain new and useful effects are produced. Now what was this structure of essential constituent parts in the machines before the court? It was the moveable set of arms sliding on the two square bars, passing through the hub of said moving set of arms, whereon this was made to traverse by means of a mechanical power applied. It was obvious to any mechanical mind, and so Col. Baldwin testified, that the screw, or the rack and pinion might be indifferently applied to the same structure. Indeed, the lever, the pulley and weight, and other powers, might be also applied to the same structure or constituent parts of the machinery. All these powers would subserve the same purpose, and by precisely the same means, that is, by augmenting the force in the inverse ratio of the velocity with which the force moved, and of course regulating the force by a gradual movement. Indeed, there can be no better test on earth of the identity of machines, than that their structure is such, that different powers may be indifferently applied to precisely the same constituent parts, and the operations of those parts, and the effects produced by the application of one or the other power be the same. At all events, whether the substitution of one power, instead of another, do or not constitute a difference, must be a question for the jury, which they are to determine upon the evidence of intelligent mechanicians. To test this yet farther, let it be supposed, that the defendant had applied for and obtained a patent as for an improvement on the plaintiff's machine, and had specified the substitution of the rack and pinion, it is clear, that in an action by the defendants against a party for an infringement, it would be competent for such party to raise the question, whether the application of the rack and pinion were any thing more than a simple change of form. From evidence disclosed in this case, it might be made to appear, that there was no difference in the effect, and no difference in the structure of the constituent essential parts of the machine, whereby the operation of stretching the silk is obtained. It would also appear that the force applied to give motion to the moving set of arms is augmented and graduated in the same ratio, and quoad these machines, if Col. Baldwin and others are believed, is the same. At all events, whether it were so or not, would be a question of fact to the jury; and if they were of opinion, that the substitution of the rack and pinion was simply a change in form, the defendants in such case could not hold their patent, because the statute says, simply changing the form shall not be deemed a discovery. Again, if on the contrary the application of a rack and pinion were not found to be simply a change in form, but an improvement, and this were the improvement specified, the defendants could not use the constituent parts of the machine, because the statute, second section, expressly enacts, that the patentee of the improvement shall not be at liberty to use the original discovery; and surely, if the defendants could not use the discovery of the plaintiffs, if the defendants were patentees of the application of the rack as an improvement, a fortiori they could not use the plaintiff's discovery now, that they are not patentees of an improvement. Here the defendants may contend, that the plaintiffs have not specified their original discovery, so that the same may be distinguished from what was known before; and whether they have or not, is next to be considered. Now the plaintiffs, in their specification, first describe the whole reel as used by them, and a machine in magnitude was produced. No objection was taken at the trial, as to the sufficiency of this description. It was fully admitted, that the whole machine, such as it appeared, was clearly described. Then the plaintiffs describe another reel, consisting of four arms and a square axle, through which axle some holes being made at certain distances, the moving set of arms could be secured at the requisite distance, according to the width of the material wound upon the reel. This also was so clearly and distinctly described, that the defendants therefrom constructed in model a reel, conforming exactly to the description. Whereupon the plaintiffs, in their specifications say, that the new reel is, in all material respects, an improvement upon the old reel, and for these material improvements they claim their patent. Now, whether there are any such material improvements was matter of fact to the jury, and what these improvements were, was also matter of fact. Nothing could be plainer, than that a material difference existed, both in the effect produced, and in the mode of operation to produce that effect. The jury were satisfied, both as to the difference of the new from the old, and that this difference made the

new better than the old; and what is improvement, but being different and better? But, said the defendants, the patentees ought to have designated, in precise terms, the particular parts which constituted the difference. The answer to this doctrine is found in the statute. The inventor, says the third section, shall fully explain the principles and character by which the machine may be distinguished from other inventions. Now the new machine was fully described, so that artists could make one from the specification. The old machine was described, so that artists could make one like that from the description; and it was manifest on inspection and from the evidence, that they were in character materially different. Certainty, to a common intent alone, is required. No precise or technical language is necessary. The public derive all the benefit, that the patent law contemplated securing to the public, and the patentee has secured to him no more than his invention. The jury found it so; and surely the court cannot otherwise decide, without assuming the determination of matters of fact. In the case of Harmar v. Playne, 11 East, 101, it was held, that a description of the old and description of the new machine in the same patent, although the description of the old was merely by recital of the former patent, was description enough of the improvement for which the patent was obtained. In the case of Boulton v. Bull, [2 H. Bl. 463,] it was held, that the description was sufficient, although no precise form or proportion of the condenser was described, nor its relative position to the cylinder named, nor the means of communication between the cylinder and condenser distinctly mentioned. It is enough, said the court, if an artist can produce the designed effect from the description contained in the specification. It cannot be, that inventors are required to describe pin for pin, screw for screw, and all the numerous unpatentable differences, that must exist in every machine, however new, in common with other machines. There are shades of difference in machines, which result from their original character, and like the shades of difference in the social and professional habits of men, which depend on their predominant passions or qualities, are seen and understood, but yet are without a name, nor is it in the power of language to describe them.

It is enough for the public, if artists can see and understand these distinctive or essential qualities of the machine from the specification. It is enough for the parties at a trial, if the jury perceive and comprehend them, and find them, in their opinion, sufficiently described in the patent or specification.

It comes next in course to consider the novel doctrine assumed by the defendants, that the plaintiffs must be considered as claiming a patent for the combination, such as it was exemplified in their machine, or else they must be considered as limited to special improvements, and these they must designate. Having already considered the latter alternative, I proceed to consider the former. In the first place, there is not a word of combination in the plaintiffs' patent, nor would this be necessary to secure their invention, if this were in fact only a combination of such parts as, properly speaking, in relation to mechanics could be combined; for the inventors are entitled to their patent, if they fully explain their invention, and the principle and character thereof, so as to distinguish it from all others known or used before; and surely this might be done in Evans' Case, [Evans v. Eaton, Case No. 4,559,] without using the word combination. But what is combination, and what parts may be combined? Is driving a nail, or turning a screw into a piece of wood a combination? Is putting arms or spokes to a hub—is putting two wheels to an axis, a combination? It is obvious enough, what combination is not. Nor is it less plain, what it is. The connexion of several distinct machines together, like Evans's mill, so as to be operated upon by one power, giving co-operative motion to all, is clearly a combination. There each machine has its characteristic, constituent parts —a being, a life of its own; but the connexion of a thousand dead parts in one machine, having but one single simple operation, can never be considered a combination.[3] A watch is a combination; for the main-spring is one power, and puts the whole machine into operation, but the hair-spring is a power that regulates this motion. Here, then, are two distinct operations. So in the card machine of Whittemore, there is a combination of parts, each performing a distinct operation, and the whole acted upon and regulated by numerous powers. But in the plaintiffs' reel there is but one power, and one single simple operation, that of moving the traversing set of arms; and it is said, "that some machines are so simple, that they cannot be considered as combinations." The reel, therefore, of the plaintiffs cannot be regarded as a combination. But if it were, and the only alleged difference were the use of the rack and pinion instead of the screw, the question of difference is for the jury; and they are to decide, "whether, on the whole, there is any substantial difference between the machines, or whether they are substantially the same. Slight or colorable differences will not protect the defendants in their infringement, or defeat the right of the patentee;" and this brings us back to the general question of identity, which lies exclusively within the province of the jury; for infringement or not, of course identity or not, says Judge Rooke, is for the jury to decide.

I have now considered the several questions made at the trial, and have shown, as it is believed, that the questions, whether the

[3] [See Ex parte Berry, Case No. 1,353.]

plaintiffs jointly invented the reel, whether the patent is broader than the invention, and whether the improvement, as such, is sufficiently described for all the purposes of the patent law, are all purely questions of fact. And I have also shown, as it is believed, and the doctrine of combination does not apply to the plaintiffs' reel; but whether it does or not, that the question of the identity of the defendants' and plaintiffs' machine is still the same, and is merely a question of fact.

In presenting this view of the subject, it will be perceived, that I have directly encountered all the objections taken in the defendants' motion, which are comprised in the first five causes assigned for a new trial. The first five causes are so involved with each other, that an attempt to give a special reply to each, would have left the whole subject in confusion. They altogether amount to this merely, that the plaintiffs have invented nothing; that if they have, their invention is not sufficiently described and distinguished in the specification; but if it is sufficiently described, the defendants have not used the plaintiffs' invention. All this is matter of fact, and as such, was properly submitted to the jury; and on all these points the evidence was either full for the plaintiffs, and uncontradicted, or else there was evidence on both sides; whence it follows, that the verdict for either of said five causes, or for the last, cannot be set aside as being against evidence.

As to the sixth cause, that the judge misdirected the jury touching the validity of the plaintiffs' joint patent, to wit, that it was valid, although patents for the same invention had been issued, in 1809, to each of the plaintiffs, as sole inventor of the same, and for aught that appeared, both the patents were in force when the action on the joint patent was commenced. The counsel for the plaintiffs is satisfied on authorities, that this direction was unexceptionable and correct. This is a new question in court, although a practice in the patent office has doubtless given many occasions of its being raised. But as this is not a point mainly in controversy now, I shall content myself with stating a few points of law, and citing the authorities, that support them.

It is a natural right, which every patentee hath, to surrender his invention, if the acceptance of it imposed no condition, which remained unperformed. In England a patentee may surrender his patent into chancery, (see Dyer's Case, 1 Dyer, 179, and notes,) and when the surrender is enrolled a vacatur is entered of course. This is by order of chancery according to ancient practice. But the circuit court of the United States has no cognizance in chancery of patents, nor has the law designated any mode, whereby a patentee may surrender his patent. In favor, therefore, of common rights, a court of common law will presume a surrender, wherever it is for the interest of a patentee, that he shall be considered as having surrendered. But the subsequent acceptance of a patent, which is incompatible with a former one, is in law an implied surrender of the former. The patents of 1809 are already inconsistent with the patent of 1818. Nay, the plaintiffs by their subsequent oath of joint invention, have utterly defeated all title under their precedent patents, independently of the surrender implied by the acceptance of the last patent.

Touching the plaintiffs' oaths as to their respective exclusive invention, it was regarded as clearly a matter of mistake, into which joint inventors might naturally fall when ignorant, as they each were, of the extent of the other's design and contrivance. In conclusion it is proper to observe, that this motion for a new trial is an application to the sound discretion of the court for an equitable interposition of its powers. To what equitable consideration are these defendants entitled? Were they not the clerk and apprentice of the plaintiff, Barrett? Did they not learn of him the use of the machines in question? Did they not employ a workman of his to take the measurement of his machines, and then, from the very outset, engage him in a suite of contrivances, to approximate to the plaintiffs' machines, and yet to save the appearance of invasion of their rights, while in fact the original design of the defendants was unquestionably, by slight and colorable differences, to conceal the infringement they consciously intended. Surely it must be admitted on all hands, that the plaintiffs have invented a most valuable method of extending the silk for dying; and if a jury of the country, selected from that public, for whose benefit the patent is granted, are in truth satisfied on all the material points, it cannot be justice to perplex and harass the plaintiffs with the necessity of further suit to obtain enjoyment of their just right and privilege. Besides, it must be remembered, that patents in England receive a strict construction, because they are there considered as being in derogation of common right. Whereas, in the United States, they are more justly regarded as bounties upon the productions of genius, and as means of great and extensive benefit to the public. As such, they ought here to receive the most liberal construction; and no patent should be held void, if it in fact fulfil the ultimate design of the patent law; if it furnish in the specification a description essentially certain, to enable the public to avail itself of the invention after the patent term shall have expired. This is the object of the law; and to this, as the great end of all its provisions, ought the attention of the judiciary and juries to be directed.

STORY, Circuit Justice. This case has been argued for the plaintiffs, as fully and as ingeniously as its merits will allow, upon the

same principles and reasonings, which were pressed upon the court at the trial. If they have failed to convince the understanding of the court, it is because in some instances the premises, and in others, the conclusions are radically unsound and inadmissible. I pass over all the learned lecture, as to what constitutes matter of fact and what of law, and what are the relative rights of courts and juries as to matters of fact, because no novelty and no instruction can attach themselves to the discussion. The whole doctrine lies in the elements of the common law, undisputed and indisputable. As little do I think it necessary to discuss the question, what constitutes the identity or diversity of machines in the abstract; or to philosophize respecting the different mechanical powers. My humble knowledge does not permit me to venture on such difficult topics, and fortunately my duties as a judge do not require me to master them. I am content on these, as on other occasions, to learn from those, who can give the proper instruction, and then to apply it to the solution of such questions of law, as are fit to be entertained here. To be sure, I must continue to believe, until better instructed, that the different mechanical powers are not one and the same power; and that a motion, which is communicated by a screw is not communicated in the same way as that by a lever, a wheel, a wedge, or a pulley. As to the opinion of skilful witnesses, whether the principles of two machines are the same, no person doubts, that it is competent evidence to be introduced into a patent cause. But care should be taken to distinguish, what is meant by a principle. In the minds of some men, a principle means an elementary truth, or power; so that in the view of such men, all machines, which perform their appropriate functions by motion, in whatever way produced, are alike in principle, since motion is the element employed. No one, however, in the least acquainted with law, would for a moment contend, that a principle in this sense is the subject of a patent; and if it were otherwise, it would put an end to all patents for all machines, which employed motion, for this has been known as a principle, or elementary power, from the beginning of time. The true legal meaning of the principle of a machine, with reference to the patent act, is the peculiar structure or constituent parts of such machine. And in this view the question may be very properly asked, in cases of doubt or complexity, of skilful persons, whether the principles of two machines be the same or different. Now, the principles of two machines may be the same, although the form or proportions may be different. They may substantially employ the same power in the same way, though the external mechanism be apparently different. On the other hand, the principles of two machines may be very different, although their external structure may have great similarity in many respects. It would be exceedingly difficult to contend, that a machine, which raised water by a lever, was the same in principle with a machine, which raised it by a screw, a pulley, or a wedge, whatever in other respects might be the similarity of the apparatus. But, although the testimony of witnesses be admissible to prove the identity or diversity of machines in principle, yet, after all, it is but matter of opinion; and its weight must be judged of by all the other circumstances of the case. It is infinitely more satisfactory to ascertain, if we can, the precise differences and agreements; and when these can be subjected to the eyes, they almost supersede all the evidence of mere opinion. In all my experience I can scarcely recollect a single instance, in which the general question, whether the principles of two machines were the same or different, has not produced from different witnesses, equally credible and equally intelligent, opposite answers. This could result only from the different meanings attached to the word, and from confounding its various senses. And this has been completely shown, when the same witnesses came to explain the precise agreements and differences, in which they have almost uniformly agreed. The case now before the court is a perfect proof in point. The witnesses differed as to the identity or diversity of the principles of the machines; but they were all agreed as to what were the precise differences and agreements in fact. There seemed then nothing left for the jury to decide, but whether these differences were substantial or formal; if substantial, then the machines were not alike; if formal only, then they were alike. And the question, whether the principles were the same in both machines, was in reality, when all the facts were given, rather a matter of law, than of the opinion of mechanics; at least matter of law was necessarily mixed up with it, which mechanics could not be presumed to be acquainted with.

The opinion, however, which I shall express, will not turn in any material respect upon any facts controverted at the trial. I shall discuss the motion for a new trial, so far as facts are concerned, upon the admissions and statements, which the plaintiffs did not and could not deny. The doctrine of patents may truly be said to constitute the metaphysics of the law. The difficulty lies, not so much in the general principles, as in the minute and subtle distinctions, which occasionally arise in the application of those principles. I will endeavour, however, to lay down some general rules, which appear to me to embrace the whole merits of the present controversy, and then apply those rules more pointedly to the facts of this case.

In the first place, a joint patent may well be granted upon a joint invention. There is no difficulty in supposing in point of fact, that a complicated invention may be the gradual result of the combined mental opera-

tions of two persons acting together, pari passu, in the invention. And if this be true, then as neither of them could justly claim to be the sole inventor in such a case, it must follow, that the invention is joint, and that they are jointly entitled to a patent. And so are the express words of the patent act,—Act Feb. 21, 1793, c. 11, § 1, [1 Stat. 318,] —which declares, that if any person or persons shall allege, that he or they have invented, &c. a patent shall be granted to him or them for the invention. In the next place, a joint patent cannot be sustained upon a sole invention of either of the patentees; for the patent act gives no right to a patent, except to the inventor; and requires an oath from the party, who claims a patent, that he is the true inventor. In the next place, a joint patent for an invention is utterly inconsistent with several patents for the same invention by the same patentees. For it is impossible, that any person can be, at the same time, the joint and sole inventor of the same invention. If, therefore, each of the joint patentees obtains a several patent for the same invention, as his own exclusive invention; and afterwards, without surrendering the first patent, they obtain a joint patent for the same as a joint invention, either the former sole patents are void, or the joint patent is void. For, besides the apparent inconsistency of the patents, if all could be sustained then a recovery upon the joint patent would be no bar to a suit upon the several patents; and the parties might obtain a double recompense for the same infringement. There is an additional reason, which deserves great consideration; and that is, that if several and joint patents could be sustained by the same parties for the same invention, they might be successively taken out, so that the term of the exclusive right might be prolonged for a great length of time, instead of being limited to fourteen years. I am therefore clearly of opinion, that a grant of a subsequent patent for an invention is an estoppel to the patentee to set up any prior grant for the same invention, which is inconsistent with the terms of the last grant. And I have very great doubts, whether, when a patent is once granted to any person for an invention, he can legally acquire any right under a subsequent patent for the same invention, unless his first patent be repealed for some original defect, so that it might truly be said to be a void patent.

In the next place if several patents are taken out by several patentees for a several invention, and the same patentees afterwards take out a joint patent for the same as a joint invention, the parties are not absolutely estopped by the former patents from asserting the invention to be joint; but the former patents are very strong evidence against the joint invention. The reason of this doctrine is, not that estoppels are odious in the law, but that a party may innocently mistake, as to the extent of his own claims. And though a several and joint invention, by the same persons of the same thing, cannot exist in fact; yet a party may suppose, that he has invented, what in truth has been partly suggested by another mind.

In the present case, each of the plaintiffs (Barrett and Stearns) obtained, in the year 1809, a several patent for the present invention, as his sole invention; and the patent, on which this action is brought, is a joint patent granted in 1818. In this view, the doctrine already stated directly applies in the case. It is the same, as was stated to the jury at the trial, and on the most mature reflection, I adhere to it.

In the next place, a patent may be for a new combination of machines to produce certain effects; and this, whether the machines, constituting the combination, be new or old. But in such case, the patent being for the combination only, it is no infringement of the patent to use any of the machines separately, if the whole combination be not used; for in such a case the thing patented is not the separate machines, but the combination; and the statute gives no remedy, except for a violation of the thing patented. This was the doctrine of Mr. Justice Washington in his most able opinion in Evans v. Eaton, [Case No. 4,559;] and it has not been in the slightest degree shaken in the supreme court. Evans v. Eaton, 3 Wheat. [16 U. S.] 454, 476, 506. I hesitate not one moment in adopting it, as established on solid foundations. It has indeed been said, that where there is a patent for the whole of a machine, whoever imitates it, either in whole or in part, is subject to an action at the suit of the patentee. Bovill v. Moore, 2 Marsh. 211. But supposing this doctrine to be true in any case and under any qualifications, (which may well be doubted,) it can apply, where the whole machine is entirely new, and cannot apply, where the patent is limited, by its very terms, to the combination of several machines.

Further. A patent under the general patent act, cannot embrace various distinct improvements or inventions; but in such case the party must take out separate patents. If the patentee has invented certain improved machines, which are capable of a distinct operation; and also has invented a combination of those machines to produce a connected result, the same patent cannot at once be for the combination and for each of the improved machines; for the inventions are as distinct, as if the subjects were entirely different. A very significant doubt has been expressed on this subject by the supreme court; and I am persuaded, that the doubt can never be successfully removed. Evans v. Eaton, 3 Wheat. [16 U. S.] 454, 506.

Further. If a patent be for an improved machine, or for an improvement of a ma-

chine,—for I follow Mr. Justice Heath (Boulton v. Bull, 2 H. Bl. 463, 482) and the supreme court (Evans v. Eaton, 3 Wheat. [16 U. S.] 454) in thinking, that the meaning of the terms is substantially the same,—then the patent must state in what the improvement specifically consists; and it must be limited to such improvement. If, therefore, the terms be so obscure or doubtful that the court cannot say, what is the particular improvement which the patentee claims, and to what it is limited, the patent is void for ambiguity. Macfarlane v. Price, 1 Starkie, 199. And if it covers more than this improvement, it is void for another reason, that it is broader than the invention.

Further. Where a combination of machinery already exists up to a certain point; and the patentee makes an addition or improvement to the machinery; he must confine his patent to the improvement; for if he takes a patent for the whole machine as improved, not distinguishing between the new and old, nor limiting his patent to the improvement, it is void, because, as so claimed, it is not his invention. Bovill v. Moore, 2 Marsh. 211.

Further. If an invention consist in a new combination of machinery, or in improvements upon an old machine to produce an old effect; the patent should be for the combined machinery, or improvements on the old machine, and not for a mere mode or device for producing such effects, detached from the machinery. This appears to have been the doctrine of all the judges in Boulton v. Bull, 2 H. Bl. 463, and was illustrated by several of the cases there put. And in a recent case, where a patent was obtained for "an improved mode of lighting cities," it was held, that it was not supported by a specification describing an improved street lamp; and that the patent ought to have been for an improved street lamp. Cochrane v. Smethurst, 1 Starkie, 205. So, where the patent was for "a new invented manufacture of lace, called French, otherwise ground lace," and the specification went generally to the invention of mixing silk and cotton thread upon the frame; it being proved, that, prior to the patent, silk and cotton thread had been used together and intermixed upon the same frame, the court held the patent bad, since the plaintiff claimed the exclusive liberty of making lace, composed of silk and cotton thread mixed, and not of any particular mode of mixing it; and the evidence proved it had been mixed before. King v. Else, 11 East, 109, note. This doctrine may not be of as extensive consequence under our patent act, where the specification forms a part of the patent, and may control its generality, as it is in England, where the specification is separated from it. But it distinctly shows the necessity of an exact description so that the patent may conform to the invention.

Let us now apply these principles to the case at bar. The patent is "for a new and useful improvement, being a mode of dying and finishing all kinds of silk woven goods." If these terms alone were to be considered as descriptive of the subject matter of the patent, it would be open to the objection in Cochrane v. Smethurst, 1 Starkie, 205, for the specification shows no other mode of dying and finishing silks, than by the use of an improved reel and an improved silk frame; and the patent ought to be for these improvements. But as the specification forms a part of the patent, and controls the generality of the preceding terms, it is to be construed a patent for a mode of dying and finishing silk woven goods, by means of an improved reel and an improved silk frame. The patent then is, not for a mode of dying alone, but of dying and finishing silks; and this, by means of the use of both machines, so that it is a patent for the machines in combination, and not separately. If so, then the defendants may use either of the machines separately, without infringing the patent right; for the exclusive right of the combination only is secured to the plaintiffs. In this view, there is an end of the present suit; for it is admitted by the plaintiffs, that the defendants did not use the silk frame, and that the only infringement, for which they seek a recompense, is the use of the reel. But if the patent could be construed, as a patent for each of the machines severally, as well as in the combination, then it would be void; because two separate inventions cannot be patented in one patent. And the same objection would lie against it, if it were to be construed as a patent for each of the machines severally, and not in combination. If, however, all these difficulties could be surmounted, and the patent were to be construed as a patent for an improved reel and an improved frame separately, there remain other insuperable objections. There is no pretence, that the patent can be sustained for the whole reel, as a new invention, although some part of the language of the specification might lead to the conclusion, that the plaintiffs so intended to claim; for reels were in use before for the same purpose. And if it were otherwise, the plaintiffs could not recover; for the defendant does not use precisely the same machine; and if he did, the patent would be broader than the invention, and so void. The patent therefore must stand, if at all, as a patent for the improvements only upon the old reel. And what the improvements claimed by the plaintiffs are, must be decided exclusively by the terms of their specification. The words of the specification, after describing the improved reel, are:—"There has been, it is said, a reel heretofore in use for the like purposes; but this, if it ever were so used, consisted of four arms, or two cross pieces, adjusted to a square axle; and the set of arms were kept separate or fixed upon the axle, not by a screw, but by pins passing through holes in said axle. Instead of pins affixed

to the arms, there were common tenter-hooks driven into the inner side of the arms, and the whole so constructed, as to be utterly inapplicable to the purposes of dying silk or other goods without great injury. The machine, for which the applicants claim a patent, is, in all material respects, an improvement upon this." This is the whole statement of the improvements in the reel, in the plaintiffs' specification. And assuming, that it is not utterly defective, from omitting to specify the particular improvements, for which the patent is claimed, (for a general statement, that the patented reel is in all material respects, without stating what these are, an improvement on the old reel, is no specification at all,) the plaintiffs have bound themselves to the improvements so specified, and cannot now claim beyond them. Rex v. Cutler, 1 Starkie, 354. Now, the plaintiffs have specified no particular number of arms to be used in their machine, as among their improvements, and therefore no particular number of arms is patented. The machine is stated by themselves to consist "of two sets of arms, each resembling in form the hub and spokes of a wheel, without the rim or fellies." There is, therefore, nothing new in this particular; and, in point of fact, the plaintiffs use eight arms and the defendants ten arms in their respective reels. The two principal improvements, actually specified, are the use of a screw, to separate gradually and keep apart the opposite arms of the reel, instead of a pin passing through a hole in the axle; and the use of oblique transverse pins to hold the selvages of the silk, instead of tenter hooks. Now, in point of fact, the defendant does not in his reel use the pins described in the specification, but staples with a small barb, which are at least as different in form and effect from the pins, as the pins are different from tenter hooks. And pins or hooks of all sizes and finish were proved at the trial to have been used for at least thirty years last past, for the same purpose. There is no pretence, that the staples and barbs used by the defendants are exactly in size, shape, and direction like the plaintiffs'. Then, as to the screw; it is a sufficient answer to the plaintiffs, that by their own showing the defendant never used the screw in his reels; but used a rack and pinion, which, it is agreed, is a different mechanical power. The only two improvements, therefore, which are specified, are not used by the defendant, either separately or in combination. How then is it possible to contend, that he has violated the plaintiffs' patent?

This is not all. The pin or hook used for this purpose is not a new invention. It has been long in use, and, as was proved at the trial, at least for thirty years. I do not say, that a pin or hook was used exactly of the same shape, dimensions, and oblique position, as that used by the plaintiffs. But it is to be considered, that the mere change of the form or proportions of any mechanical apparatus is not, by the express terms of the patent act, to be deemed a patentable invention. And as to the screw, its use for the very purpose proposed by the plaintiffs, is completely described in the work cited at the bar, printed in 1789. The words are, "these frames are held together by means of a screw, so as to be easily let out, or taken in, according to the breadth of the cloth." If, therefore, the patent could be considered as a patent for each of those improvements separately, it could not be sustained; for neither of them is new in substance. If, for the combined improvements, then, in the first place, the defendant has not used them; and, in the next place, the patent is broader than the invention; for, up to a certain point, the improvements existed before. The screw was in use for the same purpose, as early as 1789. But, if we could go beyond the patent and specification, and consider the patented improvements to be such improvements, as the plaintiffs now claim, it would not relieve the case from a single difficulty. The plaintiffs now claim in addition to the improvements already specified, 1st. The use of more arms than four to wind the silk in a spiral form. The silk was wound in a spiral form before; and surely it cannot be pretended, that the use of more than four arms on a reel or wheel was not known as well before as since the plaintiffs' invention. Besides; the plaintiffs have not specified any particular number of arms as their invention, and they never used but eight; and if such use constitute a separate invention, the defendant is at least as well entitled to claim the use of his ten as his own invention. If adding a given number of arms be an invention, adding a different number is not less an invention. 2dly. The plaintiffs claim the use of the side pieces to support and steady the screw during the operation. This is not, as I recollect, used by the defendants for the same purpose; nor, if used separately with the screw, is it any thing new. If, therefore, the whole improvements, as now claimed, were specified in the schedule, the plaintiffs could not legally support a patent for them separately; and if they are claimed in combination, then the defendants have not infringed upon that combination; and if they had, the plaintiffs could not recover, because the combination up to a certain point existed (as they have shown) before. So that to sustain their patent in point of law, the plaintiffs are driven to construe it to be for the combination, and then the evidence of infringement fails them; and to sustain their suit in point of fact, they are obliged to construe their patent to be for the improvements severally, and then they fail upon the clearest principles of law applied to the facts.

I have thus gone over the whole grounds of this cause, and in every possible view, in which I can contemplate the law or the facts of the case, the verdict is wrong. Under such

circumstances, to suffer it to stand, would be a mockery of justice. It would be surrendering the whole rights of the community to the mistakes or prejudices of juries. The public ought to know, that if a jury should be misled by the ingenuity or zeal of counsel, there is a redeeming spirit in the law itself; and that no judge in these times can be weak or wicked enough to abandon, what his duty plainly and peremptorily enjoins upon him. Let the verdict be set aside, and a new trial granted.

New trial granted.

Case No. 1,048.

BARRETT et al. v. KOELLA.

[5 Biss. 40.] [1]

Circuit Court, D. Wisconsin. Sept. Term, 1857.

FRAUDULENT PURCHASE AND SALE — ASSUMPSIT — PRESUMPTIONS.

1. Where a merchant has, by means of false representations, purchased goods for his store on credit and then sells his stock in fraud of his creditors, and the goods sold cannot be found, the vendor may bring assumpsit before the credit has expired.

2. Where such goods cannot be found, the presumption is that they have been sold and for cash. If it is shown that he took notes for part, the presumption is that the notes were negotiable.

[See note at end of case.]

[At law. Action by Soramus L. Barrett and others against J. August Koella for money had and received. Tried by jury. Verdict for plaintiffs. Heard on motion for new trial. Denied.]

N. J. Emmons, for plaintiff.

Wm. P. Lynde, for defendant.

MILLER, District Judge. This suit is for money had and received. Plea non-assumpsit.

It was proven at the trial that the defendant, early in May last, applied to the plaintiffs, at their store in Chicago, to purchase goods upon credit to replenish his retail stock in Sauk City, in this state, representing that he was possessed of property worth twenty thousand dollars over and above all his debts and liabilities. On these representations, he obtained a bill of goods to the amount of five hundred and eighty dollars, on a credit of six months. The goods were shipped to defendant at Sauk City; and about the twenty-fifth of the same month he sold his stock of goods in fraud of his creditors, he being insolvent, taking in part payment a house and lot, and also two notes of the purchaser, for about fifteen hundred dollars. It was also proven that, upon search, these goods could not be found in the store; and the defendant, immediately after such fraudulent sale, absconded leaving his family in the premises so received by him in part payment of the stock of goods. The house was put in at six thousand five hundred dollars. This suit was commenced by attachment before the time of credit had transpired.

The court charged the jury that "if the jury found that the defendant procured the goods of the plaintiffs by fraud, and he soon afterwards sold out his stock of goods and received notes of the purchaser therefor in part payment, then this action would lie, although the time of credit had not expired; that the presumption was that these notes were negotiable, from the defendant being in mercantile business and from the circumstances attending the sale; and if the goods so sold by these plaintiffs could not be found in the store, the presumption is that the defendant had sold them; and that this suit for money had and received would lie."

A verdict being rendered for the plaintiffs, the defendant moved for a new trial.

This suit will lie if the plaintiffs' goods were sold by the defendant; if they were not sold, the suit would have to be in trover or replevin. Willet v. Willet, 3 Watts, 277; Putnam v. Wise, 1 Hill, 234; Osborn v. Bell, 5 Denio, 370; Jones v. Hoar, 5 Pick. [Mass.] 285. To sustain the action, the goods must have been sold for money, or something which was received as money. A mere exchange of commodities or articles is not sufficient. Doebler v. Fisher, 14 Serg. & R. 179. In regard to things treated as money, it has been held that this count may be supported by evidence of the defendant's receipt of bank notes, or promissory notes, or credit on account, in the books of a third person, or a mortgage assigned to the defendant as collateral security and afterwards purchased and bought in by him, or a note payable in specific articles or any chattel; but not where the thing received was stocks, goods, or any other article, unless in the understanding of the parties it was considered and to be treated as money, or unless it was intended to be sold by the receiver and sufficient time had elapsed for the purpose. 2 Greenl. Ev. § 118, and the cases there cited. Real estate is not a representation of money, and it not appearing that the real property was received as so much money, I did not allude in the charge to this portion of the consideration of the sale of the stock by the defendant. See Beals v. See, 10 Barr, [Pa. St.] 56–60.

It is well setttled that proof of the receipt of promissory notes by a defendant will support the count for money had and received, from their negotiability, they being representatives of money and compose part of the circulating medium. Ainslie v. Wilson, 7 Cow. 662; Rew v. Barber, 3 Cow. 272; Cumming v. Hackley, 8 Johns. 206; Beardsley v. Root, 11 Johns. 464; Lewis v. Lozer, 3 Wend. 79; Cameron v. Clarke, 11 Ala. 259. The proof is that two notes were given by the purchaser of the stock of goods to the defendant as part of the consideration. The defendant was in the mercantile business,

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

where negotiable promissory notes pass as money and are constantly in use; and the defendant was putting off his property in fraud of his creditors, where he would the more readily take negotiable notes. For these two reasons, the court charged the jury that the fair and legal presumption is that the notes were negotiable; if they were not negotiable, the defendant might produce them at the trial. For the reasons above stated, and the non-production of the notes, I am of opinion that the verdict should not be disturbed for this reason.

The receipt of money by the defendant may be proven by circumstances. It is not necessary that the proof should be positive. This is an equitable action, and is sustained upon equitable as well as upon legal principles. Where goods are left in a store for sale and the storekeeper would neither produce them nor pay the price, it has been left to a jury to presume that the storekeeper had received the price of them. Tuttle v. Mayo, 7 Johns. 132; Gray v. Griffith, 10 Watts, 431. In this case there was no legal sale by these plaintiffs to the defendant of the bill of goods; he was in law a bailee of the goods, liable to surrender them to the plaintiffs on demand. An action of trover and conversion would lie; and upon proof that the goods could not be found in defendant's store, their conversion would be presumed, they having been purchased for the store. Upon the same principle does the law raise the presumption of their sale and the receipt of their price by the defendant. They were procured to replenish the stock of the defendant, and they are presumed to have been put into the store; and if not there, the legal presumption is that they have been sold by the defendant and their price by him received.

Motion for new trial denied and judgment upon verdict.

NOTE, [from original report.] Consult Wigand v. Sichel, 3 Keyes, [*42 N. Y.] 120, where it is held the vendor on discovering the fraud may sue for goods sold and delivered before expiration of the credit. See, also, Kerr, Fraud & M. 327, 331, note by the American editor. Mr. Chitty says, "Where goods or other property improperly received by the defendant are saleable, it may under circumstances, and after a time, be presumed that he has sold the property and received money in return, provided that there be reasonable evidence that the defendant converted the same into money, but not otherwise." 1 Chit. Pl. 351, and notes.

Case No. 1,049.

BARRETT v. McPHERSON.

[4 Cranch, C. C. 475.][1]

Circuit Court, District of Columbia. Nov. Term, 1834.

APPRENTICE—BINDING OUT BY TWO JUSTICES—APPROVAL OF PARENTS.

The binding out of an apprentice by two justices of the peace in Washington county, D. C., is of no effect, unless the parent or parents, if living, approve and indorse the indentures within two months.

This was a petition of an apprentice to be discharged. The petitioner was bound by two justices of the peace, with the consent of her mother.

It was contended that the indentures were good under the act of 1793, [Md.,] because under that act a parent may bind out a child. But that act authorizes a father, only, to bind out his child. It was then contended that this was a good binding out under the act of 1794, c. 47, [Md.,] by which any child who may be bound by the orphans' court may be bound by two justices of the peace when the orphans' court is not in session, provided the indentures be approved and recorded according to the sixth section of the act of 1793, c. 45, [Md.;] and that the parent, or parents, if living, shall approve and indorse the same within two months thereafter. The indentures were approved by the orphans' ccurt in the manner in which they are generally approved; but such approval is never indorsed.

THE COURT (THRUSTON, Circuit Judge, absent) decided that the indentures were void, because not approved and indorsed by the parent within two months after their execution.

[1] [Reported by Hon. William Cranch, Chief Judge.]

BARRETT, (MORRIS v.) See Case No. 9,827.

BARRETT, (POPE v.) See Case No. 11,273.

BARRETT, (STEARNS v.) See Case No. 13,337.

Case No. 1,050.

BARRETT et al. v. The WACOUSTA.

[1 Flip. 517;[1] 8 Chi. Leg. News, 194; 1 Cin. Law Bul. 44.]

District Court, N. D. Ohio Term. March 4, 1876.

WHAT ARE "GOING RATES."

1. Rate means price, value. Going rate as to freight, like market price for produce, means a fixed and established price. A rate for freight cannot be established by a mere offer of a shipper or demand of a carrier. It can only be done by an actual contract made in port, and the last one so made for the same port would fix the rate.

[See A Cargo of Malt, 10 Fed. 774.]

2. If on a given day the price varied, rose, lowered and rose again during the day the average for the day should be regarded as the going rate. But if no contracts had been made on that day, then the rate of the preceding day would continue until an actual shipping contract should be made at a different rate.

[In admiralty. Libel in rem by C. S. Barrett et al. against the schooner Wacousta for alleged breach of a charter party. Decree for libellants.]

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

Mix, Noble & White, for libellant.
H. D. Goulden, for defendant.

WELKER, District Judge. The libellants on the 15th of November, 1873, entered into a charter party with the defendant, whereby it was agreed that said schooner should carry a cargo for the libellants from the port of Cleveland to the port of Toronto, Canada, for two dollars and twenty-five cents in gold per ton, or the going rates, at the time the schooner should report for loading. The capacity of the vessel was four hundred tons. The vessel, through the master, reported for load on the 20th of November, 1873, to the libellants, and the master then claimed that $2.50 in gold per ton was the going rate, which was denied by the libellants; they asserting that $2.25 was then the going rate, and refused to agree to pay more. Thereupon the master refused to load the coal, which was then ready to be loaded, or take it upon the vessel, and the vessel did not carry the coal for the libellants; and they, after the refusal, contracted with the schooner Moss to carry the coal to Toronto at the rate of $2.50 in gold per ton, which difference in price they seek to recover in this suit. The contract was proven to be as above stated.

There was a good deal of evidence given on both sides to ascertain and settle what was the "going rate" at this port for the port of Toronto on the 20th and at the time the defendant reported, the libellants claiming it was $2.25, and the defendant it was $2.50. Several experts were examined and much difference of opinion was manifested as to how "going rates" were established and ascertained; some claiming that the prices fixed in the last charter party made at the port of Toronto determined the rate, and others, that whatever might be offered vessel owners by shippers made the "going rate." The testimony showed that in the forenoon of the 20th, and up to the time the defendant reported for load, the last contract for shipment for Toronto made between shipper and carrier was $2.25 in gold per ton. That before the master reported for load, he had been offered by Mr. Crawford $2.50 in gold per ton, and that when he reported to libellants, he informed them of the offer and proposed to carry for them at the same rate, which they refused, and said they would rely on their contract. Afterwards, on the same day, the master made a contract with Crawford at the rate of $2.50 in gold, which was the first contract for that price made on that date, and was followed by the one made by the libellants with the schooner Moss, at $2.50.

The question to settle is: What was the "going rate" at the time the defendant reported to take load? If $2.25, then the libellants are entitled to recover; if $2.50, then they must fail in their suit. It will be necessary, before determining the question, to understand what is meant by "going rate," and how it is established or ascertained in the port. Rate means price, value. "Going rate" as to freight, like "market price" for produce means a fixed and established price for the time. To make a market price there must be buying and selling, purchase and sale. The price of gold on 'change is fixed by sales made. A price cannot be established by a mere offer to sell, or an offer to purchase. Sales must be consummated by agreement to make a market price. The minds of the buyer and seller must unite on a price. So of a rate for freight. It cannot be established by a mere offer of a shipper or demand of a carrier. It can only be done by an actual contract having been made in the port, and the last one so made for the same port, would fix the rate. If, however, on a given day the price has varied, being raised, lowered, and raised during the day, the rate for the day would be an average of the rate, which should be regarded as the "going rate" for that day. If, on a given day, no contracts for shipments had been made, then those of a preceding day would constitute the "going rate" for that day, and would continue until changed by an actual shipping contract made at a different rate. If mere offers by shippers, or demand of carriers, could establish the rate, then there would be no certainty in the fulfillment of that large class of contracts made for freight at "going rates;" shippers would have it in their power to reduce freights at their pleasure, and carriers could increase them as might best subserve their interests.

The only safe, and the true rule is: that rates of freight are fixed and established by actual contracts in the market, and can only be changed by contract in good faith, made in the port for like services. The evidence in this case shows very satisfactorily that no contract had been made in this port before the refusal of the defendant to carry the coal for libellant for any higher price than $2.25 in gold, and that the defendant in fact, made the first contract after such refusal at the new rate of $2.50 per ton. This contract then changed the rate to $2.50, and the libellants had to conform to such increase in their contract with the Moss. The defendant, therefore, in refusing to carry the coal for the libellants at $2.25 in gold, per ton, as the contract bound the defendant to do, violated the contract of shipment, and for which the libellants are entitled to recover.

Another question is made on the hearing, which is not distinctly made in the answer of the defendant, and which it is claimed, prevents the libellants from a recovery in the case. The evidence shows that the libellants had sold the coal, to be carried on the vessel to a firm at Toronto by the name of Conger & Co., the freight to be paid by the consignees on its receipt. It also shows that the contract with Conger & Co. was that they should receive the coal chargeable with a

freight of only $2.25 in gold per ton. It is also shown that the consignees paid the $2.50 in gold per ton freight for the coal shipped on the Moss on its receipt—that afterwards, and after this suit was commenced, the libellants settled with Conger & Co., and paid them the difference in the freight so paid by the consignees. On this state of facts, it is claimed the libellants had no right in these proceedings against the defendant, having no interest in the contract and sustaining no damages.

The answer to this claim is, that by this contract the coal sold only being chargeable with $2.25 per ton, to be paid by the consignees, any excess paid over that sum was necessarily a loss to that extent on the value of the libellants' coal and the price they were to pay for it, and therefore a damage to them in the amount their consignees were then compelled to pay.

Decree for libellants for $123.91.

BARRETT, (WILLIAMS v.) See Case No. 17,714.

Case No. 1,051.

BARRETT et al. v. WILLIAMSON et al.

[4 McLean, 589.] [1]

Circuit Court, D. Ohio. Nov. Term, 1849.[2]

COLLISION—CONFLICTING TESTIMONY — USAGE OF RIVER—MEASURE OF DAMAGES — REPAIRS—LOSS OF TIME—INTEREST.

1. Where there is a conflict in the testimony, the jury must decide on the credibility of the witnesses. This may often depend upon the opportunity witnesses had to observe the facts which they have sworn to. In collision cases witnesses often become excited and alarmed, so as not to be in a condition to see and detail facts with entire accuracy.

2. The law of the river is established by usage, and this must govern those who navigate it. All are presumed to know an established usage, and are expected to conform to it.

[See Halderman v. Beckwith, Case No. 5,907.]

[See note at end of case.]

3. By this usage a descending boat is required to run in the current near the middle of the river, the ascending boat to keep near the right shore. This being the usage, if either turn out of her course, so as to run into the other, the owners of the boat leaving her track are responsible for the damages done.

[See note at end of case.]

4. The descending boat, by the usage, as appears from the testimony, on seeing the approach of the ascending boat, is required to stop her engine and float, leaving to the other boat a choice of sides. Under such circumstances, in view of the usage, it would be hazardous for the descending boat to back her engine, as that might bring her in contact with the other boat. The descending boat may act upon the presumption that the other boat does not intend to run into her. And any deviation from the established usage might create embarrassment, and, perhaps, cause a collision.

[See note at end of case.]

5. In such a case, the jury will give a remuneration for raising the injured boat, repairing her, and for her use during the time necessary to fit her for use.

[Followed in Jolly v. Terre Haute Drawbridge Co., Case No. 7,441. Cited in The Morning Star, Case No. 9,817.]

[Contra. See Smith v. Condry, 1 How. (42 U. S.) 28.]

[See note at end of case.]

6. The jury are not bound to give interest, but they will, if they find for the plaintiff, give such damages as they shall deem just.

[See note at end of case.]

[At law. Trespass on the case by Alexander B. Barrett, Robert Clark, Nathaniel D. Terry, Henry Lyne, James D. Donaldson, William Brown, and John B. Sprowle, owners of the steamboat Major Barbour, against Euclid Williamson, Thomas F. Eckert, and John Williamson, owners of the steamboat Paul Jones, for damages caused by collision between the two vessels. Tried by jury. Verdict for plaintiffs.

[Subsequently, the cause was taken to the supreme court on writ of error by the defendants, and the judgment of the circuit court was affirmed. Williamson v. Barrett, 13 How. (54 U. S.) 101.]

Taft & Mallon, for plaintiffs.

Fox & Lincoln, for defendants.

BY THE COURT, (charging jury.) This is a case of collision of two steamboats on the Ohio river. The plaintiff, who owns the steamboat called the Major Barbour, complains, that while his boat was descending the Ohio river, in her right place, the steamboat called the Paul Jones, in ascending the river, being in her right track, near the Indiana shore, left it, turning her bow across the river, ran into the Major Barbour, and crippled her so that she sunk to the bottom, etc., through the fault and negligence of the conductor or pilot of the Paul Jones. As usual in such cases, a great number of witnesses have been sworn, who were on the respective boats, and who contradict each other in their testimony. In order to refresh your minds in regard to the facts, I will state the substance of the testimony in as few words as possible.

Henry J. Spotts commanded the Major Barbour. He was asleep when the collision took place. From the shock he thought the Barbour was much injured. The pilot was directed to make for the Kentucky shore, that being nearest. The boat floated down, and sunk near the Kentucky shore.

John Braker has been a pilot for twenty years. To avoid a collision, the descending boat stops its engine, giving the ascending boat a choice of sides. When very close, it is the duty of both to do all they can to avoid a contact.

John Shalcroft, a pilot, says, if the Major Barbour was near the middle of the river, the Paul Jones hugging the Indiana shore, there was no occasion to stop the engine.

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

[2] [Affirmed in 13 How. (54 U. S.) 101.]

William Richards, G. D. Frazer, and James Matthews, agree with Braker and Shalcroft.

Henry Smith is well acquainted with the river. The Paul Jones was hugging the Indiana shore; the Major Barbour was near the middle of the river, but nearest the Kentucky shore. The Paul Jones took a direction across the river, and struck the Major Barbour, near the middle of the river. Witness is well acquainted with the proper tracks of boats ascending and descending. The Major Barbour was as near right as could be. She stopped both her engines and floated. The Paul Jones was under a full press of steam. After the contact it was more than an hour before the Major Barbour settled on the bottom of the river, near the Kentucky shore.

William Wand was pilot on the Major Barbour, and was on watch when the collision occurred. He saw the Paul Jones pass over to the Indiana shore—turned the Major Barbour nearer the Kentucky shore. The Paul Jones ran square across from the Indiana shore—witness stopped the engine, rang the bell, hailed the boat, rang the big bell. The Paul Jones approached the Major Barbour with such force as to curl the water white at its bow. When very near the Major Barbour, the Paul Jones stopped her engine, made two escapements, but struck the Major Barbour with great force. The Paul Jones was near half a mile out of her course, and was managed unskillfully.

R. C. Slaughter says, the Paul Jones came from the Indiana shore almost directly across the river, bearing up a little. Witness was standing on the starboard side, and as the Paul Jones approached, he ran to the other side of the boat. Immediately after the contact, the Major Barbour commenced sinking—she floated and settled on the bottom near the Kentucky shore. When he first saw the Paul Jones, she was one hundred and fifty yards from the Major Barbour. The shock and crash by the contact were great. The bow of the Barbour pointed down the stream.

Charles C. Molly was on the Kentucky shore, saw the two boats, one ascending, and the other descending, and saw them come together, The Major Barbour was, or appeared to be near the middle of the river, but nearer the Kentucky than the Indiana shore. The Paul Jones seemed to be crossing the river. Her true course was near the Indiana shore. The river at the place was more than eight hundred yards wide.

R. F. Conway was a cabin passenger on the Major Barbour. It was a beautiful, star-light night. Saw the Paul Jones coming into her—hailed her—bells rang. The collision took place near the middle of the river—nearest the Kentucky shore. The Paul Jones was square across the river, rather pointing down it.

Washington Green, an engineer, was on the Major Barbour; saw the Paul Jones coming up the Indiana shore two miles off—laid down—heard the bells, the Major Barbour's engine was stopped. The Paul Jones was not stopped when within eighty feet of the Major Barbour. The latter was from the Kentucky shore, not more than one third of the distance across the river.

N. S. Moore says, at the place of collision, the river is about eight hundred yards wide. Witness saw the Paul Jones turn across the river. The Major Barbour descending near the middle of it. The Paul Jones was not quite square across the river. To the same effect is the statement of William L. Mitchell.

G. Ostend was an engineer on the Major Barbour, and was on his watch. He stopped her engine, floated some minutes head down stream. The Paul Jones approached nearly square across the river, pointing to the Major Barbour. Two women, one man and two children were drowned. The bell on the Major Barbour, to back did not ring.

John Nestlewood is a pilot; the rule of the river is, for the descending boat to stop its engine, the ascending boat to maneuver.

James Hammond is a pilot, and states the law of the river as stated by the above witness. In certain positions, both boats should stop their engines and back. But when a boat is approaching across the river, as was the Paul Jones, the descending boat could do nothing more than to stop her engine.

George Frazer is a pilot; the line of the descending boat is near the middle of the river; the track of the ascending boat near the Indiana shore. Witness saw the Paul Jones was approaching in a direction to run into the Major Barbour, nearly across the river, and she continued that direction until the collision.

M. Astrander, J. Vanmetre and another witness state the same as Frazer. J. Vanmetre heard the captain of the Paul Jones say, if he had been up the accident would not have happened. Some ten or twelve other witnesses unite in saying that the Major Barbour was descending nearer to the Kentucky than the Indiana shore, and that the Paul Jones turned from the Indiana shore across the river and continued that direction until the collision occurred.

On the part of the defendants several witnesses were examined.

J. McCamment was pilot on the Paul Jones, had stood his watch on steam boats nearly two years. He saw the Major Barbour was going to run into them. Was running near the Indiana shore—could see the stones. The Paul Jones was running straight up the river, when she was struck by the Major Barbour. It was a slanting lick—knocked down the clay and brick on the starboard of the Major Barbour. Witness was backing the Paul Jones when the collision occurred. At the time, the rudder of the Paul Jones was fast on the Indiana shore. If the Major Barbour had run her proper course, the boats would have passed fifty yards apart. He stopped

the engine of the Paul Jones thirty feet before the collision—the engine of the Major Barbour could not have been stopped.

James Kelley was mate of the Paul Jones. He saw that the course of the Major Barbour was unsteady. She seemed determined to run inside of the Paul Jones, next to the shore. At the time of the collision, the Paul Jones was pointed up the river. The course of the Major Barbour was rather quartering. The Major Barbour's lights were so dim that he could not see the upper part of the boat. The boats were three hundred yards apart when the first bell was rung.

Charles Foulkner has been an engineer thirteen or fourteen years, on the Ohio. Was in bed on the Paul Jones when the big bell awoke him—then the bell rang to back the Paul Jones—did so. Heard a man say you will smash the rudder against the shore. The collision took place seventy-five or eighty feet from the Indiana shore. The Paul Jones was in the proper track for that stage of the water.

William Wathral was in his berth on the Paul Jones when the collision took place. He saw the Indiana shore when he first went out. The Paul Jones was in the ascending track. He heard the watchman say to the pilot of the Major Barbour, if you had backed the boat all would have been well. The pilot said he did what he thought was right. Said he was a little confused, but requested the watchman to say nothing about it. After the collision, the Paul Jones backed her stern against the shore. The collision was within fifty yards of the Indiana shore.

Edward Scull says, the Major Barbour came down the Indiana shore about one hundred yards from it. She struck the Paul Jones and then sheared; the bow of the Paul Jones pointed up the stream. She pushed the Major Barbour toward the other shore.

Elisha Marshall, was mate on the Paul Jones. Was called when the bell was rung; were within seventy-five or one hundred yards of the Indiana shore. As the Paul Jones backed she ran against the shore. From the direction of the Major Barbour witness thought she intended to run between them and the shore. Her bow was pointed across the river, and was running nine or ten miles an hour.

George Sutton, was a pilot; a passenger on board the Major Barbour. When the boats struck they were within a hundred yards of the Indiana shore. The Paul Jones was in the usual track. The blow was not heavy; thought the Barbour was not injured. The Major Barbour pointed to the Indiana shore and was within less than one hundred yards of it.

Henry Dayer, the Paul Jones was running within thirty yards of the Indiana shore. The Major Barbour ran against the bow of the Paul Jones; the engineer of the latter was backing his engine at the time. The Major Barbour was under considerable headway at the time. He thinks her engine was not stopped. After the collision the Major Barbour turned to the Kentucky shore.

John Chapman, was the carpenter on the Paul Jones. She was heading up stream. The Major Barbour ran near the Indiana shore. One minute after the collision the boats were within one hundred yards of the Indiana shore. The Paul Jones was backing.

L. Leister, was in the Paul Jones. She was close to the Indiana shore. She was in her right place, but the Major Barbour was not. The blow was not heavy. The Paul Jones did not back on the Indiana shore; she backed about one hundred feet. The Major Barbour was pointing down the river and was from one hundred to one hundred and fifty yards from the Indiana shore.

George Lesley, was asleep when the boats struck; about four rods from the Indiana shore. The Paul Jones pushed the Barbour to the place where she sunk. At the time of the collision the Paul Jones was backing her engines.

William L. Holbrook, was a passenger on the Paul Jones. Heard the bell ring, ran out on the star board side; took the boat to be lying up the river half a mile from the Kentucky shore. The Paul Jones was lying straight up the river, the Major Barbour across her bow.

N. Benby, when the boats struck, witness was in his berth, sprung up; saw Dr. Slaughter on board the Paul Jones, seemed not to be in his right mind. Two minutes after the collision the Paul Jones headed up stream, and the Major Barbour was quartering to the Kentucky shore.

William Hinton states that the place of the Major Barbour should have been, by the rules of the river, near the middle, and that of the Paul Jones near the Indiana shore.

Hugh Funk says, a short time after the collision, Wand, the pilot of the Major Barbour, said he was running down near the Indiana shore. Witness inquired why he did not keep the middle of the river, when Wand corrected himself by saying he thought he was in the middle. He said he did not ring the bell to back, that the Paul Jones pushed the Major Barbour to the Kentucky side.

Capt. Ross, who is a pilot, says, in the night an unpracticed eye is liable to be deceived as to the position of a boat in the river, from her lights.

Joseph Ross, has been a pilot for ten years. By the rules of the river the descending boat should float half a mile; the ascending boat takes choice of sides. Each boat should stop her engine under certain circumstances. The force of the engine would be lost in less than one-fourth of a mile. The current of the Ohio is about three miles an hour. A boat that had lost her headway would begin to back the first revolution of her engine. The proper place for the Paul Jones was from fifty to one hundred yards from the Indiana shore;

the Major Barbour's track was near the middle of the river.

The above is a condensed statement of the facts, which will enable you to judge of the merits of this controversy, and to determine it as the justice of the case shall require. There is great conflict in the testimony. The witnesses differ so essentially in their statements, that by no rule of construction can they be reconciled. The conclusion is inevitable, that some of the witnesses have sworn falsely, if not corruptly. Great allowance may be made from the circumstances under which they testify, but this can not include facts stated, not as matter of opinion, as an estimate of distance, but facts under their own observation, and stated without qualification. And there are many such in the case, which have a most important bearing upon its merits. From the nature of the case, and the peculiar responsibility of those who were at the time engaged in navigating the respective boats, much feeling to exculpate themselves might very naturally be expected. But this should not close their eyes or stop their ears. It is the province of a jury to weigh the evidence and judge of the credibility of witnesses. All things being equal, the witnesses who, from their position at the time of the collision, had the best opportunity of seeing the occurrences to which they swear, are more entitled to credit than the relations of those whose opportunity of observation was less favorable. Some of the witnesses saw nothing of the direction of the respective boats, until the moment of collision. Others sprang from their berths under great excitement and alarm, and of course could not have been in a condition to see or relate facts with precision. There are some facts to which there is no contradiction. The Major Barbour was run into by the Paul Jones, so as to cause her to sink in a very short time. She appears to have floated a short distance, after the collision, sinking gradually until she reached the bottom. The place where she sunk was near the Kentucky shore. The river at the place is proved to be about eight hundred yards wide. Now these facts may well call in question the statements of the defendant's witnesses who say that the Major Barbour ran into the Paul Jones, which was very near the Indiana shore, so near that her stern struck the shore, in backing out from the Barbour. And that the Paul Jones had stopped her engine, and was backing at the time the collision occurred.

The consequences of this collision were serious, not only to the Major Barbour, as she was much injured, but to three of her passengers who were drowned. Having called your attention, gentlemen, to the evidence, the court instruct you, that if the Major Barbour was in her proper track, as proved by several of the witnesses, near the middle of the river, and the Paul Jones in ascending the river was in her proper track near the Indiana shore, and she turned out of her proper course across the river, or quartering, in the language of some of the witnesses, so as to threaten a collision with the Major Barbour, and that so soon as this was discovered the Major Barbour stopped her engine, rang her bell and floated down the stream as the custom of the river required, leaving the ascending boat the choice of sides, and this was the law of the river. That on the near approach of the Major Barbour she was not required to back her engine, as that might bring her in contact with the other boat, but might presume that the Paul Jones did not intend to run into her, and that for an injury done to the Major Barbour, under such circumstances, by the Paul Jones running into her, the plaintiff is entitled to recover such damages as appears from the evidence was done to the Major Barbour. That if the Major Barbour turned out of her course, running near the Indiana shore, and this turning out of her course contributed to the collision the plaintiff could not recover. That where both boats were in fault the plaintiff could not recover. That in such case the fault of the Major Barbour must have been such as to have led to or contributed to the collision. That if the collision was the result of an unavoidable accident, the plaintiff could not recover. That should the jury find for the plaintiff, they will give damages which shall remunerate the plaintiff for the expenditure necessarily incurred in raising the boat and in repairing her, and also for the use of her during the time necessary to make the repairs and fit her for business. That the jury were not bound to give interest as claimed by the plaintiff, but they would give such sum in damages as they shall deem just and equitable under the circumstances.

The jury found for the plaintiff $6,714.29 cents.

[NOTE. On writ of error, this judgment was affirmed, the supreme court holding that it would have been erroneous to instruct the jury that the master of the Major Barbour was bound, not only to stop her engines, but to back her, if by so doing the danger could have been avoided; for, before the neglect to make that movement could be charged as a fault, it should have appeared that the master knew the colliding boat intended to pass her bow. In the absence of such knowledge, her proper position was that which the usage of the river prescribed, namely, to stop her engines, and float, leaving the other the choice to pass across either her bow or stern. This was his plain duty, not only from the law of the river, but due, under the circumstances, to the other boat, as affording her the most favorable opportunity to extricate herself from the danger in which she had become involved by her own fault, in carelessly leaving her proper track. The opinion was delivered by Mr. Justice Nelson. Mr. Chief Justice Taney, Mr. Justice Catron, and Mr. Justice Daniel dissented on the ground that no damages should be allowed for the use of the injured vessel during the time necessary to make repairs. Williamson v. Barrett, 13 How. (54 U. S.) 101.]

BARRON, In re. See Case No. 1,057.

BARRON, (BOWMAN v.) See Case No. 1,738.

Case No. 1,052.

BARRON v. ILLINOIS CENT. R. CO.

[1 Biss. 412.][1]

Circuit Court, N. D. Illinois. Oct. Term, 1863.

DEATH BY NEGLIGENCE—INTENT OF ST. ILL. FEB. 12, 1853 — TO MAKE CARRIERS CAREFUL, AND REMEDY DEFECTS IN COMMON LAW — RULE OF DAMAGES—NOT NECESSARY TO SHOW PECUNIARY LOSS.

1. Under the statute of Illinois of February 12, 1853, it is not necessary that the declaration should contain a special averment, showing the manner in which the next of kin have sustained pecuniary loss.

2. The action can be sustained though the next of kin had no legal claim on the deceased for services or support.

3. The intent of the statute is not to deprive all persons of its benefits, except those who were dependent on the deceased; nor is it requisite in any case to prove present actual pecuniary loss.

4. As against common carriers, the policy of the law was to make them more circumspect in regard to the lives intrusted to their care. At common law they were liable for personal injuries resulting from their fault, but they escaped responsibility if death ensued; to remedy this evil, and provide a continuing responsibility, was the object of the law.

5. There is no fixed measure of damages, nor any artificial rule by which they can be computed. The jury are in no case to take into consideration the pain suffered by the deceased, or the wounded feelings of surviving partners; but are to form their conclusions upon proof of all the circumstances attending the death, and of the relations existing between the deceased and the widow, or next of kin.

6. Decisions in New York, and of the supreme court of Illinois, commented upon.

[At law. Action by William T. Barron, executor, against the Illinois Central Railroad Company, to recover for the death of William Barron. Heard on demurrer to the declaration. Overruled.

[Plaintiff subsequently had judgment, (Barron v. Illinois Cent. R. Co., Case No. 1,053,) which was affirmed by the supreme court in Illinois Cent. R. Co. v. Barron, 5 Wall. (72 U. S.) 90.]

Clark, Cornell & Norton, for plaintiff.

McAllister, Jewett & Jackson, for defendant.

DAVIS, Circuit Justice. The declaration alleges that William T. Barron was a passenger for hire from Hyde Park to the city of Chicago; that he was killed by the fault of the defendant; that he left a will, and the plaintiff is his executor, and that he was never married, but had next of kin who are named. To this declaration the defendants have interposed a general demurrer. By the common law this action could not be sustained. In 1853, a statute—Sess. Laws 1853, p. 97; Gross, St. c. 17, § 5, [p. 60]—was passed in this state, giving a right of action wherever death is caused by the wrongful act of a person or corporation, where, if death had not ensued, the party injured would have been entitled to sue. The act also provides that the action shall be brought by the personal representatives of the deceased, and the amount recovered shall be for the exclusive benefit of the widow and next of kin, and that the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin, not exceeding the sum of $5,000.

The defendants insist that the declaration should have contained a special averment showing the manner in which the next of kin have sustained pecuniary loss; that the next of kin of the decedent, being his father and brothers, had no claim on him for support or services, and, therefore, no pecuniary loss could have been occasioned to them by his death. We cannot adopt this view of the law, but think there can be recovery if the deceased left no kin surviving him who had any legal claim on him, if living, for services or support. The cause of action is given in the first section of the act in clear and unmistakable terms. If the injured party by the common law had a right to sue, if he had lived, then, if he dies, his representatives can bring an action. Very few persons on whom an inheritance is cast under the term "next of kin," have any legal claim on their ancestor for support, or can be said strictissimi juris to suffer pecuniary loss by his death.

If the intent of the statute was to deprive all persons of the benefits of the law except those who were dependent on the deceased, why use the term "next of kin" at all. It would have been very easy to have used the word "children," and yet, if the defendant's construction of the law is correct, many children who are of age and not dependent on their parents for maintenance, could not recover. Courts must give effect to all parts of a law, if possible.

Here is a statute where the first section, in positive terms, gives the right to sue, and a construction is sought to be given to the second section which would render the right conferred in the first section a barren right in the majority of cases brought into court. Many individuals who lose their lives by the fault of persons and corporations are of age, unmarried, and have no next of kin dependent upon them for support. We cannot suppose that the statute intended to give the representatives of such persons the right to sue in one section, and to make that right nugatory in the second section, by depriving of all damages. The policy of the law was evidently to make common carriers more circumspect in regard to the lives intrusted to their care. They were responsible at common law, if through their fault, broken limbs

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

were the result, but escaped responsibility if death ensued. To remedy this evil and provide a continuing responsibility was the object of the law. We do not think it requisite, in any case, to prove present actual pecuniary loss. It can rarely be done. If so, the opinions of witnesses would have to be substituted for the conclusions of the jury. The facts which the parties shall prove will generally enable the jury to decide on the proper measure of responsibility. Some cases are harder than others, and the law intends that the jury shall discriminate in different cases. There is no fixed measure of damages, and no artificial rule by which the damages in a given case can be computed. The jury are in no case to take into consideration the pain suffered by the deceased, or the wounded feelings of surviving relatives; but are to form conclusions as to the amount of pecuniary injury the widow or next of kin have sustained (subject to the limitations contained in the statute), upon proof of all the circumstances attending the death, and of the relations existing between the deceased and the widow or next of kin. These views are sustained, we think, by the court of appeals, and the supreme court of New York, on a similar statute enacted anterior to the statute of this state. Oldfield v. New York & H. R. Co., 14 N. Y. 310; Dickens v. New York Cent. R. Co., 28 Barb. 41. The case of Chicago & R. I. R. Co. v. Morris, 26 Ill. 400, has been referred to. That was a case where the declaration did not aver that the decedent left a widow or next of kin.

The court decided that the averment was necessary, and remanded the cause, with leave to the parties to amend the declaration. There are some expressions in the opinion of the court which seem to imply that there must be an averment in the declaration showing the manner in which the next of kin have sustained pecuniary loss. This, as has been already seen, we do not consider necessary.

The demurrer is overruled.

NOTE. [from original report.] See, also, opinion on trial of this case. [Barron v. Illinois Cent. R. Co., Case No. 1,053.]

Case No. 1,053.

BARRON v. ILLINOIS CENT. R. CO.

[1 Biss. 453;[1] 2 Chi. Leg. News, 385.]

Circuit Court, N. D. Illinois. July Term, 1864.[2]

DEATH BY WRONGFUL ACT—ACTION FOR DAMAGES UNDER ST. ILL. FEB. 12, 1853—WHEN NEXT OF KIN MAY SUE—RAILROAD COMPANY LIABLE FOR ALL TRAINS ON ITS TRACK.

1. Under the Illinois statute of February 12, 1853, an action can be maintained for the benefit of the next of kin, even though they may have had no legal claim on the deceased for support. It is not necessary to prove actual pecuniary loss.

[See Barley v. Chicago & A. R. Co., Case No. 997.]

[See note at end of case.]

2. If the injured party would have had, by the common law, a right to sue if he had lived, then, if he dies, his representatives can maintain an action. The statute did not intend to give them a right of action in one section, and in the second render that right nugatory by depriving them of all damages.

[See note at end of case.]

3. What circumstances the jury may consider.

4. If a railroad company allows the trains of another company to run over its track, as to passengers on its own trains it is responsible in the same manner as if all the trains belonged to itself.

[See Illinois Cent. R. Co. v. Barron, 5 Wall. (72 U. S.) 96.]

[See note at end of case.]

At law. This was an action under the statute of February 12, 1853, brought by William T. Barron, executor, to recover damages for the death of William Barron, who was killed on the 8th of January, 1862, between Hyde Park and Chicago, while a passenger on the cars of [the defendant] the Illinois Central Railroad [Company. A demurrer to the declaration was overruled. Case No. 1,052. The hearing is now on the merits. Verdict and judgment for plaintiff. This was afterwards affirmed by the supreme court in Illinois Cent. R. Co. v. Barron, 5 Wall. (72 U. S.) 90.]

The statute reads as follows,—Gross. St. 1871, p. 60, [Sess. Laws, p. 97:] "§ 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company, or corporation, which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." "§ 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of $5,000; provided, that every such action shall be commenced within two years after the death of such person."

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

[2] [Affirmed in 5 Wall. (72 U. S.) 90.]

Clark, Cornell & Norton, for plaintiff.

McAllister, Jewitt & Jackson, for defendant.

DAVIS, Circuit Justice, (charging jury.) By the common law this action could not be sustained.

In 1853 a statute was passed in this state giving a right of action wherever death is caused by the act of a person or corporation, where if death had not ensued the party injured would have been entitled to sue. The act also provides, that the action shall be brought by the personal representatives of the deceased, and the amount recovered shall be for the exclusive benefit of the widow and the next of kin, and that the jury may give such damages as they shall deem a just and fair compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin, not exceeding the sum of $5,000.

Barron was never married, and it is contended by the defendant, that the next of kin being his father, brothers and sisters, had no claim on him for support or services, and therefore there could have been no pecuniary loss to them by his death.

We cannot adopt this construction of the law, but charge you that there can be a recovery if the deceased left no kin surviving him, who had any legal claim on him, if living, for support. The cause of action is given in the first section of the act in clear and unmistakable terms. If the injured party, by the common law, had a right to sue if he had lived, then, if he dies, his representatives can bring an action. Many individuals who lose their lives by the fault of persons and corporations, are of age, unmarried, and have no next of kin dependent on them for support. We cannot suppose that the statute intended to give the representatives of such persons the right to sue in one section, and make that right nugatory in the second section, by depriving them of all damages. The policy of the law was evidently to make common carriers more circumspect in regard to the lives entrusted to their care. They were responsible at common law, if through their fault, broken limbs were the result, but escaped responsibility if death ensued. To remedy this evil, and provide a continuing responsibility, was, in the opinion of the court, the object of the law. We do not think it requisite to prove present actual pecuniary loss. It can rarely be done. The attempt to do it would substitute the opinions of witnesses for the conclusions of the jury. The facts proved will enable the jury to decide on the proper measure of responsibility. Some cases are harder than others, and the law intends that the jury shall discriminate in different cases. There is no fixed measure of damages, and no artificial rule by which the damages in a given case can be computed. The jury are not to take into consideration the pain suffered by the deceased, nor the wounded feelings of surviving relatives, and no damages are to be given by way of punishment. In this case the next of kin are the parties who were interested in the life of the deceased. They were interested in the further accumulations which he might have added to his estate, and which might hereafter descend to them.

The jury have a right, in estimating the amount of pecuniary injury, to take into consideration all the circumstances attending the death of Barron, the relations between him and his next of kin, the amount of his property, the character of his business, and the prospective increase in wealth likely to accrue to a man of his age, with the business and means which he had. There is a possibility in the chances of business that Barron's estate might have decreased rather than increased, and this possibility the jury may consider. The jury also have a right to take into consideration the contingency that he might have married, and his property descended in another channel. And there may be other circumstances which might affect the question of pecuniary loss, which it is difficult for the court to particularize, but which will occur to you. The intention of the statute was to give a compensation for the pecuniary loss which the widow, if any, or the next of kin might sustain by the death of the party, and the jury are to determine, as men of experience and observation, from the proof what that loss is. In order to render a verdict for the plaintiff, it is necessary that the defendant should have been in fault.

The Illinois Central Railroad Company engaged to carry Judge Barron safely from Hyde Park to Chicago, and, as a common carrier, was bound to the most exact care and diligence required for the safety of passengers. The facts in the case are few and uncontradicted. On the morning of the 8th of January, 1862, Judge Barron was a passenger from Hyde Park to Chicago. The train was from seven to ten minutes behind time, and the track was slippery. By contract between the Michigan Central and Illinois Central companies, the cars of the former were permitted to use the track of the latter, as far as Calumet. Proper time tables were arranged. The Cincinnati express of the Michigan Central, by these time tables, should have passed Hyde Park at least thirty minutes in advance of the train of the Illinois Central Railroad. On the morning of the 8th of January, the Cincinnati express train was behind time, and collided with the Illinois Central train at Kenwood, which was the immediate cause of the disaster. It is argued that the Cincinnati train caused the death of Barron, and that therefore the Illinois Central is not liable. The jury may believe, from the evidence, that the Cincinnati train was chiefly in fault, and that without its agency the calamity would not have happened; yet if they also believe from the evidence, that the misconduct or negligence of

those in charge of the Illinois Central train contributed to the disaster, then the defendant was in fault, and the plaintiff is entitled to recover.

It is not a question which train was mostly in fault, but whether the train of the defendant was in fault at all. It is for the jury to say, from the evidence, whether the employes of the Illinois Central Road used the necessary degree of care and diligence in the management of their train on that morning. Their train was behind time; the track was slippery, and it was known to them that an express train was liable to come up at any minute. Should they not have indicated by flagging, or in some other way, that they were using the road? Can the jury say that if this had been done this accident would have occurred? If the proper degree of diligence did not require flagging, and if being out of time did not contribute to the accident, then the Illinois Central train was not in fault. And the court would further instruct you, gentlemen, that if you shall find that the death was caused by the joint fault of those who had the management of the Michigan Central and the Illinois Central trains, then the defendant is liable in this action; or if you shall believe from the evidence, that the Michigan Central train was running on the road of the defendant by virtue of a contract with it, and that the train was under the sole management of the agents of the Michigan Central Road, and that the death was caused entirely by their fault, then, under the conceded facts of this case, the defendant would still be responsible. We understand that the road on which the accident occurred belonged to the defendant, and, by its charter, was under its sole control to carry passengers and property; and if it allowed the trains of the Michigan Central to run over it under the management of the agents of the Michigan Central, it should be done in such a manner as not to interfere with the safety of the passengers of the defendant, and as to such passengers, the fault of the Michigan Central Road in running their train is the fault of the defendant

Verdict and judgment for the plaintiff for $3,750 damages.

NOTE, [from original report.] Consult also opinion on demurrer. 1 Biss. 412, [Barron v. Illinois Cent. R. Co., Case No. 1,052.] A railroad company allowing another to run cars over its road is liable for injuries done. Colegrove v. New York & H. R. Co., 6 Duer, 382. A railroad company is liable for an injury occasioned by negligence of its agents in management of a train under their control, though belonging to another company. Fletcher v. Boston, etc., R. Co., 1 Allen, 9.

[NOTE. This judgment was afterwards affirmed by the supreme court. In delivering the opinion, Mr. Justice Nelson held, with the Illinois cases, that the owner of the road was not relieved of responsibility by giving to the Michigan Company the privilege of using such road. See Chicago, St. P. & F. D. L. R. v. McCarthy, 20 Ill. 385; Ohio & M. R. Co. v. Dunbar, 20 Ill. 623; Chicago & R. I. R. Co. v. Whipple, 22 Ill. 105; Nelson v. Vermont & C. R. Co., 26 Vt. 717; and McElroy v. Nashua & L. R. R., 4 Cush. 400. The statute, in respect to this measure of damages, remarked the learned justice, seems to have been enacted upon the idea that, as a general fact, the personal assets of the deceased would take the direction given them by the law, and hence the amount recovered is to be distributed to the wife and next of kin in the proportion provided for in the distribution of personal property left by a person dying intestate. If the person injured had survived and recovered, he would have added so much to his personal estate, which the law, on his death, if intestate, would have passed to his wife and next of kin. In case of his death by the injury, the equivalent is given by a suit in the name of his representative. There is difficulty, in either case, in getting at the pecuniary loss with precision or accuracy; more difficulty in the latter than in the former, but differing only in degree; and in both cases the result must be left to turn mainly upon the sound sense and deliberate judgment of the jury. Illinois Cent. R. Co. v. Barron, 5 Wall. (72 U. S.) 90.]

Case No. 1,054.

BARRON v. LOCKE.

[7 Leg. Int. (1850,) 203.]

District Court.

ADMIRALTY PRACTICE—RULES OF COURT—WAGES—FORFEITURE—DEFENSES—EVIDENCE.

In admiralty. Libel by Barron against Locke, master of the schooner George S. Jones, for seaman's wages. [Decree for libellant.]

Libellant's counsel objected to evidence by respondent on the ground that no written answer had been filed, claiming right to do so under the rules of the supreme court, made under Act Cong. [Aug. 23,] 1842, [section 6, 5 Stat. 518.]

"The rules of the supreme court were not intended," THE COURT said, "to change the rules of the district courts as to seaman's wages. There can be no objection to hearing the defense without an answer."

The defense is that the seaman is not entitled to the small balance claimed, because he had not been discharged from the vessel, and that leaving without being discharged forfeited the wages due. On the other hand, it was in evidence that the seaman was sick, and unable to be on board ship. It would be hard and unjust, the court contended, to hold him to a literal performance. His sickness is an excuse, and therefore the balance of wages must be decreed, with costs.

Case No. 1,055.

BARRON v. MORRIS.

[The case reported under this title in 14 N. B. R. 371, is the same as Morris v. Brush, Case No. 9,828.]

Case No. 1,056.

BARRON v. NEWBERRY.

[1 Biss. 149.][1]

Circuit Court, N. D. Illinois. April Term, 1857.

MORTGAGES — DECREE OF FORECLOSURE AGAINST BANKRUPT DOES NOT EXTINGUISH EQUITY OF REDEMPTION—ASSIGNEE MUST BE MADE PARTY.

1. A decree of foreclosure against a man who had been duly adjudicated a bankrupt, his as-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

signee not having been made a party, is insufficient to extinguish the equity of redemption.

2. A bankrupt from the time of rendition of the decree in bankruptcy, is civiliter mortuus, so far as his property is concerned, and the equity of redemption having passed out of him into his assignee, neither the bankrupt nor any court other than the court in bankruptcy can by proceedings to which the assignee is not a party affect his title to the property.

[Cited in Taylor v. Irwin, 20 Fed. 617.]

[See Moore v. Young, Case No. 9,782; Oliver v. Cunningham, 6 Fed. 60.]

3. The mortgagee cannot plead a want of notice, all parties in the absence of fraud being chargeable with notice of proceedings in bankruptcy.

4. The property having been sold by the assignee, under order of the court, the purchaser is entitled to redeem.

5. Title by possession and payment of taxes under state law will not prevent such redemption.

[In equity. Bill by William Barron against Walter L. Newberry. Decree for complainant.]

This was a bill to redeem, filed by the plaintiff as owner of the equity of redemption in the premises described in the bill, situated in Cook county, Illinois, by purchase from Gordon Burnham, who claimed title thereto by deed from W. C. H. Waddell, the assignee in bankruptcy, for the southern district of New York. William L. Haskins, on the 11th day of July, 1836, purchased the premises in question of the defendant, Walter L. Newberry, and received a warranty deed of the same, vesting a title in him in fee simple, which was recorded in Cook county, on the 1st day of September, 1836. At the same time with the execution of said deed, Haskins executed a mortgage of the premises back to Newberry, to secure the payment of the sum of $12,000.00, the unpaid part of the purchase money, with interest at seven per cent., which was also recorded in said county, August 31st, 1836. On the 4th day of March, 1843, Haskins was by a decree in the district court of the United States, for the southern district of New York, declared a bankrupt; and W. C. H. Waddell was by order of said court made his assignee.

Haskins in his schedule of property attached to his petition, had the following entry: "One undivided half of forty acres of land in Chicago, Illinois, for which $4,000.00 principal and $420.00 interest have been paid by petitioner subject to mortgage to Walter L. Newberry for $12,000.00, part of the purchase money." After proper proceedings had upon the motion of Waddell, the assignee, a sale was ordered of the property, by the district court, and on the 15th day of July, 1845, it was sold at public sale to Gordon Burnham, for the sum of $5,00. On the 22nd day of October, 1845, a deed in due form was executed by Waddell, the assignee, to Burnham; but upon the petition of the assignee, the court made an order for another deed amending the description of the property, which order was executed by the assignee by deed, bearing date October 27th, 1855. On the 29th day of October, 1855, Gordon Burnham, in consideration of $2,000.00, conveyed the same premises to the complainant, William Barron. On the 1st day of March, 1848, long subsequent to the bankruptcy of Haskins, Walter L. Newberry filed a bill in the court of common pleas for Cook county, Illinois, to foreclose his mortgage upon said property. To this bill the only parties defendant were Haskins the bankrupt, and one Marcus Wilbur, and jurisdiction was sought to be obtained by publication under the statute of the state of Illinois. A decree was entered in this suit by default at the May term of the court, 1848, and the premises sold July 27th, 1848, to the present defendant, Walter L. Newberry, who received a master's deed on the 5th of July, 1851, and he now claims to hold the title by virtue of this deed, made to him as purchaser under the decree. Under this state of facts the complainant, William Barron, on the 8th of March, 1856, filed his bill in this court to redeem the premises from the mortgage of Newberry, and set forth therein the title of Haskins, his bankruptcy, the transfer by operation of law of the equity of redemption in the mortgaged premises to Waddell, the assignee, and a conveyance by Waddell, the assignee, to him. He also set forth a tender and offer to pay the amount due on the mortgage, and prayed leave to redeem and for an account, and reference to ascertain the amount due, and that Newberry be decreed to release by deed the said premises to him.

The answer admitted the title of Haskins and the bankruptcy, but denied that the equity of redemption was thereby conveyed to the assignee as against Newberry. It claimed that Newberry had no notice of the bankruptcy, or the title of the assignee, or of the deed of Burnham, and no such title appeared on record in the registry of deeds in Cook county, and nothing to show that Haskins was not the real owner, or held the title in trust for other parties who paid the purchase money. It was admitted that the title of record was vested in Haskins at the time of his bankruptcy, and no adverse interest had ever appeared on record, or been set up or established by any proceedings at law or in equity against Haskins' title. The answer further alleged fraud in obtaining the sale and deed by Burnham, but no evidence was offered to substantiate this charge. Title was also claimed by payment of taxes for seven years, &c., under the statute of the state.

C. Beckwith, for complainant.

It is a well settled rule that the mortgagee can not divest the equity of redemption without a proceeding to which the party legally entitled to such equity is made a party defendant; and if the mortgagor's interest has

been transferred before the suit in such a way that the mortgagee was bound to know the fact, as by descent, or by operation of law, or by deed of record, or brought home to mortgagee's knowledge, a decree and sale under such foreclosure will not affect the right of redemption unless the person owning such right be made a party. Glidden v. Andrews, 10 Ala. 166; Chaudron v. Magee, 8 Ala. 570; Fenwick v. Macey's Ex'rs, 1 Dana, 276; Holt v. Alloway, 2 Blackf. 111, note; Evans v. Instine, 6 Ohio, 117; Miami Exp. Co. v. Brown, Id. 535; Gordon v. Hobart, [Case No. 5,609.] In Watson v. Spence, 20 Wend. 260, Cowen, Judge, in giving the opinion of the court, says: "Where the equity has been assigned under such circumstances that the mortgagor is bound to know of it, the sale will not pass the rights of the assignee, unless he be made a party." Shackleford v. Stockton, 6 B. Mon. 390; Glidden v. Andrews, 10 Ala. 166. "The bankrupt, from the time his petition is filed, is civiliter mortuus as to all suits at law or equity pending in which he is a party, and consequently after that time no judgment could be recovered against him. The court will inquire whether in fact the judgment was not entered after the petition was filed, and if so will treat the judgment as of no more validity than if entered against a deceased person." Ex parte Foster, [Case No. 4,960;] McLean v. Rockey, [Id. 8,891.] Subsequent incumbrancers should be made parties. Sherman v. Cox, 2 Freem. 13; Story, Eq. Pl. § 193; Coote, Mortg. 504; Draper v. Earl of Clarendon, 2 Vern. 518; Godfrey v. Chadwell, Id. 601; Morret v. Westerne, Id. 663; Hobart v. Abbot, 2 P. Wms. 643. In Adams v. Paynter, 1 Colly. 532, V. C. Bruce says: "Ever since I have known anything of this court, such intervening incumbrancers have always been considered necessary parties to a bill of foreclosure. I should act against universally recognized and established rules if I were to suggest a doubt upon the subject." The rule thus established in England has been universally recognized in this country, although some judges have doubted its propriety. Haines v. Beach, 3 Johns. Ch. 459; Cooper v. Martin, 1 Dana, 23; 4 Kent, Comm. 185.

The assignee in bankruptcy is a necessary party to a bill to foreclose a mortgage. Lowry v. Morrison, 11 Paige, 327; Coe v. Whitbeck, Id. 42; McLean v. Lafayette Bank, [Case No. 8,885;] Thorne v. Deas, 4 Johns. 84; Sedgwick v. Cleveland, 7 Paige, 287; Anon., 10 Paige, 20; Story, Eq. Pl. §§ 158, 349, note; 1 Daniell, Ch. Pr. 255. Lloyd v. Lander, 5 Madd. 282, demurrer on joinder of bankrupts, allowed. Fellows v. Hall, [Case No. 4,723.] It has also been held that unless an assignee in bankruptcy is made a party to a suit after a decree in bankruptcy, a decree of foreclosure will be a nullity as to him, and will not foreclose the equity of redemption in the premises. Johnson v. Fitzhugh, 3 Barb. Ch. 360; Fellows v. Hall, [Case No. 4,723;] Lowry v. Morrison, 11 Paige, 327; Coe v. Whitbeck, Id. 42; McLean v. Lafayette Bank, [Case No. 8,885;] Carr v. Gale, [Id. 2,435;] McLean v. Rockey, [Id. 8,891;] Ex parte Foster, [Id. 4,960.] Where jurisdiction is conferred under a special statute by constructive notice, unless such statute is strictly pursued, the judgment will be void. Lawlins v. Lackey, 6 T. B. Mon. 70; Butler v. Cooper, 6 J. J. Marsh. 29; Green v. McKinney, Id. 193; Green v. Breckenridge, 4 T. B. Mon. 541; Bond v. Hendricks, 1 A. K. Marsh. 440. The above are all cases under publication notices. Webster v. Reid, 11 How. [52 U. S.] 437, and cases cited in brief of counsel for plaintiff. "In every form in which the question has arisen, it has been held that a statute authority by which a man may be deprived of his estate must be strictly pursued." Bloom v. Burdick, 1 Hill, 141; Jackson v. Esty, 7 Wend. 148; Atkins v. Kinnan, 20 Wend. 240; Harris v. Hardeman, 14 How. [55 U. S.] 334; Mankin v. Chandler, [Case No. 9,030;] Kelso v. Blackburn, 3 Leigh, 299. The assignee of bankrupt has a right to redeem. Lloyd v. Lander, 5 Madd. 175; Spragg v. Binkes, 5 Ves. 587; Hitchcock v. Sedgwick, 2 Vern. 161; Pillow v. Langtree, 5 Humph. 389. No lapse of time, (without permission) and with it none short of twenty years, will bar the right to redeem. Dexter v. Arnold, [Case No. 3,857,] cited and approved in [Slicer v. Bank of Pittsburg,] 16 How. [57 U. S.] 579; [Dexter v. Arnold, Case No. 3,859;] 2 Story, Eq. Pl. 1028; Hughes v. Edwards, 9 Wheat. [22 U. S.] 489; Ang. Lim. § 456. If the mortgagor continues in possession, no length of time will bar the equity. Ang. Lim. § 462; 1 Pow. Mortg. §§ 360–392, and notes.

Williams & Goodrich, for defendants.

The assignee must protect his rights by record or possession, like all other purchasers. He can procure an order for a deed from the bankrupt, which can be recorded, or he can record a certified copy of the decree. Such is the law in England. Eden, Bankr. 225–268; 2 Pow. Mortg. 591, note 5; 3 Pow. Mortg. 1085; 2 Sugd. Vend. 512; Story, Eq. Pl. § 1035, and note. Under our laws the conveyance was not perfected as to creditors without notice, until recorded. Doyle v. Teas, 4 Scam. 202; Martin v. Dryden, 1 Gilman, 187; Sturges v. Bank of Cleveland, [Case No. 13,571;] Choteau v. Jones, 11 Ill. 300.

The bankrupt had no interest to vest in his assignee; the mortgage was quadruple the value of the land,—therefore the bankrupt had nothing to pass to his assignee, nothing beneficial, to say the least. Ontario Bank v. Mumford, 2 Barb. Ch. 596; Eden, Bankr. 306; Camack v. Bisquay, 18 Ala. 286; Dwinel v. Perley, 32 Me. 197; Baker v. Vining, 30 Me. 121; Mitchell v. Winslow, [Case No. 9,673,] where it is said the assignee only

takes the interest of the bankrupt, and that a possibility cannot be assigned. See, also, Ex parte Newhall, [Id. 10,159.] The assignee abandoned his interest in the land,—this he may do. Bourdillon v. Dalton, 1 Esp. 233; Smith v. Gordon, [Case No. 13,052.] To the same point are Paulding v. Lee, 20 Ala. 753; Rugely v. Robinson, 19 Ala. 404. Similar in principle, Choteau v. Jones, 11 Ill. 323; McGoon v. Ankeny, Id. 558; Fiske v. Hunt, [Case No. 4,831;] Ex parte Christy, 3 How. [44 U. S.] 292; Packard v. The Louisa, [Case No. 10,652;] Brentlinger v. Hutchinson, 1 Watts, 46; Dart, Vend. 46; 1 Pow. Mortg. 181, note L; McKnight v. Taylor, 1 How. [42 U. S.] 161; Bowman v. Wathen, Id. 189; Piatt v. Vattier, 9 Pet. [34 U. S.] 416; Follansbe v. Kilbreth, 17 Ill. 522; 2 Sugd. Vend. 515, note.

Before McLEAN, Circuit Justice, and DRUMMOND, District Judge.

McLEAN, Circuit Justice. Many points have been raised and most elaborately discussed by the various counsel who have filed briefs in this cause, but in the view taken by the court the decision of one or two points is conclusive upon the rights of the parties, and it will not, therefore, be necessary to intimate an opinion upon such other points as in the judgment of the court are not necessarily involved in settling the rights of the parties. Neither is it the intention of the court at this time to discuss at length the points about to be decided, but merely to indicate the opinion to which we have come, as briefly as possible.

The first and principal question to be settled is whether the defendant, Walter L. Newberry, by virtue of the foreclosure proceedings in the court of common pleas of Cook county, Illinois, extinguished the equity of redemption in the mortgaged premises, as to any and all parties who had a legal claim thereto. In order to determine this question it is necessary to ascertain, first, in whom the equity of redemption was at the time of the foreclosure suit, and second, whether those proceedings were sufficient to extinguish the right of that party to redeem.

The suit to foreclose was commenced March 1st, 1848, by Newberry. In whom was the equity of redemption vested at that date?

On the 4th day of March, 1843, five years prior to the commencement of the suit to foreclose by Newberry, Haskins, the mortgagor, was decreed a bankrupt by the district court of the United States, for the southern district of New York, and W. C. H. Waddell was by order of that court made his assignee.

At the time, therefore, of this decree of bankruptcy, Haskins, the mortgagor, was the owner and possessed of the equity of redemption, for no foreclosure had either been made or attempted at that date.

Section 3 of the bankrupt law of 1841 provides: "That all the property and rights of property of every name and nature, and whether real, personal or mixed of every bankrupt, shall by mere operation of law, ipso facto from the time of such decree be deemed to be divested out of such bankrupt without any other act, assignment, or other conveyance whatsoever, and the same shall be vested by force of the same decree in such assignee as from time to time shall be appointed, &c. And the assignee so appointed shall be vested with all the rights, titles, powers and authorities to sell, manage and dispose of the same, to sue for and defend the same, subject to the orders and directions of the court as fully to all intents and purposes as if the same were vested in, or might be exercised by, such bankrupt, before or at the time of his bankruptcy."

The words of this law are too clear to admit of any misconstruction. By the rendition of the decree, all the property and rights of property of the bankrupt, "of every name and nature," pass by operation of law to the assignee, and this too, in whatever district it may be situated. This construction has been sanctioned by repeated judicial decisions in the courts of the United States, and were it a question involved in any doubt, it would now be too late to discuss its correctness.

The bankrupt from the time of the rendition of the decree of bankruptcy is civiliter mortuus, so far as any of his property is concerned. No act of his can in any manner affect it. He is thenceforth an entire stranger so far as ownership is concerned. His release cannot cancel a debt or obligation due his estate, any more than his deed can convey title to land which he formerly owned. This equity of redemption then which Haskins before his bankruptcy owned, passed by the decree and became vested in Waddell, his assignee, and this some five years before the proceedings of foreclosure instituted by the defendant Newberry. What steps then has Newberry taken to extinguish this equity of redemption in Waddell, the assignee, or his grantees? Have any proper legal steps ever been taken to accomplish this end?

The defendant, Newberry, insists that the suit instituted by him in March, 1848, did extinguish this equity of redemption so far as Haskins was concerned, and that it was also an extinguishment of the title of his assignee and his grantees. But how was this done? Newberry brought suit against Haskins and Marcus Wilbur, and in that suit obtained a decree of foreclosure and sale against Haskins. These were the only parties defendant in that suit. But the court has already decided that the equity of redemption had already passed out of Haskins into Waddell, his assignee, and that no power existed in Haskins by any act either voluntary or by order of the state court, to affect the title of his assignee to this property. That as to that he was civiliter mortuus. How then can any decree against Haskins affect the right of the legal owner? The mere fact that the title

came through Haskins, and that he once had the power to dispose of this property does not give him the power always to do so. His power of disposition ceased with the decree of bankruptcy, and the decree of the Cook county court of common pleas could not reinvest him with the title so as to pass it to the purchaser under that decree. The decree then was powerless so far as Haskins was concerned in regard to the property, and we are at a loss to understand how under these circumstances this decree of foreclosure could possibly affect the rights of third parties, strangers to the record. It is a familiar and well settled principle that no judgment can operate as a bar or foreclosure, excepting between the parties to the judgment and those who claim subsequently to them. As to all other parties it is res inter alios acta.

Applying this principle to the present case, it will be seen that the rights of Waddell, the assignee, and his grantees, Burnham and the complainant herein, were not affected in any degree by the suit instituted by Newberry against Haskins, to foreclose his mortgage. They were not parties to the suit, and their rights could not be determined thereby. As to them it was res inter alios acta.

The decision of these points settles this controversy, and it is not therefore necessary to indicate any opinion upon the other points discussed by counsel. The complainant being the owner of the equity of redemption unextinguished has the right to redeem the property, unless there are circumstances in the case which estop him from asserting his right. The court has been unable to see any thing in the conduct of the complainant or his grantors which would lead to such a result. Lapse of time, such as appears here, is not sufficient to estop the assertion of their right to redeem. The defendant has sold his land at his own price, and he will in the redemption receive his purchase money and interest. If he had taken steps to make the proper parties to his suit against Haskins, the result might have been the same, and he might have obtained his decree and sale in due legal form, but this can only be conjecture. The court cannot look at what might have been, but at the facts as they actually are, and in so looking at these facts we feel compelled to grant the prayer of the complainant to redeem. All parties are chargeable with notice of the proceedings in bankruptcy, in the absence of fraud, and hence the defendant cannot claim a want of notice. Neither do we consider the claim of title under the seven-year law of the state as affording any defense under the facts as proved. An order may be entered in proper legal form to this effect, and appointing a master to state an account, &c., as prayed by the complainant in his bill.

DRUMMOND, District Judge, concurring.

NOTE, [from original report.] By comparing the 14th section of the bankrupt act of 1867 [14 Stat. p. 517, c. 176] with this section of the act of 1841, [5 Stat. p. 440, c. 82,] it will be seen that the rights, powers, and duties of the assignee are essentially the same under both acts, and it is believed that the principle of this decision applies equally to the present bankrupt act. That an assignee appointed pendente lite is not a necessary party. See Cleveland v. Boerum, 7 Amer. Law Reg. 144. The purchaser, under a deed from the assignee of a bankrupt, can hold the title against a prior unrecorded deed from the bankrupt. Holbrook v. Dickenson, 56 Ill. 497.

BARRON COUNTY, (NORTH WISCONSIN RY. CO. v.) See Case No. 10,347.

Case No. 1,057.

In re BARROW. In re LOEB et al. In re WINTER.

[1 N. B. R. 481, (Quarto, 125;)[1] 1 Amer. Law T. Rep. Bankr. 63.]

District Court, D. Louisiana. April Term, 1868.

BANKRUPTCY—JURISDICTION—FEDERAL AND STATE COURTS—SALE BY ASSIGNEE.

1. The jurisdiction of the United States district courts sitting as courts of bankruptcy is superior [to] and exclusive [of the jurisdiction of state courts] in all matters arising under the bankrupt act.

[Cited in Re Vogel, Case No. 16,983; Re Vogel, Id. 16,982; Markson v. Haney, Id. 9,098; Re Mallory, Id. 8,991; Re Brinkman, Id. 1,884.]

2. The United States district court for Louisiana has judicial power to authorize the sale, by the assignees, of real estate surrendered by bankrupts, free and discharged of all debts secured by mortgage thereon.

[Cited in Clifton v. Foster, 103 Mass. 233; Markson v. Haney, Case No. 9,098; Giveen v. Smith, Id. 5,467; Re Brinkman, Id. 1,884; Sutherland v. Lake Superior S. C. R. & I. Co., Id. 13,643.]

[In bankruptcy. In the matter of R. H. Barrow; in the matter of Loeb, Simon & Co.; in the matter of W. D. Winter. Petition by assignees for orders to sell real property free of incumbrances. Granted.]

DURELL, District Judge. The assignees of the bankrupts have, in the above entitled cases, filed petitions praying for orders authorizing the sale of real estate surrendered by the bankrupts, free and discharged of all debts secured by mortgage thereon; thus transferring the security of the mortgage creditor and his right to priority of payment from the land to the proceeds of its sale. The judicial power of the court to issue orders in conformance with the prayers of the petitioners is called in question. The jurisdiction of a district court of the United States sitting as a court of bankruptcy, is superior and exclusive in all matters arising under the statute. The estate surrendered is placed in the custody of the court so sitting in bankruptcy, and the officer appointed to manage it is ac-

[1] [Reprinted from 1 N. B. R. 481, by permission.]

countable to the court appointing him, and to that court alone. No court of an independent state jurisdiction can withdraw the property surrendered, nor determine, in any degree, the manner of its disposition. These principles have been settled in cases which have declared the relations existing between federal and state jurisdictions. Taylor v. Carryl, 20 How. [61 U. S.] 583.

The court being possessed of jurisdiction over the bankrupt's estate, and entitled to its exclusive administration, this question arises: How far does the power of administration extend? Does it extend to a suspension of proceedings taken for the purpose of subjecting portions of the estate surrendered to a sale under state process? The answer to this question is to be found in the general powers conferred upon the court.

Until sale is made, the bankrupt is not divested of his interest in the property under seizure. The assignee, appointed before sale is made, acquires the bankrupt's interest, and he acquires it for the general benefit of the creditors. The interest of creditors in a suit wherein property is seized, is represented by the debtor, who has a standing in court and a power to intervene at any stage of the proceedings of the case. But by bankruptcy a new class of rights and interests is created, and each and every creditor has, through the assignee, a direct claim upon the estate. To permit a single creditor to follow his personal claim without reference to the common interest, might work great injustice. The debtor, by his bankruptcy, is made incompetent to act. The law strips him of his property by a summary decree, and assumes the administration of his effects. It is in the nature of a bankrupt act to deal potentially (for the good of a class) with private and personal interests, and to uphold a general and just policy.

The bankrupt act of 1867 [14 Stat. 517, c. 176] undertakes to establish a uniform system of bankruptcy. Without such uniformity the bankrupt could receive but a partial relief; for the insolvent laws of a state operate effectively only upon creditors residing within, and upon property being within the state of the insolvent's residence. Baldwin v. Hale, 1 Wall. [68 U. S.] 223. A bankrupt law, operating upon creditors wherever resident throughout the Union, must have a perfect control over all the property of the bankrupt in order to fulfil its purposes. A creditor residing without the state in which the bankrupt resides, is brought involuntarily into a court of the United States, sitting as a court of bankruptcy, and a decree of that court discharging the bankrupt, binds the creditor. It is due, then, to the creditor, that the court should collect all the assets, adjust and liquidate all the incumbrances, and dispose of and distribute all of the effects of the bankrupt. And such are the powers given to the district courts of the United States, under and by virtue of the bankrupt act. In the case of Ex parte Christy, 3 How. [44 U. S.] 292, [321,] the supreme court says: "Prompt and ready action, without heavy charges or expenses, could be safely relied on when the whole jurisdiction was confined to a single court, in the collection of the assets; in the ascertainment and liquidation of the liens, and other specific claims thereon; in adjusting the various priorities and conflicting interests; in marshalling the different funds and assets; in directing the sales at such time and in such manner as should best subserve the interests of all concerned; in preventing, by injunction or otherwise, any particular creditor from obtaining an unjust and inequitable preference over the general creditors by an improper use of his rights and remedies in the state tribunals; and finally, in making a due distribution of the assets, and bringing to a close within a reasonable time, the whole proceedings in bankruptcy." The first section of the bankrupt act of 1867 is but a repetition of a portion of this extract from the opinion of the supreme court; and the whole of it is to be found in the act. The act says that the court has the entire direction of sales to be made and of accounts to be rendered; that it has full power and authority to compel obedience to all orders and decrees made by it in bankruptcy, by process, to the same extent that the circuit courts have in any suit pending in equity. Such being the origin of the law, the court must suppose that the expositions of the opinion upon which it is based have been recognized as correct.

The estate of the mortgagee, at common law, is a fee simple estate. A tender after the law day does not discharge a mortgage; a reconveyance is necessary. The mortgagee cannot be required to do anything in equity, other than submit to redemption. This right of redemption is, in equity, inherent in a mortgage. "Once a mortgage, always a mortgage." But no such qualities attach to, or are inherent in, a mortgage in Louisiana. Here the mortgagee is not entitled to possession; cannot claim profits until after seizure, and instead of foreclosure can only sell. After insolvency in Louisiana, the syndic sells, and all that the mortgagee can ask for is that the sale may be a sale for cash. The bankrupt does not, therefore, in Louisiana, impair any of those vested rights which in England and in America have a constitutional protection. It is not important in these cases to consider how far, in other states, vested rights are under the dominion of a bankrupt law; it is sufficient to know that in Louisiana a sale of the land is all that the mortgagee bargains for, and such sale is secured by the bankrupt act as fully as by the laws of the state. The bankrupt act places in the court a discretion to fix the time and place of sale; and precisely this discretion exists in the insolvent system of Louisiana. It has never been controverted as unconstitu-

tional, and if not unconstitutional, congress may confer it. The same power is conferred upon the bankrupt court of France, to be exerted after the concordat is settled among the creditors, and a syndic is appointed; and the same power is conferred upon the bankrupt court of England, to be exerted in all cases of liens except those that convey a right in the land itself—a jus in re. The people of the thirteen original states, when they created the present general government, gave to congress the power to establish uniform laws on the subject of bankruptcies throughout the United States; and when congress put in execution that power, all the state insolvent laws became necessarily silent, and the property of the bankrupt, even to the shadow of an interest in any estate whatsoever, was thereby subjected to the dominion of the courts of the United States.

Orders will, therefore, be made and issued in conformity with the prayers of the petitioners.

BARROWCLIFF, (UNITED STATES v.) See Case No. 14,528.

BARROWS, In re. See Case No. 1,057.

Case No. 1,058.

BARROWS v. CARPENTER.

[1 Cliff. 204.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1858.

LIBEL AND SLANDER—PLEADING—TRUTH AS A DEFENSE.

1. In an action of libel, if the defendant intends to rely on the truth of that which he has published, either in bar of the action or in mitigation of damages, he must plead it specially; he cannot give in evidence the truth of the imputation without pleading such truth as a justification.

2. Where the charge is general in its nature, the defendant in a plea of justification must state some specific instances of the misconduct imputed to the plaintiff, but irrelevant matter will not vitiate, even on special demurrer.

3. It is sufficient if the defendant's plea answer the whole substance of the plaintiff's declaration.

4. The plea is required to state the substantial facts which constitute the elements of the charge when it is general.

At law. Action on the case for libel [by Ira Barrows against Benoni Carpenter. Heard on demurrer to plea. Demurrer overruled.]

The subject-matter of the complaint in the declaration was the republication, in a newspaper called "The Business Directory," published at Pawtucket, of an article which originally appeared in the "Boston Medical Journal." At the argument, it was agreed that the declaration was in the usual common-law form, with the usual and necessary innuendoes; and the court was furnished with a printed copy of the article which was the subject of complaint. As originally filed, the pleas were the general issue, and a special plea partaking of the nature of a plea of privileged communication. To the special plea the plaintiff demurred, and the court sustained the demurrer; but on motion to the court for that purpose, the defendant had leave to withdraw his special plea, and to file a substitute in its place. He availed himself of the leave granted, and filed a plea of justification which stated the particulars of the charge in the libel. To this plea the plaintiff demurred specially, showing twenty causes for its insufficiency. Some of the causes assigned were abandoned at the argument; others were overruled by the court, upon the ground that the objections set forth in them, being based upon merely verbal or clerical errors, such errors in the plea might be amended as of course. The character of the other causes set down in the demurrer sufficiently appears in the opinion of the court.

R. Mathewson and A. Payne, for plaintiff.
C. S. Bradley, for defendant.

CLIFFORD, Circuit Justice. In the first place, the plaintiff complains that the defendant, in the introductory part of his plea, has introduced and attempted to put in issue matters of fact not necessary to be alleged, and which are wholly impertinent and foreign to the cause. Various specifications are made under this head, but, in the view we have taken of the plea, they may all be considered together. Defences in actions of libel and slander, which go to a general denial of the whole declaration, must be tried under the general issue. Certain other defences must be pleaded specially, and cannot be thus given in evidence, even although they afford a conclusive bar to the action. Whenever the defendant means to insist that the imputation of the charge, as laid in the declaration, is true, he must plead such defence specially, for the reason that the matter which supplies the justification is collateral to the cause of action, and the proof of it does not contradict or repel any fact which the plaintiff would be bound to prove. On grounds of convenience and policy, also, it is obviously just and necessary that a party charged with the commission of an illegal or immoral act should be apprised of the nature and circumstances of the charge, in order that he may be prepared to meet it, and, if it be unfounded, to refute it. These considerations induced courts of justice at a very early period to adopt the rule that the defendant, if he means to rely on the truth of that which he has published, either in bar of the action or in mitigation of damages, must plead it specially. No rule can be more firmly established than that the defendant cannot give in evidence the truth of the imputation, without pleading such

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

truth as a justification. Underwood v. Parks, 2 Strange, 1200; Smith v. Richardson, Willes, 20; 1 Chit. Pl. (12th Amer. Ed.) 494; Shepard v. Merrill, 13 Johns. 475. Confine the application of the rule to the precise case described, and the law is clear; but there are two kinds of defences, in actions of this description, which constitute a complete bar to a recovery. One is properly denominated a justification, and consists in showing the entire truth of the charge which is the subject of complaint, and therefore falls within the rule already stated, and must always be specially pleaded; but the other consists in showing that the utterance or publication was honestly made by the defendant, believing it to be true, and that there was a reasonable occasion or exigency in the conduct of his own affairs, in matters where his interest was concerned, which fairly warranted the publication. Proof of such facts go to negative the inference of malice, and, consequently, afford a defence to the action, unless express malice be proved by the plaintiff. Evidence to maintain a defence of this latter kind is admissible under the general issue, or the defence may be specially pleaded at the election of the defendant. Hastings v. Lusk, 22 Wend. 416; Lillie v. Price, 5 Adol. & E. 645; Swan v. Tappan, 5 Cush. 104; Fairman v. Ives, 5 Barn. & Ald. 642; Somervill v. Hawkins, 3 Eng. Law & Eq. 503; Toogood v. Spyring, 1 Cromp., M. & R. 181; 2 Greenl. Ev. § 421; Bradley v. Heath, 12 Pick. 163. On the other hand, it is perfectly well settled, as before remarked, that the defendant cannot be permitted to prove the truth of the words under the general issue, either in bar of the action or in mitigation of damages. 2 Greenl. Ev. § 424. Every plea of justification, setting up the truth of the charge, ought to confess the publication, as laid in the declaration, otherwise it will be bad on demurrer. Three rules are suggested by Mr. Chitty, which it would be well to follow in framing such a plea: 1. He says it is necessary, although the libel contain a general imputation upon the plaintiff's character, that the plea should state specific facts, showing in what particular instances and in what exact manner he has misconducted himself; 2. That the matters set up by way of justification should be strictly conformable with the charge laid in the declaration, and must be proved as laid, at least in substance; and 3, That, if the matter of justification can be extended to the whole of the libel or slander, the plea should not be confined to a part only, leaving the rest unjustified. 1 Chit. Pl. (12th Amer. Ed.) 495. Numerous cases are reported where the plea has been held bad, as wanting the requisites prescribed in the first rule, because the pleader had not shown the particular instances of illegal or immoral conduct imputed to the plaintiff, or in what exact manner they had occurred. Parke, B., said in Hickinbotham v. Leach, 10 Mees. & W. 363, that it is a perfectly well-established rule, in cases of libel or slander, that, where the charge is general in its nature, the defendant, in a plea of justification, must state some specific instances of the misconduct imputed to the plaintiff. His views in that behalf are nothing more than a repetition of the first rule prescribed by Mr. Chitty and other writers upon the law of pleading, and appear to be sustained by all the well-considered cases upon the subject. Newman v. Bailey, 2 Chit. 665; Holmes v. Catesby, 1 Taunt. 543; Jones v. Stevens, 11 Price, 235; J'Anson v. Stuart, 1 Term R. 748. In this last case, the objection to the plea was the opposite of the present one, and it was decided that the plea was bad, on account of its generality. Among other reasons given for the decision, it was said by Ashurst, J., that the charge laid in the declaration was the charge of the defendant, and the plaintiff was bound to state it as it was made, but it does not follow that the defendant ought to justify in so general a way..... When he took upon himself to justify generally, he must be prepared with the facts which constitute the charge, in order to maintain his plea; then he ought to state those facts specifically, to give the plaintiff an opportunity of denying them; for the plaintiff cannot come to the trial prepared to justify his whole life. Beyond question, the correct rule of pleading in such cases is stated by Mr. Starkie, when he says that a party charged with an illegal or immoral act has a right to be apprised, by means of a special plea, of the nature and circumstances of the charge, in order that he may be prepared to meet it. 1 Starkie, Sland. & L. 466. Similar views were held by the supreme court of New York in Van Ness v. Hamilton, 19 Johns. 368; and also in O'Brien v. Bryant, 16 Mees. & W. 170, where an amendment was allowed to the plea, stating the circumstances with greater latitude than is done in the present case. Applying these principles to the plea under consideration, it is obvious that the objection cannot prevail. Care should be taken, undoubtedly, both in framing the declaration and the plea responsive to it, not to allege the collateral circumstances too minutely, and not to allege more than is necessary; for where the actionable quality of the publication depends wholly on its connection with collateral matter, a variance in a material point in the proof of those matters might be fatal to the party committing the mistake. But suppose the rule were otherwise, and that the particularity of statement in this plea were unnecessary, still it could not benefit the plaintiff in the present state of the pleadings. Matter wholly foreign and irrelevant to the cause may be rejected, as surplusage in a plea, as well as in a declaration or an indictment. Such irrelevant matter will not vitiate even on special demurrer, it being a maxim of the law that utile per inutile non vitiatur. 1

Chit. Pl. (12th Amer. Ed.) 228; Com. Dig. tit. "Pleader," C, 29. By these remarks we do not mean to admit that the plea contains any matter foreign to the issue. On the contrary, we are of the opinion, if the statements are true, they are no more than a proper explanation of the nature and circumstances of the charge; and in point of fact, that, if less had been stated, the plea would have been objectionable, on the ground of generality. If the statements of the plea are untrue, they may be denied by the plaintiff in his replication, and we have no doubt that such is his proper remedy.

Complaint is also made that the plea does not fully answer the declaration. None of the authorities, when carefully examined, require any more of the defendant than that his plea should answer the whole substance of the plaintiff's declaration. When the plaintiff has proved the substance of his declaration, he has made out his case; and upon the same ground, and for the same reason, when the pleadings and proofs of the defendant have substantially answered the charge, as laid in the declaration, the defense is complete. 1 Starkie, Sland. & L. 374.

Another ground of complaint is that the plea is wanting in the requisite certainty to apprise the plaintiff of the nature and circumstances of the charge. Courts of justice agree that a plea of justification, in actions of libel and slander, must contain a specific charge set forth with certainty and particularity; and it is sometimes said that the plea ought to state the charge with the same precision as in an indictment. To maintain an action of libel, however, it is not necessary that the publication should impute an actionable offense to the plaintiff. Any writing, picture, or sign which derogates from the character of an individual, by imputing to him either bad actions or vicious principles, or which tends to diminish his respectability and abridge his comforts, by exposing him to disgrace and ridicule, is actionable without proof of special damage. Cooper v. Greeley, 1 Denio, 363; Clark v. Binney, 2 Pick. 115. When the charge is general the defendant is required to state the substantial facts which constitute its elements; and when that condition is fairly fufilled, he has done all that the law requires to maintain his plea. Such a plea, says Spencer, C. J., in Van Ness v. Hamilton, 19 Johns. 368, must be certain to a common intent. It must be direct and positive in the facts set forth, and must state them with all necessary certainty. All the material facts set forth in the plea must be considered as admitted by the demurrer; and, assuming them to be correctly stated, it is difficult to perceive in what other manner the justification in this case could have properly been interposed. One of the specifications under this head is, the want of a more definite description of the territory claimed to be included in the "circle of professional business" embraced in the contract between these parties. That phrase is the one employed by the parties in making the contract, and the contract is fully set forth in the plea. Both parties having adopted that description as one suitable to express their intentions, it cannot now be held that it is insufficient to apprise the plaintiff of the nature and circumstances of the charge. Without entering more into detail, we are of opinion that the plea is sufficient, and the demurrer is accordingly overruled.

BARROWS, (UNITED STATES v.) See Case No. 14,529.

Case No. 1,059.

In re BARRY.

[The case reported under this title in Brunner, Col. Cas, 533, 7 Law Rep. 374, 11 Hunt, Mer. Mag. 265, and 136 U. S. 597, note, is the same as In re Barry, 42 Fed. 113. The decision was affirmed in 5 How. (46 U. S.) 103.]

[Cited in Bennett v. Bennett, Case No. 1,318.]

BARRY, (BANK OF THE UNITED STATES v.) See Case No. 907.

Case No. 1,060.

BARRY v. BARRY.

[3 Cranch, C. C. 120.][1]

Circuit Court, District of Columbia. May Term, 1827.

ACCOUNT—PRACTICE—PARTNERSHIP—EVIDENCE.

1. When the accounts of the parties, in an action at law, are referred by the court to an auditor, the party excepting to the report will have the same benefit, at the trial of the issue, (to the extent of his exceptions,) as he would have had if he had formally pleaded or demurred before the auditor, according to the English forms of proceeding in actions of account. What is not excepted to, will be considered as admitted. The auditor's report is of no avail, but to ascertain the points really litigated by the parties.

2. The court will permit only so much of the report to be read to the jury as states the items claimed by either party, and objected to by the other, so as to show what is litigated by the parties.

3. Items of partnership account cannot be recovered in a suit at law by one partner against the other, if the joint concerns have not been settled. The accounts current rendered by each to the other are admissible in evidence, to show, by the admissions of the parties, that the items are not items of partnership account.

4. In an action upon an open account, the plaintiff may give evidence of any item of which the defendant has had reasonable notice; and the exhibiting and filing a claim for a particular item before the auditor, will be considered as reasonable notice of such claim.

5. The proceedings in equity, in a cause in which the present plaintiff and defendant are parties, may be read in evidence, to show that the defendant had charged to another account

[1] [Reported by Hon. William Cranch, Chief Judge.]

some of the articles charged against the plaintiff in the present action.

6. If an account current be received and kept without objection, except as to particular items, the person so receiving it may still surcharge, and falsify as to other items.

At law. This was an action at law [by James D. Barry against Robert Barry] claiming $27,527.04, as a balance of account due by the defendant to the plaintiff. It was commenced by attachment, under the Maryland act of 1795, c. 56; but the defendant appeared and gave special bail, and dissolved the attachment. The accounts between the parties appearing to the court to be very complicated, the court referred the accounts to an auditor, under the 12th section of the Maryland act of 1785, c. 80, which authorizes the court "to order the accounts and dealings between the parties to be audited and stated by an auditor or auditors, to be appointed by such court, and there shall be such proceedings thereon as in cases of actions of accounts."

The auditor stated an account, showing a balance of $17,517.68, due by the defendant to the plaintiff. The defendant excepted to certain items of the statement.

THE COURT (MORSELL, Circuit Judge, absent) said that the defendant would have the same benefit at the trial of the issue, (to the extent of his exceptions,) as he would if he had formally pleaded or demurred before the auditor, according to the English form of proceedings in actions of account. That the auditor's report is of no avail, but to ascertain the points really litigated by the parties; and that what is not excepted to will be considered as admitted.

At the trial before the jury, at December term, 1826, Mr. Jones, for the plaintiff, offered to read the report of the auditor.

Mr. R. S. Coxe objected. The report is an award, which the auditor in "account" has no power to make. He was only to state the accounts, and ascertain what items were disputed. The practice of Maryland, under the statute, is like that in "actions of account." Mantz v. Collins, 4 Har. & McH. 65; Godfrey v. Saunders, 3 Wils. 113; Finney v. Harbeson, 4 Yeates, 514.

Mr. Worthington, on the same side, cited Com. Dig. tit. "Accompt," E, 15; Crousillat v. McCall, 5 Bin. 435, 438; De Sobry v. De Laistre, 2 Har. & J. 221; Consequa v. Fanning, 3 Johns. Ch. 587.

THE COURT (nem. con.) permitted only so much of the report to be read to the jury as states the items claimed by either party and objected to by the other, so as to show what was litigated by the parties; and refused to permit him to read arguments or statements of evidence, made by the auditor in his report.

The defendant having offered evidence that the plaintiff and defendant had been in partnership in a tan-yard, and it appearing that some of the items in the plaintiff's account were for leather, which the defendant suggested might be their joint property,

THE COURT (nem. con.) said that the accounts might go in evidence to the jury, and that it was competent for the defendant to prove that any items in the accounts were really for the joint concern, and, if the jury should so find them, and that the partnership concerns were not settled, they could not, in this cause, find for the plaintiff as to those items. One of the jurors being taken very ill, a juror was withdrawn by consent, and the cause was continued to the next term, May, 1827.

Upon the trial, at this term, it appeared that the plaintiff's account, filed as the foundation of the attachment in this cause, commenced with a balance of $4,234.08; whereupon Mr. Worthington, for the defendant, objected to the plaintiff's giving evidence of any item of account not constituting part of an account the balance of which should not appear to be $4,234.08.

But THE COURT (nem. con.) refused to restrict the plaintiff to such proof, and said that the plaintiff might give evidence of any item of which the defendant had had reasonable notice; and that the exhibiting and filing of claims before the auditor would be considered as reasonable notice that he meant to rely upon such claims.

The plaintiff had produced in evidence the accounts current of the defendant against him, and relied upon surcharging and falsifying; and, in order to show that a certain charge of $9,000 ought to have been made against the estate of one James Barry, of which the plaintiff was executor, and not against the plaintiff personally, he offered to read the proceedings in a suit in equity, by Rabourg, Hearne, and the present defendant, Robert Barry, against the present plaintiff, James D. Barry, as executor, and others, as heirs of the said deceased James Barry, in which the same sum of $9,000 was charged to the estate of the said James Barry, which

THE COURT (THRUSTON, Circuit Judge, absent) permitted him to do so.

Mr. Coxe, for the defendant, prayed the court to instruct the jury, that if they should find, from the evidence, that the defendant transmitted to the plaintiff the accounts current which have been given in evidence by the plaintiff in this cause, at or about the time when they respectively bear date, and that the plaintiff retained these accounts without objection, or with objection only to particular items, it is not competent for the plaintiff, by any evidence at this time, to surcharge and falsify the said accounts, beyond such items specially objected to. Murray v. Toland, 3 Johns. Ch. 569.

But THE COURT (MORSELL, Circuit Judge, doubting) refused to give the instruction.

Mr. Coxe then prayed the court to instruct the jury, that it is incumbent on the plaintiff, in his attempt to surcharge and falsify

the accounts current transmitted by the defendant to the plaintiff, to do so by the fullest and most distinct proof, and the inaccuracy of each item so sought to be falsified; and that the jury cannot by law, without such full and distinct proof, now reject any such item.

But THE COURT refused also to give this instruction.

Mr. Coxe then prayed the court to instruct the jury, in substance, that the plaintiff cannot recover, in this action, for partnership items, unless the partnership accounts were settled, and balance struck, and a promise to pay, before bringing this suit.

Which instruction THE COURT gave.

Whereupon Mr. Jones, for the plaintiff, prayed the court, in substance, that if the joint interest in any particular articles was severed before the bringing of the suit, the plaintiff might, in this action, recover for such articles.

Which instruction, also, THE COURT gave, (nem. con.)

The jury not being able to agree, a juror was withdrawn, by consent, and the cause was continued to the next term, December, 1827, when the plaintiff withdrew his action.

BARRY, (BIGGS v.) See Case No. 1,402.

BARRY v. EVERETT. See Case No. 1,061.

Case No. 1,061.

BARRY v. GUGENHEIM et al.

SAME v. EVERETT.

[5 Fist. Pat. Cas. 452;[1] 1 O. G. 382; Merw. Pat. Inv. 242; 2 Bench & Bar, 65.]

Circuit Court, E. D. Pennsylvania. April Term, 1872.

PATENTS FOR INVENTIONS—SPECIFICATIONS AND MODEL—TIN CANS.

1. It is not sufficient that the parts or features of a machine which are essential to the production of the proposed result be shown in the patent office model. If the inventor desires to appropriate them, he must so inform the public by his specification; and if they are not so described, whether they relate to the construction or the mere adjustment of the machine, their use by others is not unlawful.

[Cited in Couse v. Johnson, Case No. 3,288.]

2. If the essential parts or features of a machine are such as the experience of a mechanic, skilled in the art, would devise or apply in the operation of the machine, a patentee can have no exclusive right to their employment.

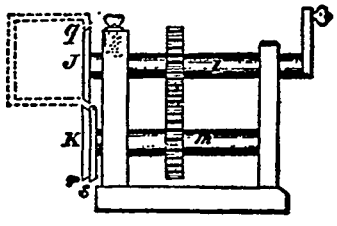
3. Where the seam between the body and the cover of a metallic can had been closed by compression between revolving swages, so adjusted that their beveled faces were parallel to each other: *Held*, that a change in the adjustment which destroys the parallelism of these faces, for the purpose of producing a wider and smoother seam, belongs to the category of mechanical skill.

4. Where one swage was described as having a beveled periphery, and the swage with which it operated as having "a corresponding beveled periphery," these terms import that the beveled surfaces were parallel.

5. Letters patent for an "improvement in machine for making tin cans," reissued to Christian Barry, October 6, 1868, are void for want of novelty.

[In equity. Bills by Christian Barry against Gugenheim, Dreyfus & Co. and against Horace Everett.] Final hearing on pleadings and proofs. [Bills dismissed.]

Suit brought on letters patent [No. 71,680] for "improvement in machine for making tin cans," granted to complainant December 3, 1867, and reissued October 6, 1868, [No. 3,143.] A suit by the same complainant against Horace Everett was argued at the same time. The nature of the invention is sufficiently stated in the opinion, and will be readily understood with the aid of the accompanying engraving, in which J and K represent the swaging rollers, and the dotted lines, a can passing between them.



T. A. Burton, for complainant.
J. B. Gest, for defendants.

McKENNAN, Circuit Judge. Both these cases present the same questions, and have been submitted upon the same proofs. They involve the consideration of only the third claim of the complainant's reissued patent. This claim is for part of a tool for closing the top and bottom, or the cover and the body of metal cans, so as to make them air-tight without the use of solder, and is in these words:

"3. The swage or die, J, having beveled periphery, q, and swage or die, K, having a corresponding beveled periphery, r, operating together, substantially as described, for the purpose specified."

The swages thus described are attached to the ends of horizontal shafts carrying cog-wheels working into each other, and having their bearing upon the standards of an upright frame. These shafts are made to rotate in opposite directions by a crank-handle attached to the upper shaft. By a preliminary process, the can-body and the top and bottom lids are prepared for the operation of the closing machine. The cylinder or can-body is flared outward, and the lids intended to close the ends of the can are countersunk to a depth corresponding with the flare of the body, with an extension of their rims so as to allow them to lap over on the outer side

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 242, contains partial report only.]

of the flared ends of the body. This extension is bent downward, forming a hook-shaped figure. The lid, thus prepared, is then put on the body, and the open seam thereby formed is placed between the swages of the closing-tool, and, by their rotation and compression, the flared part of the body and the hooked rim of the lid are brought into close contact, producing a tight, smooth joint, composed of three layers of the metal. It is the simple office of the closing-tool to make this seam, and it is effected by the inward and outward bevels of the periphery of the swages and their rotary compression of the parts to be brought into close contact. This is the essential purpose of the invention as described in the specification.

The invention of this tool is claimed by the complainant, and, as before stated, is the subject of the third claim of his reissued patent dated October 6, 1868. Its novelty is denied by the respondents; and, as the proofs sustain this denial, it is necessary only briefly to advert to this point of the defense.

The complainant's original application was filed October 25, 1867, and the earliest period to which the proofs carry back the date of his alleged invention is October or November, 1865. This is the import of the testimony by Julius Zabel, who says he made wheels for the complainant, like those in his exhibit No. 6, for closing boxes, in one or the other of these months in that year. Aside from the general statements of several witnesses, that sunken head-cans closed from the outside were well known for years before the complainant's alleged invention, and that the tool for thus closing them was, in principle and operation, like his, one machine at least has been exhibited in evidence which disproves the novelty of the complainant. It is the machine made by Henry Diedricks for McCoy & Snell. There is no dispute that Diedricks made such machine for McCoy & Snell; and in both the principle and result of its operation it cannot be substantially discriminated from the complainant's. The most earnest contention has reference to the time when it was made and used. I do not propose to discuss in detail the evidence on this point, but only to state that it satisfactorily proves this machine to have been completed and worked in the early part of 1865, antedating the complainant's machine some nine months.

It is sought to invest the complainant's machine with the peculiar result of producing a wider and smoother seam than any of its predecessors was capable of producing, as the result of a want of parallelism in the beveled faces of its swages; and it is consequently urged that it is thereby to be distinguished as a novel invention from any other closing-machine. This suggestion seems to have originated with S. Lloyd Wiegand, an acute and intelligent expert, who was examined as a witness for the complainant, and elaborates it in his testimony. It is a sufficient answer to it to say that a difference in the taper of the bevels of the rollers is not stated or indicated in the complainant's specification as a part of his invention, or as essential, or even important, in producing the result proposed by him. Mr. Wiegand says it is shown in the model deposited in the patent office, but that will not supply the omission of a reference to it in the specification. If it is a peculiar feature of the complainant's machine, and he desires to appropriate it, he must have so informed the public by his specification, or he can not claim an exclusive right to it. The very object of the specification is to furnish the public with a description of the invention in such "full, clear, and exact terms" that any one skilled in the art to which it appertains may make, construct, and use it, and, without subtraction from or addition to the means specified, produce the precise result described by the inventor. It must, therefore, distinctly indicate the parts or features of a machine which are essential to the production of the proposed result. If they are not described, whether they relate to the construction or the mere adjustment of the machine, their use by others is not unlawful. If they are such as the experience of a mechanic skilled in the art would devise or apply in the operation of the machine (and to this category is to be assigned the peculiar adjustment of the rollers in the complainant's machine according to the clear import of Wiegand's testimony), the patentee can have no exclusive right to their employment.

But there is another reason why the suggested discrimination is unwarranted. It is inconsistent with the testimony of the specification. By the third claim the swage, J, is required to have a beveled periphery, q, and the swage, K, is to have a "corresponding beveled periphery, r." Can this mean anything else than that such bevel is to be made with the same inclination or angle? How can they be said to correspond unless their surfaces are parallel? But this is rendered clear by the drawing referred to and made part of the specification, in which the working faces of the rollers are shown to have a corresponding inclination and exactly parallel lines. It results, therefore, that deviation from parallel lines in the working faces of the rollers is not an appropriate feature of the complainant's machine, and that it can not for that reason be distinguished from the other machines exhibited in evidence.

The machine made for McCoy & Snell is constructed with an upper and a lower swage, correspondingly beveled, and is adapted to produce the same result as the machine described in the complainant's patent. As it was completed and worked before the complainant devised his, his alleged invention lacks essential elements of novelty.

The bills in both cases must, therefore, be dismissed with costs.

BARRY, (HEARNE v.) See Case No. 6,303.

BARRY, (McALLISTER v.) See Case No. 8,656.

Case No. 1,062.

BARRY v. MERCEIN.

Circuit Court, S. D. New York.

[The case cited under this title in Bennett v. Bennett, Case No. 1,318, is the same as In re Barry, 42 Fed. 113. Affirmed by supreme court in Barry v. Mercein, 5 How. (46 U. S.) 103.]

BARRY, (PANCOST v.) See Case No. 10,705.

BARRY, (PERRY v.) See Case No. 11,000.

BARRY, (RICE v.) See Case No. 11,751.

BARRY, (SACKETT'S HARBOR BANK v.) See Case No. 12,204.

BARRY, (THOMPSON v.) See Case No. 13,942.

BARRY, (UNITED STATES v.) See Case No. 14,530.

Case No. 1,063.

Ex parte BARSTOW.

[3 App. Com'r Pat. 268.]

Circuit Court, District of Columbia. March 3, 1860.

PATENTS FOR INVENTIONS — ANTICIPATION — COOKING STOVES.

[An improvement in cooking stoves, consisting in a chamber interposed between the fire box and the flues, and formed of two parallel plates, which extend clear to the top plate of the stove, except at the corners, where passages conduct the fire to the oven flues, the advantage claimed for which is economy of fuel, is not anticipated by an improvement covering a similar construction, save that the plates of the central chamber do not extend to the top plate of the stove, and that there was a central passage to the oven flues, the object of which is to utilize a cooking stove as a heater, by conducting the current of air passing through and heated by this chamber to apartments above, the oven being adapted to be converted into an auxiliary air chamber for heating purposes.]

[Appeal from the commissioner of patents.]

[Application by A. C. Barstow for letters patent for an improvement in stoves. The application was denied. Applicant appeals. Reversed.]

MORSELL, Circuit Judge. The appellant states his claim thus: "What I claim as my invention, and desire to have secured to me by letters patent, is the double plate extending from the bottom to the top plate, and throughout the width of the stove, forming a partition chamber, so arranged as to separate the fire chambers from the flues when said plate or chamber is provided at the top or thereabouts and bottom or thereabouts with apertures or openings, respectively for the admission to and evacuation from said chamber of external air, whereby a continuous and rapid circulation of fresh air is necessarily created and maintained through and by the heat of the chamber for the purposes herein specified; in combination with the flue passages near the top and at either end of said partition chamber, by which three or more boiler apertures can be used on the front of a stove, and over a comparatively small fire, and the heat be applied equally to each, and by which also, when the heat has passed from the fire chamber, it is first applied to the ends of the oven where it is most needed.

The commissioner, in his letter to the judge of the 12th of December, 1859, among other things, says: "The issue between the office and the applicant respects the novelty of the invention claimed;" and it is only deemed necessary to refer to the several letters of rejection and to the reports of the board of appeal for the ground of the official action, in so far as they are involved by the reasons of appeal.

The first of those documents referred to is that of the board of examiners to the acting commissioner, and by him adopted as of the 18th March, 1859. It states: "Several references are given by the examiner in his treatment of this case, but we see no necessity of alluding more particularly to any of them, except the patent granted to R. G. Cochran in 1840, which appears to us to embrace the precise conditions of Barstow's claim. Like Barstow's, Cochran's stove is provided with a chamber interposed between the fire box, and the forward flue, in the former, as in the latter this chamber extends from the bottom to the top plate of the stove, leaving on either hand only sufficient spaces for the passage over said chamber of the products of combustion, and, in the one as in the other, this chamber is provided with apertures or openings at its bottom and top for the direct ingress and egress of atmospheric air. In short, these chambers are precisely alike in construction; they are located in the same relative position; they operate precisely alike, and produce the same results. We cannot discover the slightest reason for impugning the action of the examiner, and it is accordingly recommended that his decision be affirmed, and a patent finally refused; this report is confirmed, and the application for a patent rejected by the acting commissioner, March 18, 1859." The next one is dated November 9, 1859, and states: "This is a renewal of the application filed by the same party, June 25, 1859, and which was rejected by the acting commissioner on appeal on the 15th of March, 1859. The amended claim is, however, nearly the same as that originally presented, the only difference being that in this, one of the conditions is that the heat, as it passes from the fire chamber, is applied first to the ends of the oven; and, after a careful review of the opinion formerly expressed by us, we can perceive no reason for changing its tenor. Cochran's stove, patented in 1840, a reference

given on the rejection of the first application, but not in the rejection of this, is so nearly like Barstow's in respect of the devices claimed, including the feature in which the first and second claims differ, that they may be pronounced to be identical. A comparison of the model shows this conclusively. We cannot say the same of the reference now relied on by the examiner, viz. the rejected application of Thomas. We recommend that the patent prayed for be denied." This was confirmed, and patent refused by the commissioner on the 10th November, 1859.

From this decision there were five reasons of appeal filed. The first is a general reason that Barstow had complied with all the previous requirements of the statute. The others are as to the novelty, and particularly stating that the commissioner erred in deciding that his invention was identical with that of R. G. Cochran, patented October 10, 1840. Such was the case when all the original papers were laid before me by the commissioner for trial according to notice duly given, at which time and place Barstow, the appellant, appeared by his attorney, and filed his argument in writing and the case was submitted. The commissioner, in his last and final report, seems to rely on the invention of Cochran, patented in 1840, to show Barstow's claim to be nothing more than an analogous use. He says that it "is so nearly like Barstow's in respect to the devices claimed, including the feature, in which the first and second claims differ, that they may be pronounced to be identical. A comparison of the models shows this conclusively." The model and drawings ought no doubt faithfully and truly to represent the invention as claimed, but whether they do so or not must be tested by a comparison with the claim as described in the specification. That alone can be considered as conclusive.

The leading purpose and object of the appellant appears to be the economy of fuel to be used in the cooking stove, which he supposes may be reduced to a third less than what is now required by stoves according to the ordinary construction. This and other minor important advantages may be effected by peculiar arrangements and alterations in the construction as particularly stated and set forth in his specification, drawings and model. The principal means consists in suitably adapted and regulated drafts, for which purpose, as stated by him, instead of the mode heretofore used, he states the nature of his invention to consist in forming the partition which separates the fire place from the flues of a stove of a double plate or chamber, provided at the bottom and top with apertures or openings, respectively, for the admission to and evacuation from the stove of external air, whereby a continuous and rapid circulation of fresh air is necessarily created and maintained, through and by the head of the said chamber. By this means the plate or chamber and the parts contiguous thereto are effectually preserved from destruction or deterioration, and the use of a back plate extending to the top plate of the stove, without leaving a central space, between the said back and top plates, partitioned so that the exit flues of the fire chamber can be formed at the extreme ends of the same, thus admitting the apertures for boilers over the fire, and conducting the heat to the apertures at the ends of the stoves in the same degree as to those in the center, before it can pass into the flues for heating the ovens, etc. By this arrangement in a stove of a double fire plate, extending from the bottom to the top plate throughout its whole width, and having openings at the top and bottom for the direct admission and evacuation of external air in combination with the flue passages near the top of said plate at either end thereof, he is enabled to provide the top plate in front of the partition chamber with three boiler apertures arranged in one row laterally This in itself constitutes a novel and important feature, as in stoves of a different construction three boiler holes could not be used with advantage without a very long fire chamber, which necessitates the burning of a very large quantity of fuel.

Cochran's object and design, by his improvement in cooking stoves, appears to have been, according to what he himself states in his specifications, to make certain improvements in the manner of constructing a cooking stove by which it should be adapted to the heating of air and to the conveyance of the air so heated wherever it may be wanted, and for the warming of apartments in dwellings not heretofore practiced. He says that his improvement may be applied to stoves of various forms, and that he does not therefore intend to limit it to the one of the particular construction which he had represented in the accompanying drawing. His principal mode or manner is an air chest or hollow box situated between the fire chamber and the front oven flue, which flue descends in front of the ovens, extends under it, and passes up the back to the exit or smoke pipe, there being a flue also over the oven and valves operating, so as to govern and regulate the draft in the ordinary mode. C is an opening leading into the air chest to which opening is to be attached to conduct air from without the apartment into the air chest. In the drawing the opening C is represented at the side of the stove, but it will in most cases be found most convenient to make it through the bottom. D, D, is a tube or trunk for conveying the heated air from the air chest to the pipe or pipes by which it is to be distributed. Fig. 2 is a view of the top plate of the stove, with the holes for cooking utensils, E, the collar to receive the stovepipe. F is a heated air tube, shown also in Fig. 1. This tube is represented as rising from the trunk or tube, D, D, within the stovepipe, along which it may be continued to any required distance, and pass thence to any apartment to be heated. If desired, the heated air may be conveyed di-

rectly from the trunk, D, as through a pipe, G, which is supposed to feed from the opening G Fig. 1. In combination with the aforegoing arrangements of the air chest and its appurtenances for heating air, I constitutes the oven, a secondary air chest to be so employed when not used for the purpose of baking, &c. He further says: "What I claim as constituting my invention, and desire to secure by letters patent, is the manner in which I have combined and arranged the air chest for heating air with a cooking stove, rendering the oven or ovens of such stoves auxiliary thereto, by converting them into air heating chambers, and connecting them with the air chamber first named, in the manner and for the purpose herein set forth."

Having thus fully stated the inventions of the respective parties, A. C. Barstow, and the reference to Cochran's, by a careful examination and comparison I am satisfied there are several substantial differences between the claims of Barstow on this application and that of Cochran, patented in 1840.

First, the object and purpose of the respective parties. Barstow's object is to effect the economy of fuel by a saving of considerably less than that found necessary for the purpose of common cooking stoves by peculiar contrivances and arrangements in connection with the regulation and direction of the draft. For this end the construction is materially different. Barstow's back plate, as described, is joined to the top plate throughout its entire length and breadth, with the exception of two flues in each of the corners, thereby preventing the direct escape of the heat, which becomes continuous, and (after having heated the center) is directed to the corners, which are also sufficiently heated, &c.

2nd. Cochran does not pretend to aim at any such end; his particular object is not the saving of fuel, nor does his contrivance show any such purpose. In his own language he says: "The nature of his improvements, as shown, is the manner in which he has combined and arranged his air chest (which he fixes at the side of his stove) for heating air, &c., rendering the oven or ovens auxiliary, &c. He says his draught is regulated according to the ordinary mode, and what is that? The hollow back to the fire chamber stops short at the usual height in cooking stoves generally, so as to establish a quick and straight draught from the fire chamber to the oven flue in the rear, over the top of the back plate, nearly throughout its whole width. There are other material advantages accomplished by Barstow's peculiar arrangement and contrivances, as before stated, which need not be repeated.

For the aforegoing reasons, I think the commissioner erred in his decision, and that the same ought to be annulled and reversed, and a patent is hereby directed to be issued to the said Barstow for his improved invention, as prayed.

Case No. 1,064.

BARSTOW v. PECKHAM et al.

[5 N. B. R. (1873,) 72.]

District Court, D. Rhode Island.

BANKRUPTCY—PRIORITIES—JURISDICTION—PETITION.

[In bankruptcy proceedings it was adjudged that a certain creditor, by virtue of a mortgage to him, had a claim on the estate superior to that of the assignee, and the equity of redemption was ordered to be sold by the latter. Another creditor then filed a petition to the judge, setting up certain prior, but unrecorded, mortgages and bill of sale, also an attachment issued thereon before the bankruptcy proceedings, and praying that he be adjudged to have the superior claim on the property covered thereby. *Held*, that the petition should be dismissed for want of jurisdiction, the petitioner's remedy being by action at law or suit in equity.]

[Distinguished in Ferguson v. Peckham, Case No. 4,741. Cited in Re Marter, Case No. 9,143. Contra, see Norris' Case, Case No. 10,304.]

KNOWLES, District Judge. The respondents move for a dismissal of the petition of Barstow, as not within this court's jurisdiction, the movers contending that either by formal suit in equity or regular action at law should the petitioner have proceeded against them, and not, as he has done, by simple petition, invoking summary action on the part of the district judge, subject only to the revisory power of the circuit judge at chambers or in open court; the parties, of course, being thus precluded access to the circuit court as appellants or plaintiffs in error, besides being deprived of all benefit from the rules of evidence and from the established forms and modes of procedure, which parties to suits and actions are accustomed and required to respect and follow.

The question presented arises upon a state of facts somewhat peculiar, thus: One John Moore upon his petition, filed December second, eighteen hundred and sixty-eight, was on the twenty-ninth of December adjudged a bankrupt. It appearing from his schedules that the bulk of his debts were equally the debts of a copartner (one Joshua S. Drowne,) contracted on the firm name of Drowne & Moore, such proceedings were had under this court's orders, that the firm of Drowne & Moore was declared bankrupt, and on the seventeenth of May, eighteen hundred and sixty-nine, an assignment of their property was made to S. W. Peckham. The property consisted almost exclusively of the tools, machinery, implements and stock of a silver spoon manufactory, and a jeweler's workshop, which, in January, eighteen hundred and sixty-nine, several creditors of the firm (Barstow among them) had attached on writs from a state court, returnable in March, eighteen hundred and sixty-nine. This property the assignee found in the custody of the attaching officer, and therefore, on the twenty-sixth of May applied to the court for an order dissolving those attachments and also

for license to sell the said property free from a mortgage incumbrance conceded by him to exist thereon in favor of Mary S. Browne of Brooklyn, New York, wife of said Joshua, for the sum of five thousand dollars, due by promissory note of the firm, dated July thirteenth, eighteen hundred and sixty-eight, (the date of the mortgage) and recorded in Providence registry, October fifteenth, eighteen hundred and sixty-eight. Upon the first of these applications the court ordered "that the officer deliver the attached property to S. W. Peckham, assignee, and that said assignee, from the proceeds thereof, when sold, pay said officer his reasonable costs and charges on the attachments and for keeping said property." Upon the second, a notice was ordered to issue to said Mary F. Browne, to appear on the second of June, to show cause against said application, on which day she made appearance filing her "petition in equity" wherein she set forth her claim to the property under her said mortgage, representing that said Peckham had taken possession of the property and refused to surrender the same to her, and prayed that "said assignee be directed to surrender possession thereof to her, to be disposed of under her said mortgage according to law."

After a full hearing upon this petition of Mrs. Browne (as also it is presumable upon the assignee's application for leave to sell,) a decree of the court was entered July fourteenth, eighteen hundred and sixty-nine, as follows:—

"I. That the petitioner has a lien upon the property described in and referred to in the petition, superior to the claims of the respondent subject to any equities the respondent may have for payments made or liabilities incurred in relation to said property while in his possession or otherwise.

"II. That the respondent may sell the equity of redemption in said property, at such time and in such manner as he may deem best for the interest of the general creditors, and may, at his direction, retain possession thereof until sale be made.

"III. That all questions of costs and of expenses paid or liability incurred in acquiring, holding and delivering over said property be and the same are hereby reserved for further consideration and disposition by the court."

At the hearing upon this petition certain of the attaching creditors (Barstow among them) as well as the assignee were represented by counsel and fully heard. Under this decree the assignee, within fifteen days, advertised a sale of his equity of redemption in the property by auction, to take place on the fourth of August, eighteen hundred and sixty-nine; whereupon, on the twenty-eighth of July, said Barstow presented to the judge at chambers his petition (the subject of the motion), in which he set forth claims to said property in virtue of certain unrecorded mortgages and bills of sale of earlier date than the said mortgage to Sarah F. Browne, and in virtue of his attachment of January, eighteen hundred and sixty-nine, and prays, among other things, that the court will adjudge his claims upon said property to be paramount in whole or in part to the claim of Mrs. Browne; that a portion of the property be delivered to him; that another portion be restored to the attaching officer; that yet another portion be sold, and that "meanwhile the assignee be enjoined from further complicating the title of said property by any sale of the equity of redemption thereof." The injunction prayed for was at once granted, the assignee not opposing, and a citation ordered to issue to said Peckham, and Sarah F. Browne and her husband to appear before the court on the fourth of August, to show cause against the petitioner. The injunction to the assignee embodied a provision that he might move its dissolution at any time on giving one day's notice to Barstow or his solicitor of record.

The several respondents entered appearance on the fourth of August, Peckham filing his answer on the eighteenth of August, the other respondents (by consent) deferring the filing of theirs until September seventh, eighteen hundred and sixty-nine. It appears from statements of counsel that before the filing of these answers, the propriety or legality of proceeding in a matter of this kind by petition simply was questioned in some quarters, and that the respondents proposed that by consent the aforesaid petition and answers be formally converted into and treated as equity pleadings to all intents and purposes, and that the petitioner declined to accede to this proposal. Also it appears that both parties afterwards manifested a desire to speed the cause as it stood by taking the needed testimony; and more than this, that in January or February, eighteen hundred and seventy, the respondents repeated their offer to the petitioner, expecting a change in the form of the pleadings, coupled, however, with a condition with which unfortunately, in part at least from accident and mischance, the petitioner failed to comply. At last the petitioner declaring or omitting to prepare for a trial of the petition, the respondents, on the twenty-ninth of March, eighteen hundred and seventy, filed the now pending motion to dismiss the petition for want of jurisdiction. As already stated, the assignee was, on the twenty-eighth of July, eighteen hundred and sixty-nine, forbidden to sell as authorized by the decree of the fourteenth of July. The property meanwhile remained in his custody deteriorating from disuse and subjecting itself or some party, or the assignee himself, to storage expenses of not less than seventy-five cents per diem, in view of which facts he early in March, eighteen hundred and seventy, filed his petition to the court praying leave to make sale of the property free from all incumbrances, the proceeds thereof in the reg-

istry to be subject to the claims of the antagonizing mortgagees and attaching creditors. Upon this petition of the assignee Barstow was fully heard, he claiming that the property should be sold in Providence in parcels to suit purchasers; the respondents, Browne and wife and the majority in interest of ascertained creditors, claiming, firstly, That only the assignee's equity of redemption be sold, and secondly, That if the property itself specifically was to be sold, it should be in bulk as an entirety, and in New York rather than in Providence. Prior to any decision upon this question of sale, the respondents filed this motion to dismiss the petition of Barstow, and thus in the most effectual mode possible, dissolve the injunction of which the assignee complained. Upon the motion to dismiss, no hearing was asked by either party or ordered by the court until the fifth of October, eighteen hundred and seventy, for the reason that his honor, Justice Clifford, had taken under advisement in June, eighteen hundred and sixty-nine, the case of Knight v. Cheney, [Case No. 7,883,] in deciding which it was confidently anticipated that he would give an authoritative exposition of those sections of the bankrupt act upon an assumed construction of which this motion to dismiss is based. The desired opinion of his honor, owing to the pressure of judicial duties of more importance he has not yet committed to paper, but of its tenor and import the parties and counsel in this cause, as well as those in Knight v. Cheney were fully informed by an oral communication at the September term, eighteen hundred and seventy, of the circuit court when its judgment in that cause was announced.

Any further delay in the disposal of the motion is earnestly deprecated by the respondents, and with reason as it seems to me. I am unable to concur with the learned and astute counsel of the petitioner, that until the opinion in writing of Justice Clifford shall be received, it is advisable to suspend judgment upon this motion. It may happen, as he suggests, that that opinion will contain some qualifying remark excepting the case at bar from the scope of the general principles he orally announced. This is possible, but is, in my judgment, so improbable that I cannot, in view of it, further delay action upon the question presented. That question, fully enough stated in my opening paragraph above, is not now a novel one. When first passed upon by a justice of the supreme court, (Justice Swayne,) his exposition of the law overruling a decision of the judge of the northern district of Ohio, was in harmony with the argument and positions of the learned counsel of the petitioner. In re Neal, [Case No. 1,406.] Subsequently, however, opinions and rulings directly adverse to those of Justice Swayne, have been given for the guidance of the profession by two of his associates of the supreme bench, by Chief Justice Chase, in Re Alexander, [Id. 160,] and by Justice Nelson, in Re Kerosene Oil Co., [Id. 10,206,] and in Re Bonesteel, [Id. 1,627,] whose rulings in this regard have been followed by Judge Blatchford in Re Ballou, [Id. 818.] Of the ruling of Justice Clifford upon this point in Knight v. Cheney, [supra,] in this district in September last, it is sufficient to say that I understood them to be in full accord with those of Justices Chase and Nelson. Such being the ruling of the judge of this circuit, sustained by two at least of his associates, I can but regard it as authoritative, and accordingly sustain the motion to dismiss.

In the analogous case of Knight v. Cheney, Justice Clifford gave the petitioner leave to convert his petition into a bill in equity if he saw fit, but admonished the parties that the only advantage to be gained by so doing would be a saving of the service of a new subpoena, as the answers filed and the testimony taken (if any) could not be used but by consent in the prosecution of the suit in its amended form. In thus ordering he was understood to exercise a discretionary power, and in that case it doubtless was wisely exercised. In the case at bar, however, I see no occasion for qualifying the order of dismissal. On the contrary, it seems desirable that the assignee and other parties be placed in the same position in which they were under the decree of my predecessor of July fourteenth, eighteen hundred and sixty-nine, before the filing of the petition of Barstow. That decree, for aught that appears, was satisfactory to all parties interested other than Mr. Barstow. The respective and relative rights of the assignee and of Mrs. Browne in the property were by that decree defined and settled satisfactorily to them and to the court. Mr. Barstow, so far as is shown, was in no sense a party to those proceedings otherwise than as a creditor of the firm, who had not seen fit to prove his claim, and of course is not bound by the court's adjudication. His rights in the property, however acquired or held, he is of course entitled to protect and enforce as he shall be advised, now being authoritatively informed that by an action at law or suit in equity, and not by a simple petition to the judge, is he to seek redress and relief.

I will add as not impertinent in this connection, that the thirteenth general rule, as amended, contains provisions which appear to be designed as well as suited to relieve claimants and assignees from some of the embarrassments, delays and expenditures to which the parties in this cause have been subjected. Whether in that rule is to be found anything of importance to the parties at this stage of this cause is for them, not the court, to inquire and determine.

The petition is dismissed for want of jurisdiction, and as a consequence, the injunction upon the assignee of July twenty-eighth, eighteen hundred and sixty-nine, ancillary to the petition, is dissolved.

Case No. 1,065.

BARSTOW v. SWAN.

Circuit Court, District of Columbia. 1860.

PATENTS FOR INVENTIONS—INTERFERENCE—PRIORITY—EVIDENCE.

[1. Cited in Law, Pat. Dig. 298, to the point that an assignor who has sold his invention is not a competent witness to prove priority upon an interference declared.]

[2. Cited in Law, Pat. Dig. 307, 516, to the point that, when the prima facie force of a patent as to priority of invention on the part of the patentee has been once destroyed by evidence of prior invention on the part of another, it cannot be restored by the patent itself, but only by specific testimony from witnesses.]

[Nowhere reported; opinion not now accessible.]

Case No. 1,066.

BARSTOW v. WILMOT.

[18 Betts, D. C. MS. 77.]

District Court, S. D. New York. March 22, 1851.

SHIPPING—LOSS OF GOODS—PERILS OF THE SEA—ROUGH PASSAGE—BILL OF LADING.

[1. A bill of lading of certain millstones provided that they should be delivered to the consignee in the like good order and condition as at the time of shipment, "all and every the dangers and accidents of the sea and navigation of whatsoever nature being excepted." It was shown that they were properly stowed, and that the ship had an extraordinarily rough passage, being thrown more than once on her beam ends, so that her cargo shifted. One of the stones was found to be broken when she reached port. *Held*, that the loss was within the exception of the bill of lading, and the ship was not liable therefor.]

[2. A provision in the margin of such bill of lading to the effect that "any extra expense of discharging at New York (the port of destination) to be paid by the consignee" makes him liable for such extra expenses as are necessarily incurred.]

[In admiralty. Libel by Thomas H. Barstow against Samuel D. Wilmot for freight. Decree for libellant.]

BETTS, District Judge. This action is brought by the master of the ship Mortimer Livingston to recover $171.80 for the freight of grindstones from Liverpool to New York, including $8 extra charge for unloading them. The respondent tendered before suit brought, and paid into court, $73.92, claiming he was entitled to damages equivalent to the residue of the demand because of the breaking and destruction of one of the millstones. The contestation between the parties has been as to who shall bear the loss, and no question has been raised as to the valuation put upon the stone not delivered. The bill of lading signed at Liverpool admits the shipment on shipboard of thirty grindstones, to be delivered in the like good order and condition at the port of New York (all and every the dangers and accidents of the seas and navigation of whatsoever nature being excepted) to the respondent. At the foot of the bill of lading was a note, in writing, "Weight unknown. Seven of the above chipped when shipped;" and in the margin, "Any extra expense of discharging in New York to be paid by the consignee." All the stones were delivered and accepted, except one, and that was broken on the passage, and for the purpose of this discussion is to be regarded as worthless.

The first mate testified to the stowage of the stones at Liverpool. Two persons, whom he supposed to be the shippers, requested them removed, after being first stowed and placed on their flats. They were removed accordingly to the place indicated, and so stowed. There was a thick body of coal under them, and boards were necessary to make them lie even, and fine coal spread over them and round them. Pieces of board were put between their edges, and a sufficient thickness of coal above to prevent injury from the cargo. No stones were placed so as to touch each other, and no one on top of another. He has had a good deal of experience in stowing and importing grindstones, and testified that the stowage in this case was good.

The ship had an extraordinarily rough passage, running under close-reefed top-sails nearly the whole time, and was several times blown on her beam ends, and shifted her cargo so much as to give her about two feet list. Two experienced shipmasters, one a port warden, and one a marine surveyor, testified that the stowage described by the mate was good and proper. The stevedore, who discharged the cargo, testified he had 15 years' experience in his business, had frequently unladen cargoes of grindstones, and that he found these stowed as described by the mate, and that the stowage was good. No part of the cargo placed above them came in contact with the stones. Mr. Noyes, an importer of grindstones, examined for the respondent, testified that he considered it safe stowage to lay stones on their flats if coal is under and over them. He should not suppose they would start by the rolling of the vessel, and did not think any extra expense was required for discharging this ship. Mr. Randolph, also examined by the respondent, says he is an importer of grindstones, and he generally finds them stowed standing on their edges, but sometimes laid on their flats, embedded in coal. He cannot account for the breaking of the stone in this case unless by the weight placed on it. A Mr. Chandler was examined to prove an admission by the libellant that he would satisfy the respondent for the damage done the stones. His testimony, however, shows no such admission, or any acknowledgment that he was answerable for the loss. I find, then, upon this testimony, that the grindstones were sufficiently and properly stowed, and that the damage was produced by causes within

the exception of the bill of lading. The contract exonerates the master from liability for losses occurring otherwise than from his own negligence or want of due skill in performing his duties. He is not an insurer for the safe delivery of the cargo, nor for anything more than, so far as depends on himself and those connected with the ship, that it shall be safely stowed, in a proper place, and not subjected to injury by the omission of due care and attention on his part. 3 Kent, Comm. 324; The Reeside, [Case No. 11,657;] Abb. Adm. 347, [Baxter v. Leland, Case No. 1,124.] Under this special undertaking, the master is only answerable for misconduct, or the want of ordinary diligence. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344.

The defence set up cannot, therefore, avail the respondent, and the libellant is entitled to recover the balance of his demand, with interest and costs. The testimony of the stevedore shows that extra expense was necessarily incurred by the libellant, to the amount of $8, in discharging the stones, and that, by the reservation in the margin of the bill of lading, is to be borne by the respondent.

A decree must be entered for the libellant for $97.88, with interest from the time the suit was commenced, and costs.

BARSTOW, The AMOS C. See Case No. 337.

BARSTOW STOVE CO., (FORBES v.) See Case No. 4,923.

Case No. 1,067.

BARTELSON et al. v. The CYNTHIA.

[25 Int. Rev. Rec. 384; 14 Phila. 411; 36 Leg. Int. 462; 8 Reporter, 773.]

Circuit Court, E. D. Pennsylvania. Oct. 31, 1879.

COLLISION—STEAM AND SAIL—CHANGE OF COURSE.

Circumstances justifying a sailing vessel in changing her course; it is the duty of a steam vessel, when about to pass a sailing vessel, to observe closely the course of the latter, as well as any conditions which may render a change of such course necessary, and to regulate her own movements accordingly. If she fails to do this she is derelict.

[Appeal from the district court of the United States for the eastern district of Pennsylvania.

[In admiralty. Libel by Bartelson and others against the tug Cynthia for collision. The district court entered a decree for libellant, (nowhere reported.) Respondent appeals. Affirmed.]

Finding of facts by the court: On the 25th of October, 1876, the steam tug Cynthia, with the loaded bark Haugesund in tow, was coming up the Delaware river from Girard point, on the ebb tide. She had reached the upper part of League island, when the schooner Bowdoin, bound to sea, crossed the bows of the bark, standing toward the Pennsylvania shore, with the wind W. S. W. When the schooner got in shore she tacked, and at this time the tug and bark were quite near her. The schooner lighted up her head sheets to enable her to luff, but she did not luff, and a collision resulted between the bark and her, by which both of them were considerably injured. The bark was in the charge and under the entire control of the tug, and from the poop deck of the latter there was an unobstructed view of the river, showing a clear channel toward the eastward or New Jersey shore. If she had changed her course in time, and had gone in that direction thirty or forty yards, the schooner would have had room to pass, and danger of collision would have been avoided. When the schooner tacked she was as near the western shore as it was safe for her to go, as, if she had prolonged her westward tack, and then had attempted to change to the eastward and had missed stays, she would have gone ashore.

A. L. Wilson and J. G. Johnson, for appellant.

Alfred Driver and J. Warren Coulston, for appellee.

McKENNAN, Circuit Judge. I have had some difficulty in coming to a satisfactory conclusion in this case, but, under all the circumstances, I think the decision of the district court is right. I do not assent to a broad assertion of the absolute right of a sailing vessel to change her course without reference to surrounding circumstances, nor can I affirm that a steamer is liable for the consequences of a collision with a sailing vessel, when she has observed all proper and necessary precaution to avoid it, simply because she did not foresee a possible change of the sailing vessel's course. But it is the duty of a steam vessel, when about to pass a sailing vessel, to observe closely the course of the latter, as well as any conditions which may render a change of such course necessary, and to regulate her own movements accordingly. If she fails to do this she is derelict. In this case, it seems to me, the change of tack by the schooner at the time when it was made, was not only proper but necessary. A prolongation of her westward tack, with the impending risk of being cast ashore, was not incumbent on her when the only reason for it was the possible danger of collision with the tug or her tow. Under the circumstances the probable occurrence of a change of tack ought to have been anticipated by the tug, and timely precautions adopted in view of it. To stop her, or slightly to change her course in time, would have been effectual. But she did neither of these until it was too late, and hence her dereliction was the primary cause of the loss. Whatever fault may be imputed to the

schooner does not affect the primary liability of the tug, and is not therefore, as was said by the district judge, a practical question in the case. A decree must be entered, that the libellant recover of the respondent, Zacharias Williamson, and his stipulator, Philip Hammerschlag, his damages, to wit, the sum of $2,000, with interest from March 14, 1879, and costs.

Case No. 1,068.

In re BARTENBACH.

[11 N. B. R. (1875,) 61; 2 Amer. Law T. Rep. (N. S.) 33.]

District Court, E. D. Michigan.

BANKRUPTCY—INTEREST—MORTGAGES—PRIORITIES—COSTS.

[1. Where a note provides for the payment of interest thereon in semi-annual installments, but fails to make any provision for interest on the principal remaining due after maturity of the note, the creditor is entitled to interest after maturity by operation of law, but not by any provision of the contract.]

[2. A state statute allowing interest on unpaid installments of interest has reference to installments due by contract, and hence it does not apply to the interest so accruing by operation of law.]

[3. Where property subject to two mortgages is sold in bankruptcy proceedings, the senior mortgagee is as much entitled to payment of his mortgage in full, together with all proper costs and expenses, as he would be in case of regular foreclosure proceedings.]

[4. But money paid under the order of the bankruptcy court to procure the release of the wife's dower in the mortgaged premises, which could only be barred by sale under the power of sale contained in the mortgage, or by regular foreclosure proceedings, is an extraordinary expenditure, and, being for the benefit of both senior and junior mortgagees, should be apportioned between them.]

[5. Cited in Re Archenbrown, Case No. 505, to the point that the requirement of Act March 2, 1867, § 29, (Rev. St. § 5110, cl. 7,) that a bankrupt shall have kept "proper" books in order to be entitled to a discharge, is fulfilled by books from which a competent accountant could ascertain the bankrupt's condition. The form is unimportant.]

[In bankruptcy. In the matter of George A. Bartenbach.] On the application of the Michigan Health and Relief Society, a secured creditor, to review a computation by the register of the amount due upon its note and mortgage; and of C. J. Riley, the assignee, for the allowance and adjustment of the costs and expenses of the sale of mortgaged premises free of the incumbrances.

C. J. Riley, in pro. per.

Mr. Ward, (Ward & Palmer,) for the society.

LONGYEAR, District Judge. A portion of the assets of the bankrupt, certain city lots in Detroit, were subject to two mortgages—one, which is the senior mortgage, to the Michigan Health and Relief Society, to secure a note of the bankrupt, and one to Workum & Schloss, to secure a bond of the bankrupt—both being for the payment of money. The first named note and mortgage bear interest at the rate of ten per cent. per annum, payable semi-annually. They were given January 30th, 1869, for four thousand dollars, payable three years from date, with interest as above stated. The interest on this note and mortgage was paid, as stipulated, up to and including the time the debt matured, viz., January 30th, 1872; and on the 30th of July following, another six months' interest was paid, but no portion of the debt nor any interest thereon since July 30th, 1872, had been paid at the time of the bankruptcy. The property has been sold by the assignee under an order of this court made on the application of the holder of the bond and junior mortgage and notice to all persons interested, free from both incumbrances. The proceeds were sufficient to pay the first mortgage in full and all costs and expenses of the sale and leave a surplus to apply on the second mortgage, but nothing for the benefit of the general creditors; and the assignee was directed to apply the proceeds accordingly. It was referred to the register, Hovey K. Clark, Esq., to compute the amount due upon the respective mortgages, as a guide to the assignee in applying the proceeds. The register having made the computations, the Michigan Health and Relief Society objected, and complained that the register had not allowed interest on each installment of interest remaining unpaid at the end of every six months, as is claimed to be its right under the following statute of Michigan: "That when any installment of interest upon any note, bond, mortgage, or other written contract shall become due, and the same shall remain unpaid, interest may be computed and collected on any such installment so due and unpaid, from the time at which it became due, at the same rate as specified in any such note, bond, mortgage, or other written contract, not exceeding ten per cent.; and if no rate of interest be specified in such instrument, then at the rate of seven per centum per annum." Act Feb. 19, 1869; 1 Comp. Laws, 1871, p. 541, § 1637.

The costs and expenses of the proceedings to sell and of the sale have been considerable; and in addition to those of an ordinary character the assignee, under an order of court, paid one hundred dollars to obtain a release of the right of dower of the wife of the bankrupt in the mortgaged property. A dispute arose as to the payment of these costs and expenses, the assignee claiming that the same should be retained by him proportionately out of the respective amounts going to each mortgagee, and the Michigan Health and Relief Society, the said senior mortgagee, claiming that the proceeds being sufficient to pay such costs and expenses over and above its debt and interest, it is entitled to payment in full without any deduction on that account. The assignee thereupon reported to the court the said costs and ex-

penses, and asked that the same be audited and allowed, and for an adjustment of the same as between the said mortgagees.

First. Interest. The note and mortgage in question are not set out in the papers, and are not before me; but I take it for granted that they contain no express stipulation for payment of interest on the debt after maturity, in case the debtor should fail to pay the debt by the time specified. The contract being silent as to interest after maturity, "the creditor" (say the United States supreme court) "is entitled to interest after that time by operation of law, and not by any provision of the contract." Brewster v. Wakefield, 22 How. [63 U. S.] 118, 127. This being the law and the debt being past due, the provision of the note and mortgage for payment of interest by installments had ceased. The interest up to maturity of the debt had been paid, and the only interest in question here is such as had accrued after that time by operation of law, and not by any provision of the contract. It was, therefore, not due by installments; but it was due at any and all times, as fast as it accrued. It is clear, therefore, that the above quoted statute of Michigan for computing and collecting interest on unpaid installments of interest, had no application and did not cover this case. In fact, I do not see how, in the absence of an express provision of the "note, bond, mortgage, or other written contract" for payment of interest at specified times after maturity of the debt, the statute can in any case have any application whatever to interest accruing after such maturity. For these reasons I concur with the register in his conclusion, and in his refusal to compute and allow interest on the interest accrued on the note and mortgage in question after the expiration of every six months, or otherwise; and the same is approved.

Second. Costs and expenses of sale. The mortgage in question was a first lien upon the property; and, by the terms of the mortgage, the mortgagee was entitled, in case of foreclosure, to payment in full, including all legal costs, to the full extent of the proceeds. The junior mortgagee was entitled only to the surplus, if any, and that could be ascertained only after payment in full of the prior lien and all legal costs and expenses of its enforcement. Such were the rights of these parties under their respective mortgages. Those rights are sacredly preserved by the bankrupt act, and must be enforced in this court the same as in any other. The proceeds were sufficient to pay the entire debt and interest secured by the note and mortgage of the Michigan Health and Relief Society and remaining unpaid, and all costs and expenses of the proceedings and sale, and leave a surplus to apply on the junior mortgage. That surplus is all the junior mortgagee can claim. The costs and expenses here spoken of, however, include only such as are usual in such cases, and not the one hundred dollars paid to obtain release of dower. That was an extraordinary expenditure, and stands upon a different footing from the other expenditures. It is true, the wife had joined with her husband in both mortgages; but, notwithstanding that, her right of dower could be barred only by a sale under the power of sale contained in the mortgage, or a decree of a court of competent jurisdiction, where she could be made a party to the foreclosure proceedings, and not by a sale free of the mortgages, as was here proposed to be done. It was therefore necessary, and for the benefit of all concerned, to obtain the release in order to a sale in this court to the best advantage, and thus avoid the delay and expense of a foreclosure; and the court, in fact, refused to allow a sale without such release. That amount must therefore be apportioned to the parties interested, according to the amounts which each is entitled to receive of the proceeds, after deducting, of course, all the other costs and expenses. It results that the assignee must pay to the senior mortgagee, the Michigan Health and Relief Society, the full amount of its debt, less its fair proportion of the one hundred dollars paid by the assignee for the release of dower, to be ascertained on the basis above indicated; that he must retain or be paid out of the remainder of the proceeds all costs and expenses of the proceedings to sell and of the sale, including the one hundred dollars paid for the release of dower, and pay over the surplus to the junior mortgagee.

Third. The assignee's account of costs and expenses. There being no opposition, and the items appearing to the court to have been necessary, and that they are reasonable in amount, the account of the assignee of the costs and expenses of the proceedings to sell and of the sale is allowed as stated.

Let an order be made embracing the foregoing conclusions and results.

Case No. 1,069.

BARTH v. MAKEEVER et al.

[4 Biss. 206.][1]

Circuit Court, D. Indiana. May Term, 1868.

LIEN OF JUDGMENT—MARSHALING OF ASSETS—JURISDICTION—CONFLICT OF AUTHORITY.

1. A judgment rendered in the circuit court of the United States for the district of Indiana, is a lien from its date on all the lands of the defendant situated within the district. And if, after its rendition, the defendant acquires other lands in the state, the lien of such judgment instantly attaches on these lands also; and a sale of them by the defendant, made before execution issues on the judgment, does not divest the lien. And, in such a case, the purchaser of the subsequently acquired land cannot, as against a prior purchaser of the land on which the judgment became a lien at the moment of its rendition, insist that the officer shall first levy on and sell the lands held by

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

such prior purchaser before the subsequently acquired lands shall be levied on and sold.

2. In a cause over which a national court has original jurisdiction solely by reason of the citizenship of the parties, if the rights and interests of third persons should become complicated with the litigation, either as to the original judgment, or any property in the custody of the court, or any abuse or misapplication of its process, and if no state court has power to determine and guard those rights and interests without a conflict of authority with the national court, the latter court will, from the necessity of the case, and to prevent a failure of justice, give such third persons a hearing irrespective of their citizenship, so far as to protect their rights and interests relating to such judgment or property and to correct any abuse or misapplication of its process, and no farther.

3. A bill is defective which does not give the full names of all the parties to whom it refers.

In equity.

Barbour & Jacobs, for complainant.
Wm. Henderson, for defendants.

McDONALD, District Judge. This is a bill in equity, filed by Sebastian Barth against John Makeever, Daniel S. Makeever, Ephraim Sayers, Thomas J. Sayers, Thomas Clark, Henry G. Ely, Edward E. Bowen, William H. McConnell, Ingram Little, Abraham Trounstine, Joseph Trounstine, and Charles Keiffer.

The defendant, John Makeever, has filed a disclaimer. The defendants, Daniel S. Makeever, Ephraim Sayers, and Thomas J. Sayers, have demurred to the bill. The other defendants have not yet entered an appearance.

The point now to be decided is whether the demurrer ought to be sustained.

Two points are made in support of the demurrer: first, that this court has no jurisdiction over the parties—second, that there is no equity on the face of the bill. We will examine these points in their order.

I. Has this court jurisdiction over the parties to the bill? The bill alleges that, on the 26th of June, 1858, said "Ely, et al," recovered in this court two judgments against said Clark—one for $771.90—the other for $760.24; that on the 20th of May, 1860, one "Day and Matlock" recovered in this court a judgment against said Clark for $2,278.86; that on the 22nd of November, 1860, said "Abraham Trounstine, et al," recovered in this court a judgment against said Clark for $1538.75; and that these judgments, from their dates respectively, were, and continue to be, liens on divers tracts of land situate in Jasper and Newton counties, Indiana, abundantly sufficient to satisfy said judgments, and then, and long afterwards, the property of Clark.

The bill avers that Clark, on the 3rd of May, 1861, became the owner by purchase of a tract of fifteen acres of land in Marion county, Indiana; and that he sold and conveyed the same, for valuable consideration, to the complainant, Barth, on the 4th of July, 1861.

The bill further alleges that, on the 9th of January, 1861, "Trounstine, et al," took out execution on their said judgment, and the same was returned replevied by "Wm. C. Pierce and M. P. Carr," as Clark's sureties; that on the 26th of June, 1861, another execution was issued on the same judgment which the marshal levied on several of said tracts of land in Jasper county; and returned the same not sold for want of bidders; that, on the 8th of December, 1863, a venditioni exponas was issued on the same judgment, and was returned "unsatisfied without a sale, having ascertained that Thomas Clark was and is not the owner of the land;" that, on the 16th of June, 1864, another fieri facias was issued on the same judgment, was levied on divers of said tracts of land in Jasper county, and was returned not sold; and that, on the 6th of February, 1865, another venditioni exponas was issued on the same judgment, and the return on it showed a sale of one of the parcels of land in Jasper county for $33.

The bill further states that, on the 26th of April, 1865, "Trounstine, et al," assigned their said judgment to the defendants, John Makeever, Daniel S. Makeever, and Ephraim Sayers; that, about the same time, said Ely assigned his said two judgments to said Ingram Little; and that thereupon all said assignees of said judgments, in consideration of $65, released the liens of said assigned judgments on a large portion of the land which had been levied on as aforesaid. But the bill does not state to whom the release was executed.

The bill, also, avers that in May, 1865, on the petition of John Makeever, Daniel S. Makeever, and Ephraim Sayers, this court set aside all said levies, except that on one tract of land.

The bill also avers that, on the 10th of June, 1865, another fieri facias was issued on the judgment in favor of "Trounstine, et al," to the marshal, who, at the same time, had in his hands two other executions on the two judgments rendered in favor of said Ely as above stated; and that by virtue of those three executions, the marshal levied on Barth's fifteen acres of land, and sold the same for $1150, to the said Ephraim Sayers, Thomas J. Sayers, and Daniel S. Makeever. But whether the marshal conveyed to them the land pursuant to this sale, is not stated in the bill.

The bill also charges that after the rendition of said judgments and before the said conveyance by Clark to Barth, the said John Makeever, Daniel S. Makeever, Ephraim Sayers, and Thomas J. Sayers became respectively owners by purchase from Clark of large portions of the lands, the levy on which had been set aside as aforesaid, of sufficient value to pay all said judgments; and that the obtaining of the execution of said release, and the procuring of said setting aside of levies, and the said levy on and sale of Barth's land,

were effected by them in fraud of Barth's rights, and were fraudulently intended by them to screen their own lands aforesaid from liability to said judgments and wrongfully to subject Barth's to the payment thereof.

The object of the bill evidently is to show that the judgments in question became liens on all said lands in Jasper and Newton counties before they became liens on the after-acquired land of Clark which he sold to Barth; that therefore those lands ought to have been levied and sold to satisfy said judgments before resort was had to Barth's; that said order setting aside the first levy, as well as said release, was a fraud on Barth; and that consequently the levy and sale of Barth's land was, under the circumstances, an abuse of the process of this court, as well as a fraud on him.

The bill attempts to excuse the complainant's apparent negligence in not earlier urging these objections to said proceedings, by averring that he is a man of foreign birth, and speaks and understands our language very imperfectly, and was utterly ignorant of the existence of these proceedings till within a few days before he filed his bill.

The bill prays that said levy and sale of Barth's land be set aside, and for other relief.

The bill is silent as to the citizenship of the parties.

The complainant evidently founds his claim on the suppositions, first, that the release alleged frees his lands from the lien of the judgments, at least to the extent of the value of the property released; and, secondly, that the Jasper and Newton county lands were primarily liable for the satisfaction of the judgments, and therefore the sale of Barth's land under the circumstances, was a misapplication and abuse of the process of the court. As to the release, however, as the pleadings now stand, it is entitled to no consideration, because the bill does not show to whom it was executed. But as to the second ground of the claim, namely the primary liability of the lands in Jasper and Newton counties, if, under the facts stated, the law creates such primary liability, it becomes a very serious question whether the sale of Barth's land first was not such a misapplication and abuse of our process as to give us jurisdiction to redress the wrong even as to parties over whom we could not take original jurisdiction for the want of proper citizenship.

But, under the facts stated, does the law create a primary liability against the Jasper and Newton county lands, and only a secondary liability as to the Barth land? This question must be answered by a proper construction of the Indiana statutes relating to judgment liens on lands. For the acts of congress are construed as adopting those statutes. Simpson v. Niles, 1 Ind. 196; Doe v. Shrew, [Shrew v. Jones, Case No. 12,818;] Ward v. Chamberlain, 2 Black, [67 U. S.] 430.

Under the Indiana statutes, it is well settled that judgments not only bind the lands of the debtor owned by him at the rendition thereof, but also his subsequently acquired lands from the moment of their acquisition. Michaels v. Boyd, 1 Ind. 259.

If the judgment liens had attached on all the lands in question at the same moment, and if John Makeever, Daniel S. Makeever, Ephraim Sayers, and Thomas J. Sayers had purchased a part of them from Clark before Barth made his purchase, it would be clear that Barth's land would have to go first to satisfy the judgments. For it is a rule, both as to mortgage and judgment liens, that where a debtor sells portions of the lands bound by a lien to different persons and at different times, the parcels thus sold will be liable to discharge the lien in the inverse order of such sales. 4 Kent, Comm. 179, note b; Aiken v. Bruen, 21 Ind. 137. But it is insisted by the complainant that this rule is inapplicable to the present case; and he claims that another rule equally well settled does apply, namely, that when a judgment exists against a man, and after its rendition he acquires lands and sells them before any execution issues on the judgment, the purchaser takes them clear of any judgment lien. And it must be admitted that this rule is strongly supported by the cases of Colhoun v. Snider, 6 Bin. 135, and Roads v. Symmes, 1 Ham. [1 Ohio,] 281. But we can hardly consider these cases as authority on the point in question; for they were made on statutes materially different from the Indiana act touching judgment liens. Indeed, upon the authorities above cited, we must regard it as settled law in this state that judgment liens attach on subsequently acquired lands at the date of their acquisition. The question whether a conveyance of such lands by the debtor before execution issues on the judgment destroys the lien, however, has not been settled here; but it is a question which seems to us to admit of very little doubt. Surely when a judgment lien once attaches on subsequently acquired land, it vests such a right in the creditor as cannot, without his act or consent, be divested by the voluntary act of the debtor conveying the land to a stranger. The circumstance, therefore, that Clark conveyed this land to Barth before the execution issued cannot help the complainant.

But it is urged in support of the bill, that as the judgment liens on the Barth land are younger than those on the other lands in question, the latter lands must be deemed primarily liable to the satisfaction of these judgments, and must, therefore, be first levied and sold for that purpose, before a seizure and sale of the Barth land. This, however, seems to us to be a mere assumption. We have found no authority in support of it. We see no good reason for it. We see no

good reason why, because a judgment lien attaches on one piece of land earlier and on another later, the former must bear the whole burden till it is exhausted, before the latter shall be touched.

Now, as the bill contains no averment touching the citizenship of the parties to it, it is obvious that our jurisdiction over the parties must, irrespective of their citizenship, depend upon the subject matter of the bill. And the point insisted on as this subject matter is, that the bill shows a misapplication and abuse of the process of this court which we have jurisdiction to correct without regard to citizenship. If, indeed, the bill does show such misapplication and abuse, we should entertain no doubt of our jurisdiction. In the case of Conwell v. White Water Valley Canal Co., [Case No. 3,148,] decided at the present term, we laid down a rule on this subject to which we are disposed to adhere. It is this: "In a cause over which a national court has acquired jurisdiction solely by reason of the citizenship of the parties, if the rights and interests of third persons should become complicated with the litigation, either as to the original judgment, or any property in the custody of the court, or any abuse or misapplication of its process; and if no state court has power to determine and guard those rights and interests, without a conflict of authority with the national court; the latter court will, from the necessity of the case, and to prevent a failure of justice, give such third persons a hearing irrespective of their citizenship, so far as to protect their rights and interests relating to such judgment or property, and as to correct any abuse or misapplication of its process, and no farther."

But does this rule reach the present case? Does it appear by the bill that there has been any abuse or misapplication of our process? From what has been already said we think these questions must be answered in the negative. In our opinion, the bill, as it now stands, so far from showing that Barth's land ought not to have been first seized and sold, really indicates a state of facts bringing the case within the rule established in the case of Aiken v. Bruen above cited. And, if so, Barth's land would be primarily liable to satisfy these judgments, also the other lands only secondarily liable. If this conclusion be just, Barth has no right to complain that there has been any abuse or misapplication of the process of this court.

II. In support of the demurrer, it is urged that, even if the court has jurisdiction of the parties, there is no equity on the face of the bill on which a decree could be rightly rendered in favor of the complainant.

We have already anticipated and sustained this objection to some extent. The bill, however, is defective in many other respects. It materially violates the twentieth rule in equity established by the supreme court. It infringes a fundamental rule of pleading by omitting to give the full names of all the persons to whom it refers. Thus it describes certain plaintiffs as "Abraham Trounstine, et al.," "Henry G. Ely, et al.," "Day & Matlock." It refers to no exhibits. And, in fine, it shows the marks of haste and the want of care, to such an extent that any decree which we might render in favor of the complainant would, in our opinion, be erroneous.

Although, as the bill now stands, we might perhaps be justified in dismissing it, at this stage, for want of jurisdiction, as it yet may be improved by amendment stating to whom the release in question was executed, indicating whether the marshal executed a conveyance of the Barth land, giving the full Christian and surnames of all the persons referred to in it, putting it in the shape required by the twentieth equity rule of the supreme court, and otherwise reforming it, we will, for the present, merely sustain the demurrer, and give leave to the complainant to amend. If he should not choose to amend the bill will be dismissed for want of jurisdiction.

BARTHOLEW, (KINSING'S ASSIGNEE v.) See Case No. 7,831.

BARTHOLOMAE, (GOTTFRIED v.) See Case No. 5,632.

Case No. 1,070.

BARTHOLOMEW v. SAWYER et al.

[4 Blatchf. 347;[1] 1 Fish. Pat. Cas. 516; 41 Hunt, Mer. Mag. 575; 16 Leg. Int. 316.]

Circuit Court, S. D. New York. Sept. 16, 1859.

PATENTS FOR INVENTIONS—PRIORITY—FOREIGN INVENTIONS—PUBLISHED DESCRIPTION—ACT JULY 4, 1836.

1. As, on the trial, there was no proof that the patentee, at the time of his application, did not believe himself to be the first inventor or discover of the thing patented; and as, at the time of the application, he made oath that he did believe that he was such first inventor and discover, it must be *held*, that, at the time of such application, it satisfactorily appeared that he believed himself to be the first inventor and discoverer of the thing patented.

2. No description, in any printed publication, of the thing patented can avoid the patent, unless such description in such printed publication, was prior in point of time to the invention of the plaintiff.

3. It appears, clearly, by the latter part of section 15 of the act of [July 4,] 1836, [5 Stat. 117,] that by the terms "not known or used by others before his or their discovery thereof," in section 6 of the same act, was not meant to be included a use in a foreign country, but that such use by itself would not avoid the patent.

4. In section 7 of the act of 1836, the terms "prior to the application" for a patent, refer only to the public use or sale of the invention with the applicant's consent or allowance. They do not refer to anything else.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. Syllabus is from 1 Fish. Pat. Cas. 516, and the statement and opinion from 4 Blatchf. 347.]

5. And the terms "prior to the alleged invention of the applicant" refer to an invention or discovery of some one, other than the applicant, in this country, and also to a patent, or description in some printed publication in this or some foreign country.

[Cited in brief in Bain v. Morse, Case No. 754.]

6. The publication to void the patent must be anterior to the discovery of the patentee. It is not sufficient that it should be anterior to the application to the commissioner for a patent.

[7. Cited in White v. Allen, Case No. 17,535, to the point that he who invents first, although his invention is imperfect and incomplete, has the prior right if he is using the reasonable diligence prescribed by section 15, 5 Stat. 117, in perfecting and adapting the same.]

[At law. Action by Frederick Bartholomew against Nathaniel Sawyer and William S. Carr, for infringement of letters patent No. 11,113, granted June 20, 1854. Verdict was rendered for plaintiff. Heard on defendant's motion for a new trial. Denied.]

This was an action at law for the infringement of letters patent granted to the plaintiff, June 20th, 1854, for a cock used in water-closets. At the trial it appeared that the invention was made by the plaintiff as early as June, 1850, and that his application for the patent was made in February, 1853. Prior to the plaintiff's discovery of it, the thing patented was not known in the United States. It was claimed, by the defendants, that it was known and in public use in England and Scotland, before such discovery of it by the plaintiff. It was not claimed, however, and no evidence was offered to prove, that the plaintiff, at the time of his application to the patent office, knew of such use, or believed at that time that he was not the first discoverer and inventor. It was not made to appear that the same, or any substantial part thereof, had, at any time before his application for a patent, been patented in any country. No evidence was offered by the defendants to prove that the same, or any substantial part thereof, had, before the plaintiff's discovery in June, 1850, been described in any printed publication, although it was claimed by them, and evidence was offered to prove, that subsequent to the discovery of the plaintiff, and before his application for a patent, an engraving of the patented device, and a printed description of the same, without date, accompanying such engraving, was publicly exhibited at the Crystal Palace Exhibition, in London, in the year 1851, and was soon thereafter, and in the same year, brought to this country. The patented device was known and in use in this country, to a limited extent, as early as the year 1852, having been imported from England. During the trial, it was ruled by the court, that the patent of the plaintiff could not be avoided by the mere fact that the invention patented had been known and used in a foreign country before the discovery of the plaintiff. The court also ruled, that no description, in any printed publication, of the thing patented, could avoid the patent, unless such description in such printed publication was prior in point of time to the invention of the plaintiff, and so charged the jury. A verdict was rendered for the plaintiff, for $3,000. The defendants now moved for a new trial, on the ground that the court erred in so ruling and charging the jury; and that the court should have ruled and charged the jury, that, if the thing patented had been described in a printed publication, before the application of the plaintiff for a patent, that would avoid the patent, though it might have been after the invention of the plaintiff.

Charles M. Keller, for plaintiff.
William Tracy, for defendants.

Before NELSON, Circuit Justice, and INGERSOLL, District Judge.

INGERSOLL, District Judge. As, on the trial, there was no proof that the patentee did not, at the time of his application for a patent, believe himself to be the first inventor or discoverer of the thing patented, and as, at the time of his application, he made oath that he did believe that he was such first inventor and discoverer, it must be held, that it satisfactorily appears that, at the time of such application, he believed himself to be the original and first inventor and discoverer of the thing patented.

The 6th section of the patent act of July 4th, 1836, (5 Stat. 119,) provides, "that any person or persons having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used by others before his or their discovery or invention thereof, and not, at the time of his application for a patent, in public use or sale, with his consent or allowance, as the inventor or discoverer," may, on application to the commissioner of patents, obtain a patent for the thing invented or discovered. If the thing discovered or invented by the applicant was known or used before his discovery or invention, within the meaning of these terms, as used by the patent law, then no legal patent can be granted, and, if granted, the same cannot avail the patentee. It appears clearly, by the latter part of the 15th section of the same act, that a use in a foreign country was not meant to be included within the terms, above recited, "not known or used by others before his or their discovery or invention thereof," and that such use will not, by itself, avoid the patent. For, it is expressly provided, by the 15th section, "that whenever it shall satisfactorily appear, that the patentee, at the time of making his application for the patent, believed himself to be the first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or dis-

covery, or any part thereof, having been before known or used in any foreign country." In the present case, it appeared, on the trial, that the patentee did, at the time of making his application for a patent, believe himself to be the first inventor or discoverer of the thing patented. The patent of the plaintiff, therefore, could not be avoided by the mere fact that the invention or discovery patented had been known or in use in a foreign country before the discovery of the plaintiff. It also appears, by the 7th section of the same act, that the use meant by these terms was intended to be confined to a use, discovery or invention in this country, made prior to the discovery or invention of the applicant, the proof of which prior use must be so limited, provided the patentee, at the time of his application, believed himself to be the first inventor or discoverer. The 7th section makes it the duty of the commissioner upon the application of anyone for a patent, to make an examination of the alleged new discovery or invention, and then provides, that "if, on any such examination, it shall not appear to the commissioner that the same had been invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant, or that it had been patented or described in any printed publication in this or any foreign country, or had been in public use or sale, with the applicant's consent or allowance, prior to the application, if the commissioner shall deem it to be sufficiently useful and important, it shall be his duty to issue a patent therefor." The terms, in this section, "prior to the application" for a patent, refer only to the "public use or sale" (of the invention) "with the applicant's consent or allowance." They do not refer to anything else. And the terms, "prior to the alleged invention or discovery thereof by the applicant," refer to an invention or discovery by some one other than the applicant, in this country; and also to a patent or description in some printed publication in this or some foreign country. The true meaning of this section, taken by itself, is, that a patent shall issue to the applicant and be valid, if he is the originator and author of a useful invention or discovery, unless the thing invented by him had, prior to the alleged invention or discovery by the applicant, been invented or discovered or used by some one else in this country; or, unless the invention of the applicant had been patented or described in some printed publication, in this or some foreign country, prior to the alleged invention or discovery by the applicant; or, unless said invention of the applicant had been in public use, or on sale, with the applicant's consent or allowance, prior to his application to the commissioner for a patent. This latter restriction was modified by the act of March 3d, 1839, (5 Stat. 354,) so that the public sale or use, with the consent and allowance of the applicant, must, in order to forfeit his right, be more than two years before his application.

Other portions of the act of 1836 confirm the view thus taken of the subject. In the 15th section, it is provided that, upon the general issue, with notice, certain matters may be given in evidence, to avoid the patent. Among those matters are, that the thing patented had been described in some public work anterior to the supposed discovery thereof by the patentee, (not anterior to the application for a patent,) or that it had been in public use or on sale with the consent and allowance of the patentee, before his application for a patent. The publication, to avoid the patent, must be anterior to the discovery by the patentee. It is not sufficient that it should be anterior to the application to the commissioner for a patent.

It has been urged, that the proviso to the 15th section gives a different rule on this subject. That proviso is as follows: "That, whenever it shall satisfactorily appear, that the patentee, at the time of making his application for the patent believed himself to be the first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof, having been before known or used in any foreign country, it not appearing that the same, or any substantial part thereof, had before been patented, or described in any printed publication." It is claimed, that the time referred to by the terms, "having been before known or used in any foreign country," is the time when the application for the patent was made; and that the terms, "had before been patented, or described in any printed publication," refer, also, to the time when such application was made, and not to the time when the original invention or discovery was made. If there be any doubt as to the construction which this proviso should receive when considered by itself, the true construction of it is free from doubt, when it is considered in connection with other sections, and with the whole scope of the act. Viewed in such connection, it must be held, that the time referred to by the terms above recited, is the time when the original invention or discovery of the patentee was made, and not the time when he presented his application to the commissioner. Any other or different construction of this proviso would be in conflict with the whole scope of the act, and with the plain and clear enactments of certain parts of it, and would make several of its sections irreconcilable with each other.

With this view of the case, the motion for a new trial must be denied.

Case No. 1,071.

BARTHOLOMEW v. WEST et al.

[2 Dill. 290;[1] 8 N. B. R. 12; 7 West. Jur. 441.]

Circuit Court, D. Nebraska. 1872.

HOMESTEAD—ST. NEB. JUNE 22, 1867, CONSTRUED—TENANCY IN COMMON — DELAY IN CLAIMING EXEMPTION.

1. Under the statute of Nebraska relating to the homestead exemption, [Code, § 525,] the head of the family need not be the sole owner of the fee; it is sufficient, if the other requisites concur, that he has such an interest in the land as may be sold on execution.

[Cited in Re Swearinger, Case No. 13,683.]

2. The right to the homestead exemption is not lost by the delay of the husband to claim it until an order is applied for by the assignee in bankruptcy to sell the property for the benefit of the estate.

[3. Cited in Re Pratt, Case No. 11,370, to the point that occupation by the wife and family is equivalent to occupation by the husband.]

[Petition for review of the decision of the district court of the United States for the district of Nebraska.

[In bankruptcy. In the matter of West & Lewis; Bartholomew, assignee.] This is a petition by the assignee under the second section of the bankrupt act, to review an order of the district court refusing the application of the assignee for an order to sell lot 3 in block 66, in the town of Blair. [Petition for review dismissed.]

The ground of the refusal was that the property was exempt as a homestead. The claim of the bankrupt to a homestead is based upon the amendment to section 525 of the Code of Nebraska, which provides:—

"A homestead consisting of a quantity of contiguous land not exceeding two lots, being within an incorporated town, city, or village, owned and occupied by any resident of the state being the head of a family, shall not be subject to attachment, levy, or sale, upon execution or other process issuing out of any court of this state, so long as the same shall be owned and occupied by the debtor as such homestead." Act June 22, 1867, §§ 1–3, (Laws Neb. p. 91.)

In January, 1870, a petition in bankruptcy was filed against West & Lewis, and they were subsequently adjudicated bankrupts. West, one of the bankrupts, makes the claim in this case to the homestead exemption.

At a prior term of this court a decree was entered in favor of the assignee, setting aside as fraudulent the conveyance of the property to the wife of the bankrupt, but reserving all rights of homestead.

The other necessary facts appear in the opinion.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

William O. Bartholomew, for petitioner for revision.

James W. Savage and Carrigan & Osborn, for West.

DILLON, Circuit Judge.—In March, 1869, the firm of West & Lewis determined to remove to the new town of Blair, then just laid out, with a view to reside and do business. Their lots were purchased mostly on credit, and a title bond received. On one of the lots a store building was erected; on another Lewis erected a house for a home for himself and family; and on the other —the lot now in question—a house was erected in the summer of 1869 by West, who at once moved into it with his family, where they have since resided. In December, 1869, the title bond, which had been taken in the name of the members of the firm of West & Lewis, was assigned to West's father without consideration. The father thereupon procured the legal title from the town proprietor, and after the bankruptcy of West & Lewis, the father conveyed the lot to Mrs. West without any valuable consideration. In January, 1870, the firm was thrown into bankruptcy. At a former term the court decided that the assignment of the title bond and the conveyance to the wife were fraudulent as against the assignee, and a decree was entered to the effect that the property was subject to the payment of the debts of the bankrupts, reserving, however, all right to a homestead, such right not being put in issue in that suit. [Unreported.]

In that case the wife made an ineffectual attempt to show that the lot was purchased and paid for with her money. It appears that she was possessed of some property, that it was sold and the proceeds delivered to the husband, who also put them into the firm, and that when the cash payment was made on the lot, and some of the payments for the improvements, it was out of money or means drawn by the husband from the firm; but there is no satisfactory evidence that the property was otherwise purchased with her money, or that it was held in trust for her.

I find from the evidence, although the title bond was taken in the name of the firm, that in point of fact the understanding of the members of the firm was that Lewis should own in severalty the lot on which he built his house, and that West should own in severalty the lot in question.

The assignee resisted the claim to a homestead, first, on the ground that the lot or property was either partnership property, or held by Lewis & West as tenants in common, and that the statute of Nebraska does not give a homestead unless the party claiming it is the sole owner.

But I find that, in fact, it was not partnership property as respects the co-partners, nor

was it held by them as tenants in common. But if it were owned by them as tenants in common, I do not admit that a homestead right could not be asserted to it in favor of the head of a family who would otherwise be entitled to the exemption. The authorities, however, are conflicting: 1 Amer. Law Reg. (N. S.) 652, 654, 655, and cases cited.[2] See, also, and compare Thurston v. Maddocks, 6 Allen, 427; Smith v. Smith, 12 Cal. 216; McQuade v. Whaley, 31 Cal. 531; Thorn v. Thorn, 14 Iowa, 49.

But it is not now necessary to decide the point, as I find Lewis & West were not tenants in common in respect to this lot, but that there had been an equitable partition of the lots purchased, and that this was West's.

When the statute speaks of property owned by a debtor, it does not mean that the ownership must be of the full legal title. It is sufficient that the interest be such as may be sold on execution or subjected to the payment of debts. And although the husband in this case had only a title bond, this made him the owner in such a sense as to entitle him, the other requisites concurring, to the benefit of the statute of Nebraska on the subject of homestead exemption: 1 Amer. Law Reg. (N. S.) 652, and cases cited;[2] Pelan v. De Bevard, 13 Iowa, 53. See, also, Stewart v. Brown, 37 N. Y. 350.

It is next insisted that if West were otherwise entitled to a homestead, the right has been lost by reason of the fraudulent assignment of the title bond to his father, and the subsequent conveyance to the wife. If it had appeared in the other suit that the property was exempt as a homestead, and that creditors had no claim upon it, the court would undoubtedly have dismissed the bill of the assignee. But I have elsewhere held that where a fraudulent conveyance is made and set aside at the instance of the assignee, the husband or head of the family is not estopped to set up the right to a homestead exemption: Cox v. Wilder, [Case No. 3,308.] To that view I still adhere.

I am of opinion that the right to the exemption has not been lost by delay. When the assignee applied for an order to sell the property, it was competent for the husband to resist it, as he did, on the ground that the property was his homestead and exempt as such.

The petition for review is dismissed. Petition dismissed.

NOTE, [from original report.] See Cox v. Wilder, [Case No. 3,308,] and cases cited in note; In re Cross, [Id. 3,426,] and note.

[2] [Deere v. Chapman, 25 Ill. 610; 33 Miss. 462; Peland v. De Bevard, (Iowa, 1862,) 13 Iowa, 53; Horn v. Tufts, 39 N. H. 478; Wolf v. Fleischacker, 5 Cal. 244; Reynolds v. Pixley, 6 Cal. 165; Giblin v. Jordan, Id. 416; Kellersberger v. Kopp, Id. 563.]

Case No. 1,072.

BARTLE v. COLEMAN.

[3 Cranch, C. C. 283.][1]

Circuit Court, District of Columbia. April Term, 1828.[2]

EQUITY—PARTNERSHIP ACCOUNTS—PARTIES—GOVERNMENT CONTRACT—CORRUPTION.

1. In a suit in equity, for the settlement of the accounts of a partnership consisting of three persons, one of whom is dead, insolvent, his next of kin, or other personal representatives, are necessary parties.

2. A court of equity will not sustain a suit to compel the settlement of the concerns of partners in a government contract, in the profits of which the agent of the government, who made the contract, was to participate.

[See note at end of case.]

[In equity. Bill by Andrew Bartle against George Coleman upon a partnership account. Bill dismissed. This was afterwards affirmed by the supreme court in Bartle v. Nutt, 4 Pet. (29 U. S.) 184.]

The bill charges that, in 1814, a contract was entered into between the complainant and the government of the United States, for rebuilding Fort Washington; that this contract was made, on the part of the United States, by Ferdinand Marsteller, a deputy quartermaster-general; that, when the contract was made, it was agreed between the complainant, the defendant Coleman, and the said F. Marsteller, that each should receive one-third of the profits of the contract; that, when the work was finished and measured, it was supposed that the profits amounted to $4,500, and the sum of $1,500 advanced to Coleman, the defendant, for his share; that afterwards frauds to a great amount, were discovered on the part of F. M., by means of the information of the complainant to the department of war, and that great deductions were made from the price of the labor and materials, so that, instead of a profit, the loss upon the concern was $10,538; one half of which the complainant claims against the defendant Coleman, as Marsteller had died totally insolvent, leaving no personal property nor personal representative. The bill seeks an account and general relief. The answer of the defendant denied the partnership, but admitted that he was agent for disbursing the money, and entitled to a commission for the same.

Mr. Taylor, for the defendant, contended that the personal representatives, or next of kin, of F. Marsteller, should have been made parties, as the bill admits him to have been a partner in the profits of the contract. Madd. Ch. Pr. 148, 154, 155; 1 Harr. Ch. Pr. c. 3, p. 76. That the court ought not to lend

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Affirmed in 4 Pet. (29 U. S.) 184.]

its aid to enforce a contract founded in a fraud upon the United States. The fraud is admitted in the bill itself.

Mr. Jones, contra, contended that, as F. Marsteller died insolvent and left no personal representative, it was not necessary that his next of kin should be parties. The solvent partners are liable inter se, for the loss by the insolvent partner.

CRANCH, Chief Judge, after stating at large the evidence of the partnership of the defendant in the transaction, said:—

We think, therefore, that the fact of partnership between the plaintiff and defendant and F. Marsteller is established.

The next question is, whether the court can make a final decree, unless the personal representatives be made parties in the cause? We think we cannot. Mr. Marsteller was equally interested with the plaintiff and defendant in the profit or loss upon the government contract. The interests of his personal representatives are equally affected by the settlement of the account. But even if they were parties, we are of opinion that the copartnership was a fraud upon the United States, and that a court of equity ought not to lend its aid to either of the partners against the other. It is proved that Mr. Marsteller himself was the agent of the government in making the contract; and it is expressly averred in the plaintiff's bill, "that, when this contract was made, it was understood and agreed between George Coleman, the defendant, and Ferdinand Marsteller, now deceased, that they should share with your orator the profits of the contract; that is to say, that each should receive one third of the profits." If this be not fraud per se, it is such strong evidence of it that the court, in the absence of all exculpatory proof, must consider the transaction as fraudulent. No such exculpatory proof is produced; but the plaintiff himself avers that great frauds were committed upon the government by Mr. Marsteller. Under these circumstances, this court, as a court of equity, will not lend its aid to enforce this iniquitous agreement, but will leave the parties to their legal remedies. The bill must be dismissed, but without costs.

MORSELL, Circuit Judge, concurred. THRUSTON, Circuit Judge, absent.

[NOTE. This decree was afterwards affirmed by the supreme court on the ground that "public morals, public justice, and the well-established principles of all judicial tribunals" forbid the interposition of courts of justice to lend their aid to enforce a contract which began with the corruption of a public officer. The opinion was delivered by Mr. Justice Baldwin. Bartle v. Nutt, 4 Pet. (29 U. S.) 184.]

BARTLE, (UNITED STATES v.) See Case No. 14,531.

Case No. 1,073.

BARTLEMAN v. DOUGLASS.

[1 Cranch, C. C. 450.][1]

Circuit Court, District of Columbia. Nov. Term, 1807.

PLEADING—ASSUMPSIT—RELEASE—FRAUD.

1. An agreement by the plaintiff to release the defendant upon his executing a deed, is a good defence in assumpsit, the deed being executed.

2. A promise by the defendant to pay the plaintiff an additional sum is a fraud upon the other creditors, and is void.

At law. Assumpsit. Non assumpsit and issue.

Mr. E. J. Lee, for the defendant, gave in evidence an agreement of the plaintiff and other of his creditors, to release him on executing a deed of his property to such trustees as the subscribers should appoint, and that he executed such a deed.

Mr. Swan, for the plaintiff, contended. 1. That the plaintiff never approved the trustees, or the deed. 2. That no release was ever executed by the plaintiff. 3. That the defendant promised to secure the plaintiff in another debt due from the defendant and another.

Mr. E. J. Lee, in reply, cited Cockshot v. Bennett, 2 Term R. 763, and Butler v. Rhodes, Peake, 238.

THE COURT (FITZHUGH, Circuit Judge, contra) refused to instruct the jury that the agreement and deed did not make a good defence at law; being of opinion that the agreement bound the plaintiff to give a release upon the execution of the deed, and a court of equity would have compelled him to execute it; and that in assumpsit it ought to be admitted in evidence on the general issue, it being a fraud upon the defendant as well as upon the other creditors that the plaintiff should refuse to execute the deed after the others had executed it. See Heathcote v. Crookshanks, 2 Term R. 24; Jackson v. Duchaire, 3 Term R. 551; and Jackson v. Lomas, 4 Term R. 166.

BARTLEMAN, (SCOTT v.) See Case No. 12,524.

Case No. 1,074.

BARTLEMAN v. SMARR.

[2 Cranch, C. C. 16.][1]

Circuit Court, District of Columbia. Dec. Term, 1810.

AFFIDAVIT TO HOLD TO BAIL.

[Cited in Clarke v. Druet, Case No. 2,850.]

Mr. Law, for the defendant, moved to appear without bail. There was an affidavit

[1] [Reported by Hon. William Cranch, Chief Judge.]

filed, charging the defendant in the following manner: "1809, Oct. 5. To goods per bill, $19.89," with an affidavit "that the above account is just and true."

THE COURT was of opinion that it was not a sufficient affidavit to hold the defendant to bail.

Case No. 1,075.

BARTLETT et al. v. BUDD et al.

[1 Lowell, 223.] [1]

District Court, D. Massachusetts. Feb. Term, 1868.

ANIMALS—CONVERSION OF DEAD WHALE—SALVAGE SET-OFF—DAMAGES.

1. A whale killed and taken into complete possession is the property of the taker, who may maintain an action against one who afterwards appropriates it, whether with or without knowledge of his title.

2. *Held*, that an alleged usage that a whale found adrift in the ocean is the property of the finder unless reclaimed by the owner before it is cut in, was not proved in this case. Quaere, whether such a usage would be valid?

[Cited in Swift v. Gifford, Case No. 13,696; Ghen v. Rich, 8 Fed. 160.]

3. Salvage cannot be given by way of set-off when the finder has throughout contested the title of the owner.

4. The measure of damages adopted in Bourne v. Ashley, [Case No. 1,699,] adhered to.

[Cited in Guibert v. The George Bell, 3 Fed. 585.]

In admiralty. Libel by [Ivory H. Bartlett and others] the owners of the bark Canton Packet, of New Bedford, against [John Budd and others] the owners of the ship Emerald, of Sag Harbor, for the value of a whale. [Decree for libellants.]

The first officer of the libellants' vessel killed several whales one afternoon in July, 1856, in a bay of the Okhotsk sea, and one of these he anchored in five fathoms of water, with an anchor which he borrowed from the mate of the Brunswick, and attached to the body what whalemen call a waif, that is, some article belonging to a whale-boat which may serve as a signal; in this case, a paddle and sail, and went on shore at some distance, for the night. The next morning two boats of the Emerald found the whale and towed it to their ship where it was cut in and boiled down. The witnesses on behalf of the respondents testified that they found the whale adrift, the anchor not holding, the cable coiled round the whale's body, and no waif or irons attached to it. The original taker swore that he notified them on the spot that the whale was his. This they all denied.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

T. M. Stetson, for libellants.
J. C. Stone, for respondents.

LOWELL, District Judge. A whale, being ferae naturae, does not become property until a firm possession has been established in the taker. But when such possession has become firm and complete, the right of property is clear, and has all the characteristics of property. Upon the evidence, the right to this whale appears to stand on the same footing as the right to the anchor attached to it, which was very properly restored to its owner: Taber v. Jenny, [Case No. 13,720.]

The respondents here, as in Taber v. Jenny, set up a usage that a whale found adrift in the ocean is the property of the finder, unless the first taker shall appear and claim it before it is cut in. To this the libellants' witnesses reply that the usage only applies to whales found with no marks of appropriation excepting harpoons or "irons." And they give the very plausible reason for this distinction that irons are not in fact sure signs that the whale has ever been captured; because it may, and often does, escape after being wounded, and die at a very considerable distance of time and place from that of its being struck. These witnesses go farther, and affirm that the usage does not obtain at all in bays and harbors, but only off soundings. Without deciding the last point, I find the preponderance of evidence to be very strong in favor of the libellants' version of the usage in the matter of the definite marks by an anchor, or other sure sign of actual capture. And if it were not so, there would be great difficulty in upholding a custom that should take the property of A. and give it to B. under so very short and uncertain a substitute for the statute of limitations, and one so open to fraud and deceit. I do not, however, here pass upon the limits within which usage may reasonably vary, whether upon the one side or the other, the strict law of the pursuit and capture of whales and their appropriation, but decide that this whale was the property of the libellants.

This is not a case of salvage, because the conduct of the finders was inconsistent with the idea of a saving for the benefit of the true owners. Taber v. Jenny, ubi supra. A libel for a conversion of the whale is the true remedy, and that has been adopted.

For the reasons given by me in another case, I am unable to adopt the rule of damages which Judge Sprague followed under the peculiar circumstances of Taber v. Jenny, but pronounce for the value of the whale in the Okhotsk sea in July, 1856, to be ascertained in the mode laid down in my former decision [Bourne v. Ashley, Case No. 1,699] with interest and costs.

Case No. 1,076.

BARTLETT v. CRITTENDEN et al.

[5 McLean, 32;[1] 7 West. Law J. 49.]

Circuit Court, D. Ohio. Nov. Term, 1849.

LITERARY PROPERTY—DEDICATION — COPYRIGHT—INJUNCTION TO RESTRAIN INFRINGEMENT.

1. An author has a common law right in his manuscript, and is entitled to an injunction to restrain the publication of it.

[Cited in Boucicault v. Fox, Case No. 1,691; The Mark Twain Case, 14 Fed. 731; Henry Bill Pub. Co. v. Smythe, 27 Fed. 926. See, also, Wheaton v. Peters, 8 Pet. (33 U. S.) 591, 656; Little v. Hall, 18 How. (59 U. S.) 165; Keene v. Wheatley, Case No. 7,644; Parton v. Prang, Id. 10,784.]

2. But when the work is published, the author has not, by the common law, an exclusive right to re-publish it.

[Cited in Parton v. Prang, Case No. 10,784; The Mark Twain Case, 14 Fed. 730. See, also, Wheaton v. Peters, 8 Pet. (33 U. S.) 591; Keene v. Wheatley, Case No. 7,644; Keene v. Kimball, 16 Gray, 549; Pulte v. Derby, Case No. 11,465.]

3. Since the statute of Anne, the author has no exclusive right to republish his work in England.

4. The first publication is a dedication of the work to the public.

5. The common law gives protection to the author for his manuscript only.

6. But the 9th section of the copyright act of 1831, [4 Stat. 438,] also protects the author's right to his manuscript.

7. The whole of the manuscript need not be printed. If a substantial part of it be taken, chancery will enjoin its publication, on the application of the author, or his legal representatives.

8. The novelty of a work on book-keeping, must necessarily consist in the plan or mode of keeping accounts. The items of debt and credit are only used to illustrate the principle of the work.

9. Private letters are within the statute, and their publication will be restrained.

10. The author's property in the manuscripts may be transferred, or abandoned, like any other right of property.

[In equity. Bill by R. M. Bartlett to restrain A. F. Crittenden and others from infringement of copyright. Injunction granted.]

Walker & Kebler, for complainant.

Storer & Gwynne, for respondents.

OPINION OF THE COURT. This bill is brought to protect the copyright of the complainant, in a manuscript work on book-keeping, of which he claims to be the author; and the defendant is alleged to have published a work on the same subject, which the complainant charges was copied from his manuscript. For twelve years and upwards, the complainant has been engaged in teaching the art of keeping books, and has used his work, which is still in manuscript, in his school, with the view of rendering it more perfect, and with the intention of publishing it. The work of the defendant contains two hundred and seven pages, ninety-two of which are alleged to have been taken from the plaintiff's manuscript, with only colorable alterations. The answers deny the allegations in the bill.

A reference was made to a master, with special instructions, who reports, "that the book of the respondents contains a portion of plaintiff's manuscript, with only slight alterations; and he says that it is impossible that the book and the manuscript could have been composed by two persons, neither having for his guide the entries of the other. The balance sheets are the same in both. As regards the plan and arrangement, they are the same. The book contains explanations, which are valuable to the learner, that are not in the manuscript. Both works consist of a series of brief sets of mercantile books by double entry." The master reports, that the plan of the work in the manuscript and in print, is substantially the same; that in the book there are explanations interspersed through the series of sets, which the manuscript does not contain; that these explanations are of great use to the learner, but that they may be verbally given with equal advantage. The system in the manuscript, the master states, is superior to any he has seen, except that of the book published by the defendant, which is the same in substance, "that, unlike all the systems he had seen, the manuscript is made up of a few brief sets of mercantile books, which show the entire process of ordinary double entry book-keeping, and in a compass of very little magnitude;" and he says, that "he discovers in other treatises nothing bearing a resemblance to the manuscript plan. He therefore concludes that the plan is original." "The manuscript, in its present state, (the master says,) contains substantially a system of book-keeping, suitable to be used by a teacher in his school." "As the system, when published, becomes its own teacher, it should be accompanied with such precise explanations as may be necessary to a proper understanding and use of it by the uninitiated. It should also be accompanied with forms of the auxiliary books."

Jonathan Jones, of St. Louis, a witness, states, that in 1841 he opened a school in St. Louis, as the partner of the complainant, for instruction in book-keeping on Bartlett's plan, which consists "of eleven sets of books, with a balance sheet for each set, and an inventory attached, showing property on hand, and that Bartlett was the author of them; that his manuscript contains a perfect system of book-keeping, and differs from all others in arrangement, being composed of short exercises." The defendant, Crittenden, entered the school, ignorant of book-keeping; and after completing the course, he took charge of the writing department for a short time. In 1846, Crittenden called on the witness with a copy of his work, which, on examining, the witness found to be Bartlett's

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

system. And Crittenden then told him, that when he was in Bartlett & Co.'s school, he took a precise copy of the manuscript, with the view of publishing it; and that he did publish it in 1845. And the witness says, if all of Bartlett's manuscript were struck from Crittenden's book, there would not be enough left for a title-page. A copy of Bartlett's manuscript was used at the St. Louis school, and witness never prohibited any of the learners from copying it. Crittenden knew that it was Bartlett's manuscript, and that he intended to publish it as soon as he could make the necessary arrangements. Witness has heard Bartlett frequently say so. Witness gave Crittenden a letter to Bartlett, referring to the published work, that Bartlett might see it. To Josiah Bliss, a witness, Crittenden said, that his system was the same as Bartlett's. Nine other witnesses, who are book-keepers, being sworn, state, that Bartlett's system of book-keeping is new; and that its plan and arrangement are preferable to any other. And they say that Crittenden's book is the same in substance.

On the part of the defendant, James T. Annan was sworn, who says that he has been a book-keeper for fifteen years,—has examined Bartlett's system, and finds nothing new or original in it, either in the forms of stating the accounts, or in the arrangement, or in any particular; that the materials are not new in matter or form; nothing could be taught by it without rules and explanations, and auxiliary books; and that it is wholly unfit for publication; that a cash book is essential to a complete system, and that Bartlett substitutes for it a cash account. The individual who conducts the business is not named in the exhibit, and there are no indexes. Richard Miller, who has been a book-keeper for twenty-five years, agrees with the statement of Annan, and adds, that in Bartlett's plan, there is properly no day-book, only a waste-book, from which to make the day-book entries. John Gundry has been a book-keeper and teacher for seven years, and he agrees with Annan. He says Bartlett has more sets than usual; but he had used the same, or about the same number, more or less. Bartlett's plan contains no definition of terms, such as drafts, bills of exchange, acceptances, &c.,—no mercantile forms, such as bills receivable and payable, account of sales, account current, &c.,—no forms of calculations, viz: interest, discount, commission, equation of payments, reduction of currencies. But he says, that no work has come to his knowledge wherein the theory has been carried out to so great an extent as in Bartlett's, though many authors have recommended it. He never saw the identical entries until the spring of 1842, when he examined Bartlett's manuscript. In 1845, witness united with Bacon to teach book-keeping, who had been using Bartlett's system, and they continue to use it in the school.

The complainant claims relief on two grounds: 1. At common law. 2. Under the act of congress 3d February, 1831, [4 Stat. 438.]

In the case of Wheaton v. Peters, 8 Pet. [33 U. S.] 655, the supreme court say: "That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted." And again, page 661, "An author has, by the common law, a property in his manuscript; and there can be no doubt that the rights of an assignee of such manuscript would be protected by a court of chancery." In combating the argument in the same case, that an author had a common law right to republish his own works, and to prohibit others from doing so, the court showed that after the statute of Anne there was no such right in England, and that if such right were shown to exist there, it did not follow that it exists to the same extent in Pennsylvania. That the common law in this country exists in the different states, as modified by them by statutory enactments and judicial decisions. But the question under consideration is very different from the one decided in the above case. We have to say whether the writer has a right of property in his own manuscripts. That he has such a property in his own literary labor, until he shall relinquish it by contract or by some unequivocal act, would seem to be clear. This is laid down in Maugh. Lit. Prop. 74, 137; Webb v. Rose, 4 Burrows, 2330; Pope v. Curl, 2 Atk. 342; Manley v. Owen, 4 Burrows, 2329; Southey v. Sherwood, 2 Mer. 435; 2 Story, Eq. Jur. § 943. Lord Mansfield, and some others, distinguished for their great learning and ability, have considered the publication of a work not as such a dedication of it to the public by the author at common law, as to deprive him of an exclusive right to republish it. With the greatest respect for these opinions, we think there is a difference in principle between the right to republish a printed work, and the exclusive right of an author to publish his own manuscript. A man may write without any intention to publish. He may treat of principles and characters without restraint—with a view to his mental improvement, or from some other motive, without incurring any responsibility so long as the manuscript remains unpublished. It is, therefore, essential, in all proceedings for a libel, to prove publication. And there is no law which can compel an author to publish. No one can determine this essential matter of publication but the author. His manuscripts, however valuable, cannot, without his consent, be seized by his creditors as property. They are valueless to all the world except to the author and his representatives; or to such persons as he shall transfer them. But the author who publishes his work, dedi-

cates it to the public. He voluntarily incurs all the responsibility of a publisher. His object is to instruct or amuse mankind, and the more his work is circulated, the greater is the compliment to his ability as a writer. There is no reason, then, against a republication of the work by any one, except that it may reduce the profits of the author. And, on this ground, he cannot complain, as he has failed to secure the right under the statute. If the common law protects the rights of an author, as contended for, the statute was useless. An action for damages and an injunction, would as effectually protect the rights of an author, as any provisions of the statutes. But there is another view, which is still more conclusive, against the exclusive right to republish a printed work. The statute limits the right to a term of years. The common law right, if it exist, is without limitation. To hold, then, that there is a common law right, independently of the statute, is to disregard the statute. Whilst the common law protects the right of the author to his manuscripts, it cannot be made to extend to the republication of a published work. As well might it be contended that the inventor of a machine, after it has gone into general use, by the acts of the inventor, may, by the common law, claim the exclusive right of making and selling it. But we think this case is within the act of congress referred to. The section 9 of that act—4 Pet. St. 438, [4 Stat. 438]—provides: "That any person or persons who shall print or publish any manuscript whatever, without the consent of the author or legal proprietor first obtained, shall be liable to suffer, and pay to the author or proprietor, all damages occasioned by such injury, to be recovered by a special action on the case founded on this act." "And the several courts of the United States empowered to grant injunction to prevent the violation of the rights of authors and inventors, are hereby empowered to grant injunctions," &c.

That the complainant is the author of the manuscript in question, is proved. And it also appears, from the statement of the experts, and by the reports of the master, that the manuscript contains a new and useful system of bookkeeping. The novelty consists in the mode of keeping accounts. It can consist in nothing else. The names and figures used in the items of debit and credit, are of no importance; as they are only used to illustrate the mode or principle of the work. The manuscript was contained on different sheets or cards, for the convenience of teaching; but this is immaterial. Its parts were necessarily connected. Three or four of the witnesses state that there is no novelty in the manuscript—nothing that had not been taken from, or might not be found in different works on book-keeping. But this is contrary to the views of the witnesses generally, and, especially, to the report of the master. The objection that the manuscript does not contain a complete system, as explanatory notes, &c., are necessary and usual in such works, to enable the student to learn the art of book-keeping without an instructor, is not sustainable. A surreptitious publication of an important part of the manuscript, is equally within the principle of the statute. But the notes are only explanatory of the system, as contained in the body of the work. They facilitate the progress of the learner, but they add nothing to the system. From the weight of the evidence, including the master's report, Bartlett's system may be said to be complete for the purpose of teaching. Was there a publication of the manuscript of the complainant by the defendant? He has denied in his answer, somewhat equivocally, the charge of publication, as made in the bill. He confessed to Jones, that he took a copy of the manuscript, with a view of publishing it, and that he did publish it in 1845. After the publication of his book, he admitted, to other witnesses, that the system of his work was the same as Bartlett's. It seems Crittenden became a student in the school of Bartlett and Jones, conducted by Jones at St. Louis, and in which he acquired his knowledge of bookkeeping. The manuscript of Bartlett was used in that school, and it was there that the defendant made out his copy.

Independently of this proof, a comparison of the book with the manuscript, will show that at least ninety-two pages of the book were substantially copied from the manuscript. The master says that they could not be the production of two minds. So nearly are they identical, that no one can read them without at once perceiving that one must have been copied from the other. The system is the same in both, and the discrepancies that appear only show the intent of the copyist. It is believed that there is no case in the books where the piracy is more palpable. The inconsistency of Jones in giving a letter to Crittenden, recommending him and his book to Bartlett; is explained in his testimony. He gave the letter to bring the fact of publication to Bartlett's notice. This act of the witness, though apparently inconsistent with his statements, does not destroy his credibility. He must have known, as he states, that the book contained Bartlett's system; but it was not for him to say, or to know, whether Crittenden, under the circumstances, was liable to an action for the publication. The facts of the case go strongly to show the probability that Crittenden told Jones, as he swears, that he copied Bartlett's manuscript.

It is argued, to bring the case within the ninth section, that the whole of any manuscript must be published; that the principle of law in relation to colorable alterations of a printed book, or a fair abridgment of it, does not apply under this section to a manuscript. If the whole of the manuscript must be published, will the omission of a line or

a word, evade the statute? That it will, would seem to be the argument of the counsel. Under such a construction, the question might well be asked, of what value to an author is the statute? It purports to protect him against a fraudulent use of his manuscript; but practically it gives him no protection. It has been passed in mockery of his right. He is the sport of every man who has the disposition and the opportunity to pirate his manuscript. No such rule of construction is admissible. Has a substantial part of the manuscript been published? Does the book of the defendant contain Bartlett's system of book-keeping? Of this there can be no doubt. Such a publication is within the above section. It renders the manuscript valueless.

Was there an abandonment of the manuscript by Bartlett? This is the only remaining point to be considered, and it is the one most relied on in the defence. It satisfactorily appears from the evidence, that Bartlett intended to publish his manuscript. And this is only material on the question of abandonment. His right of property in no way depends on his intention in this respect. His manuscript was used in the school taught by himself in Cincinnati, and by the partnership school taught by Jones in St. Louis. In both these schools the manuscript was studied by the pupils, and they were required to copy certain parts of it, and were at liberty to copy the whole. These schools, and especially the one at Cincinnati, have been in operation several years. And under these circumstances, it is contended, there was an abandonment of the manuscript.

Bartlett's right of property in his manuscript may be transferred or abandoned, the same as any other right of property. Where the copy-right of a published work is secured, under the statute, the author, by using the work in imparting instruction to his pupils, or by disposing of it to a friend, does not thereby transfer his exclusive right to publish it, or incur a suspicion that he intends to abandon it. And how does this differ from the case under consideration? In both cases the law gives a right of property to the author, and a remedy to enforce that right. And in both cases he may transfer or abandon that right. The evidence of a transfer or abandonment must be as clear and as specific in the one case as in the other. An acquiescence in the publication of his manuscript, or in the republication of his printed book, would authorize the presumption of an assignment or of an abandonment. To make a gift of a copy of the manuscript is no more a transfer of the right or abandonment of it, than it would be a transfer or an abandonment of an exclusive right to republish, to give the copy of a printed work. In his treatise on Equity, (section 943,) Mr. Justice Story says, "In cases of literary, scientific, and professional treatises in manuscript, it is obvious, that the author must be deemed to possess the original ownership, and be entitled to appropriate them to such uses as he shall please. Nor can he justly be deemed to intend to part with that ownership by depositing them in the possession of a third person, or by allowing a third person to take and hold a copy of them. Such acts must be deemed strictly limited, in point of right, use, and effect, to the very occasions expressed or implied, and ought not to be construed as a general gift or authority for any purposes of profit or publication, to which the receiver may choose to devote them." And he says, to prevent the publication of manuscripts, without the consent of the author, an injunction should be issued. Even the publication of private letters by the person to whom they were addressed, may be enjoined. This is done upon the ground that the writer has a right of property in his letters, and that they can only be used by the receiver for the purposes for which they were written. So far as this, and, in justification or defense, an individual has an interest in letters received by him. Eden, Inj. c. 13, pp. 275, 276; Duke of Queensberry v. Shebbeare, 2 Eden, 329; Southey v. Sherwood, 2 Mer. 435, 436; Macklin v. Richardson, Amb. 694; Pope v. Curl, 2 Atk. 342; Lord Perceval v. Phipps, 2 Ves. & B. 19, 24; Gee v. Pritchard, 2 Swanst. 403, 415, 422, 425. "No length of time will authorize the publication of an author's original manuscript without his consent." In 1804, the court of sessions of Scotland interdicted, at the instance of the children, the publication of the manuscript letters of the poet Burns. Cadell v. Stewart, 1 Bell, Comm. 116n. Lectures, oral or written, cannot be published without the consent of the lecturer, though taken down when delivered. Manuscript reports were copied by the clerk of a gentleman, to whom the author had lent them, and the chancellor granted an injunction to restrain the publication. Forrester v. Waller, 2 Eden, 328; Eden, Inj. 322. The earl of Clarendon delivered to defendant's ancestor, the manuscript of the second part of his father's History of the Rebellion, with liberty to take a copy of it, and make what use of it he thought fit. Complainant, who was Lord Clarendon's representative, obtained an injunction from Lord Northington, who said, that it could not have been the donor's intention that the donee should print the work, though he might make every use of it except that. Duke of Queensberry v. Shebbeare, 2 Eden, 329. Lord Eldon refused to grant an injunction, until the right was tried at law, where the manuscript had been in the hands of a publisher twenty-three years, and had not been called for by the plaintiff. Southey v. Sherwood, 2 Mer. 435. Sparks had procured, from the representatives of Washington, the right of publishing his letters and other writings, and had done so in twelve volumes. Upham, in his Life of

Washington, had taken many of these letters from Sparks, they never having been published before. On a bill filed, Mr. Justice Story said: "Unless there be a most unequivocal dedication of private letters and papers by the author, either to the public or some private person, I hold that the author has a property therein, and that the copyright thereof exclusively belongs to him." And he granted an injunction. Folsom v. Marsh, [Case No. 4,901.] The manuscript of Bartlett was used in his school at Cincinnati, and in the school at St. Louis, for the purpose of imparting instruction to the pupils, and it does not appear, from the evidence that copies were required or permitted to be taken of it for any other purpose. There is nothing in the testimony from which an implication can arise, that Bartlett consented to the publication of his manuscript by the defendant, or that he ever abandoned it. It seems he was much excited when he was informed of the publication of Crittenden, and, shortly afterwards, instituted this suit.

An injunction will be granted to restrain the defendants from a further publication of the first 92 pages of the work, or sale of it; and a reference is made to a master to ascertain the number of copies sold, and the number on hand, &c., and that he report at the next term.

[NOTE. For prior litigation between the same parties involving the same subject-matter, see Bartlette v. Crittenden, Case No. 1,082.]

BARTLETT, (GOODHUE v.) See Case No. 5,538.

Case No. 1,077.

BARTLETT v. KANE.

[Taney, 186.] [1]

Circuit Court, D. Maryland. April Term, 1852.[2]

CUSTOMS DUTIES—APPRAISEMENT—POWER OF SECRETARY OF THE TREASURY—PRODUCTION OF DOCUMENTS — RECOVERY OF PENALTY PAID UNDER PROTEST.

1. In an action against the collector of customs, to recover duties paid under protest, on an importation of Peruvian bark, where it appeared, that the official appraisers, under instructions of the secretary of the treasury, had predicated their valuation of the bark on the quantity of sulphate of quinine produced by the several packages in the invoice: *held*, that the secretary of the treasury had no power to fix a chemical analysis of bark as the only test of its dutiable value.

[See note at end of case.]

2. The law of congress fixes the duties upon the market value at the port of exportation; the purchaser must and can only look at the fair market value of the article among those trading in it at the port of exportation; and he can only be required to adopt the methods usually adopted by merchants in making purchases.

3. But still the appraisers, when they suspect a wrong done to the government, have a right to employ this means as a test by which, with the other knowledge and information in their power, they may be able to arrive at a correct estimate of the true value of the article imported.

4. An appeal from the decision of the official appraisers to that of merchant appraisers was made by the importers; but on the official appraisers demanding of them the production of all documents connected with the importation, they refused to comply with the demand, withdrew the appeal, and paid the duties under protest: *held*, that the parties, by withdrawing their appeal, and refusing to produce the papers called for, had fixed the correctness of the appraisement.

[See note at end of case.]

5. The appraisers had the right to call for these papers, whether with the view of correcting their own judgment, if erroneous, or of laying them before the merchant appraisers, in the event of a prosecution of the appeal.

[See note at end of case.]

6. A refusal to produce papers admitted to be in a party's possession, raises the strongest inference that the papers, if produced, would operate against the person holding them.

7. The act of congress (30th August, 1842, [5 Stat. 564,] § 17) makes it, in such a case as this, conclusive proof, that the papers, when produced, would be demonstrative against the pretensions of the party having them in his possession.

8. A demand for these papers could properly be made by the official appraisers, even after their own decision had been given.

9. Where the penalty of twenty per cent. is imposed on an importation, because of the excess of the market value, over the invoiced value, which is paid under protest, and such importation, having only been entered for warehousing, is afterwards exported elsewhere for sale: *held*, that the importer was not, for this reason, entitled to recover back the amount of the penalty so paid.

[See note at end of case.]

[At law. Suit by Edwin Bartlett against George P. Kane, collector of the port of Baltimore, to recover customs duties alleged to have been illegally exacted. Verdict and judgment for defendant. This judgment was afterwards affirmed in 16 How. (57 U. S.) 263. See note at end of case.]

It is admitted that, in the month of September, 1849, the barque St. Joseph brought to the port of Baltimore, six hundred and fourteen seroons of Peruvian bark, shipped at Arica, in Peru, in January preceding, and consigned to the plaintiff, residing in New York, as appears from the invoice, a copy of which is herewith filed, marked A. That said bark belonged to Messrs. Pinto & Co., of Arica, and was obtained by them under the contract and circumstances shown by the testimony taken under the commission in the above cause. It is admitted that, on the arrival of the St. Joseph in Baltimore, Messrs. Birckhead & Pearce, the agents of the plaintiff, entered two hundred seroons, of the first quality, of said bark, for consumption, and the rest of the invoice for warehousing; and that subsequently, the defendant caused the whole of said importation to be appraised,

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

[2] [Affirmed in 16 How. (57 U. S.) 263.]

and that the official appraisers, acting in obedience to instructions from the secretary of the treasury in reference to the appraisement of this article, proceeded to ascertain the quantity of quinine in said bark, by chemical analysis, in order to fix therefrom the dutiable value of said bark. It is admitted, that said appraisers, in accordance with said analysis, reported that the one hundred and thirty-four seroons of third quality, mentioned in the invoice, were not undervalued; but that upon the other two parcels, valued in the invoice and entry at $49,737 Peruvian, or $45,758 04/100 American currency, they reported a deficiency of dutiable value, in the amount declared in the invoice and entry, of $7339 56/100, upon which increased value, a duty of fifteen per cent., amounting to $1100 93/100, was exacted by the defendant, and likewise an additional duty, by way of penalty for undervaluation, of twenty per cent. on the appraised value, amounting to $10,799 40/100, was likewise exacted, making together the sum of $11,900 33/100, which, in addition to the duty of fifteen per cent. on the dutiable value declared in the invoice and entry, was paid by the plaintiff under protest, to obtain the possession and control of his said goods. It is further admitted that, of the two hundred and fifty-four seroons of first quality bark which were entered for warehousing, twenty-five were re-shipped to Amsterdam, by the plaintiff, from Baltimore, and one hundred and three were transported to New York (whence one hundred of them were also re-shipped), and thus said one hundred and twenty-five seroons became entitled to drawback, which was paid to the plaintiff, but the penalty of twenty per cent. for undervaluation on these seroons has never been returned. It is agreed, that the instructions of the secretary of the treasury, having reference to the questions involved in this case, may be referred to by either party, for whatever purpose they may be legally available, as well as all official documents from the custom-house. That the official appraisers, on the 6th of October, 1849, notified Messrs. Birckhead & Pearce that they should require the production of all papers or documents relative to said importation, and Messrs. Birckhead & Pearce notified the plaintiff, Mr. Bartlett, of this requisition of the official appraisers, whereupon Mr. Bartlett, by his letter of the 11th October 1849, declined the production of the papers, &c., demanded, and directed Messrs. Birckhead & Pearce to withdraw the appeal they had made, and to pay the duties and penalty required, under protest; and at the same time proposed, as a final settlement, to pay the additional duties, provided he was released from paying the penal duty of twenty per cent. This statement is subject to corrections by either party as to details or explanation, as the oral testimony in the case, at the trial, may require.

Brown & Brune, for plaintiff.

The plaintiff prays the court to instruct the jury:

1. That until superseded by a valid appraisement, the dutiable value of the plaintiff's goods, mentioned in the invoice, duly verified, and declared on the entry, must be deemed the true dutiable value of such goods.

2. The plaintiff further prays the court to instruct the jury that the mode pursued by the appraisers, as stated in their evidence, of ascertaining the foreign dutiable value of the plaintiff's import and bark, per St. Joseph, was illegal, and their appraisement void.

3. That the non-compliance by the plaintiff with the requirements of the appraisers, contained in their letter of the 6th October 1849, did not make valid the illegal appraisement of the plaintiff's goods previously made and then still appealed from.

4. That the seventeenth section of the act of 1842, which declares that the refusal of a consignee to produce any papers which the permanent appraisers may call for, shall render the appraisement which they may make final and conclusive, applies only to appraisements made after such refusal, and therefore can have no effect in this case.

5. That the additional duty exacted and retained on the parcels entered for warehousing, and entitled to debenture and exported, was illegally exacted.

6. That under the contracts between the Messrs. Pinto & Co. and the Bolivian government, the plaintiff's goods are not to be considered goods "actually purchased," within the meaning of the eighth section of the act of 1846, and therefore, the penalty prescribed by that act, and exacted in this case, was illegally exacted, and may be recovered back in this suit.

Z. Collins Lee, Dist. Atty., for defendant.

Upon the statement of facts and other evidence in this case, the defendant, by his counsel, asks the following instructions to the jury:

1. That the plaintiff is not entitled to recover the amount claimed in this action, because he has not complied with the requisitions of the act of congress in such cases provided.

2. That the value of the bark imported and appraised in this case, was the true value, with the costs and expenses added thereon; and was ascertained by the official appraisers, in the mode authorized by law and the instructions of the treasury department to the collectors in such cases.

3. That the penal duty of twenty per cent., imposed by the act of congress of 1846, for an undervaluation of goods in invoices imported into the United States, is not a duty, in the ordinary meaning of duties or imposts, but a penalty or fine inflicted for a violation

of the revenue laws of the United States, and is not, therefore, subject to drawback or debenture, upon a reshipment of the goods which have been subjected to this penalty.

4. That upon all the evidence in this case, the defendant acted in compliance with the laws of the United States and instructions from the treasury; and though the official appraisers of the United States examined the bark of the plaintiff, and also had it analyzed by a chemist appointed by the government, and compared its analysis and value with that of a similar cargo of bark imported from the same country by Wyman, Appeton & Co., and brought into the port of Baltimore about a month before the bark of the plaintiff was entered; yet, if from the evidence in this case that the plaintiff was duly notified, by the official appraisers, of the undervaluation of his bark, and their increase of the marketable value, after such examination, analysis and comparison, and that he was required by the appraisers to furnish papers, documents or other evidence, for the purpose of satisfying said appraisers as to the value of said importation, and refused to comply—and afterwards, or at that time, withdrew his appeal to the merchant appraisers, and then paid the duties under protest—he is not entitled to recover.

TANEY, Circuit Justice. The facts of this case are these: In the month of January, 1849, Messrs. Pinto & Co., of Bolivia, shipped from the port of Arica, in Peru, a quantity of bark, grown in Bolivia, but known under the name of Peruvian bark. These shippers had, in the years 1845 and 1846, contracted with the Bolivian government for a monopoly in the trade of this article, for the term of several years, for which they were to pay the government a certain price. One of these contracts states that "Tabla Calisaya bark, which is cut from the body of the tree, being of three times the value of Canato bark, which is cut from the branches, and this by reason of the greater quantity of the salts, the active principle, contained therein." The bark, thus procured, is sent to Tacna, and thence usually to Arica, a port in Peru, from which port it is shipped abroad; from this port are also sent quantities of this bark, which are obtained clandestinely, and brought to Arica; sometimes this bark is shipped from a Bolivian port, but this much increases its cost at the port of shipment.

The bark in question was, by Pinto & Co., dispatched from Arica, in the ship San Josef, destined for Baltimore, to the plaintiff, residing in New York; and he consigned it to Messrs. Birckhead & Pearce, of Baltimore, by whom it was here entered at the custom-house, in the month of September 1849. In the invoices accompanying this shipment, the first quality, or Tabla Calisaya, was invoiced at $70 per quintal.

About a month before the arrival of the San Josef at Baltimore, another invoice of bark had arrived in Baltimore, in the barque George and Henry, to different consignees, which had left the port of Arica, about two months after the date of the bill of lading of the cargo in question, and there was evidence that a rise, throughout the whole of 1849, had taken place in the price of this kind of bark in the ports of South America. The first quality of bark received by the George and Henry was invoiced, some at eighty cents and some at ninety. On the arrival of the plaintiffs' cargo, Messrs. Birckhead & Pearce entered it in the usual way, and samples of it were submitted to the appraisers for examination; neither of the appraisers was a good judge of the value of this article, but directed it to be subjected to a chemical analysis, by the government chemist, and having subjected the bark of the other shipment to a like process, they found the cargo by the San Josef, which was invoiced at $70 per quintal, to contain more sulphate of quinine than the bark received by the George and Henry, which was invoiced at a much higher price, this sulphate of quinine being the active principle of the bark. To this test the appraisers felt themselves bound to subject this bark, in consequence of the orders of the treasury circular of the 2d day of November 1848, in these words:

Copy 1.

Treasury Department, November 2, 1848.

Sir: I have to acknowledge receipt of your communication of the 21st ult., with the report of the U. S. appraisers, in relation to an importation by Messrs. Birckhead & Pearce, of Baltimore, per barque "George and Henry," from Arica. It appears from the documents submitted, that the valuation of the article in question, was predicated by the appraisers on the quantity of sulphate of quinine produced by the several packages in the invoice; a portion of the same, invoiced at $65, found, on analysis by Dr. Stewart, the special examiner, to produce 2 24/100 per cent. of quinine, being taken as the basis of the value of the others (with certain exceptions), which, by the analysis, produced an equal proportion of quinine.

It being the opinion of this department, that the course pursued by the U. S. appraisers was the true one, under the circumstances, and is sustained by law, you are directed to estimate and adjust the duties accordingly.

Very respectfully, &c.,

R. J. Walker, Secretary of Treasury.

William H. Marriott, Collector of Customs, Baltimore.

After calling for the bill of lading, which was sent to them, the appraisers determined that the duty upon the bark should be so increased, that it became liable to the additional or penal duty of twenty per cent., and made to the collector the following report:

Appraisers' Office,
Baltimore, October 3, 1849.

The undersigned report to the naval officer an addition to E. Bartlett, of New York's, invoice of bark, per barque St. Joseph, from Arica, entered by Birckhead & Pearce, on 21st ult., viz:

J. T. P. 454 seroons bark, weighing 681 quintals at $10 98.....is	$7204 98
J. P., 26 ditto. ditto. 39 quintals, $14 82.62.....	578 22
	$7783 20
Commissions 2½ per cent.	194 58
Peruvian currency.....$7977 78@92cts.	$7339 56
Duty 15 per cent.....	$1100 92

M. McBlair.

E. Bartlett, New York, per St. Joseph, entered by Birckhead & Pearce, 494 seroons bark:

681 quintals, at 70 cts., is.....	$47,670 00
Commissions 2½ per cent.....	1,191 75
	$48,861 75

The 13 seroons bark, per George and Henry, which cost 80 cents per pound, produced 2 76/100 per cent. of quinine.

The above bark, per St. Joseph, is invoiced at 70 cents, and produced 2 78/100 quinine per cent., and consequently—

Ought to have been invoiced.....	80 58
	70
Difference.....	10 58

If this addition be made, it will stand as follows:

681 quintals at 10 58-100 per quintal, is....	$7204 98
Commissions 2½ per cent.....	180 12
	$7385 10

J. P., 26 seroons, invoiced at 53 cents, produced 2 34/100 per cent. of quinine. In proportion to the above, it ought to be valued, viz:

39 quintals, at $14 82.63, is.....	$578 22
2½ per cent. commissions.....	14 16
	$592 68

$7977 78 at 92, is $7339 56, U. S. currency.
Duty, 15 per cent., is $1100 92.
Peruvian currency.....$7977 78

On the 4th October, the collector notified Messrs. Birckhead & Pearce of this decision; they, on the next day, asked to be furnished with the grounds of such decision, and on the 6th October, protested in writing against it and asked that the case should be submitted to merchant appraisers, as required by law. On the same day, and after such request of Birckhead & Pearce, the appraisers wrote to Messrs. Birckhead & Pearce this letter:

Appraisers' Office,
Port Baltimore, 6th Oct., 1849.

Gentlemen: In relation to your appeal, in the case of Mr. E. Bartlett's importation of bark, per barque St. Joseph, from Arica, we beg leave respectfully to notify you, that we require of this gentleman the production of all correspondence and letters and accounts in his possession relative thereto, and that he shall make a deposition before the collector of New York, that the papers he sends are all the documents he has received relating to this shipment.

Very respectfully, M. McB.,
H. W. E.

Messrs. Birckhead & Pearce.

The appraisers now state, that this letter was written to enable them to ascertain if they had committed any error or mistake in their opinion, and to enable them to review and correct the same, if erroneous.

On the 11th October, Mr. Birckhead declined to furnish the papers asked by the appraisers, in their letter of the 6th, directed the appeal to the merchant appraisers to be withdrawn, proposed to pay the additional duty, except the twenty per cent., as assessed by the appraisers, and if this were declined, instructed Birckhead & Pearce to pay the duties under protest. This is the letter:

New York, 11 October, 1849.

Messrs. Birckhead & Pearce, Baltimore.

Dear Sirs: I have yours of 9th and 10th instant. I return the debenture certificate endorsed. In looking more carefully to the requisition of your appraisers of bark, per St. Joseph, I find that I shall have to have copied and translated a mass of correspondence from January last, when it was shipped, to August; for reference is made to it in all my letters from Pinto & Co. and Alsop & Co., in order the more fully to explain Pinto & Co.'s mode of invoicing the bark. I shall have to present a series of documents, commencing in 1847, with their contract with the Bolivian government, proving its actual cost to be about $60 per quintal; all these are necessary to make out my own case, and I am unwilling to present anything less than all the documents. I do not see, however, what use they can be of, at present, to the appraisers, who have made up their valuation of the bark and made a return to the collector. I shall, therefore, defer the presentation of my documents for another tribunal, and, not to lose more time in delivering the bark to the purchasers, I wish you to inform the collector that, by my instructions, your appeal is withdrawn; and that you are prepared to pay, under protest, whatever duties may be exacted on the bark. You will then please send to me in bond what has been so directed, and deliver the remainder, as already ordered. At leisure, we can then test the question of this exaction.

The appraisers have been misinformed of the value of bark at Arica, in January last; after the large sales I made here in March and April were known, it never rose there above seventy-five to eighty cents, and if any small parcels were, at any time, smuggled to the coast and sold at that, or even a higher price, it was no guide to its value.

If a resort to the courts can be avoided, by having the valuation fixed at a rate not imposing the additional duty of twenty per cent., I shall be glad, for I have no disposition to engage in a law-suit. My immediate want, however, is the bark, and I will take my chance of having justice done, by paying all that is now asked, under protest. You can draw on me, at sight, for what funds may be required. I credit you $111 03, for proceeds of C. Keener's draft of $114 96.

Yours, Edwin Bartlett.

Some further correspondence occurred, in all of which the appraisers insisted upon the correctness of their views, and adhered to their original opinion. Some part of the cargo by the San Josef was entered for consumption, and some for exportation. Mr. Bartlett being desirous of having the latter portion trans-shipped to New York, the collector before he would permit this to be done, insisted upon receiving all the duties thereon, including the twenty per cent. additional, which was also paid under protest. The papers called for by the appraisers in their letter of the 6th October, have not been furnished, even upon the trial.

The counsel for the plaintiff contends:

1. That the invoice valuation of the goods is deemed the true value until evidence be offered to show this valuation to be erroneous.

2. That the only method of correcting this valuation is by showing a valid appraisement according to law.

3. That the appraisement, in this case, was not a valid one.

4. That the refusal of the said plaintiff to furnish the papers called for by the appraisers did not affect his interest, but that the appraisement was erroneous.

5. That having exported some of this bark, he is entitled to the debenture upon such exportation, including the twenty per cent. he paid as a penal infliction, for an attempt to defraud the revenue laws of the United States.

The first proposition may be conceded to the plaintiff, and the question occurs, was the appraisement in this case a valid one? I do not think the secretary of the treasury had the power of fixing a chemical analysis of bark, as the only test of its dutiable value, in the manner he attempted to do, in his circular of 2d November 1848; although the contract of Pinto & Co., regards this as one method of determining the relative values of bark. The law of congress fixes the duties upon the market value at the port of exportation; and this can certainly not mean that a purchaser of this commodity shall, when he goes to buy, carry with him a chemist to fix the exact quantity of sulphate of quinine contained in the thing purchased; but he must, and can only look at the fair market value of the article among those trading in it at the place of exportation; he can only be required to adopt the methods usually adopted by merchants in making purchases. Still, the appraisers, when they suspect a wrong done to the government, have a right to employ this means as a test, by which, with the other knowledge and information in their power, and to be procured by them, they may be enabled to arrive at a correct estimate of the true value of the article imported. Here, too, when the appraisers, having seen the two articles, are unable to form a judgment with regard to their value, they had a right to resort to this mode of ascertainment, and with this information before them, they could legitimately come to the conclusions they have reached.

But, supposing I am wrong upon this subject, the party by withdrawing his appeal, and refusing to produce the papers called for, has fixed the correctness of the appraisement. The appraisers certainly had the right to call for these papers, whether with the view of correcting their own judgment, if erroneous, or of laying them before the merchant appraisers, in the event of a prosecution of the appeal.

To refuse to produce papers, admitted to be in a party's possession, always raises the strongest inference that those papers, if produced, would operate against the person holding them. In government claims, this refusal almost amounts to evidence of fraud. The act of congress makes it, in such a case as this, conclusive proof that the papers, when produced, would be demonstrative against the pretensions of the party having them in his possession. The act makes no restriction as to the time when these papers may be called for; it does not designate who shall make the demand, and I see no reason why the demand made in this case was not properly made, and by the proper officers.

The next question then is, to what amount of debenture is the party entitled in this case, upon the bark which he had exported? Here there is an increase made by the appraisers of about fifteen per cent. upon the invoice value of the cargo. The consequence of this appraisement is, that a penal exaction of twenty per cent. is imposed upon this cargo, by way of punishment for the attempt upon the revenue laws of the country. Here are two distinct things, one is an ascertainment of actual value, the other the penal consequence flowing from this ascertainment of real value; the first fixes the actual value upon which, if the party had entered the goods at the price so fixed, the duty would have been paid; it fixes the value of the goods on which the ad valorem duty is to be charged; this duty is affected by the increase or decrease of such value. But the second is quite another affair; if the appraisers fix the increased value at $11 25, or fifty per cent. over the invoice, the same twenty per cent. can be charged; the one fluctuates according to the judgment of

the appraisers, they have the right of determining what it shall be; the other is a fixed and settled per-centage established by the act of congress.

If upon this twenty per cent. assessment, a party would have a right to claim a debenture, the party offering might defeat this provision by an exportation of the articles in regard to which he had offended. I, therefore, think that the plaintiff is not entitled to any drawback upon the exportation of this bark, beyond the duty which would accrue if the goods had been entered at the price fixed by the appraisers as their true value.

Verdict for defendant.

[NOTE. Upon appeal the supreme court affirmed the judgment, upon the grounds, with others, that the appraisers had power to require the production, on oath, of all letters, accounts, or invoices relating to the goods imported; that the direction of the chemical examination, though perhaps improper, did not destroy the validity of the appraisement; that the importer having appealed, from its appraisement on withdrawal of the appeal, and refusal to furnish the letters called for, the appraisement stood good; and that the importer was not entitled to the 20 per cent. additional duty assessed under Act July 30, 1846, § 8, (9 Stat. 43,) as a drawback upon re-exportation. Bartlett v. Kane, 16 How. (57 U. S.) 263.]

Case No. 1,078.

BARTLETT v. MERCER et al.

[8 Ben. 439.] [1]

District Court, S. D. New York. June Term, 1876.

BANKRUPTCY—ACTION BY ASSIGNEE TO SET ASIDE FRAUDULENT CONVEYANCE—MORTGAGES—CONSIDERATION.

1. G. M. and his sister J. M., in 1864, conveyed a farm which they owned jointly, for $4,000. G. M., with the consent of J. M., received all the purchase money and invested a part of it in his own name in two bonds and mortgages and the rest of it in another farm. The two lived together for many years, keeping no hired help, and whatever money each expended being expended for the joint benefit and support of both. No accounts were kept between them, and J. M. had no evidence of indebtedness from G. M. In August, 1870, suits were brought against G. M., for debts growing out of a mercantile business which he was carrying on. He made up an account, treating J. M. as entitled to one-half of the $4,000, and to one half of $1,500 worth of personal property which he had in 1864, and to interest for six years and more, and to $600 for her labor and services for six years; and on August 20, 1870, he conveyed to J. M., in consideration of the amount due by such account, the two bonds and mortgages and the farm which he had bought. In April, 1871, G. M. was adjudicated a bankrupt, and the assignee filed a bill to set aside the conveyance of the bonds and mortgages and of the farm. *Held*, that, on the evidence, J. M. had always regarded G. M. as absolute owner of all the property, real and personal, which stood in his name, and over which he had exercised ownership and control and which he had treated as his own.

2. That, in the absence of any contract, that G. M. should pay her for her services, she had no claim on him for such services, while they lived together.

3. That the conveyances, therefore, were made without valid consideration and with intent to hinder and defraud the creditors of G. M., and must be set aside.

In equity. This was a suit in equity by [Ebenezer F. Bartlett] the assignee in bankruptcy of George Mercer, to set aside a conveyance by the bankrupt to his sister, Jane Mercer, of a farm in Columbia Co., N. Y., which conveyance was executed on August 20th, 1870, and to set aside two assignments made by him at the same time of two bonds and mortgages held by him. George Mercer was adjudicated a bankrupt on the 22d day of April, 1871. [Decree for plaintiff.]

Matthew Hale, for complainant.

S. L. Magoun, for defendants.

BLATCHFORD, District Judge. There must be a decree for the plaintiff in this case. The testimony is satisfactory to the point, that the conveyance of the farm to Jane Mercer by George Mercer, who was her brother, on the 20th of August, 1870, and the transfer to her by him on the same day of the two bonds and mortgages, one for $1,500 and the other for $1,100, were made without valid consideration and with intent to hinder, delay and defraud his creditors. Although Jane Mercer held the title jointly with George Mercer to the farm which they sold and conveyed in 1864, yet she permitted George Mercer to receive the entire price of it, $4,000, and to invest a part of it, in his own name, in the two bonds and mortgages above referred to, and the rest of it, in his own name, in the farm which he so conveyed to her in 1870. From 1864, she made no claim to any interest in those bonds and mortgages, or in the farm, so far as appears. The interest on the bonds and mortgages seems to have been collected from time to time by George Mercer, and treated as his own. The farm seems to have been worked as the property of George Mercer, its produce sold and received by him, and his claim of ownership to it, he having the legal title to it, was asserted by him when he was inquired of as to his property. No accounts between himself and Jane Mercer were kept by either of them. She held no evidence of indebtedness against him, and he does not seem to have made known to any one that he was a debtor to Jane Mercer in respect of any matter. Suddenly, after suits had been brought against him for debts growing out of the mercantile business he was carrying on, he hurriedly makes up an account between himself and Jane Mercer, treating her as entitled to one-half of the $4,000, and to one-half of $1,500 of personal property which he had in 1864, and to $1,250 for six years' and more interest on such $2,750, and to $600 for her labor and services for six years, being a total of $4,600, for

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

which he conveyed the farm to her at $2,000, and assigned the two bonds and mortgages at $2,600. At that time his debts in his mercantile business amounted to between $7,000 and $8,000. His assets in such business nominally exceeded that amount by a very small margin, and, besides that and the property he so transferred to Jane Mercer, he had only $1,300 of property, which he proceeded a few days afterwards to transfer to another relative, a nephew, by a transaction which is the subject of another suit, argued with the present one. There is no evidence that she had any title or claim to the one-half of the $1,500 of personal property. She and her brother had lived together for many years, keeping no hired help; whatever money each expended was expended for the joint benefit and support of both, with the assent of both; and there is no evidence that either considered any money that was expended by either as raising an indebtedness on the part of either to the other, or that Jane Mercer did not always regard her brother as the absolute owner of all the property, real and personal, which stood in his name and over which he exercised ownership and control, and which he treated as his own. So, too, in the absence of any contract, actual or recognized, during the time she lived with her brother, that he should pay her for any services, she had no lawful claim on him for any compensation for any services. It is quite apparent, from the evidence, that the moving cause for the transfers to his sister, was his apprehension of approaching pecuniary trouble and his desire to keep his property from going to his creditors.

There must be a decree setting aside the conveyance and transfers, with costs, with a reference to a special master to take an account, as against Jane Mercer, of the property which she received, giving her proper credits and taking properly into account the $80 note she gave to her brother, and she must convey to the plaintiff such of the property as she still has.

Case No. 1,079.

BARTLETT et al. v. ROGERS et al.

[3 Sawy. 62.][1]

Circuit Court, D. California. June 8, 1874.

WILLS — FOREIGN PROBATE — OBJECTION—WHEN TAKEN — LIMITATION — NOTE PAYABLE ON DEMAND—ACCORD AND SATISFACTION.

1. The probate of a will and issue of letters testamentary in the state of New York, do not authorize the executors to maintain actions for the collection of assets of the estate of the deceased in the state of California.

2. The objection may be taken at the hearing, where it does not appear on the face of the complaint where letters are issued, and issue has been joined on the allegation of the complaint that letters testamentary have been duly issued to the plaintiffs.

3. A note payable on demand, whether with or without interest, is immediately due. An action may be maintained upon such a note without previous demand, and the statute of limitations begins to run from its date.

4. But if there be any exception in the case of a note bearing interest, a note which does not in terms call for interest, is not within the exception.

5. Where a debtor transfers specific property to trustees for the use of his creditors, under a mutual agreement signed by the creditors, whereby they accept the property in full satisfaction and discharge of their several demands, there is a valid accord and satisfaction.

6. Such accord and satisfaction *held* good as against the indorsee of a promissory note payable on demand, given by the debtor to one of the parties to said agreement, who held no other demand against the debtor, where it did not appear that the transfer of said note was made before the date of said accord and satisfaction.

[At law. Action by Robert S. Bartlett and another, as executors, etc., of Bartlett, against Henry S. Rogers and others, upon a promissory note. Judgment for defendants.]

Earl Bartlett, for plaintiffs.

Campbell, Fox & Campbell, for defendants.

SAWYER, Circuit Judge. The will of Bartlett was admitted to probate, and letters testamentary thereunder issued to plaintiffs by the surrogate's court in the county of Broome, state of New York. The will has never been admitted to probate, nor have letters testamentary ever been issued to plaintiffs in the state of California. It is well settled that the probate of a will and the issue of letters testamentary in one state, do not authorize the executors so appointed to maintain an action as such in another state. Doolittle v. Lewis, 7 Johns. Ch. 46; Morrell v. Dickey, 1 Johns. Ch. 156; Williams v. Storrs, 6 Johns. Ch. 353; Brown v. Brown, 1 Barb. Ch. 195; Vroom v. Van Horne, 10 Paige, 549; Mellus v. Thompson, [Case No. 9,405;] Caldwell v. Harding, [Id. 2,301;] Kerr v. Moon, 9 Wheat. [22 U. S.] 566; Armstrong v. Lear, 12 Wheat. [25 U. S.] 169; Vaughan v. Northup, 15 Pet. [40 U. S.] 1. It is claimed, however, that the objection ought to have been raised by demurrer, and if not so taken, should have been set up specially in the answer, and the objection not having been so taken, it is waived. But it does not appear on the face of the complaint that the will was proved, and the letters issued by a foreign court, or that there had been no probate of the will in the courts of California. The objection seems to go rather to the title of the plaintiffs to the debt sued on, than to their capacity to sue. Kerr v. Moon, 9 Wheat. [22 U. S.] 572. But however that may be, the complaint is either wholly bad, as not stating facts sufficient to constitute a cause of action in their favor, or else the allegation "that said will was duly probated and letters testamentary duly issued to said plaintiffs upon said estate of

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

said Bartlett," is a sufficient allegation that the letters were issued by the proper court to enable the plaintiffs to maintain their action, in the absence of an objection by special demurrer specifically pointing out the defect. In the former case, the objection may be taken at any time under section 434 of the California Code of Procedure. In the latter, issue is taken upon the allegation itself in the answer, and on that issue it is necessary for plaintiffs to show that they were duly appointed by a court competent to confer authority to maintain the action. In Armstrong v. Lear, 12 Wheat. [25 U. S.] 169, the authenticity of the will was admitted, and the question of its effect submitted apparently without objection, yet the court refused to permit the action to be maintained. So in Doolittle v. Lewis, 7 Johns. Ch. 50, the court recognize the propriety of taking the objection "at the hearing," and in Kerr v. Moon, 9 Wheat. [22 U. S.] 566, the objection was taken for the first time at the argument on appeal, although the defect appeared on the face of the bill, and it was argued by the respondent that the objection came too late. But the supreme court held otherwise, and reversed the decree. Id. 570–572. I think this point well taken by objection made to the introduction of the record when offered in evidence, under the issue raised by the answer.

The objection that the action is barred by the statute of limitations is clearly fatal.

The due bill sued on was executed more than twelve years before the death of Tompkins; and Tompkins had been in the state continuously, twelve years after its execution, and before his death.

The statute of California provides that all actions founded upon written instruments shall be barred in four years, and on those executed out of the state in two years. That a note or bill payable on demand, whether with or without interest, is due immediately; that an action may be brought on it as soon as it is made, without previous demand; and that the statute of limitations begins to run from its date, is the law of the state of New York, where the instrument in question was made, as settled by its highest courts there can be no doubt. Wheeler v. Warner, 47 N. Y. 520; Herrick v. Woolverton, 41 N. Y. 581; Howland v. Edmonds, 24 N. Y. 308. The law as settled in California is the same. Brummagim v. Tallant, 29 Cal. 506; Bell v. Sackett, 38 Cal. 409; Ziel v. Dukes, 12 Cal. 482. The statute begins to run as soon as the action accrues. If, then, an action can be maintained upon a note payable on demand, as soon as made, without a previous demand, the right of action must necessarily have accrued at that time, and the statute commences to run at the same point of time. But the note in suit does not purport by its terms to bear interest, and is, therefore, not on its face within the exception relied on, if any such there were. The claim is therefore barred, and the executors were forbidden by the statute to allow it. Code Civ. Proc. § 1499.

I also think the accord and satisfaction shown, is a good defense to the action. Certain property was delivered to trustees in satisfaction of the debts due the various creditors of Tompkins, upon a mutual written agreement among the creditors to receive the property as such and discharge Tompkins. Among the creditors executing the agreement was Denton, the payee of the due bill sued on. Plaintiff's theory, however, is, that the money on the instrument in suit was not due till actual demand was made, and that Denton could not make an agreement for accord and satisfaction, so as to find a holder who received it before due, without notice. But, as we have seen, the instrument was due immediately on its execution, and it does not appear when it came to the possession of Bartlett. It is only alleged that it came to the possession of Bartlett during his lifetime, and this may have been more than ten years after it became due. There was no other debt due from Tompkins to Denton, and there is nothing to show, either in the averments of the complaint, or in the evidence, that Bartlett received the note before the accord and satisfaction.

If I am right upon either of the points discussed, there must be judgment for the defendants, and I think them entitled to judgment on all.

Let judgment be entered for defendants with costs.

Case No. 1,080.

BARTLETT v. RUSSELL.

[4 Dill. 267; 16 N. B. R. 211; 9 Chi. Leg. News, 377; 6 Am. Law Rec. 13; 4 Law & Eq. Rep. 197; 24 Pittsb. Leg. J. 206.] [1]

Circuit Court. D. Colorado. 1877.

BANKRUPT ACT—OFFICE OF PETITION FOR REVIEW —LIEN OF FI. FA. ON GOODS AND CHATTELS.

The statute of Colorado provides that "no writ of fieri facias, or other writ of execution, shall bind the estate of the defendant but from the time such writ is delivered to the sheriff or other proper officer to be executed." Under this statute, an execution on a judgment is a lien on the debtor's property from the time it is delivered to the sheriff to be executed, which will be protected in bankruptcy, and will not be defeated by a petition in bankruptcy, filed after the delivery but prior to the levy of the execution.

[See In re Paine, Case No. 10,673; In re Hull, Id. 6,857; Crane v. Penny, 2 Fed. 187; also, In re Weeks, Case No. 17,350; Goddard v. Weaver, Id. 5,495; In re Wheeler, Id. 17,490.]

In bankruptcy. This was a petition for review, filed by [Albert E.] Bartlett, assignee in bankruptcy of Peabody, to reverse an order of the district court, in bankruptcy,

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 4 Law & Eq. Rep. 197, contains partial report only.]

in favor of the respondent, [Edward] Russell. [Unreported.] The material facts appear in the opinion, orally given, of the circuit justice.

Blake & Jacobsen, for petitioner.
Thomas Macon, for respondent.

MILLER, Circuit Justice. I have given to this case all the consideration I shall have time to give it, and, although there are conflicting authorities upon the subject, I have arrived at a conclusion satisfactory to myself, and will proceed to announce it.

The case is this: The bankrupt was sued in the state court by Edward Russell, who obtained a judgment against him, and fearing that he would probably not make his money otherwise, he obtained an order from the court, and had execution issued and placed in the hands of the sheriff. In about an hour after that was done, the bankrupt filed his petition in bankruptcy, and in about an hour after that the execution was levied upon the personal property of the debtor. While the sheriff was taking an inventory, however, the marshal of the United States made his appearance, and claimed the property under the orders of the district court, and it was delivered to him. Afterwards a petition was filed in the United States district court by Russell, asking that the proceeds of that property, which had been sold, might, as far as was necessary, be appropriated to the payment of this debt, and the district court gave the order, directing that the debt be paid out of the assets, as far as the property levied upon would pay it.

For the reversal of that order, the assignee of the bankrupt had filed a petition here, and the first question is as to the jurisdiction of this court. I have some doubt about that—whether the order of the district court may be reviewed on petition in this way. I have concluded, however, to give the petitioner the benefit of the doubt, since the whole matter seems to have been conducted in a summary way; and I am rather inclined to the opinion that this is one of those questions which may be reviewed by this form of proceeding—which may be called the extraordinary jurisdiction of the circuit court under the bankrupt law.

The question then recurs, whether the order of the district court was correct, that the plaintiff, Russell, had established such a lien on the goods of the bankrupt, seized under the writ of execution, as required that they should be first appropriated to pay his judgment.

The question is one, or ought to be one, upon the local laws of this state, because it is a question whether, under the laws of the state of Colorado, the proceedings which the plaintiff in the original suit instituted for the purpose of making his debt, created such a lien that it should be respected in the bankruptcy proceedings.

But, while you have a statute in this state upon this subject, there are no decisions construing the statute. The counsel, in the argument, referred to no such decisions, and my associate says there have been none in this state upon it. But the statute is one which exists, and has long existed in other states, and is in precisely the same words as the statute of Kentucky and Illinois, and is said to have been copied from the statute of Illinois; and the counsel for the petitioner, in his argument, relies upon the decisions of the state court of Kentucky construing that statute. The statute is: "That no writ of fieri facias, or other writ of execution, shall bind the estate of the defendant or defendants but from the time such writ shall be delivered to the sheriff or other proper officer to be executed." This is a limitation of the common law, by which the goods and chattels of the party were bound from the time the writ was tested.

Now, I cannot go into all the authorities which were referred to the other day in the argument. The argument was an able and exhaustive one, and a great many authorities were cited. The English authorities are in conflict with the authorities in this country. I can only say, in view of the principle of our bankrupt law, that I am of the opinion that there was such a lien as gave to the plaintiff in the action at law the right to appropriate that money to the payment of his debt; and that there was a lien of some kind is not disputed.

Some cases were cited, showing that a subsequent execution, or an execution delivered to the sheriff subsequent to the first one, may appropriate property to the exclusion of the lien established by the first execution delivered to the officer. But that whole subject was reviewed by the supreme court, in the case of Waller v. Best, 3 How. [44 U. S.] 111. That was a case concerning the effect of this statute in the state of Kentucky, and that eminent jurist, Chief Justice Taney, after reviewing the decisions of the state court of Kentucky, uses this language in reference to the decision of the state court in the case of Addison v. Crow, [5 Dana, 271:] "This is the latest decision in the courts of the state to which we have been referred, or of which we are aware, and, as we have already said, it appears to have been well considered. And whatever doubts might before have been entertained, we must, under the authority of this case, regard it as the settled law of the state, that the creditor obtains a lien upon the property of his debtor by the delivery of the fieri facias to the sheriff; that it acquires no additional validity or force by being actually levied, but that the lien is as absolute before the levy as it is afterwards, and continues while the process remains in the hands of the sheriff to be executed."

It does not become me to overrule that decision, and it was upon decisions of the state

of Kentucky that the counsel for petitioner rely to show that the lien was not an absolute one.

I read the above from Curtis's decisions of the United States supreme court, the chief value of which lies in the head notes, and his head notes, although brief, are entitled to great weight, as expressing the result of the case. He says, in the head notes to this case: "In Kentucky, the delivery of fieri facias to the sheriff creates a lien on the debtor's lands, which is as valid before as after a levy." Not only is this case an authority which I do not feel like overruling, but it meets my approval. I think that there is a lien established by the delivery of the execution to the sheriff. The construction of our bankrupt law by the supreme court has tended very much of late years to give effect to liens established by judicial proceedings, in which there was no collusion, no summary process, but a lien obtained by the orderly and regular course of judicial proceedings, and not by attachment; and such liens will be respected by the federal courts in the administration of the bankrupt law.

The judgment of the district court in this case is affirmed.

Affirmed.

BARTLETT. (UNITED STATES v.) See Case No. 14,532.

Case No. 1,081.

BARTLETT v. WILLIAMS.

[Holmes, 229.][1]

Circuit Court, D. Massachusetts. Aug. Term, 1873.

COLLISION—SAILING VESSELS—CHANGE OF COURSE.

1. A schooner on the starboard tack overtook, and passed a short distance to leeward of, a brig, and when three or four lengths in front came in stays, which brought her across the bows of the brig, and rendered a collision inevitable. Just before actual collision the course of the brig was changed about a point. *Held*, that the schooner was in fault for coming in stays under such circumstances.

[See The Alaska, Case No. 130.]

2. That the brig was not in fault for changing her course, according to the best judgment of the master, after the collision had become inevitable through the fault of the schooner.

Admiralty appeal [by Enoch Bartlett, claimant of the schooner William G. Bartlett] from a decree of the district court of Massachusetts awarding damages to the appellees [Sheldon Williams and others, owners of the brig Richard and Torrey] in a case of collision. [Affirmed.] The facts are stated in the opinion.

R. H. Dana, Jr., and S. J. Thomas, for appellant.

J. C. Dodge, for libellants.

SHEPLEY, Circuit Judge. I find the facts in this case to be that the brig Richard and Torrey, the property of the libellants, on the 7th of July, 1871, was in the Vineyard sound on a voyage from Calais, Me., to Providence, R. I. The schooner William G. Bartlett, on the same day, was passing through the sound, bound for Philadelphia. The weather was clear. The wind was ahead for vessels passing through the sound to the westward. Before the collision, both vessels were beating, and both had been for some time on the starboard tack. The schooner had been astern of the brig, but she outsailed her, and overtook and got ahead of her. She, by reason of her rig, would lay a point nearer the wind than the brig, and worked to windward faster than the brig. The schooner passed the brig on her lee (port) side; and, after passing her a short distance, not probably more than four or five times her length, came in stays. This brought the schooner across the brig's bows, and made the collision inevitable. When the schooner tacked, if she saw the brig (about which there is much conflict in the testimony) she evidently intended to retain the advantage she had gained in distance, and to pass to the windward in a course which brought her across the bows of the brig. It is contended on the part of the schooner that she intended to go to the leeward and under the stern of the brig, and that the brig changed her course and fell off, and that, if the brig had kept her course, she would have ranged ahead of the schooner, and the collision would have been avoided.

I am not able, upon a careful review of the testimony, to come to this conclusion. The brig's wheel was put hard up immediately before the collision, and the brig fell off about a point; but this was not done until the collision would have been inevitable if the brig had kept her course. The schooner had wrongfully come in dangerous proximity to the brig, and across her bows. There was no time for deliberation. The course adopted was supposed to be the most judicious one under the circumstances; and if it were not so, as the order was given in the exercise of the best judgment of the master, and if he had kept his course there was no reasonable ground to believe the schooner would have passed her, I do not think, on the best consideration I am able to give the testimony, that the brig should be adjudged in fault; although I do not wish to give countenance to any relaxing of the rule, that the vessel whose duty it is to keep her course should not change it before a collision is inevitable. At the time of the change of the course by the brig, the schooner was in stays, and could not change her course, because she had no headway. She was helpless; and the brig saw that all that could be done to avoid the collision must be done by the brig.

Decree of district court affirmed, with interest from date of decree, and costs.

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

Case No. 1,082.

BARTLETTE v. CRITTENDEN et al.

[4 McLean, 300.] [1]

Circuit Court, D. Ohio. July Term, 1847.

LITERARY PROPERTY—DEDICATION—ABANDONMENT.

1. By the common law, a party had a property in his own manuscripts.

[Cited in Boucicault v. Fox, Case No. 1,691; Henry Bill Pub. Co. v. Smythe, 27 Fed. 926.]

2. And if they be in the possession of other persons, who are about to make an improper use of them, a court of chancery would inhibit such use.

[Cited in Boucicault v. Fox, Case No. 1,691; Henry Bill Pub. Co. v. Smythe. 27 Fed. 926.]

3. The principles in regard to a manuscript, may be applied to the invention of a machine.

4. It belongs to the inventor, and it will continue to be his property until he shall give it the public or abandons it.

5. Under our present law, a use of a machine for less than two years, before the application of a patent shall be made, does not invalidate the right.

6. A person who uses his own manuscripts for the purpose of instructing others, does not thereby abandon them to the public.

[Cited in Keene v. Wheatley, Case No. 7,644; Boucicault v. Hart, Id. 1,692.]

7. Nor does he abandon them, when his pupils are permitted to take copies.

[Cited in Boucicault v. Hart, Case No. 1,692.]

8. Such copies being intended for the purpose of instruction, as used, can be applied to no other purpose.

9. In the use, the intention of the owner of the manuscript can not be perverted or extended.

[In equity. Bill by R. M. Bartlette to restrain A. F. Crittenden and others from infringement of copyright. Injunction granted.]

Mr. Walker, for complainant.

Storer & Gwynn, for defendants.

OPINION OF THE COURT. This is an application to enjoin the defendants from printing, publishing, or selling a work denominated "An inductive and practical system of double-entry book-keeping, on an entirely new plan," on the ground that a material part of the manuscript, and the arrangement, were the work of the complainant, and were pirated from him by the defendants. It appears that the complainant for twelve years has been engaged in teaching the art of book-keeping, in the city of Cincinnati and other places. That he had reduced to writing the system he taught, on separate cards for the convenience of imparting instruction to his pupils; and that he permitted his students to copy these cards, with the view to their own advantage and to enable them to instruct others. That Jonathan Jones, being qualified in the school of the complainant, as a teacher, and having copied the manuscripts of the complainant, engaged, in connection with him, to teach a commercial school in St. Louis. While thus engaged, A. F. Crittenden, one of the defendants, entered the school at St. Louis as a student, and was permitted to copy the manuscripts of the complainant, in the possession of Jones; and from those manuscripts, with certain alterations, he made up the first ninety-two pages of the book, under the above title, which was published in Philadelphia, in connection with his brother, by E. C. & J. Biddle, two of the defendants, in the present year. The answers of the defendants either deny the allegations of the bill, or do not admit them, and call for proof of the facts stated. On this motion for an injunction the merits of the case have been discussed, with much research and ability.

This application is made under the 9th section of the act of congress of the 3d of February, 1831, [4 Stat. 438,] which provides, that "any person or persons who shall print or publish any manuscript whatever, without the consent of the author or legal proprietor first obtained, etc., shall be liable to suffer and pay to the author or proprietor, all damages occasioned by such injury," etc. And power is given to grant an injunction to restrain the publication. The first section of the act of the 30th of June, 1834, [4 Stat. p. 728, c. 157,] requires all deeds or instruments in writing for the transfer or assignment of copy-rights, to be acknowledged and recorded. At common law, independently of the statute, I have no doubt, the author of a manuscript might obtain redress against one who had surreptitiously got possession of it. And on general equitable principles, I see no objection to relief being also given, under like circumstances, by a court of chancery. But this is a proceeding under the statute.

The defendants contend that the complainant, by suffering copies of his manuscripts to be taken, abandoned them to the public. The principle is the same, it is alleged, in regard to copy-rights and patents. And that a consent or permission of the author to use the manuscripts, is as fatal to his exclusive right, as the consent of the inventor to use the thing invented. Rundell v. Murray, [Saunders v. Smith,] 3 Mylne & C. 711, 728, 730, 735; Millar v. Taylor, 4 Burrows, 186, [2303;] Barfield v. Nicholson, 2 Sim. & S. 1. To show the analogy between copy-right and patents, the defendants cited Whittemore v. Cutter, [Case No. 17,601;] Mellus v. Sillsbee, [Id. 9,404,] in which the question considered was, did the inventor suffer the thing patented to go into public use without objection? Walcot v. Walker, 7 Ves. 1; Platt v. Button, 19 Ves. 448; Wythe v. Stone, [Case No. 18,107.]

The 7th section of the act of the 3d of March, 1839, [5 Stat. 354,] declares that a purchaser from the inventor of the thing invented, before a patent is obtained, shall continue to enjoy the same right after the

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

obtainment of the patent as before it; and that such sale shall not invalidate the patent, unless there has been an abandonment, or the purchase has been made more than two years before the application for the patent. Before this act, a sale of the right would have been an abandonment to the public by the inventor. The decisions, therefore, referred to, do not apply to cases arising under this statute. A sale of the right is not an abandonment, if made within two years before the application for a patent, as the law now stands; and it may be a matter of some difficulty, within the above limitation of two years, to determine what act shall amount to an abandonment. Where the act is accompanied by a declaration, to that effect, there can be no doubt; but if a sale be not an abandonment, a mere acquiescence in the use of the invention would seem not to be. Within the two years, to constitute an abandonment, the intention to do so must be expressed or necessarily implied from the facts and circumstances of the case. It is a question of intention, as to the extent of the license, of which we must judge, as we are called to do in other cases. But the limitation of two years does not apply in this case, should a copy-right be considered in principle identical with an invention of a machine, as more than two years have elapsed since copies of the complainant's manuscripts were taken with his consent.

The question arises upon the facts stated, and must be decided on general principles. In the first place, there was no consent of the complainant, that his manuscripts should be printed. That they were not prepared for the press is admitted. They were without index or preface, although, as alleged, they may have contained the substantial parts of the complainant's system, which, in due time, he intended to print. Copies of the manuscripts were taken for the benefit of his pupils, and to enable them to teach others. This, from the facts and circumstances of the case, seems to have been the extent of the complainant's consent. It is contended that this is an abandonment to the public, and is as much a publication as printing the manuscripts. That printing is only one mode of publication, which may be done as well by multiplying manuscript copies. This is not denied, but the inquiry is, does such a publication constitute an abandonment? The complainant is no doubt bound by this consent, and no court can afford him any aid in modifying or withdrawing it. The students of Bartlette, who made these copies, have a right to them and to their use as originally intended. But they have no right to a use which was not in the contemplation of the complainant and of themselves, when the consent was first given. Nor can they, by suffering others to copy the manuscripts, give a greater license than was vested in themselves. In England, if an invention be pirated and given to the public, it prevents an inventor from obtaining a patent. But this is not the construction of our laws. If an inventor of a machine sell it or acquiesce in its public use, not within the limitation of the two years, he forfeits his rights. He must be diligent in making known and asserting his right, where it has surreptitiously got into the possession of another, or he abandons it. This was the settled rule before the act of 1839, and it would seem that cases which do not come within the provisions of that act, must be governed by the old rule. No length of time, where the invention does not go into public use, can invalidate the right of the inventor. He may take his own time to perfect his discovery, and apply for a patent. And the same principle applies to the manuscripts of an author. If he permit copies to be taken for the gratification of his friends, he does not authorize those friends to print them for general use. This is the author's right, from which arises the high motive of pecuniary profit and literary reputation. When the inventor consents to the construction and use of his machine, he yields the whole value of his invention. But an author's manuscripts are very different from a machine. As manuscripts, in modern times, they are not and can not be of general use. Popular lectures may be taken down verbatim, and the person taking them down has a right to their use. He may in this way perpetuate the instruction he receives, but he may not print them. The lecturer designed to instruct his hearers, and not the public at large. Any use, therefore, of the lectures, which should operate injuriously to the lecturer, would be a fraud upon him for which the law would give him redress. He can not claim a vested right in the ideas he communicates, but the words and sentences in which they are clothed belong to him.

It is contended that the manuscripts are incomplete, and if published in their present state, could not be protected by a copy-right. That an unfinished manuscript or book, which gives only a part of the thing intended to be written or published, can be of no value, and if printed no relief could be given, as no damage would be done. That the parts of a machine, in the process of construction, if pirated, would give no right to an injunction by the inventor. If the manuscript or machine referred to consisted of a mere fragment, which embodied no principle and pointed to no design, the piracy of it would afford no ground of relief. But such is not the character of complainant's manuscripts. They may not be complete for publication. Some explanatory notes may be wanting, to assist the reader in comprehending the system. This information was communicated by lectures, and for the purposes of instruction in that mode, the notes were unnecessary. But the

cards contain the frame work of the system. The substratum is there, and so exemplified as to show the principle upon which it is constructed. That it was valuable, is shown, from the fact of the cards having been used by the defendants in teaching the system, and in publishing them as they have done.

The facts show the piracy beyond all doubt, and that it was done under circumstances which admit of little or no mitigation. The cards, as they well knew, had been, for a number of years, and were then being used by the complainant to instruct pupils. They had learned all they knew on the subject from the complainant. They probably knew that he intended to publish his plan. But this would, to some extent, at least, supersede the necessity of personal instruction. In disregard of these considerations, and of the obligations the defendants owed to the complainant, the publication was made.

The court will allow an injunction unless a satisfactory arrangement shall be made between the parties.

[NOTE. For subsequent litigation between the same parties involving the same subject-matter, see Bartlett v. Crittenden, Case No. 1,076.]

Case No. 1,083.

BARTLETTE v. The VIOLA.

[3 Chi. Leg. News, 245.]

District Court, D. Minnesota. April Term, 1871.

MARITIME LIENS — MASTER'S WAGES—PILOTAGE—SUPPLIES AND REPAIRS—MORTGAGE ON VESSEL.

[1. The master has no lien upon a vessel for his wages.]

[2. The remedy of the master of a vessel who seeks to enforce payment of wages as acting pilot, where he was not pilot in fact, but performed pilot's duties, is in personam, and not in rem. The Larch, Case No. 8,085, followed.]

[3. The remedy of the master for advances for supplies and repairs is also in personam. The Larch, Case No. 8,085, followed.]

[4. One who takes command of a vessel as master continues as such until the completion of the voyage, unless superseded, and cannot assert a lien for additional pay for standing on watch as pilot.]

[5. While a mortgage on a vessel cannot be foreclosed in equity, nor delivery of the boat decreed to the mortgagee, yet the proceeds of the sale may be applied in extinguishment of the mortgage.]

[In admiralty. Libel by L. D. Bartlette against the steamboat Viola for libellant's wages, for additional pay as pilot, and for advances for supplies and repairs. Libel dismissed.]

NELSON, District Judge. The libellant is endeavoring to assert a lien upon the boat for master's wages and also for additional pay in standing one watch as pilot, and for advances made for necessary repairs and supplies. There can be no lien upon the vessel for master's wages. The contract is made upon the personal responsibility of the owners. 1 Paine, 73, [The Grand Turk, Case No. 5,683;] 1 Newb. Adm. 176, [Dudley v. The Superior, Case No. 4,115;] Bee, 31, 348, [Castello v. Bouteille, Case No. 2,504; Forbes v. The Hannah, Id. 4,925;] 3 Mason, 255, [The Packet, Case No. 10,654.] Nor can the master enforce in a proceeding in rem, the collection of his wages as acting pilot. He was not the pilot in fact, but performed pilot's duties while master of the vessel. He must resort to a suit in personam for his pay as acting pilot, and has no lien on the vessel for the same. Advances made by the master for repairs and supplies are upon the same footing. The authorities are not altogether uniform upon this subject, but this court will follow the decision in The Larch, [Id. 8,085.] See, also, Ware, 104, [The Mary Anne. Case No. 9,195.]

In any view of the case the libellant was master of the "Viola" until the completion of the voyage and the return of the vessel to her home port, unless superseded. There is no evidence of his having been discharged. He was ordered to lay the boat up late in the fall at St. Louis, on account of the difficulty in returning to Hudson, from whence the vessel departed, and where she was owned. Ordinarily, being satisfied upon these points we should dismiss the libel and restore the boat to the party from whom she was taken by the marshal, but in this case we have some seven or eight claimants intervening. The boat has been appraised under the 10th admiralty rule, and restored to the claimant from whose possession she was taken. The appraised value was satisfactory to all parties, and a stipulation has been given. We must therefore order the payment into court of the amount of this stipulation, and distribute it to the intervening claimants that in our opinion are justly entitled to it.

Without commenting upon the claims of the other parties, and they are numerous, the owners of the boat being deeply involved, and the contest in the state courts for the possession of the property being vigorous and protracted—we are of the opinion that the First National Bank of Hudson, Wis., as trustee, represents a claim which is the earliest lien and entitled to be first paid out of these proceeds in court. This claim is a mortgage of the boat, executed by the owners on the 13th day of November, A. D. 1866, and filed on the same day in the office of the deputy collector of customs of the port of St. Paul, in this district, where she was enrolled. It was given for a valuable consideration, and the owners have defaulted in the condition upon which it was executed. It is true the admiralty court can neither entertain a suit to foreclose the mortgage, nor can it decree a delivery of the boat to the mortgagee; but the fund in the registry, representing the boat, which had been sold

by authority, can be held under the mortgage, and we are bound to apply it towards extinguishing this lien. The money must, therefore, be appropriated towards liquidating this claim. [Schuchardt v. Babbidge,] 19 How. [60 U. S.] 239; 2 Woodb. & M., 118, [Deshon v. The Medora, Case No. 3,820.] The stipulators are ordered to pay into court the sum of $2,000, and the clerk will pay the same to the proctor for this claimant, after deducting charges of the officers of the court, if any exist against the boat, and the libel is dismissed with costs.

BARTON, In re. See Case No. 1,085.

Case No. 1,084.

BARTON v. ANTHONY.

[1 Wash. C. C. 317.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

MARINE INSURANCE — CUSTOM AND USAGE—ARBITRATION AND AWARD—EXCEPTIONS TO AWARD.

1. It is the custom in Philadelphia, that if an order be given to insure $12000, the agent should insure a greater sum, in order to cover the amount to be insured. By the custom, he cannot insure to cover premium, in the same policy with that to cover the value.

2. Evidence not laid before referees, cannot be exhibited to the court on exceptions to the report.

[See Hurst v. Hurst, Case No. 6,930; Frick v. Christian Co., 1 Fed. 250.]

[At law. Action by Seth Barton against Anthony for breach of an agreement to effect marine insurance. Plaintiff excepts to the award upon arbitration. Exceptions overruled and judgment upon the award.]

This case came on upon exceptions to the report of referees. The plaintiff, living in Baltimore, in May, 1798, wrote to the defendant in Philadelphia; ordering him to insure 12000 dollars on a certain vessel, she being valued at that sum; and 9000 dollars on the freight, valued at that sum; and to insure sufficient to cover the premium. The defendant effected an insurance, in Philadelphia, on the vessel, for 14100 dollars, the exact amount of the 12000 dollars, and the premium paid on it. Within a few days after this, the plaintiff came to Philadelphia, and went on to New York, where he effected insurance on the freight. There was no evidence laid before the referees, to show either that the insurance on the vessel was communicated to the plaintiff, or that he objected to the conduct of the defendant, until after notice of the loss in August. But the referees presumed that the plaintiff knew what the defendant had done, and acquiesced; although he had insured 900 dollars short of what he was ordered. Mr. Fitzsimmons, one of the referees, was examined and deposed to the above facts: he saw that the plaintiff's order was confused, but had it been laid before the office, they would have understood it. That to get at the sum which should have been insured, to cover the value and premium, you should say, if $80 : 100 : : 12000, the result of which would be 15000 dollars. That by the custom, you cannot insure to cover premium, in the same policy with that to cover the value. Evidence, not laid before the referees, was spoken of by the plaintiff's counsel.

BY THE COURT. In the case of Hurst v. Hurst, [Case No. 6,930,] it was laid down, that on exceptions to a report, no new evidence be received; and that the court will not set aside a report, unless for plain mistakes in matters of law or fact. In this case, the referees presumed, that after the defendant had effected the insurance on the vessel, the plaintiff must have known what he had done, and had acquiesced in it, and we think the referees had very strong grounds on which to build this presumption. Within a few days after the policy was effected, the plaintiff was in Philadelphia; that he inquired how his order had been executed, cannot be doubted; because, otherwise, he would not have himself insured the freight in New York. The inquiry having then most certainly been made, it is not to be doubted but that he was informed not only of what had not been done, as of that which had. He ought then to have objected, and not lie by, until he received notice of the loss. Exceptions overruled, and judgment on the award.

BARTON, (PRENTISS v.) See Case No. 11,384.

Case No. 1,085.

BARTON et al. v. TOWER.

[5 Law Rep. 214; 1 Pa. Law J. 209; 1 N. Y. Leg. Obs. 8.]

District Court, N. D. New York. July Term, 1842.

BANKRUPTCY — PETITION BY CREDITOR HOLDING CLAIM NOT DUE—ASSIGNMENT BY TRADER—ACT OF BANKRUPTCY.

1. It is not a valid objection to a petition in invitum, by a creditor, that his claim is not yet due.

[Cited in Linn v. Smith, Case No. 8,375; In re Alexander, Id. 161.]

2. An assignment by a trader of his property, whether made in contemplation of bankruptcy or for the purpose of giving a preference, or not, is void, and, of itself, an act of bankruptcy.

[Cited in Gassett v. Morse, Case No. 5,264.]

3. Where two partners made an assignment of their property, with a direction, that it should be distributed among their creditors by the as-

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

signment, "in the same manner as if the same were in the hands of an assignee under the bankrupt act of the United States, by virtue of proceedings duly had in bankruptcy," it was *held*, that such assignment was an act of bankruptcy, and was void.

In bankruptcy. This was a petition by Elliphas B. Barton and William Osborn, that Julius Tower be declared a bankrupt. The petition set forth, that Tower was a merchant; that he owed not less than $2000; that he owed to each of the petitioning creditors, severally, not less than $500, to wit, the sum of one thousand dollars besides interest, for which they severally held his promissory note, made jointly with him and other persons. Both of these notes were stated to have been made before the commission of the acts of bankruptcy charged, and one of them was due, the other being payable in September next. The petition charged Tower with having, on the second and fifth of April last, executed three several fraudulent conveyances of certain valuable real property, and with having also, on the 30th day of the same month, in conjunction with Charlemagne Tower, executed a fraudulent conveyance or assignment of all his property for the benefit of his creditors. On the day appointed for the hearing, Tower filed his objection, under oath, to a decree of bankruptcy. He expressly admitted all the facts set forth in the petition, except that he denied that the several conveyances and assignment mentioned in the petition were fraudulent; the same having as he alleged, been executed in good faith. Annexed to the objections was a copy of the general assignment, which purported to be of all the joint property of Julius and Charlemagne Tower, as ex-partners in business, under the name and style of Reuben Tower & Sons, and of all the separate property of each of them for the benefit of all the creditors without preference. There was a direction in the deed of assignment, that all their property and the proceeds thereof should be divided and distributed among their creditors by the assignees, "in the same manner as if the same were in the hands of an assignee under the bankrupt act of the United States, by virtue of proceedings duly had in bankruptcy."

M. S. Myers, for petitioning creditors.
Mr. Bacon, for the debtor.

CONKLING, District Judge. One of the objections urged against a decree of bankruptcy in this case is, that the debt of one of the petitioning creditors is not yet due. Whatever doubt may have formerly been entertained in this court, in deference to decisions under the former bankrupt law of England, whether a creditor whose debt was not yet due, could become a petitioning creditor, I cannot now perceive any valid ground for such doubt. There is nothing in the language of the act which appears to me to require such a construction. The act declares that "all persons being merchants, &c., owing debts to the amount of not less than $2000, shall be liable to become bankrupts within the true intent and meaning of this act and may, upon the petition of one or more of their creditors, to whom they owe debts, amounting in the whole to not less than $500, to the appropriate court, be so declared," &c. A debt is not the less owing because it is not yet due; and my conviction is strong, that the legislature did not intend, that the act should receive the narrow construction contended for by the counsel for the debtor. The phraseology of the act in relation to the debt of not less than $500 to the petitioning creditor is the same in this respect, as that used in relation to the aggregate amount of debts, which the debtor must owe, of not less than $2000, and it will not be pretended, that these debts must be actually due. But at any rate the objection is inapplicable to the other petitioning creditor, whose debt alone is more than sufficient, and I think it is a mistake to suppose, that a petition by two creditors, one of whom would be entitled to petition alone, would be vitiated by the insufficiency of the debt claimed by the other.

It is in the next place objected, that no decree of bankruptcy can now be made, because the debtor has denied the fraud charged against him. There are three descriptions of fraudulent conveyances, assignments, &c., which bring a merchant, banker, factor, &c. within the operation of the first section of the bankrupt act. 1. Such as are fraudulent, or against the common law, or the provision of such English statutes as have been incorporated into the jurisprudence of this country; 2, (as I am now well satisfied, whatever doubts I may have originally entertained,) such as are voluntarily made, in contemplation of bankruptcy, and for the purpose of giving a preference to one or more of the creditors of the debtor over his other creditors. The making of a conveyance of this description has always been held to be an act of bankruptcy under the English bankrupt law, as being contrary to the policy of the law, without any express words in the statute. But in our act they are expressly declared to be "utterly void, and a fraud upon this act." 3. Assignments of all the effects of the debtor, whether upon trust for the benefit of his creditors or not, on the ground, first, that the debtor necessarily deprives himself, by such an act, of the power of carrying on his trade, and secondly, that he endeavors to put his property under a course of application and distribution among his creditors, different from that, which would take place under the bankrupt law. It is unnecessary to cite authorities to show, that such an assignment is an act of bankruptcy in England, because it has been a well settled and familiar rule. It is a sound and useful rule; and there is nothing whatever in the language of our act, which re-

quires a different construction in this respect. In fact, the provision of the act in question is copied almost verbatim from the correspondent provision in the third section of the act of 6 Geo. IV. c. 16. With regard to the three conveyances of specific property, part of the debtor's property, which he is charged with having made on the second and fifth of April, although from the circumstances of the case, and especially from the fact of their having so soon been followed by an assignment of all the remaining effects of the debtor, the inference is strong, that they were made in contemplation of bankruptcy, and for the purpose of giving an unlawful preference; yet, inasmuch as they are denied to have been fraudulent, it cannot be said that they certainly carry with them intrinsic evidence of fraud. But with respect to the general assignment made on the 30th of April last, I entertain no doubt, that, according to the express admission of the debtor, it is an act of bankruptcy.

All assignments by a debtor, though but of a part of his effects, if voluntarily made in contemplation of bankruptcy, and for the purpose of giving a preference, whatever may have been the antecedent law of the state, when they are made, are, by virtue of the bankrupt act, utterly void; and all assignments by a merchant, banker, factor, etc., who owes not less than $2000, of all his property, or as was said by Lord Mansfield in the case of Hooper v. Smith, 1 W. Bl. 442. of "so much of his stock in trade as to disable him from being a trader," whether made in contemplation of bankruptcy or for the purpose of giving a preference or not, are void, and for themselves acts of bankruptcy.

A decree of bankruptcy must therefore be entered in this case; and also in the case of the same petitioner against Charlemagne Tower, which depends upon exactly the same principles.

BARTON, (UNITED STATES v.) See Cases Nos. 14,533 and 14,534.

BARTOW IRON WORKS, (MARTIN v.) See Case No. 9,157.

Case No. 1,086.

In re BARTUSCH.

[9 N. B. R. (1874,) 478.]

District Court, D. Massachusetts.

BANKRUPTCY—PROOF OF CLAIMS—POSTPONEMENT BY REGISTER.

[1. Under section 23 of the bankrupt act of March 2, 1867, (14 Stat. 528,) which authorizes the judge, at the first meeting of creditors before the election of an assignee, to postpone proof of any claim which he regards as doubtful, the register may exercise the same discretion.]

[2. Where, at such meeting, claims are objected to which the register regards as clearly valid, he can neither admit them as valid, nor postpone the proof merely because they are objected to, but he must apply to the court if the objections are not withdrawn.]

[Cited in Re Jackson, Case No. 7,123; Re Hunt, Id. 6,884.]

In bankruptcy. This case arose upon a certificate from T. W. Palfrey, Esq., register, [in the matter of Bartusch, a bankrupt,] and was argued by Oliver Stevens, Esq., and Messrs. Graves.

LOWELL, District Judge. The question arises, for the first time in this district, whether the register holding the first meeting has authority to postpone the proof of debts under section twenty-three of the statute, [Act March 2, 1867, 14 Stat. 528,] or whether he is merely to take the evidence and report it to the court, as in other issues of law or fact. Congress appears to have been of opinion that if the registers had judicial powers conferred upon them they would be judges, who must be appointed for life, under the first section of the third article of the constitution; and for this reason it was very careful to restrain the powers of these officers within narrow limits. Whatever may be the meaning of the constitution, it has always been the practice to confer a certain amount of judicial power upon commissioners and other magistrates who are not called judges, and who are not appointed and do not hold office as judges. There is very great convenience in this practice, and I do not know that its propriety has been doubted. Registers in bankruptcy have, and must have, certain judicial powers, such as the regulation of the course of meetings, and of the evidence given before them, and the ordering of many things which cannot be called ministerial. It seems to me they should have the power given by section twenty-three to postpone the proof of debts. The word used is "judge," but the register exercises many of the functions of the judge, especially in respect to the proceedings at meetings of the creditors. The purpose of this section is, that the choice of an assignee shall not be delayed by the litigation of doubtful claims. If such delay were once admitted it might be months before the choice could be made, and disastrous results would ensue. The reasons in favor of the register's exercise of this power are like those which prompted its adoption. He has the means for a prompt and careful decision, and he sees the witnesses. His discretion is not likely to be abused, and if in any case the indirect result should be the election of a person unfit to be assignee, it would be the register's duty not to confirm him. He must, of course, decide upon each debt separately, and upon evidence which satisfies him that there is a judicial doubt of its validity or of the right of the creditor to prove it. These are the only grounds mentioned in the statute.

I understand there is a standing rule in the southern district of New York giving this power to registers. A rule, however, is not

necessary, if the statute, by the word judge, refers to the magistrate holding the meeting, and a rule would not avail to give the power unless the statute may be so construed. The registers have exercised this power in this district, and, so far as I know, in the other districts. Bump, Bankr., notes to section 23, and cases cited. The practice is open to this obvious remark, that if debts are objected to, and the register considers them not doubtful, but clearly valid and admissible, he yet cannot admit them to proof, against objection, because that would be the decision of a question which the statute gives him no power to decide. I agree that in such an event the court must be applied to, if the objections are not withdrawn. The register has not the power to proceed to a choice of assignee without the votes of all the creditors who wish to vote, if their votes can influence the result, unless the register himself considers their claims doubtful. He cannot postpone them merely because they are objected to; but we have found, in practice, that frivolous or unfounded objections usually are withdrawn after a summary hearing before the register. It was early seen that parties contending for choice of an assignee might make a dead lock at any time by each objecting to all debts offered by his opponent. I then passed a rule that the objections should be stated and tried on the spot, and reported to me at once, intimating that the propounder of frivolous objections might be visited with costs. This has put an end to these vexatious delays.

While, therefore, the register's powers are limited, and, as it were, one sided in this matter, yet I think he has, by law and practice, the right to postpone the proof of a debt which, upon the evidence, he judicially considers to be of doubtful validity, though he can neither admit nor disregard a contested claim which he deems valid, and which would have controlling weight, but must report it to the court. I do not mean to be understood that the court could not order the choice of assignee to proceed, notwithstanding an appeal to the circuit court.

Case No. 1,087.

BAS et al. v. STEEL.

[Pet. C. C. 406.] [1]

Circuit Court, D. Pennsylvania. April Term, 1817.

PLEADING — DECLARATION — AVERMENTS — DEMURRER — NONSUIT — SHIPPING — PORT REGULATIONS — CLEARANCE — MANIFEST.

1. If the declaration does not set forth a proper case, and in correct form, the defendant may avail himself of these defects by demurrer. But if a sufficient case be stated, then it is incumbent on the plaintiff to prove it, and if he fail to do so, he is not entitled to a verdict.

2. Want of proper averments in the declaration cannot be made the ground of a nonsuit.

3. Unless a manifest of the cargo on board of a vessel about to depart from a port in the United States for a foreign port, be sworn to, and delivered or tendered to the collector by the master, or person having command of the vessel, the collector is not bound to grant a clearance for such vessel.

At law. This was an action on the case, brought by the owners of the Dos Amigos, [Joseph Bas, Escardo, and others,] being subjects of his Catholic majesty, against [John Steele] the collector of the port of Philadelphia, for refusing to grant a clearance to the said ship and cargo from this port to Havanna, in July, 1813. In consequence of the refusal and the consequent delay, the cargo was so damaged as to render it necessary to dispose of it at auction at an enormous loss. The object of the suit is to recover damages for the injuries sustained by the plaintiffs, by reason of the conduct of the defendant. The declaration contained four counts, in all of which it was alleged, that Escardo, one of the plaintiffs, was master of the said vessel and the person having the charge and command of her. In two of the counts, it was stated, that he the said master, &c. delivered to the collector a manifest of all the cargo on board said vessel, and swore to the same (pursuing the requisitions of the ninety-third section of the duty law of [March 2,] 1799,—3 Laws U. S. p. 224,) [Bior. & D. Laws; 1 Stat. 698,] and that notwithstanding, the defendant refused to grant the clearance. In the other two counts, it was stated that the said master, &c. tendered the said manifest to the said collector, and offered to swear to it, but that the collector refused to receive the same or to grant the clearance. The plaintiffs proved that the defendant refused to grant the clearance; and, it appeared, that the ground of the refusal was a suspicion of the collector that the intention of the master was to supply the British fleet in Delaware bay, or off the coast, with provisions. He therefore required to be satisfied upon that point, before the clearance could be granted. The witnesses examined by the plaintiffs, proved that Escardo was part owner of the ship and cargo, and agent for the other part owners, but that he was not the master or person having the command of her.

The defendant moved for a nonsuit on the following grounds:—First, that the declaration does not aver, nor is it proved, that the inspection laws of the state of Pennsylvania had been complied with, and the fees paid, agreeable to the ninety-third section of the duty law. Second, that it is not proved that a manifest was delivered, or tendered, or that Escardo was the master or commander.

WASHINGTON, Circuit Justice, delivered the opinion of the court.

The only ground upon which this motion

[1] [Reported by Richard Peters, Jr., Esq.]

can with propriety be made, is, that the plaintiffs have failed, by their own evidence, to make out the case stated in their declaration, so as to entitle them to a verdict. If the declaration does not set forth a proper case, and in correct form, the defendant may avail himself of these defects, by demurrer. But, if a sufficient case be stated, then it is incumbent on the plaintiffs to prove it, and if they fail to do so, they are not entitled to a verdict. Whenever this is perceived, it saves time for the court to direct a nonsuit upon the plaintiffs' own showing. Upon this view of the subject, the defendant cannot make the want of proper averments in the declaration the ground of a nonsuit, and consequently the want of evidence to prove facts not averred. The first reason then which is assigned for this motion, cannot be maintained.

The second ground for the motion is of a different kind. The declaration states, that Escardo, "being the master or the person having the charge and command of the vessel, did deliver to the collector a manifest of the cargo sworn to by him;" or, as it is stated in some of the counts, "tendered a manifest to the collector and offered to swear to it, which was refused." It was essential that this averment should have been made in the declaration, as the collector was not bound to grant the clearance, unless the manifest was delivered according to the provisions of the ninety-third section of the collection law, or at least tendered to the collector. Being averred, the defendant could take no exception to the declaration by demurrer. But if it was necessary to aver it, it is equally so that it should be proved, for without such proof the plaintiffs have no case in court. So far from proving this fact, it appears by the plaintiffs' own showing, that Escardo, the person who is stated in the declaration to have been master or the person having the charge and command of the vessel, and who delivered the manifest, had nothing to do with the navigation or maritime command of the vessel; and it is perfectly clear to the court, that no other person is authorized under the law to swear to the manifest. The words charge or command, were clearly intended to apply to some officer of the vessel below the grade of the master, and not to an agent, consignee, or owner. Independent of this defect in the evidence, the plaintiffs have offered no proof whatever that a manifest was made out, sworn to, and delivered or tendered by any person; and yet this is a necessary part of their case.

It was contended by the plaintiffs' counsel that enough appeared to let the case go to the jury, because, as the defendant refused to grant the clearance upon another ground, the jury might fairly presume that the manifest was dispensed with, or that it was in fact produced. But, this would be to presume in favor of the plaintiffs, against their own averments and proof. For they say that Escardo was master, and swore to the manifest and delivered it, and then they prove that he was not master If the jury should presume that he was master, this would be against the plaintiffs' own proof; and if they should presume that the manifest was sworn to and delivered by some other person, being master, this would be against the plaintiffs' averment in their declaration. But the truth is, that because the defendant urged one reason for refusing a clearance, it does not follow that all other objections were removed. If the plaintiffs had removed his suspicions as to the object of the intended voyage, still it would have been necessary, that the master should deliver the manifest, before he could demand a clearance.

The plaintiffs agreed to be called.

NOTE, [from original report.] Upon a rule to show cause, the nonsuit was taken off and the plaintiffs permitted to amend their declaration.

[For the subsequent disposition of this case, see Bas v. Steele, Case No. 1,088.]

Case No. 1,088.

BAS v. STEELE.

[3 Wash. C. C. 381.][1]

Circuit Court, D. Pennsylvania. April Term, 1818.

WAR—BLOCKADE—LICENSE TO NEUTRAL VESSEL—PORT REGULATIONS—CLEARANCE—TORTS—EVIDENCE OF PROPERTY—POSSESSION—REGISTRY OF VESSEL—DAMAGES.

1. The laws of the United States do not require a person, in order to entitle himself to a clearance, to produce to the collector, a certificate of his having complied with the inspection laws of the state; unless the law of the state requires it.

[See Boyden v. Burke, 14 How. (55 U. S.) 575.]

2. When one party in a cause wishes the production of papers, supposed to be in the possession of the other, he must give to him notice to produce them. If they are not produced, he may give inferior evidence of their contents; or may draw inferences from their non-production, unfavourable to the other side. But if it is his intention to nonsuit the plaintiff—or if the plaintiff, requiring the papers, means to obtain a judgment by default, under the 15th section of the judicial act, [1 Stat. 82,] he is bound to give the opposite party notice, that he shall move the court for an order upon him, to produce the papers; or, on failure to do so, to award a nonsuit or judgment, as the case may be.

[Cited in Dunham v. Riley, Case No. 4,155; Russell v. McLellan, Id. 12,158; Gregory v. Chicago, M. & St. P. R. R., 10 Fed. 529.]

[See Maye v. Carberry, Case No. 9,339; Bank of U. S. v. Kurtz, Id. 920; Thompson v. Selden, 20 How. (61 U. S.) 194.]

3. No advantage can be taken of the non-production of papers, unless ground is laid, for presuming that the papers were, at the time

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

the notice was given, in the possession or power of the party; and that they are pertinent to the issue. In either of the cases, the party to whom the notice was given, may be received, to prove, by his own oath, that the papers are not in his possession or power; which oath may be met, by contrary proof, according to the rules of equity.

[See Garrett v. Woodward, Case No. 5,253.]

4. In an action for a tort to personal property, possession, accompanied by an assertion of ownership, is prima facie evidence of property. Documentary evidence, is only necessary when the ownership is denied, and the production of papers is called for.

[Cited in The Nancy Dell, 14 Fed. 747.]

5. The register of a vessel is not, per se, evidence of ownership.

[Cited in The Nancy Dell, 14 Fed. 747.]

[See U. S. v. The F. W. Johnson, Case No. 15,179.]

6. In an action against the collector of the customs for refusing a clearance, upon a count, stating that the plaintiff was the owner of the vessel—laden with a cargo, of a certain value, the allegation is sufficient, as to ownership of the cargo.

7. In actions of contract, or tort, damages, which materially and necessarily arise from the breach or gravamen, need not be stated; as they are covered by the general damages laid in the declaration. Special damages, not necessarily implied, cannot be recovered, unless specially stated; and, although the plaintiff has given evidence of special damages, without objection, by the defendant, yet the defendant may object to their allowance, on the trial.

8. The general nature of the cargo, being provisions—the blockade of the river Delaware, by the enemy, and a license to the plaintiffs, being neutrals in the war, from the blockading squadron, will not authorize the collector to refuse a clearance; there being no law to authorize such refusal.

9. Whether a neutral, within the territory of one belligerent, commits a crime against that belligerent by an intercourse with the enemy must depend on the nature of that intercourse.

10. If the owner contemplated an illicit intercourse with the enemy—such as to supply him with provisions, the clearance of the vessel might be withheld by the collector.

11. The collector must show probable cause for his suspicions; and if the party, having it in his power to remove the suspicions by evidence, fails to do so, he is not entitled to damages for the refusal of the clearance by the collector.

At law. This action was brought to October sessions, 1813, to recover damages from the defendant, [John Steele,] who was collector of the port of Philadelphia, for refusing a clearance to a Spanish vessel, owned by [Joseph Bas and Escardo] the plaintiffs, who were merchants residing at Havana. The vessel, called Les Dos Amigos, having on board a cargo of sugars, arrived at Philadelphia, early in March, 1813, consigned to Escardo, one of the plaintiffs, who came in her as a passenger. Soon afterwards the blockade of the Delaware, by the British, took place; and the Dos Amigos was detained. The owner of a Spanish vessel, also in the port of Philadelphia, with the consent of the proper authority, went down to the blockading squadron, to obtain permission to sail with a cargo of flour, for Havana; and he was requested by Escardo to ask permission for the Dos Amigos to carry a cargo of potatoes and onions to the same place. On his return, he informed Escardo that this permission was granted; but that it was a verbal license, the British commander having refused to give one in writing. A cargo, consisting of onions and potatoes, the growth of 1813, was immediately purchased by Escardo, the cost of which was 2,163 dollars, 53 cents; and, on the 21st of July, accompanied by the captain of the Dos Amigos, he went to the custom-house; where the captain delivered in duplicate a manifest of the cargo, in the usual form, one copy of which was signed by him, and, with the oath required by law, written out. A clearance was not granted, and the owner and master were informed by the deputy-collector, the defendant being absent, that from the nature of the cargo, it being composed of articles of a perishable nature, it was believed to be intended for supplies to the blockading squadron. It was stated by Escardo, that the vessel had a license from the British commander, to carry the cargo to Havana; and the evidence as to this admission, whether the license was declared to be verbal or written, was contradictory. The deputy-collector required the production of the license; and the plaintiff, Escardo, denied any intention to furnish supplies to the hostile vessels. Two or three interviews between Escardo and the deputy-collector took place; and the clearance not being granted, counsel were employed by the plaintiffs, who demanded from the defendant, a clearance for the Dos Amigos, and notified him of a claim for damages, should he continue its refusal. A correspondence took place on the subject; surveys were held on the cargo on the 27th and 28th of July, and it was found in a perishing state; and on the 2d of August, it was sold under the direction of an auctioneer, for 157 dollars 33 cents. The declaration contained four counts: 1st. For refusing a clearance to the Dos Amigos, laden with a cargo: 2d. For refusing the clearance maliciously: 3d. For refusing the clearance, and stating that the manifest was sworn to by the captain: 4th. For refusing it, and stating that the master was ready, and offered to swear to the manifest. The evidence of ownership of the vessel, was the possession of Escardo, in the name of the plaintiffs; and the reputation of such ownership, at Havana. The fact of the refusal of the clearance, was shown by the correspondence between the counsel of the plaintiffs, and the late A. J. Dallas, Esq., who was counsel for the defendant; in which this refusal was admitted, and the reasons for the same stated. The defendant's counsel had, soon after the suit was commenced, given the plaintiffs notice to produce certain documents and papers on the trial; and, on their being

called for, it was stated by their counsel, that no such documents or papers were in their possession, or existed, with the exception of the log-book called for, which had accompanied the vessel, on her return to Havana; and an account of the particulars of the cargo, and the receipt of the persons from whom it had been purchased, for the cost thereof; which was offered as a bill of parcels.

C. J. Ingersoll, for the defendant, moved for a nonsuit, on the following grounds: 1. That the manifest delivered to the collector, by the captain of the Dos Amigos, was not sworn to. 2. That notoriety of ownership, and possession of the vessel by one of the plaintiffs, for all the owners, was not sufficient to support this action for damages, ex delicto. 3. That according to the provisions of the 15th section of the judiciary act,—2 Laws U. S. p. 65, [Bior. & D. Laws; 1 Stat. 82,]—the non-production of papers, after notice, gives the party calling for them, if defendant, a right to a non pros; if plaintiff, to a judgment by default.

The counsel for the plaintiffs opposed the nonsuit, alleging that one of the counts of the declaration, averred a readiness on the part of the master, to swear to the manifest; and that as the oath was subscribed by the master, the jury might infer that it was sworn to. That notoriety of ownership, and actual possession of a chattel, was the usual and sufficient evidence of ownership; and, certainly, sufficient to permit the question to go to the jury; and that the provisions of the act of congress, relative to the production of papers, applied only where a motion had been made to the court, for an order on the party, to produce the papers, followed by notice thereof, and some evidence that the party called on for them, had them in his possession, and that they were pertinent to the issue.

[Motion denied.]

WASHINGTON, Circuit Justice. With respect to the objections on account of the inspection laws, the answer of the plaintiffs' counsel is sufficient. The act of congress does not require the collector to interfere, unless it appears that he is called on so to do by some state law. As to the ownership of the vessel and cargo, it is a sufficient answer to this motion, that some evidence has been given, which may, in the opinion of the jury, be sufficient to prove this fact; and the rule of this court, and of every court is, that where such evidence is given, the court will not take the cause from the jury. As to the manifests, upon being reminded of the counts in the declaration, which aver a readiness to deliver a manifest, these difficulties disappear. The manifest is not sworn to: it is filled up and signed, but the oath was not administered; and it would not in this form be sufficient to support an indictment for perjury. But it is sufficient, under these counts, if the master did all in his power—if he showed himself in readiness to take the oath. The only question with us is, whether enough is shown, to allow the jury an opportunity to draw an inference. Two facts are made out now, which did not appear before. The master, with Escardo, was seen to go two or three times towards the custom-house, professing that he meant to go there; and, at that time, the manifest was in the possession of one of them. Taking these circumstances in connexion with the manifest having been left with the collector; and that the collector does not assign as a reason, why the clearance was refused, that the master would not swear to the manifest, —there is enough, from which the jury may infer, that the manifest was delivered to the collector, by the master, and that he was ready to take the oath; and the objection stated, is not that he refused the oath, but that there was a suspicion of an intended infraction of the law, by furnishing supplies to the enemy.

In the former case, the court stated that the assigning of one reason, did not exclude a right in the collector to give another, if the objections arising from the first should be cleared up. The case is now changed; because now it appears, that a manifest may have been signed and delivered to the collector—and, as another reason for refusing the clearance was assigned, this furnishes an additional fact, from which the jury may infer a readiness on the part of the master, to swear to the manifest. The remaining point is important and novel; and has not yet been decided in the supreme court, in this court, or in any other circuit court, so far as we are informed.

It is not difficult to give a construction to the section of the act of congress. When either party wants papers, he must give notice; and he has in view one of these objects: 1st. That if the papers called for, are not produced, he may be enabled to argue against the party not producing them to the jury: 2d. This object may be to obtain evidence from the contents of the papers called for: and, 3d. To move the court for a new suit, or for a judgment by default, as the case may be. But in either case, the party must entitle himself to the benefits of the section, by showing that the party was in possession of the papers called for; and he must also give evidence of the contents of the papers; for it will not do for him only to say what those contents are. The court will require reasonable proof of the possession, and of the pertinency of the papers. If the object of the party is to avail himself of the provisions of the section, so as to move for a nonsuit, or for judgment by default, he must put the party on his guard, and let him know the

consequences of a refusal; and the party receiving such notice, will come prepared to meet it. In any such case, when the party is called on to produce papers, he may make oath that he has them not; and thus extricate himself from difficulty. This is the case in chancery, where the plaintiff charges the defendant with having papers to which he has a right, and the defendant relieves himself by his oath; and this may be met by contrary proof of two witnesses. In every case, the party claiming the papers must give evidence of the relevancy of the papers, and of the opposite party having possession of them. Whenever a judgment by default, or a nonsuit, is intended to be claimed, the notice to produce papers, must give the party information that it is intended to move for a nonsuit, or a judgment by default, as the case may be; and this must hereafter be considered as the rule of the court, under this section of the act of congress.

Nonsuit refused.

The nonsuit having been refused, and the case submitted to the jury, the counsel for the defendant contended—1. That the receiving a license from the enemy of the United States, by the owner of the Dos Amigos, destroyed the neutral character of the vessel, and justified the refusal of the clearance. 2. That as the declaration stated the plaintiffs to be owners of the vessel, "laden with a cargo," this was not a sufficient averment of ownership of the cargo, to authorize a claim for damages for its loss. 3. That there was no evidence to show a demand of a clearance from the collector, after the 21st and 22d of July, and subsequent to the explanations given in the correspondence; and that the failure to make such a demand, as it might have been granted, was an answer to this suit. 4. That a clearance is not a necessary document for a foreign vessel, sailing from a port of the United States; and therefore, the refusal of the clearance was not the cause of the damages sustained by the plaintiffs. The counsel for the defendant cited 1 Chit. Pl. 146, 147, 486, 487; 1 Condy, Marsh. Ins. 407; [The St. Nicholas,] 1 Wheat. [14 U. S.] 431; 4 C. Rob. Adm. 284; 6 C. Rob. Adm. 131; 4 C. Rob. Adm. 65; [The Sally,] 8 Cranch, [7 U. S.] 384.

On the part of the plaintiffs, it was argued —1. That a neutral, not an inhabitant of the place, has a right to obtain a license from the enemy of the nation, when he may wish to proceed to a port in his own country with a cargo, and that such an act was no forfeiture of his neutral character. 2. That the averment in the declaration, that the plaintiffs were owners of the vessel, laden with a cargo, was sufficient; and that if it was not, the jury might give damages for all the consequences of the detention of the vessel by the defendant, even without a direct averment of ownership in the cargo. It was also said, that as the defendant had not objected to the evidence, given by the plaintiffs, of ownership in the cargo; which evidence was intended to apply to that part of the declaration; they could not now object to the effect of such evidence. 3. That a new demand of the clearance was not necessary; and that had the defendant determined to grant a clearance after the explanations, he should have notified the plaintiffs of his readiness so to do. 4. That a clearance is necessary to every vessel sailing on the ocean, to protect her from molestation, and is the usual and proper document for that and other purposes;—that without a clearance, the Dos Amigos would have been arrested by the fort in the Delaware—by the officers of the customs in the district of Delaware—by the gun-boats stationed at the mouth of the harbour; and would have been interrupted by any cruiser she might meet on the ocean.

WASHINGTON, Circuit Justice, charged the jury. This is an action brought by the owners of a vessel, laden with a cargo, against the collector of the port of Philadelphia, for having refused the vessel a clearance, in consequence of which the cargo was lost; and damages are claimed, as a compensation for the same. We will lay the case before the jury, under the following heads, which will embrace all the arguments of the counsel on both sides, and we shall make such observations upon them as apply.

The first question is, was a clearance asked, and refused?

2. Are the plaintiffs the persons to complain of the refusal?

3. Did the plaintiffs perform all that by law they ought to have done, in order to entitle themselves to call for a clearance?

4. To what extent can damages be claimed, if the plaintiffs are entitled to any?

Lastly. Can they recover these damages from the defendant?

1. Was the clearance refused? The correspondence between the parties has been read repeatedly; and as it is the duty of the court to give a construction to written papers, they will observe upon it. The plaintiffs' counsel in their letter to the defendant, complain of the refusal of a clearance to the Dos Amigos; and the answer of the defendant acknowledges the refusal, and justifies it on certain grounds stated therein. This supports the charge of a refusal by the defendant, and that the plaintiffs complained thereof. But if there is any doubt on this subject, Mr. Wilson's acknowledgment removes it. He states, that two persons, one of whom was the master of the Dos Amigos, came to the custom-house, and applied for a clearance, and he having declined to give the explanations asked, the clearance was not granted; and O'Conway states, that at two interviews, the officer was asked if the vessel would be permitted to depart, and he answered that she would not; as the British vessels were in the mouth of the bay, and

the cargo might fall into their hands. But it is said, that if the clearance was refused when first applied for, the subsequent negotiations, between the counsel of the plaintiffs and of the defendant, kept the affair in suspense until the 28th of July, when a new demand should have been made, and was necessary; in order to enable the plaintiffs to recover in this action. This is not the law; nor is it reason. Because, after the refusal of a clearance on the grounds stated, and the plaintiffs had said they would look to the collector for damages, if his suspicions had been removed, it was the duty of the defendant to say to the plaintiffs, I will give the vessel a clearance. If he was not satisfied with the explanations offered by the plaintiffs, to remove those suspicions, he must stand or fall before the jury, by the propriety of the reasons of his refusal. The plaintiffs had done enough.

2. Are the plaintiffs the persons entitled to complain of the refusal?—have they given satisfactory reasons to the jury, to show they are the owners of the vessel? The law has been correctly stated by the plaintiffs' counsel. Possession and assertion of ownership, are sufficient evidence thereof. Documentary evidence is not necessary, unless the asserted ownership is denied, and the party has been called on to produce such documents. The evidence in this case is, that Escardo was here, in possession of the vessel, and asserted he was the owner for all the plaintiffs; and he afterwards proceeds to manifest this, by instituting the suit in the name of all the owners. Longfausse was at Havana, saw the owners there, heard them assert that they were owners of this vessel; and he states, that it was there a matter of notoriety they were the owners. The register of the vessel, if it were produced, would not be sufficient evidence, and would be no more than this, but that it would be in writing; nor would it be equal to this, if it were not accompanied by possession. This is, however, a question of evidence, on which the jury must decide.

3. Did the plaintiffs do all that by law they ought to have done, in order to entitle the vessel to a clearance? What does the law require? That the master shall deliver to the collector, a manifest of the cargo on board the vessel, stating the articles of which the same is composed, and the prices thereof, to be signed and sworn to by him. What is the evidence on this subject? Mr. Wilson, the deputy-collector, states, that "on the 21st of July, 1813, the captain of the Spanish vessel, with a foreigner, not known to him, came to the custom-house. Two outward manifests were laid on the desk at which he stood, either by the captain or the gentleman with him. He took them up and examined them as was usual. He observed to the captain, and to the gentleman with him, that the cargo was of a very perishable nature, and that he doubted whether it could reach Havana in a state proper for use, and was therefore intended for the British squadron; and he referred particularly to the articles being the growth of that season. They declared they were bona fide destined for Havana, and they withdrew." From this, the following facts appear as applicable to the manifest. Two manifests, filled up, and signed, were placed on the desk of the deputy-collector; were examined by him, and no objections made to them; but he stated a suspicion, that the cargo could not reach Havana, and that, therefore, it was intended for the British squadron. Mr. Dallas states, in his letter, that this would be no obstacle to granting the clearance, if the grounds for suspicion of illicit intercourse were removed. This admits, that the manifest was tendered, and that the captain was ready to swear to it; and the court think it was the duty of the collector to require it to be sworn to, if he thought it necessary. Two manifests were laid on the desk: only one has been produced on notice; and the jury will judge why the other has not been produced. The court has no difficulty in saying, that these circumstances amount to evidence, that the manifest was sworn to, or that the master was ready to swear to it; and that the plaintiffs did all, or were ready to do all, the law required of them.

4. To what extent can the plaintiffs claim damages, in this case, if the jury shall be of opinion they are entitled to damages? The averment in the declaration is, that the plaintiffs "were the owners of a vessel, laden with a cargo;" and it is said, that this is an averment of the ownership of the cargo. This will not do. They ought to have stated the ownership of both vessel and cargo, and the averment in the declaration does not mean this. It would apply as well to a vessel laden with a cargo on freight; and ownership in the cargo does not follow from it. What is the rule of law as to damages? it has been admitted, on both sides, that, whenever the declaration claims damages, whether in contract or in tort, all the damages, which the jury can say arose out of the breach stated in the declaration, may be given, and such is the law. But if the plaintiff means to go further, he must state them specially, as well to give notice, as that, otherwise, the evidence will not fit the declaration, and these must always correspond. It was argued, but not relied on by the plaintiffs' counsel, that this is a rule of evidence and not of compensation; and the defendant having allowed evidence to be given of the value and loss of the cargo, he could not afterwards oppose its effect, in ascertaining the extent of damages. There are some instances, where, after evidence has been admitted, the court will not permit counsel to object to its influence. Thus, when the signatures to a note have been admitted, the party shall not say, you cannot claim damages for the note, because this would be a trick; and

having suffered the note to go to the jury as proved, he shall not afterwards oppose its operation upon them. But whenever the case is, as in the present cause, the rule is otherwise. Does, or does not, the evidence fit the declaration? If it does not, it is now too late to inform the jury they ought not to regard it. What are the damages which arose out of the case stated in the declaration in this cause? The owners of a vessel sue the collector for refusing a clearance of a vessel with a cargo on board. Freight undoubtedly is lost by the prevention of the voyage. If the cargo belonged to any body else, or to themselves, the loss was sustained and may be recovered. The owners of a vessel are equally entitled to freight, to whomsoever the cargo may belong. As to the amount of this loss, it is properly within the province of the jury to ascertain it, and the court will not attempt to state it.

Lastly, can these damages be recovered from the defendant? The defendant has produced evidence of circumstances to justify his conduct; and various grounds of defence have been taken by his counsel. In the origin of of the case, but one objection was made to granting the clearance—a suspicion of illicit intercourse with the enemy; subsequently there was another—that the plaintiffs had in their possession a license from the blockading squadron, which it was their duty to produce, to show whether it was an authority for the vessel to proceed to Havana. The grounds of suspicion of illicit intercourse were, the general nature of the cargo, it being provisions;—the blockade of the Delaware, and sailing under a British license. All these are put together, because they admit of one answer; they did not justify the collector. A neutral vessel, in a blockaded port, takes a cargo on board, and asks leave to depart. The collector says no: you have a cargo of provisions and a license. The answer is, I have a right to go; and what is it to you if I have a license? The blockading squadron may prevent it; I have a right to run the risk, and you cannot interfere. The nation may prevent it, but an executive officer cannot. If congress did not think proper to make such a law, the collector could not make it, and say, you shall not go. As to the license, the plaintiffs had a right to take it; and the blockading squadron had a right to give it; and the reasons given by the supreme court, against an American citizen taking a license, do not apply in such a case. The American citizen, by taking a license, takes side with the enemy; and as, in time of war, every member of the nation is considered at war, he shall not be at peace. But these reasons do not apply to a neutral. He can go into a blockaded port, and can go out, if the blockading force will permit it; and it is not for any officer of the port to say, he shall not go. The act of congress, relative to licenses from the enemy, does not apply,—First, because it was passed after the cause of action arose. Secondly, because Escardo was not an inhabitant of this country, as no person is an inhabitant of a place, but one who acquires a domicil there; otherwise, all neutral trade would be destroyed. Going to a place to obtain a cargo, and coming away, does not give a neutral a domicil, or make him an inhabitant. If the circumstance of the blockading squadron having been at the time in the mouth of the Delaware, is a justification of the defendant, it would amount to this; that, although congress had repealed the embargo, the collector had the same powers he possessed when the embargo was in force. Suppose any citizen had attempted to go; could the collector stop him because he might fall in with the enemy? If no law has been produced to authorize the collector to refuse it, he ought to have granted the clearance. Intercourse with the enemy has been alleged against one of the plaintiffs, and this was never thought of by the collector, but is the suggestion of counsel. Intercourse with the enemy, by citizens of the United States, would have been improper; but in a neutral, it is not necessarily a criminal act. Such intercourse might be criminal, as giving information; but when it had been ascertained, that it amounted to no more than procuring a license to go to sea, with a cargo, it was not criminal. But, suppose it had been so; what had the collector to do with it? The vessel might have gone out, and Escardo have been indicted. The case of The Tulip, [Case No. 14,234,] has no application. There, the American vessel carried out important despatches from the British minister, which, if she did not, at sea, fall in with a conveyance for them, she was to land in some part of England or Ireland; and the court had no difficulty in condemning her.

The case comes to this:—the collector had two conflicting duties imposed upon him; one to the individual who asked a clearance; the other to his country. If the destination of the vessel was the enemy, he had a right to refuse a clearance; if not, and there were not circumstances to warrant his suspicions, he had no such right. He was to judge upon circumstances, and to proceed on such ground, as that any just man could say, there did exist reasons sufficient to authorize the belief, that this was the destination of the vessel; and if the jury, carefully and coolly examining all the reasons, think he had just grounds for the suspicion, they will find a verdict in his favour.

The court then went into a minute examination of the evidence which had been adduced by the defendant; and concluded by stating; that if, upon the facts, the jury thought the defendant had just and reasonable grounds for his conduct, he was not answerable; but if they did not think so, they would find for the plaintiffs.

After the court had concluded the charge, Mr. C. J. Ingersoll requested that the court would instruct the jury, whether, if the license to the Dos Amigos was or was not in writing, and the deputy-collector misunderstood the plaintiff Escardo in relation to it, it was not the duty of Escardo to explain the circumstance.

WASHINGTON, Circuit Justice. If Mr. Wilson, the deputy-collector, said to Escardo, I understand you have a license in writing, and I ask you to show it, and he was silent and did not explain it, the consequences would be the same, and the defendant would have been justified. Still, the jury will have to determine on the accuracy of Mr. Wilson's recollection; not on his veracity, for that has not been doubted. The court say nothing about the point which was mentioned, whether the collector is answerable for the acts of his deputy. He is certainly answerable for all his acts.

Verdict for plaintiffs.

[NOTE. See Bas v. Steel, Case No. 1,087; motion for nonsuit.]

BASCADORE, (UNITED STATES v.) See Cases Nos. 14,535 and 14,536.

Case No. 1,089.

BASCOM et al. v. LANE et al.

[Brunner, Col. Cas. 348;[1] 4 Am. Law J. (N. S.) 193; 9 West. Law J. 162; 8 Leg. Int. 162.]

Circuit Court, D. New York. Nov. 11, 1851.

RELIGIOUS SOCIETIES—DIVISION OF CHURCH—DISTRIBUTION OF COMMON PROPERTY

A church conference may consent to the division of the church into two bodies, and such separation being in pursuance of proper authority will carry with it a division of the common property. Commissioners appointed by one of the divisions have power to file a bill against the trustees of the common property for a division of the same.

[See Smith v. Swormstedt, Case No. 13,112.]

[In equity. Bill by Henry B. Bascom and others, commissioners appointed by the general conference of the Methodist Episcopal Church South, against George Lane and another, agents of the book concern of the Methodist Episcopal Church, for a settlement and division of property of the church. Decree for complainants.]

Reverdy Johnson, Daniel Lord, and Mr. Johnson, Jr., for complainants.

Rufus Choate, George Wood, and E. L. Fancher, for respondents.

NELSON, Circuit Justice. The complainants state in their bill, that before and on the 8th day of June, 1844, there existed in the United States of America a voluntary association, known as the Methodist Episcopal Church, not incorporated, but composed of seven bishops, four thousand eight hundred and twenty-eight preachers belonging to the traveling connection; and, in bishops, ministers, and membership, about one million one hundred and nine thousand nine hundred and sixty, then being in the United States and territories thereof, united and holden together in one organized body, by certain doctrines of faith and morals, and by certain rules of government and discipline. That the general government of this church was vested in one body, called the general conference, and in certain subordinate bodies called annual conferences, and in bishops, traveling ministers, and preachers; and that the constitution, organization, form of government, and rules of discipline, as well as the articles of religion and doctrines of the church, were of general notoriety; but, for the more particular information of the court, reference is made to a printed volume, entitled "The Doctrines and Discipline of the Methodist Episcopal Church"; and the complainants allege that differences and disagreements have sprung up between what was called the northern and southern members, in respect to the administration of the church government, concerning the ownership of slaves by the ministry of the church, of such a character, and attended with such consequences, as threatened fearfully to impair the usefulness of the church, as well as permanently to disturb its harmony; and that it became a question of grave and serious importance whether a separation ought not to take place by some geographical boundary, so that the church should thereafter constitute two separate and distinct Methodist Episcopal Churches; and thereupon the complainants allege that at a general conference of the church, holden according to usage and discipline, at New York, on the 8th day of June, 1844, the following resolutions were duly adopted by a majority of over three fourths of the entire body. As the principal question in the case arises upon these resolutions, we copy them entire.

Resolved, By the delegates of the annual conferences, in general conference assembled: —1. That should the annual conference in the slave-holding states find it necessary to unite in a distinct ecclesiastical connection, the following rule shall be observed with regard to the northern boundary of such connection: All the societies, stations, and conferences, adhering to the church in the south by a vote of the majority of the members of said societies, stations, and conferences, shall remain under the unmolested pastoral care of the southern church; and the ministers of the Methodist Episcopal Church shall in no wise attempt to organize churches or societies within the limits of the church south, nor shall they attempt to exercise any pastoral oversight therein, it being understood

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

that the ministry of the south reciprocally observe the same rule in relation to stations, societies, and conferences, adhering by a vote of a majority to the Methodist Episcopal Church; provided, also, that the rule shall apply only to societies, stations, and conferences bordering on the line of division, and not to interfere with charges which shall, in all cases, be left to the care of that church within whose territory they are situated. 2. That ministers, local and traveling, of every grade and office, in the Methodist Episcopal Church, may, as they prefer, remain in the church, or, without blame, attach themselves to the church south.

Resolved, By the delegates of all the annual conferences in general conference assembled, that we recommend to all the annual conferences, at their first approaching sessions, to authorize a change of the sixth restrictive article, so that the first clause shall read thus: "They shall not appropriate the produce of the book concern, nor of the charter fund, to any purpose other than for the benefit of the traveling, supernumerary, superannuated, and worn-out preachers, their wives, widows, and children, and to such other purposes as may be determined upon by a vote of two thirds of the members of the general conference." 3. That whenever the annual conference, by a vote of three fourths of all their members voting on the third resolution, shall have concurred in the recommendation to alter the sixth restrictive article, the agents at New York and Cincinnati shall, and they are hereby authorized and directed to deliver over to any authorized agent or appointee of the church south, should one be organized, all notes and book accounts against the ministers, church members, or citizens, within its boundaries, with authority to collect the same for the sole use of the southern church; and that said agents also convey to aforesaid agent or appointee of the south, all the real estate, and assign to him all the property, including presses, stock, and all right and interest connected with the printing establishments at Charleston, Richmond, and Nashville, which now belong to the Methodist Episcopal Church. 4. That when the annual conferences shall have approved the aforesaid change in the sixth restrictive article, there shall be transferred to the above agent for the southern church so much of the capital and produce of the Methodist book concern as will, with the notes, book accounts, presses, etc., mentioned in the last resolution, bear the same proportion to the whole property of said concern that the traveling preachers in the southern church shall bear to all the traveling ministers of the Methodist Episcopal Church. The division to be made on the basis of the number of traveling preachers in the forthcoming minutes. 5. That the above transfer shall be in the form of annual payments of $25,000 per annum, and specifically in stock of the book concern, and in southern notes and accounts due the establishment, and accruing after the first transfer mentioned above; and until the payments are made, the southern church shall share in all the net profits of the book concern, in the proportion that the amount due them, or in arrears, bears to all the property of the concern. 6. That Nathan Bangs, George Peck, and James B. Finley be, and they are hereby appointed commissioners, to act in concert with the same number of commissioners, appointed by the southern organization (should one be formed), to estimate the amounts which will fall due to the south by the preceding rule, and to have full power to carry into effect the whole arrangement proposed with regard to the division of property, should the separation take place. And if by any means a vacancy occurs in this board of commissioners, the book committee at New York shall fill said vacancy. 7. That whenever agents of the southern church are clothed with legal authority or corporate power, to act in the premises, the agents at New York are hereby authorized and directed to act in concert with said southern agents so as to give the provisions of these resolutions a legally binding force. 8. That all the property of the Methodist Episcopal Church, in meeting-houses, parsonages, colleges, schools, conference funds, cemeteries, and of every kind, within the limits of the southern organization, shall be forever free from any claim set up on the part of the Methodist Episcopal Church, so far as this resolution can be of force in the premises. 9. That the church so formed in the south shall have a common right to use all the copyrights in possession of the book concern at New York and Cincinnati, at the time of the settlement by the commissioners. 10. That the book agents at New York be directed to make such compensation to the conferences south for their dividend from the chartered fund, as the commissioners above provided for shall agree upon. 11. That the bishops be respectfully requested to lay that part of this report requiring the action of the annual conferences before them as soon as possible, beginning with the New York conference.

The complainants further allege that the said general conference had full and competent power and authority to adopt the resolutions, each and all of them, and that the same became of binding force and validity; and that in pursuance of said resolutions, such proceedings were afterwards had in the several annual conferences of the Methodist Episcopal Church in the slaveholding states, in general convention assembled by delegates (elected on the basis of the resolutions of the general conference of 1844) at Louisville, Kentucky. On the 1st day of May, 1845, the following resolution was adopted after mature and deliberate consideration:—

Be it resolved, by the delegates of the several annual conferences of the Methodist Episcopal Church in the slave-holding states,

in general convention assembled, that it is right, expedient, and necessary to erect the annual conferences represented in this convention into a distinct ecclesiastical connection, separate from the jurisdiction of the general conference of the Methodist Episcopal Church, as at present constituted; and, accordingly, we, the delegates of said annual conference, acting under the provisional plan of separation adopted by the general conference of 1844, do solemnly declare the jurisdiction hitherto exercised over said annual conferences, by the general conference of the Methodist Episcopal Church, entirely dissolved; and that said annual conferences shall be, and they are hereby constituted a separate ecclesiastical connection under the provisional plan of separation aforesaid, and based upon the discipline of the Methodist Episcopal Church, comprehending the doctrines and entire moral, ecclesiastical, and economical rules and regulations of said discipline, except only in so far as verbal alterations may be necessary to a distinct organization, and to be known by the style and title of the Methodist Episcopal Church South. Yeas, ninety-four.

And that afterwards, on the 2d day of July, 1845, a council of the bishops of the Methodist Episcopal Church met at New York (which council was composed of the northern bishops), and then and there adopted unanimously the following resolutions:—

1. Resolved, That the plan reported by the select committee of nine at the last general conference, and adopted by that body, in regard to a distinct ecclesiastical connection, should such a course be found necessary by the annual conference in the slave-holding states, is regarded by us of binding obligation in the premises as far as our administration is concerned.

2. Resolved, That in order to ascertain fairly the desire and purpose of those societies bordering on the line of division, in regard to their adherence to the church, north or south, due notice should be given of the time, place, and object of the meeting for the above purpose, at which a chairman and secretary should be appointed, and the sense of all the members present be ascertained, and the same be forwarded to the bishop who may preside at the ensuing annual conference; or forward to said presiding bishop a written request to be recognized and have a preacher sent them, with the names of the majority appended thereon.

And the complainants allege and insist, that by and in virtue of the foregoing proceedings, the Methodist Episcopal Church in the United States, as it had existed before the year 1844, became and was divided into two distinct Methodist Episcopal Churches, with distinct and independent organizations, powers, and authority, compounded of the several annual conferences, charges, stations, and societies, lying or being situated north and south of the aforesaid line of division.

And the complainants further allege, that, by force of the foregoing proceedings, the Methodist Episcopal Church South became and was entitled to its proportion of all the property, real and personal, and of all funds and effects which, up to the time of the separation, had belonged to the Methodist Episcopal Church; and that the church south was and is so entitled, without any change or alteration of the sixth restrictive article above mentioned. That before and on the said 8th day of June, 1844, the Methodist Episcopal Church owned and possessed a large amount of property in various parts of the United States, real and personal, which was in the hands of agents and trustees; and, among others, large interests therein belonged to the said church, in what was denominated the book concern, in the city of New York, consisting of houses and lots, machinery, printing presses, book bindery, books, papers, debts, cash, etc., amounting to about the sum of seventy-five thousand dollars, the whole of which property is now in the possession of the defendants, Lane and Scott, as book agents.

And the complainants further allege, that after the division of the Methodist Episcopal Church into two distinct churches, by virtue of the resolutions of the general conference of 1844, and the action of the annual conference of the south, as hereinbefore set forth, the agents of the book concern, since the year 1845, have utterly refused to pay the annual conferences south, or to the complainants for and in behalf of them, their said just proportion of the profits and income to the said book concern, and still continue to withhold the same. That the said general conference of the church south, holden at Petersburg, Virginia, in May, 1845, in pursuance of and in compliance with the plan of separation of 1844, proceeded to appoint the complainants, Bascom and Green, together with S. A. Latta, commissioners, to meet the commissioners appointed by the general conference of the Methodist Episcopal Church of 1844, and to settle and receive from said commissioners the just proportion of the property and effects due to the church south, according to the said plan of separation; and that the said Bascom, Green, and Latta afterward applied to Nathan Bangs, George Peck, and James B. Finley, appointed by the general conference, in 1844, as the said book agents, to meet them for the purpose of a settlement and division of the said property, and have repeatedly called on them for that purpose; but that the defendants have wholly failed and refused to act in the premises; nor have they been enabled to induce the said book agents, nor commissioners, nor church itself, to pay to the said church south its proportionate share of the said property and funds, as provided in the said plan of separation.

And the complainants allege that they are members of the Methodist Episcopal Church.

South; that Kelly and Allen are supernumerary preachers, and Tevis a superannuated preacher; and that they belong to the traveling connection of the said church; and as such have a personal interest in the estate, real and personal, now holden by the Methodist Episcopal Church, by the defendants, as agents and trustees appointed by the general conference; that there are about fifteen hundred preachers belonging to the traveling connection of the Methodist Episcopal Church South, each of whom has the same personal interest in the said property as the complainants; and that the great number of persons thus interested in the recovery sought by the said bill makes it inconvenient, if not impossible, to bring them before the court as complainants; that they are citizens of states other than the state of New York, and that their interests exceed the sum of two thousand dollars; that the defendants, Lane and Scott, have the custody and control by law, and by virtue of their appointment as agents of the book concern, of all the property and effects of the said concern, as above described.

The complainants further allege, that the entire membership of the Methodist Episcopal Church South is about four hundred and sixty thousand five hundred and fifty-three; and that the entire membership of the church north is about six hundred and thirty-nine thousand and sixty-six; and that it is therefore impossible to bring all the parties in interest before the court in this bill, either as complainants or defendants.

The defendants admit the adoption of the resolutions of the general conferences of the 8th of June, 1844, by a majority of over three fourths of the entire body; but allege that the said resolutions were, in respect to their operation and effect, provisional and contingent, and were intended to meet a future emergency, that it was supposed might arise in the church between the northern and southern members; and further, that the said resolutions, called the plan of separation, were not duly or legally passed; and that the general conference had no power or authority to pass or adopt the same, except that portion comprising the recommendation to the annual conferences to change the sixth restrictive rule; and that the last named resolutions, when adopted, were null and void, and without any binding force, except as a matter of recommendation. The defendants further insist, that even had the so-called plan of separation been constitutional and valid, it merely provided for a prospective plan, which without the happening of certain future conditions, or on the failure of which conditions, or either of them, could not, by its express terms, nor was it ever intended to have any force or validity, and is null and void. And that the same was never ratified by the annual conferences named therein; and that the southern annual conferences have, in all respects, as to the church south, acted on their own responsibility, without any authority from the general conference of 1844. The defendants admit that the resolutions set forth in the complainants' bill were adopted by the convention of delegates from the annual conference in the slave-holding states, assembled at Louisville, Kentucky, on the 1st of May, 1845; but they deny that the delegates comprising said convention were selected on the basis, or according to the authority of the provisional plan of separation of 1844. And they insist that the Methodist Episcopal Church South exists as a separate ecclesiastical connection, by the actions and doings of the individual bishops, ministers, and members attached to such church, proceeding in the premises on their own responsibility; and that such bishops, ministers, and members have voluntarily withdrawn themselves from the Methodist Episcopal Church, and have renounced all their rights and privileges in the communion and under her government. The defendants further admit that the council of bishops of the Methodist Episcopal Church, called the northern bishops in complainants' bill, met and adopted the resolutions therein stated. They deny that this church, as it existed before the year 1844, or as it at any time existed, was lawfully divided into two distinct Methodist Episcopal Churches, as alleged in the said bill; but that the separation and withdrawal from the church of a portion of the bishops, ministers, and members was an unauthorized separation. The defendants admit that before and on the 8th day of June, 1844, the Methodist Episcopal Church owned and possessed large amounts of property in various parts of the United States, and that the property, consisting of the book concern, with all houses, lots, machinery, printing presses, etc., is now, and always has been, the property of the preachers belonging to the traveling connection of the Methodist Episcopal Church and their families; but that, if such preachers do not, during life, continue in such traveling connection, and in communion, and subject to the government of the said church, they forfeit, for themselves and their families, all their ownership in, and all claim upon, said book concern, and the produce thereof. They admit that all lands, property, and effects pertaining to the said book concern are in the possession of the defendants, Lane and Scott, as agents duly appointed by the general conference. They admit, also, that the said book concern was originally commenced by traveling members of the Methodist Episcopal Church, on their own capital, with the design, in the first place, of circulating religious knowledge, and by whom it was surrendered to the ownership of all the traveling preachers in full connection, and made subject to the control of the traveling preachers in their general conference; and that it was agreed, from time to time, the profits arising from the sale of the books should

be applied to pious and charitable objects, but principally to the support of traveling ministers and their families, until, in the general conference of 1796, it was determined that the said moneys should in future be applied wholly to the relief of traveling preachers, including such of them as were deceased; and that it was resolved in that conference that the produce of the sale of the books, after the book debts were paid, and a sufficient capital provided for carrying on the business, should be regularly paid "for the relief of distressed traveling preachers, for the families of traveling preachers, and for the superannuated and worn-out preachers, and the widows and orphans of preachers."

We have thus stated what we regard as the material parts of the bill and answer. A good deal of documentary proof was read on the hearing; but upon the view we have taken of the case, it will not be necessary to refer particularly to it, except as stated in the course of this opinion, as most if not all of the facts material to be noticed are matters of serious dispute. Indeed, the bill and answer present most of the facts upon which our opinion will be founded. The complainants include traveling, supernumerary, and superannuated preachers belonging to the traveling connection of preachers in the Methodist Episcopal Church South, representing in this suit a numerous body in that connection, and claim their proportionate share in the profits of the book concern, which this description of persons were confessedly entitled to before the division of the Methodist Episcopal Church into two distinct organizations took place, under the plan of separation of 1844. This book concern was established at a very early day, by the traveling preachers in connection with that church, and the profits to be derived therefrom, devoted by them to the relief of their distressed supernumerary and worn-out brethren, their widows and orphans. The establishment was small at first, but at present is one of a very large capital, and of extensive operations, producing great profits, to be applied in behalf of the objects of charity. It has, doubtless, been conducted with great judgment, and prudence by the agents in the immediate charge of it; but its growth and present magnitude are not less owing to the labor and devotion of the body of the traveling preachers, who have always taken the principal charge of the circulation and sale of the books in the Methodist connection throughout the United States, accounting to the proper authorities for the proceeds.

The traveling preachers of this church were the founders of this charity, and have designated the objects and purposes to which it shall be applied; and if it is, at any time, wrongfully withheld by those in the immediate charge of it, or diverted from the objects designed by the founders, it is the duty of the court to interfere and enforce the execution of the trust. The foundation of this charity is peculiar and novel, differing essentially from the cases of this description that have heretofore fallen under the equitable jurisdiction of a court of chancery. The traveling preachers are both the founders and the beneficiaries. They are the proprietors of the charitable fund, and, according to the constitution under which the endowment was made, also entitled to its proceeds.

We do not perceive, however, that these considerations can in any way affect the nature or character of the interest of the complainants, or confer upon them a title to the enjoyment of their proportion of the proceeds, superior to that of beneficiaries of a pure charity, where a third person has made the endowment in the ordinary way for charitable and pious uses, or, that it can be administered upon any other principles than those governing courts of equity in this class of cases. For, according to the original constitution of this fund by the founders, who had a right to prescribe the terms and conditions upon which the proceeds or profits should be distributed, and the persons to whom and which when prescribed furnishes the law of the case for the court, these proceeds and profits have been devoted to the relief of distressed, traveling, supernumerary, and worn-out preachers in the connection of the Methodist Episcopal Church, their widows and orphans; and to entitle the complainants, and those they represent, to the enjoyment they must bring themselves within the description. We must add, however, that the connection of this body with the original establishment, and subsequent growth of this fund, as a portion of its founders give to their claims a peculiar merit, which cannot but impress upon the court an anxiety so to administer it as to secure to them the benefit of the fruits of so sacred a trust, if reasonably consistent with the rules and principles of equity, and intent of the original founders.

The bill brings the complainants clearly within the description of persons entitled to a distribution of the proceeds of the fund; and the main question in the case, therefore, arises upon the answer and proofs in support of it. It is insisted,—1. That the resolutions of the general conference of 1844, when properly understood, do not impart an unqualified assent of that body to a division of the Methodist Episcopal Church into two separate and distinct organizations or churches; that the assent thereby given was conditional and contingent, and that the conditions were not complied with, nor has the contingency happened. 2. That, if otherwise, the general conference was not possessed of competent power and authority to assent to or authorize the division. And, 3. That the division, therefore, that took place was a nullity; and the separate organization a wrongful withdrawal and disconnection from the membership, communion, and government of the church, by reason of which

the traveling, supernumerary, and worn-out preachers composing the separate organization, are taken out of the description of the beneficiaries of the fund. There were some other matters brought into view in the course of the argument which we may notice hereafter; but the above petitions present the main grounds upon which the defense rests.

1. As to the resolutions, or the plan of separation, as they are usually called. The first one declares, that should the annual conference of the slave-holding states find it necessary to unite in a distinct ecclesiastical connection, the following shall be observed with regard to the northern boundary of such connection: All the societies, stations, and conferences adhering to the church in the south by a vote of the majority of the members shall remain under the unmolested pastoral care of the southern church; and then follows a mutual stipulation that each church shall abstain from organizing churches or societies within the boundaries of the other; and also from exercising any pastoral oversight therein. The second, that ministers, local and traveling, of every grade and office, in the Methodist Episcopal Church, may, as they prefer, remain in that church, or without blame attach themselves to the church south. The fifth resolution declares that all the property of the Methodist Episcopal Church, in meeting-houses, colleges, schools, conference funds, cemeteries, and every kind, within the limits of the southern organization, shall be free from any claim set up on the part of the Methodist Episcopal Church, as far as this resolution can be of force in the premises. The third is a recommendation to the annual conferences at their approaching sessions, to authorize a change of the restrictive article of the fundamental law of the church, which we shall have occasion to examine with some particularity in another branch of this case, and which prohibited the general conference from appropriating the produce of the book concern to any other purpose than for the benefit of the traveling, supernumerary, and worn-out preachers, their widows and orphans, without the concurrence of the annual conferences.

The change recommended was to add to the clause of limitation, "and to such other purposes as may be determined upon by a vote of two thirds of the members of the general conference." The object of recommending this change was to enable the general conference to proceed at once, and make an equitable division of the property and effects belonging to the Methodist Episcopal Church, as then organized between the two separate organizations. For this purpose, the next resolution provided that as soon as the annual conferences shall have concurred in the recommendation, the agents at New York and Cincinnati were directed to deliver over to the agent of the church south all notes, etc., against the ministers, members, or citizens within its boundaries, for the sole use of said church; and also to convey to such agent all the real estate and other property connected with the printing establishments at Charleston, Richmond, and Nashville, which then belonged to the church; and in the one following, that there should be transferred to the said agent so much of the capital and produce of the Methodist book concern as would, with the property and effects before mentioned, bear the same proportion to the whole property of the said concern that the traveling preachers in the southern church bore to all the traveling preachers of the Methodist Episcopal Church. The terms and mode of payment were then prescribed, and commissioners appointed to meet commissioners to be appointed by the southern organization to estimate and fix the amount that might fall due them according to the preceding arrangement. And in winding up, the bishops are requested to lay that part of the report (resolutions) requiring the action of the annual conferences before them as soon as possible.

Now it will be seen from this analysis of the plan of separation, that the only condition or contingency upon which an absolute division of the church organization was made to depend was the action of the several annual conferences in the slave-holding states. If these should find it necessary to unite in favor of a distinct organization, by the very terms of the plan, the separation was to take place according to the boundary designated. It was left to them to judge of the necessity; and their judgment is made final in the matter. And when the decision is made, and the church is divided into two separate bodies, it is declared ministers of every grade and office in the Methodist Episcopal Church may, as they prefer, remain in that church, or, without blame, attach themselves to the church south. The whole plan of separation confirms this view. As soon as the separation takes place in accordance with the first resolution, all the property, in meeting-houses, parsonages, colleges, schools, conference funds, and cemeteries, within the limits of the southern organization, is declared to be free from any claim on the part of the northern church. The general and common property, such as notes and other obligations, together with the property and effects belonging to the printing establishments at Charleston, Richmond, and Nashville, and the capital and produce of the book concern at New York, was referred for future adjustment. This was necessary, on account of the restrictive article upon the power of the general conference, in respect to the produce of the book concern and charter fund. Some delay was necessary to procure that authority from the annual conferences. But one mode of the adjustment was settled, depending only upon the action of the conferences in respect to the authority. The notes and book debts against persons within the south-

ern church, together with the several printing establishments situated within its limits, were to be transferred to that church; and also so much of the capital and produce of the book concern, which, together with the aforesaid property, would bear the same proportion to the whole interest in that concern as the traveling preachers in the southern church bear to all the traveling preachers of the Methodist Episcopal Church. This perfected the adjustment of the common property between the two organizations.

It will be seen looking back to the plan of separation, that the only contingencies or conditions subsequent to be found in it are two. First, the separate organization was to depend upon the action of the annual conferences in the slave-holding states; and, second, the division of this latter portion of the common property of the church, upon the action of all the annual conferences in respect to the change of the restrictive article. When the annual conferences in the slave-holding states acted and organized a southern church, as they did, the division of the Methodist Episcopal Church into two organizations became complete. And so would the adjustment of the common property between them, if the assent of all the annual conferences had been given to the change of the restrictive article. The failure to give that has left this part of the plan open, the only consequence of which is to deprive the southern division of its share of the property dependent upon this assent, and leave it to get along as it best may, unless a right to recover its portion legally results from the authorized division into two separate organizations.

The argument against this view is, that the separation was to take place, not only in the event of the concurrence of the southern conferences, but also upon the assent of all the annual conferences to change the restrictive article. And the preamble to the plan of separation was referred to as countenancing this construction. We think otherwise. On the contrary, in our judgment, it confirms the view above taken. That preamble recites that a declaration had been presented to the general conference with the signatures of fifty-one delegates of that body from thirteen annual conferences in the slave-holding states representing that for various reasons enumerated, the objects and purposes of the Christian ministers and church organization cannot be successfully accomplished by them, under the jurisdiction of the general conference, as then constituted; and that in the event of a separation, a contingency to which the declaration asks attention, as not improbable, we esteem it the duty of the general conference to meet the emergency with Christian kindness and the strictest equity. Then follows the plan of separation, and it leaves the strongest impress throughout of the conviction and spirit so feelingly and impressively announced in the preamble. The question of separation is left to the judgment of their southern brethren in the church, where delegates had declared the necessity, and provision is made for the adjustment and division of the common property which, so far as we know, are founded upon principles of "the strictest equity," between the parties, and then the constitutional powers of the conference are exhausted in the endeaver to carry out this division. It is apparent, from the plan of separation, as well as from the whole course of the proceedings, that if this body had possessed the power, or had believed that they possessed it, to make an effectual division of the property, it would have been made at the time, dependent only upon the determination of the southern conference for a separate organization. They advanced as far as was supposed to be in their power, and took immediate steps to obtain the necessary authority to perfect it. The division of the property was not an element that entered into the consideration of the southern delegates to declare for a separate organization. They related to a different subject, and one of much more transcendent interest to the churches, north and south, and which during the present session had threatened to rend the vast and heretofore compact body of Christians in pieces. The agitation growing out of it had reached the highest authorities of the church, and had brought in conflict its chief functionaries and ablest members, and in respect to which opinions were entertained and expressed, deep and irreconcilable. In the judgment of a large portion of the body, separation was the only alternative to peace, the future Christian fellowship and usefulness of the church. The division of the property was but a consequence of separation, subordinate, and of comparative insignificance. Instead of the division of the church depending upon the division of the common property, the very reverse is the result of the true construction of the plan of separation.

2. As to the power of the general conference to authorize a separation of the church organization. The Methodist Episcopal Church of the United States was established in its government, doctrine, and discipline, by a general conference of the traveling preachers in the communion in 1784. Down to that time the Methodist Societies in America had been governed by John Wesley, the founder of this denomination of Christians, through the agency of his assistants. During this year the entire government was taken into the hands of the traveling preachers with his approbation and assent. They organized it, established its doctrines and discipline, appointed the several authorities, superintendents or bishops, ministers and preachers to administer its polity, and promulgate its doctrines and teaching throughout the land. From that time to this, the source and fountain of all its temporal

power are the traveling preachers in this connection in general conference assembled. The lay members of the church have no part or connection with its governmental organization, and never had. The traveling preachers comprise the embodiment of its power, ecclesiastical and temporal, and, when assembled in general conference, according to the usages and discipline of the church, represent themselves, and have no constituents; and thus the organization continued until the year 1808, when a modification took place. At the general conference of that year, composed of all the traveling preachers, it was resolved to have thereafter a delegated conference, to be composed of one of every five members of each annual conference. These annual conferences are composed exclusively of traveling preachers. The ratio of representation has been altered from time to time, so that in 1844 the annual conferences were represented by one delegate for every twenty-one members.

The reason for the change to a delegated body, instead of the assemblage of the entire body of traveling preachers, was the great enlargement of the boundaries of the church, which had expanded with the settlement of the country, the consequent multiplication of the traveling preachers, the distance and expense of travel, and the deprivation of the field of their labors for too long a period of the Christian ordinances, and religious instruction. The general conference of 1808, which determined in favor of a delegated body for the future, imposed upon the powers of this body certain limitations, which, in the language of the proceedings of the church, are called restrictive articles, six in number. It is declared that the general conference shall have full powers to make rules and regulations for the church, under the following limitations and restrictions:—1. They shall not alter or change the articles of religion, nor establish any new standards of doctrine. 2. They shall not allow of more than one representative for every fourteen members of the annual conference, nor less than one for every thirty. 3. They shall not alter the government so as to do away with Episcopacies, or destroy the plan of itinerent superintendencies. 4. They shall not change the general rules of the united societies. 5. They shall not deprive the ministers or preachers of trial by committee, and of appeal, nor the members, of trial before the society or lay committee and appeal. 6. They shall not appropriate the produce of the book concern, nor the charter fund, to any purpose other than for the benefit of the traveling, supernumerary, superannuated, and worn-out preachers, their wives, widows, and children; provided, that upon the concurrent recommendation of three fourths of all the members of the annual conferences present and voting, a majority of two thirds of the general conferences succeeding, shall suffice to alter any of the above restrictions, except the first article. These comprise all the limitations upon that body assembled by delegates. That the general conference composed of all the traveling preachers, and who established the government, doctrines, and discipline of the church, possessed the power to reconstruct and reorganize the government, ecclesiastical and temporal, into two or more separate and distinct organizations, is a question about which we think no serious doubt can well be entertained. These traveling preachers represented the sovereign power of the government, and were responsible to no earthly tribunal for the mode and manner of its exercise. They were entirely free to exercise their own sense and judgment as to what was the best polity and organization of the church, to accomplish this great object and design of the master in whose service they were engaged, and which were, in the language of their own discipline, "to reform the continent, and to spread scriptural holiness over these lands." As they might have constructed any number of separate and distinct organizations in their first fraternal association and effort in the fulfillment of their mission, according, as it might seem to them best, so was it equally in their power at any subsequent period of their labors. The power remained unchanged.

The only argument urged against this view is the unity of the first organization of the church in 1784, which, as supposed, evinced a design that it should be co-extensive with the territorial limits of the United States, neither more nor less; and to remain and continue a united church within these limits in the exercise of its jurisdiction, spiritual and temporal; and further, that, if a power exists in any general conference to break up this organization and polity of the church, as originally designed and established, it belongs to an extraordinary general conference assembled especially for the purpose, and not to one assembled in the ordinary way, for the discharge of its mere administrative duties, as the chief legislative body of the church; and the history, ecclesiastical judicatories, practice, and usages of the church from its origin were ably and extensively received and examined, on the argument, for the purpose of sustaining these several positions. But the obvious answer to them is that the argument overlooks the source and fountain of the power belonging to the general conference. We must look to these, and not to the mere exercise of power in the administration of the sacrament, when seeking to measure its depth and extent. Where is the limit? And who has prescribed it? The traveling preachers assembled in general conference embody, in themselves, the sovereign power; and we have nowhere seen their consent to any limitation or restriction till all come down, in the history of their administration, to the conference of 1808. We must have some evidence that they have parted with a portion of their sovereign

power that confessedly belonged to them at the first organization since that period; and that they assembled in the subsequent conferences, subject to the disability, before their power can be distinguished from those originally possessed. We have not been referred to any such evidence, nor have our own researches discovered any, nor do we believe there are any recorded acts or declarations of this body to the effect claimed. As jurisdiction and authority, spiritual and temporal, in each general conference, from 1784 to 1808 inclusive, were the same, unlimited and unrestrained, possessing all the power, which since the latter period has belonged to the general and annual conferences combined under the new organization, it necessarily follows that all the power and authority possessed by the annual conferences have been conferred upon them from time to time by the general conference.

The arguments that this body, previous to 1808, did not possess the competency to reorganize and reconstruct the government and the church, as they might think best for the great objects of its mission, goes the length of denying that power to the concurrent action of both the general and annual conferences since that period. And that there is something in this association and system of policy, differing so radically from all others of which we have any knowledge, that even the constituent and representative, although comprising every element of power appertaining to the government, can neither change or modify it. As the argument comes down to this, we cannot think it necessary to pursue this branch of the case any longer. As it respects the powers of the general conference since the modifications of 1808, it is the same as previously existed, subject to the six restrictive articles; and neither of them has any connection with or bearing upon the question we have been considering. They relate to the doctrine of one church, its representative in the general conference, the Episcopacy, discussion of preachers and members, the book concern and charter fund. These concern the exercise of the administrative powers of the conference, and are intended as limitations upon them, no less concurred in by the annual conferences. The powers conferred upon the general conference are broad and unlimited, subject only to those checks in regulating the doctrine, and perhaps discipline, of the church. In all other respects, and in everything else that concerns it, this body shall represent the sovereign power the same as before. The practice of the general conference since the change in 1828 confirms this view. The connection of the annual Upper Canada conference with the Methodist Episcopal Church was dissolved in 1828, and that body authorized to erect itself into an independent ecclesiastical establishment. The force of this precedent has been attempted to be weakened upon the allegation, that this connection differed from that of the annual conferences within the United States; and that it rested upon a sort of compact between that conference and this church, and therefore held a different relation to it. But on looking into the history and discipline of the church, this will be found to be a misapprehension of that resolution; and that the Canada conference was brought within its folds in the same way as those lying upon the frontier settlements within the United States. It will be found that as early as 1804, the Upper Canada districts were included in the New York annual conference, and continued as a part of it, the same as other districts, till 1812, when these districts, and also the Lower Canada districts, were included within the Genesee conference. In 1816, the Lower Canada districts were embraced within the New York and New England conferences. In 1820, both Upper and Lower Canada were again included in the Genesee conference; and in the same year, the bishops were authorized, with the concurrence of this conference, to establish an annual conference in Canada; and in 1824, the Canada conference included the whole of the Upper Province, and thus it stood in 1828, when erected into an independent establishment.

We have seen nothing in the history, discipline, or practice of the church restricting its organization or Christian labors to the territorial limits of the United States; but much to show that both have been steadily devoted to the accomplishment of the high and holy mission avowed in founding the church, namely, "to reform the continent, and to spread scriptural holiness over these lands." As early as 1840, the republic of Texas was incorporated into its bosom, and an annual conference established. And we doubt not but that, as the principles of civil liberty and religious toleration work their way in the advancement of cizilization over regions hitherto impenetrable to the missionary, unless of a particular faith, this great work of organization and Christian labor will be carried on regardless of territorial boundaries or forms of secular government. In referring to the practice of the church, we must not overlook the action of the general conference of 1844, in the instance now before us. The vote upon the first resolution stood one hundred and forty-seven to twenty-two, in a body representing more than four thousand traveling preachers in this communion; and among whom, it is fair to suppose, were included men of the greatest experience and knowledge in the administration of the polity of the church. Indeed, on looking into the report of the debates of this session, and into the discussions upon the report of the committee on the division of the church, and especially upon the all-absorbing subjects that led to its necessity, no one can fail to be impressed with the eminent ability and intelligence of the leading members of that body; nor for a moment

doubt but that they were profoundly skilled in all the history, practice, and usages of the church government, spiritual and temporal, and in the nature and extent of their own powers, as the highest judicatory belonging to it. As it respects the action of this body in the matter of division, no one can pretend but that it proceeded upon the assumption of unquestioned power to erect the church into two separate ecclesiastical establishments. The only doubt entertained or expressed in the plan of separation, related to the division of the common property, on account of the sixth restrictive article, which we have conceded all along was not within its competence, but which we shall presently notice more particularly in another part of the case. Independently of this question of property, the power of severance is written upon every page of their proceedings. Having now arrived at the conclusion that the general conference of 1844 was competent to make the division, and that the only condition annexed to it has been fully complied with, we are prepared to apply the principles of law, which, in this posture of the case, must govern it.

We have held, in a previous part of this opinion, that the complainants must bring themselves within the description of persons entitled to the benefit of this charitable fund as prescribed by its original founder; and that, when they have done this, those who deny or withhold the charity must present a case to the court, taking them out of the description. This has been attempted by showing that they have wrongfully separated from the connection and communion of the Methodist Episcopal Church, and erected themselves into an independent ecclesiastical establishment, and have therefore deprived themselves of the character of beneficiaries of the fund. Having arrived at the conclusion that there is no foundation for this allegation, the ground of defense, of course, fails; and the complainants still continue clothed with the character and rights belonging to them previous to the separation. The separation having taken place in pursuance of the action of the competent ecclesiastical authority, by the action of the founders of the fund themselves, how can it be maintained that the beneficiaries, falling within the new organization, have forfeited the character which entitles them to its enjoyment? What act have they done to deprive them of the description of the persons for whose relief its proceeds have been permanently devoted? It is not pretended but that they are still traveling preachers in the Methodist Episcopal connection and communion, subject to its doctrines and discipline, and devoted to the accomplishment of that mission for which this church was planted in these United States; nor but that the field of their labors is within the domain covered by its original organization. A new construction of its polity, within this limit, has been determined upon by its highest judicatory, in order that the great mission may be more harmoniously and more effectually carried on. For this purpose two distinct ecclesiastical organizations, we may say identically the same, have taken the place of one, the same discipline, faith, and doctrine, and all united in spreading the same gospel and teachings throughout the land. Assume, therefore, that the general conference was disabled on account of the sixth restrictive article, from apportioning this fund; still, if the complainants bring themselves within the description of the beneficiaries, they are not thereby deprived of it. The law steps in and enforces the right. Holding this relation to it, and not having forfeited it by any wrong act of their own, or by any cause set up against them, it is not in the competence of the general conference and annual conferences combined to deprive them. Their right rests upon established principles of law and equity, which make it the duty of a court of chancery to interfere, and see that the fund is properly administered.

Looking at the position of these complainants and those they represent, on account of the action of the general conference of 1844, dividing the ecclesiastical organization and substituting in its place two distinct, independent judicatories, it is by no means certain that the distribution is in contravention even of the sixth restrictive article, that appropriates the fund for the benefit of the traveling supernumeraries and worn-out preachers, their widows and orphans. It is this description of persons to whom it is destined by the adjudication of the court. They are not only within the description, but are also the very persons heretofore in the enjoyment of it, and for whom it was originally intended. Granting that these persons have done no wrongful act, but are still laboring in the church as heretofore, except under a different merely territorial organization, they are covered by the spirit if not by the letter of the restrictive article.

Upon the whole, our conclusion is that the complainants are entitled to their share of the produce of the book concern, and a decree will be ordered accordingly. Whether the funds shall be administered by an application of produce pro rata, or by an apportionment of the capital, are questions reserved until the settlement of the decree. We had hoped that this unfortunate controversy would have been amicably adjusted by the parties, agreeably to the suggestion of each of the learned counsel, at the close of the argument, and in which the court cordially concurred. But if the views we have taken of the case, and conclusions we have arrived at, shall tend in the least degree to heal the unhappy divisions, and restore brotherly affection and Christian friendship among so highly useful and distinguished a body of Christians, we shall not regret the labor we have bestowed in deciding it.

Case No. 1,090.

In re BASHFORD.

[2 N. B. R. 73, (Quarto. 26.)]

District Court, S. D. New York. Aug. 6, 1868.

BANKRUPTCY — DEBT CREATED BY FRAUD — DISCHARGE OF BANKRUPT.

An objection to discharge of bankrupt, grounded on the fact that the debt was created by fraud, is not a valid one. Such debts are not discharged by the discharge of bankrupt.

[In bankruptcy. Application for discharge of Henry W. Bashford, bankrupt. Opposed on the ground that the debt of the opposing creditor was created by fraud. Granted.]

This case having been submitted on the specifications filed in opposition to the discharge of the bankrupt, the following decision is ordered on file:

BLATCHFORD, District Judge. The only specification filed as the ground of objection to the discharge of the bankrupt is, that the debt of the creditor was created by the fraud and embezzlement of the bankrupt, and while acting in a fiduciary character. The objection is not a valid one. It is not one of the grounds of objection specified in section twenty-nine of the act [of March 2, 1867, (14 Stat. 531,)] as a ground for withholding the discharge. If the debt in question is one of the character set forth in the specification, it will not be discharged by the discharge. Sections thirty-two and thirty-three especially except such a debt from the operation of the discharge. But the existence of such a debt is no ground for withholding a discharge, which will operate on such debts as are not excepted by sections thirty-two and thirty-three. A discharge will be granted in this case when the register shall have furnished a certificate in conformity.

BASHORE, (SHRYOCK v.) See Case No. 12,820.

BASKET, (CHANEY v.) See Case No. 2,595.

BASKET, (HASSELL v.) See Case No. 6,198.

BASKETS OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the quantity or number of baskets.]

Case No. 1,091.

In re BASS.

[3 Woods, 382;[1] 15 N. B. R. 453; 9 Chi. Leg. News, 303.]

Circuit Court, S. D. Georgia. April Term, 1877.

BANKRUPTCY — HOMESTEAD EXEMPTION — WAIVER BY BANKRUPT.

1. The homestead secured to the head of a family by the state law is excepted by section 14 of the bankrupt act (Revised Statutes, section 5045) from the operation of the conveyances made to the assignee, and is not subject to the jurisdiction of the bankrupt court, but must be pursued by those having claims against it in the proper state tribunals.

2. The fact that the bankrupt has in a particular case waived his right to the exemption, or that the homestead was not ascertained and set out in severalty before the proceedings in bankruptcy were begun, does not change the rule.

[Approved in Byrd v. Harrold, Case No. 2,269.]

In bankruptcy. This was a petition filed by [John F. Picket] the assignee in bankruptcy to review the decision [unreported] of the bankrupt court denying an order asked for by the assignee, directing him to "sell sufficient of the property of the bankrupt, [Miles Bass,] in which the homestead exemption had been waived, to satisfy the claim in favor of which the waiver had been made." [Affirmed.]

Mr. Allen Fort, for the assignee:

1. A waiver of the homestead exemption is valid and binding in Georgia, and the debt in favor of which the waiver is made may be enforced against the exempted property: Bush v. Lester, 55 Ga. 579; Simmons v. Anderson, 56 Ga. 53; In re Solomon, [Case No. 13,166.] 2. The assignee is only bound to set apart such a homestead as was exempt by law in 1871. At that date a waiver of the homestead was binding on the debtor. 3. The district court has jurisdiction complete in all matters relating to the bankrupt estate, as well for the purpose of enforcing liens and equitable mortgages on the bankrupt's exemption property as for the distribution of whatever surplus there may be, as assets.

Mr. Simmons, for bankrupt:

1. A waiver in law, to be valid, must be made with the same solemnities as are necessary to create an estate in land. There was no such waiver in this case. 2. The court has no jurisdiction of the matter. In re Hunt, [Case No. 6,883;] In re Lambert, [Id. 8,026;] In re Poleman, [Id. 11,247.]

BRADLEY, Circuit Justice. The only property possessed by the bankrupt in this case, beyond the articles exempted by the bankrupt act (amounting to five hundred dollars in value) was claimed by him as homestead property, under the constitution and laws of Georgia, and therefore exempt from the claims of ordinary creditors by the state law, and it is conceded that if this homestead claim is admissible, the property is covered by it. But only one creditor has proved under the bankruptcy, being a partnership firm, one of whom was appointed assignee. This debt is represented by several promissory notes of the bankrupt, each of which contains an agreement to waive and renounce the maker's right to homestead and exemption in his property as against that contract. The assignee applied for an order to sell the prop-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

erty in question, notwithstanding the claim of the homestead right, and free and discharged therefrom. The district judge refused so to order on the ground taken by the district court, of this and other districts, that the homestead secured to a person by the state law is excepted by the fourteenth section of the bankrupt act (Rev. St. § 5045), from the operation of the conveyance made to the assignee, and is not subject to the jurisdiction of the bankrupt court, but must be pursued by those who have claims against it, in the proper state tribunals.

I think the position taken by the district judge is correct. Not only is all property exempted by state laws, as those laws stood in 1871, expressly excepted from the operation of the conveyance to the assignee, but it is added in the section referred to, as if ex industria, that "these exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee, and in no case shall the property hereby excepted pass to the assignee or the title of the bankrupt thereto be impaired or affected by any of the provisions of this title." In other words, it is made as clear as anything can be, that such exempted property constitutes no part of the assets in bankruptcy. The agreement of the bankrupt in any particular case to waive the right to the exemption makes no difference. He may owe other debts in regard to which no such agreement has been made. But whether so or not, it is not for the bankrupt court to inquire. The exemption is created by the state law, and the assignee acquires no title to the exempt property. If the creditor has a claim against it he must prosecute that claim in a court which has jurisdiction over the property, which the bankrupt court has not. Nor does it make any difference that the homestead was not ascertained or set out in severalty until after the proceedings in bankruptcy were commenced, or until after the conveyance to the assignee was executed. Whenever properly claimed and designated, the exemption protects it, and the exception created by the bankrupt act relates back to the conveyance and limits its operation. Though not designated when the conveyance was executed, it was capable of being designated, and on the principle that id certum est quod certum reddi potest, it is as much entitled to the benefit of the exception as if it had been designated and set apart before the bankruptcy occurred. And here it is proper to remark that the assignee in this case misconceived his duty and powers when he assumed to judge that the bankrupt was not entitled to a homestead. That is for the court to say, and not for him. It was his business to report to the court whether the property claimed as homestead was or was not within the limit of value which the laws of Georgia allow for that purpose. Unless the court has this information, it cannot determine whether the property claimed is fairly within the allowance for homestead or not, and whether it has jurisdiction over the property or not. What equities might arise if there were several creditors, and some of them had a lien or claim against the homestead property, and the others not, it is not necessary to decide. Those who had no such claim might, perhaps, properly object to those having such a claim being allowed to come in for a dividend against the general assets, until they had first exhausted their remedy against the exempted property, on the principle of marshaling assets. This would depend on the question whether the equity of the general creditors is superior to that of the bankrupt and his family in reference to the right of homestead and exemption. In some cases at least the equities might perhaps be equal, in which case the court would not require the assets to be marshaled. But even where the right to marshaling existed the bankruptcy court could not assume jurisdiction of the exempted property and order it to be sold, but would require the favored creditor to pursue his remedy against such property in a forum that could lawfully reach it. The decree of the district judge is affirmed with costs.

Case No. 1,092.

BASS v. DINWIDDIE.

[Brunner, Col. Cas. 190;[1] Cooke, 130.]

Circuit Court, W. D. Tennessee. 1812.

EJECTMENT — OCCUPANCY — QUESTION OF FACT — STATUTE CONSTRUED — OCCUPANT LAW — VALIDITY OF — TITLE — OLDEST GRANT AS EVIDENCE OF.

1. Occupancy is a question of fact for the jury. No person can claim the privileges of an occupant under the statute unless he has actually settled on land claimed.

2. The occupant law [1806] of this state, so far as it violates the compact with other states by giving preference to its citizens over those of the other states, is void.

3. The oldest grant is conclusive evidence of title at law, except in the single case of an elder legal entry.

At law. The plaintiff [lessee of Bass] is a citizen of North Carolina, and claimed the land in controversy by a grant, older in date than that under which the defendant claims. To obviate that the defendant produced in evidence an entry made on the 3d day of August, 1807, of an occupant claim, under the law of 1806, which was prior to the date of the plaintiff's grant. The plaintiff then produced an entry upon a military warrant made the 5th day of August, 1807. The offices for receiving and making entries were opened on the 3d day of August, 1807; but it appeared that no entry had been made until the 5th day of August, except as to occupant claims. The holders of warrants were obliged to have them listed, and then drew for priority of entry which was not done as to occupant claims.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

The compact between North Carolina and Tennessee contains the following provision:—"That in the entering and obtaining titles to lands, no preference shall be given to the citizens of the state of Tennessee over citizens of any other state, claiming under North Carolina; nor shall any occupancy or possession give preference in entering or obtaining titles so as to injure or take away the right of any person now claiming by entry, grant, or otherwise, under North Carolina." This compact was ratified in the year 1804.

The section of the occupant law of 1806, under which the defendant made his entry, is as follows:—"That any person or persons who may have seated him, her, or themselves on any vacant and unappropriated land within the jurisdiction of this state, and who were in actual possession of the same at and before the 1st day of May in the present year, such person or persons shall be entitled to a preference of entering the same for three months after the first Monday in June next, upon any good and valid warrant."

Testimony was introduced to show an actual settlement at and before the 1st day of May, 1806; but this point was controverted by other evidence. [Judgment for plaintiff.]

Mr. Dickinson, for plaintiff.

Mr. Haywood, for defendant.

BY THE COURT.—The question of occupancy is a question of fact to be determined by the jury. One thing, however, is certain, that unless the occupant was seated on, and in actual possession of, the premises at and before the first day of May, 1806, he was not as such entitled to make his entry. The privilege given was intended in favor of the actual settler, and before any person can claim the extension of it to him he must show that he comes within the law. But it has been argued by the counsel for the defendant that his entry is good, independent of the occupant law. To this it may be replied that he can no otherwise claim. At the opening of the office the holder of a warrant, desirous of making an entry, was to have it listed, and then draw for priority of entry. This was not necessary upon the warrants which were to be entered as occupant claims, nor was it done in the case of the defendant's warrant. This was a preference allowed to the occupant claimants over the common holder of a warrant. It also appears that the first entry made upon the listed warrants was on the 5th of August, two days after the defendant's entry. And besides, the entry upon the face of it expresses it to be an occupant claim. From hence it follows that the claim of the defendant must be viewed as an occupant claim.

It has been contended that the claim of the defendant is void, being derived from an act of assembly expressly violating the compact. The court are also of this opinion. The compact expressly declares that the state of Tennessee shall give no preference to her own citizens over the citizens of any other state deriving title under North Carolina. The object of this was to place all claimants upon the same footing, and not to permit a fair and bona fide holder of a warrant to be postponed in favor of a citizen of Tennessee. The state of Tennessee has no power to perfect grants for land unless what is derived from the compact. If this be the case, how stand these claims? Both plaintiff and defendant hold warrants which they wish to enter. One of them is a citizen of North Carolina, and the other a citizen of Tennessee. The legislature of Tennessee pass a law declaring that an occupant who actually settles upon the land shall have a preference in entering the same at any time within three months from the first Monday in June, 1807. By virtue of this law the occupant enters the land at a time when the other holder of the warrant cannot make an entry because of the preference given to the occupant who is necessarily a citizen of Tennessee. Is this not giving a preference to the citizens of Tennessee over the citizens of any other state? There can be no doubt of it; and therefore the law in such respect is void. It may be also remarked that this cannot be called an act of the legislature in its sovereign capacity. The power to make any law on the subject is derived from a marked and designated authority. This authority cannot be exceeded, or the act will be void.

An attempt is made to liken this case to that of Ghilcrist v. Nixon, [unreported.] Without attempting to show all the distinctions that exist, we will remark that in that case both the entry and grant of Ghilcrist was of an elder date than that of Nixon. The real ground the court went upon in determinating in favor of Ghilcrist was that we would not permit the consideration of the grant to be inquired into in a court of law. We were of opinion that the oldest grant was conclusive evidence of the title at law, except in the single case of an elder legal entry. That was not the case there, because Ghilcrist's grant was older than Nixon's entry. We were of opinion, under these circumstances, that the consideration of that grant could not be inquired into. That case, therefore, is not similar to the present.

NOTE, [from original report.] Relation between Elder Legal Entry and Later Grant.—See Donegan v. Taylor, 6 Humph. 503, citing case in text.

Case No. 1,093.

BASS v. FIVE NEGROES.

[Bee, 201.] [1]

District Court, D. South Carolina. 1803.

SALVAGE—MARITIME SERVICE—COSTS.

[1. Rescuing runaway slaves, destitute of food or water, adrift at sea, 60 leagues from land,

[1] [Reported by Hon. Thomas Bee, District Judge.]

in a stolen canoe, providing them with food, and bringing them safely to land, is an important maritime service, which, though not attended with great risk, will entitle the rescuer to one-tenth the value of the property saved.]

[2. In such a case the costs of the proceedings are not properly chargeable to the owner of the canoe, but should be paid by the owner of the slaves.]

[In admiralty. Libel by Captain Bass against five negro slaves and a canoe. McCall claims the canoe. Decree for libelant, with costs against the owner of the negroes.]

[BEE, District Judge.] It appears that these five negroes had been driven out to sea in a canoe, and that they were picked up by Captain Bass in lat. 33, near the outward edge of the Gulf Stream, and about sixty leagues from land. They were destitute of provisions and water, and, according to the account given by the negroes, had been so for four days. Captain Bass went two or three miles out of his course to take them on board; and supplied them with provisions until he arrived with them in this port, fourteen days after he found them. There was no great risque in rendering this service; but it was very important in its effects, for, without it, these people would, probably, have perished. Their chance of meeting with vessels was small, and they could not have subsisted much longer without provisions and water. They were making, as they say, a West-India course, and could never have reached land without this, or some similar, assistance. The canoe and negroes may be valued at three thousand dollars. Every case of salvage must depend upon its own circumstances; but it is now agreed that courts ought always so to act as to afford encouragement to salvors in general. I have frequently, especially in cases of derelict, awarded one half of the property saved. At present, I shall be satisfied with decreeing one tenth. Let Captain Bass be paid that sum; and let the owner of of the negroes pay the costs, as it appears that they stole the canoe, which is the property of another claimant, Mr. M'Call.

BASS, (UNITED STATES v.) See Case No. 14,537.

Case No. 1,094.

BASSELL v. AMERICAN FIRE INS. CO.

[2 Hughes, 531.] [1]

Circuit Court, E. D. Virginia. Sept. Term, 1877.

INSURANCE — CONDITIONS IN POLICY — AGENT OF INSURED — CHARACTER OF INSURED PROPERTY — QUESTIONS OF LAW AND FACT.

1. The conditions annexed to a policy of insurance, in order to bind the insured, must be brought to his attention at or before the time of the contract of insurance.

2. If a solicitor of insurance by his acts makes himself the agent of the insurer, and the insurer contracts through him and by him, a clause in the policy declaring that persons so acting are agents of the insured and not of the insurer, is invalid to change the character of agent of the insurer held by the solicitor described.

[See Mohr & Mohr Distilling Co. v. Ohio Ins. Co., 13 Fed. 74.]

3. Whether certain classes of goods embraced in a stock of merchandise insured as "dry goods," were or were not "dry goods," is a question of fact for the jury, and not necessarily one of mere law for the court.

At law. Action on the case, on a policy of insurance. The plaintiff, John Y. Bassell, was a merchant in the town of Leesburg, Loudoun county, Virginia, and in the fall of 1876 set up a branch store in Middleburg, in the same county, and transferred a portion of his stock from his house in Leesburg to his branch store in Middleburg. Desiring to insure the stock of this branch store, and being sick and confined to his bed, he sent for one Peter F. Shroff, living in Leesburg and operating in insurance business, who, according to the pretensions of the plaintiff, was acting as the agent of the defendant and other companies. Shroff said he was well acquainted with the premises, and asked what stock the plaintiff proposed to keep and insure, to which plaintiff replied, "Dry goods, etc.; just such as I have in my store here." Shroff asked if he intended to keep kerosene oil, or anything of that character; to which plaintiff replied, "Only what I need for lighting my store." To which Shroff rejoined, "Of course, that is presumed; I only meant to inquire if you intended to keep it in stock for sale;" or words to that effect. Shroff then sent on the application, and in a few days the policy was received by him, and he notified Bassell that he had the policy, and would furnish it to him upon the payment of the premium. The plaintiff sent him, by plaintiff's clerk, the amount of premium required by Shroff, and received in return the policy sued upon. Shroff forwarded the premium to the defendant through Wise & Co., at Alexandria, Virginia; and its receipt was admitted. Wise & Co. were the agents of the defendant, for whom Shroff was a sort of canvasser.

The policy contained the following clauses; but it did not appear that they were brought to the knowledge or attention of the plaintiff, —to wit: At the beginning of the policy there were words making the conditions annexed to it a part of the policy, and also these words: "This policy of insurance witnesseth, that the American Fire Insurance Company have received of John Y. Bassell twelve dollars —— cents, premium for insuring (according to the tenor of their printed conditions hereunto annexed, which are hereby made a part of this contract of insurance)," etc. And also on the face of the policy, in

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

red ink: "That any party, other than the assured, procuring the insurance, either at the office of the company or its agents, shall be considered the agent of the assured, and not of this company. Benzin, naphtha, petroleum oil, and other inflammable liquids, the storage or use of which is subject to legal restrictions, prohibited, unless permission is indorsed in writing on this policy." And on the back of the policy, under the head of "Conditions of Insurance," etc., in very small type, was the following: "XIV. This company is not liable for damages by lightning, or explosions of any kind, except by fire consequent thereon; nor where the fire heat is used in any process, to the articles damaged by such process; nor to goods in show windows, where the fire originates from lights in said windows; nor where camphine, pine oil, burning fluid, or any similar inflammable liquid is used for light or kept for sale, by the assured, without permission noted on the policy."

On the 15th day of September, 1876, a fire occurred in the aforesaid store in Middleburg, and the entire stock of goods was either destroyed or damaged by the fire; and the loss (testified to by the clerks, and by merchants of the town who had seen the stock) amounted to from $4000 to $4500. The inventories were destroyed by the fire; but the plaintiff forthwith made out his preliminary proof of loss as best he could, and it was forwarded to the defendant. Thereupon Thomas M. Alfriend, the general agent for defendant in Virginia, went to the scene of the fire, examined the premises and the damaged goods, and with the plaintiff agreed upon an estimated value for said damaged goods, leaving the loss far in excess of the amount of the policy. According to plaintiff's evidence, Alfriend expressed himself entirely satisfied with the preliminary proofs and the adjustment of the loss; and went away after giving the plaintiff to understand that the policy would be paid in sixty days, or sooner for a reasonable discount. Alfriend denied this statement in his evidence. The day this suit was brought the plaintiff received notice, from the Philadelphia office, of objections to his preliminary proofs, and requiring a bill of particulars, etc. It was proved also at the trial that the plaintiff's bills, invoices, etc., were destroyed by the fire, and it was therefore impossible for him to have furnished a bill of particulars (even if the defendant's agent, Alfriend, had not already waived it).

In the progress of the trial the plaintiff introduced the aforesaid Peter F. Shroff, whom he claimed to have dealt with as agent of the defendant; but who testified that he was not the agent of the defendant. There was no evidence to prove, or tending to prove, the cause or origin of the fire. It was not proved that the fire was caused by kerosene oil used in a lamp, or what sort of oil was in a lamp which was proved to be in the store.

The jury found a verdict at the July term of the court for the plaintiff. [Unreported.] A motion was forthwith entered for a new trial; and this motion was heard at the adjourned term in September. On the hearing of the motion the defendant's counsel read the affidavit of H. C. Ryon, containing material averments, as newly discovered testimony; and the plaintiff in reply read the affidavit of said Ryon, exactly the counterpart, in every particular, of his affidavit given to defendant, and also the affidavit of Ryon and others, to prove that the defendant's agent who was conducting the suit had had interviews with Ryon previous to the trial; besides affidavits of others as to Ryon's credibility, etc.

In support of its motion for a new trial, the defendant company relied upon the following grounds, to wit:

1. The verdict was contrary to the evidence.

2. The plaintiff has discovered evidence since the trial of the most material character (Ryon's), which by the exercise of extraordinary diligence the defendant could not have obtained and used at the trial. The defendant had no knowledge of the witness (Ryon) or of what he could testify to, and has only learned these facts since the trial. This evidence will be positive and direct, to the most material facts in the case, viz., the character and value of the stock of goods in the plaintiff's store at Middleburg at the time of the fire, the disposition of the fire in the store, the origin of the fire, the extent of the fire, the conduct of the witnesses, Crissy and Noland, the clerks of the plaintiff. The evidence will also establish the fact, that said clerks had lost the key of the store some days before the fire, and that the store (as they said) had been entered and robbed the night before the fire. That there never were any goods kept under the counter; that there were no shelves nor any other convenience for keeping goods under the counter; that there were no goods under the counter at the time of the fire. The affidavit of the witness is in the defendant's possession, and will be filed at the time of the hearing of the motion for a new trial.

3. For misdirection on the part of the court in this, to wit:

1st. That Shroff was the agent of the defendant. 2d. That the conditions attached to the policy and made a part of the contract by the very first paragraph in the body of the policy, did not bind the plaintiff unless his attention was directed to said conditions, before or at the time the policy was issued. 3d. That the jury was to determine whether or not boots and shoes, hats and caps, were dry goods.

4. For refusing to instruct the jury as follows, to wit: 1st. That every one may be presumed to remember some particulars though his books may be lost, and that a statement in gross, such as that furnished by the plaintiff, merely reiterating the descrip-

tion in the policy, was not such as the law required the plaintiff to make. 2d. That proof of loss was insufficient, and thereby leaving that question for the jury to pass upon.

[Motion denied.]

HUGHES, District Judge. I do not think that Ryon's affidavit makes a sufficient case for a new trial on the facts. Even if it did, his own subsequent affidavit is in direct contradiction to it. The objection on the score of misdirection of the court deserves more serious consideration.

1st. As to Shroff's relation to the parties. That Shroff was not the agent of the insurers or of the insurers' resident agents at Alexandria in general, is readily conceded. But in this case he contracted with Bassell for the insurance; he received the premium in person; which having been transmitted to the insurers in Philadelphia, directly or indirectly by him, a policy was returned through him, and the policy was by him delivered to the insured. Such is my recollection and understanding of the testimony. Now whether the insurers, or their resident agents, Wise & Co., or Shroff, or even Bassell himself, regarded Shroff as the agent of the insurer, he was nevertheless so in the eye of the law. A person may be the agent of another in law without intending it. He may be so, without that other person intending it. He may be so without either of the parties for whom he was the intermediary, intending it. See Ex parte White, (In re Nevill,) 6 Ch. App. 403. It is acts which constitute agency, and not intentions, or even disavowals, or denials, or even contracts of denial as that embodied in this policy. Shroff was by his acts the agent of the insurers in this matter, the agent pro hac vice; and he was so, notwithstanding the clause in the policy which he himself transmitted to the insured contracting that he was not. The agency had been established by his acts, and its functions performed before the unipartite policy was delivered.

2d. The second instruction was to the effect that the conditions of a policy indorsed in small type upon the back of it are not parts of it, to bind the insured, unless they are distinctly drawn to the attention of the insured at the time of the contract. Policies of insurance differ from ordinary contracts in this, that while ordinary contracts are signed by both parties, policies are unipartite in form, signed only by the insurer. In general they are transmitted to the insured after the agent and the insured have contracted; after the insured has paid a premium, and under circumstances which put it out of his power to object to such provisions inserted in it as were not in his mind or in the oral understanding which was had when he paid the premium; and policies are most of them loaded down with such provisions. My instruction seemed to be accepted by the defendant's counsel at the trial, who contended before the jury that the words in the very first paragraph of the body of the policy, making the annexed conditions a part of the policy, effected a compliance with the instruction. I thought so myself; but it was a question of fact left to the jury, and the jury differed both from defendant's counsel and myself. Union Mut. Ins. Co. v. Wilkinson, 13 Wall. [80 U. S.] 222. That the nonsigning party to a contract, unipartite in form, ought to have notice of conditions not in the body of the contract is too obvious a principle of law to be disputed. The jury thought that the words of reference in the body of the contract did not convey this notice, and I do not see my way to setting aside the verdict on that account.

3d. As to whether boots and shoes, hats and caps, were embraced in the term "dry goods," and whether that question ought to have been referred to the jury, I think the ruling of the court was right. If a term used in a contract is ambiguous, the court may resort to any rational and proper means of interpreting its meaning. It usually consults the lexicographers. If they are at fault, it resorts to other means of ascertaining the true purport of a word. At last, however, in case of doubt, it is the intention of parties to the contract which is the real point to be ascertained, and when this may be interpreted by usage and custom, especially by the understanding of a term in trade, the question may well be left to a jury largely composed of intelligent merchants, as this jury was, for their determination. In the case under consideration this course was peculiarly proper, and the court adheres to its ruling.

4th. That an insured person ought in general to be required to furnish a detailed statement of the particulars of his loss is not denied. If he shows by evidence that he was prevented from doing so by the consumption by the fire of his invoices, that requirement is satisfied. Dishonest men might endeavor to furnish the particulars from a fertile memory and invention, but it is an argument for the integrity of the insured person, if he declines this expedient, and confesses flatly his inability to furnish the particulars after his means of doing so are destroyed. I think there was in this case a waiver by Alfriend, general agent of the defendant's company, of further proofs of loss than those furnished, and that the notification from the Philadelphia office, sent simultaneously to bringing the suit, came too late to enable the insured to supply the omission. The motion for a new trial is denied.

BASSETT, (FRANCIS v.) See Case No. 5, 037.

Case No. 1,095.

BASSETT v. ORR et al.

[7 Biss. 296.][1]

Circuit Court, E. D. Wisconsin. Oct. Term, 1876.

CREDITORS' BILL—EXECUTION — RETURN OF MARSHAL PRESUMED TRUE—BURDEN OF PROOF—EVIDENCE—AMOUNT OF PROPERTY.

1. If it is apparent that there was no bona fide attempt made by the officer to find property to satisfy the judgment, a creditor's bill will be dismissed.

2. As the basis for a creditor's bill, an execution upon the judgment should be in good faith issued, and should be returned unsatisfied by the officer upon a reasonable and actual but ineffectual effort to find property. If the return of the officer on its face shows a failure in this respect then there is no foundation for equity jurisdiction.

3. The marshal is not bound to hold the execution the sixty days it might run before making a return, as the remedy at law might be exhausted before the expiration of the return day, and in that case the execution could be immediately returned.

4. When the return of the marshal is on its face complete and sufficient, the presumption is that the return is true and that the officer performed his duty; such presumption is not overcome by the fact that he returned the process on the day he received it, as he might have previous knowledge of the judgment debtor's property and situation.

5. The burden of showing the return false is upon the defendant.

6. The return is a sufficient basis for a creditor's bill.

7. The falsity of the return may be shown by establishing that the debtor had property liable to execution and which could have been levied on to pay the debt.

8. It is not necessary that there should be property sufficient to fully satisfy the execution in order to defeat the remedy in equity, and if there be property sufficient to satisfy a considerable portion of the debt a creditor's bill ought not to be sustained until such property is exhausted.

9. In this case, property being mortgaged and defendant's affairs complicated, the bill was sustained.

In equity. The complainants [Henry D. Bassett, surviving partner] recovered a judgment against the defendant Hunter Orr, in this court, April 15th, 1875. Execution was issued upon the judgment and delivered to the marshal April 16th, 1875, and was returned by him on the same day nulla bona. The defendant's residence was at Oconto, in this state. On the 17th of April the complainants commenced this action against the judgment debtor, and other parties, which was in the form of a creditor's bill, to reach property for the satisfaction of the judgment. A receiver was appointed in the action April 29th, and an injunction was issued and served November 6th, 1875. The bill was in the usual form.

Defendants pleaded, averring that the marshal made no attempt to find property from which to make the amount of the execution issued upon the judgment, and that he returned the execution without any effort to discover or levy upon property; that the judgment debtor at the time owned property consisting of lands and a saw mill, in the county of Oconto, of value more than sufficient to satisfy the judgment and execution.

Upon the issue thus made, and the testimony, the defendants insisted that the bill should be dismissed. [Denied.]

Tenneys, Flower & Abercrombie, for complainants, cited First Nat. Bank v. Gage, 8 Chi. Leg. N. 370.

John J. Tracy, for defendant, Orr; with whom was H. M. Finch, who cited Gibson v. Woodworth, 8 Paige, 131; McElwain v. Willis, 9 Wend. 549; Smith v. Thompson, 1 Walker, Ch. 1; In re Remington, 7 Wis. 643; Reed v. Wheaton, 7 Paige, 664; Voorhees v. Howard, *43 N. Y. 371; Crippen v. Hudson, 3 Kern. [13 N. Y.] 161; Cassidy v. Meacham, 3 Paige, 311; Riopelle v. Doellner, 26 Mich. 102.

DYER, District Judge. To permit a judgment creditor to issue an execution upon his judgment, and to procure its immediate return, "No property found," when in fact no effort whatever had been made by the officer to find property, and when in fact the debtor had tangible, visible property from which the amount of the judgment could be realized, and then to suffer the creditor to make such proceedings the basis of a creditor's bill, would be a perversion of the plainest principles of equity practice applicable to the subject. Upon such a state of facts being shown, I should not hesitate to dismiss the bill.

In this case it is claimed:

I. That it is apparent on the face of the marshal's return, considered in connection with the dates of the entry of judgment, of the issuance of execution, of the return itself, and of the filing of this bill, that there was no bona fide attempt made by the officer to find property.

II. That upon the testimony the court should conclude that the marshal was directed by the creditor to return the execution, "Nothing found," without any effort to discover property.

III. That to lay the basis for a creditor's bill the execution should not have been returned until the return day thereof, and that by its terms the officer had sixty days within which to look for property and to return the execution.

IV. That the judgment debtor owned visible property upon which the judgment was a lien and from which the amount of the judgment could have been made at the time the execution was returned.

It is insisted either that the bill should be dismissed, or that all proceedings subsequent to the filing of the bill should be set aside,

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

and the bill be entertained only in aid of the execution.

The testimony taken upon the issue formed by the bill and plea, hardly warrants the conclusion that the execution was returned by the marshal, "No property found," under direction of the judgment creditor's attorneys so to make return. The only testimony upon that subject is that of Mr. Tenney, one of the attorneys, who testifies that he presumes the marshal was instructed to make such a return in case he found he could collect nothing, and that he supposes the marshal made his return as it was made, because he was satisfied he could make nothing by levy.

I do not think the marshal was bound to hold the execution the sixty days it might run, before making a return. In other words, the remedy at law might be exhausted before the expiration of the return day, and in that case the execution could be immediately returned. There are cases to the contrary in New York, but they arose and were decided upon ancient statutes of that state. The cases cited upon the argument, Smith v. Thompson, 1 Walker, Ch. 1, and First Nat. Bank v. Gage, 8 Chi. Leg. N. 370, are in antagonism upon the point. The practice sanctioned by the courts of this state is against the theory that a creditor's bill cannot be filed until after the return day of an execution, although the execution should be actually returned before that time. The test is, and I think should be, has the remedy at law been exhausted before the exhibiting of the bill; and I understand that in this court under the established practice, such a bill may be presented, though the execution be in fact returned before the return day, if the bill is otherwise within the equity rules.

As the basis for a creditor's bill, an execution upon the judgment should be in good faith issued, and should be returned unsatisfied by the officer after a reasonable and actual but ineffectual effort to find property. In other words, the remedy under the execution should first be exhausted. If the return of the officer on its face shows a failure in this respect then there is no foundation for equity jurisdiction. As in the case of In re Remington, 7 Wis. 643, cited on the argument, where the officer made return by order of the attorney and returned only that there was no personal property whereon to levy, which was held insufficient to support proceedings in the nature of a creditor's bill. If there be collusion between the officer and the party and a false return is made, proof of the fact is of course fatal to a bill. Here the return of the marshal is on its face complete and sufficient. The presumption is that the return is true. The presumption is that the officer performed his duty. That presumption is not overcome by the fact that he returned the process on the day he received it. We do not know but that on some other process, or by some other means, he had previously had occasion to investigate, and had acquired knowledge of the judgment debtor's property and situation. In any event we have to presume the return true until the contrary is shown, and the burden of showing the return false is upon the defendant. Unattacked, and supported by this presumption, the return is a sufficient basis for a creditor's bill. Its falsity may however be shown by establishing the fact that the debtor had property liable to execution, and which could have been levied on to pay the debt. Such fact should be clearly and satisfactorily shown. In such event a creditor's bill could not be maintained. I do not regard it essential that there should be property sufficient to fully satisfy the execution in order to defeat the remedy in equity. If there be property sufficient to satisfy a considerable part of the debt, a creditor's bill ought not to be sustained until such property is exhausted.

The remaining question then is, does it clearly and satisfactorily appear from the testimony that the judgment debtor had tangible property and effects, real or personal, from which the debt or a considerable part of it could be realized? The defendant testifies that he owns a quantity of pine lands from which the timber has been cut off, and the amount and value of which he does not state, but which lands are incumbered by mortgage to the extent of between four and five thousand dollars. Then the firm of Hunter Orr & Co. owned a saw mill standing on leased land. The defendant Orr testified that the mill cost $22,000. In November, 1875, there was rent unpaid for the leased land amounting to about $700, and also some taxes. The yearly rent agreed to be paid was $600 or $700. In April, 1875, the mill was let to the sons of the defendant Orr, his firm having previously discontinued business; but those lessees in November, 1875, had paid no rent for the use of the mill. There was a judgment in favor of one Somers against Orr, upon which there was originally due about $5,200, but which had been reduced by levy and sale of property, to about $3,000; and for the payment of which the property of Orr seems to have been liable. Then Blanchard, Borland & Co., of Chicago, held a transfer of defendant's interest in the mill and leasehold, as security for a balance due to them on account of advances. Mr. Blanchard testifies that the value of the mill was much affected by the fact that it stood on leased lands, that there was a large amount of the rental and taxes unpaid, and that the owner of the lands would not permit the removal of the mill. With permission to remove the mill and after paying all delinquent taxes and rents, and securing the payment of the rent for the term of the lease, he thinks the mill might have been sold for between $3,000 and $4,000. Viewing the property just as it stood in April, 1875, and without special reservations touching removal of the mill, and payment of

taxes and rent, he does not think the property had any salable value. Considering all the evidence bearing upon the circumstances of the judgment debtor, the character, value and situation of his property and the incumbrances upon the same, it is by no means clear that any part of the complainants' judgment could have been realized by ordinary proceedings upon the execution.

The testimony taken as to property possessed by the defendant, tends to the conclusion that there is slight basis, if any, so far as property is concerned, for a creditor's bill. The plea will be overruled as a plea, and as it presents the only issue in the case which the defendants seek to raise, it may stand as an answer to the bill, with the right to the parties of bringing forward all the merits of the case.

BASSETT, (UNITED STATES v.) See Cases Nos. 14,538 and 14,539.

Case No. 1,096.

BASSILL v. JEFFERSONVILLE.

[The case reported under this title in 3 Wkly. Law Gaz. 279, is the same as Case No. 1,449.]

Case No. 1,097.

BASTABLE v. WILSON.

[1 Cranch, C. C. 124.] [1]

Circuit Court, District of Columbia. June Term, 1803.

PLEADING—ACTION ON JUDGMENT.

1. After not guilty and issue, to an action of debt upon a judgment in Virginia, suggesting a devastavit, the court will not suffer the defendant to plead nul tiel record, without showing sufficient cause why it was not pleaded before.

2. Nil debet is no plea to an action of debt on a judgment of another state.

At law. Debt [by Bastable against Wilson's administrator] upon a judgment of the Dumfries district court suggesting a devastavit; plea, not guilty and issue. Defendant moves now, when the cause is called for trial, to put in the plea of nul tiel record, without showing why he had not pleaded it before, or that it was now necessary for the justice of the cause.

Motion overruled by THE COURT.

The defendant then offered the plea of nil debet—refused without argument. Judgment confessed saving equity.

BASTABLE, (WILSON v.) See Cases Nos. 17,788 and 17,789.

BASYE, (VEITCH v.) See Case No. 16,909.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 1,098.

In re BATCHELDER.

[1 Lowell, 373;[1] 3 N. B. R. 150, (Quarto, 37.)]

District Court, D. Massachusetts. July Term, 1869.

BANKRUPTCY—TRANSFER BY INSOLVENT—PREFERENCE — ASSIGNMENT UNDER DURESS — PROPER BOOKS OF ACCOUNT.

1. Where a trader transferred his whole stock and book accounts to one creditor, about three weeks before filing his petition, and had no other property, but owed many debts; *held*, a preference unless explained.

[Cited in Re Seeley, Case No. 12,628.]

2. It is no valid excuse for such an assignment, that it was made under threat of legal process.

[Cited in Strain v. Gourdin, Case No. 13,521.]

[See Rison v. Knapp, Case No. 11,861; Traders' Bank v. Campbell, 14 Wall. (81 U. S.) 87; Clarion Bank v. Jones, 21 Wall. (88 U. S.) 325; In re Jackson Iron Manuf'g Co., Case No. 7,153.]

3. If the necessary effect of an act is to prefer one creditor, the intent to prefer is presumed, though other motives may have co-operated to induce the act.

[4. The discharge of a bankrupt trader should not be refused for failure to keep proper books of account, when the books themselves are not produced, and parol statements regarding them are vague and inconclusive. The evidence as to the improper conditions of the books, and their bearing on the debtor's business, should be complete.]

[Cited in Re Frey, 9 Fed. 380.]

In bankruptcy. The examination of the bankrupt [Charles W. Batchelder] disclosed that about three weeks before he filed his petition, he assigned and transferred his whole stock in trade and book accounts to his father, in satisfaction of a pre-existing debt. He had no other estate or property, excepting such as is exempted from the operation of the bankrupt law, and he owed a considerable amount of debts, and was in fact insolvent. It appeared that his father came to his place of business with a sheriff's officer, and threatened to attach his stock and break up his business unless he made the conveyance, and it was under this pressure that the assignment was made. [Discharge refused.]

J. L. Colby, for opposing creditors.

W. H. Towne, for bankrupt.

LOWELL, District Judge. It is argued that this act was not a preference, because it was not voluntary. I have considered this question more than once, and am fully satisfied with my former decisions, that under the bankrupt act such a payment does not lose its character of a preference by being made under pressure. The English courts worked out the doctrine of preference from a consideration of the equities of the subject-matter. The word itself was not found in their stat-

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

utes, but they held that the intent of the law being to distribute the assets equally among all the creditors, no unjust advantage ought to be given to any one creditor. But under their earlier statutes, [at the time this subject was given its legal shape,] [2] the title of the assignee related back to the act of bankruptcy, and in declaring a trader to be bankrupt by reason of a preference, they indirectly deprived, or tended to deprive, the preferred creditor of his title, and that without hearing him. It became necessary, therefore, to be very cautious not to create acts of bankruptcy which might prejudice honest creditors. A creditor has a right to demand and receive payment of his debt, they said; and from this starting-point they arrived at the rule that a payment made in pursuance of a lawful demand, should not be considered a fraud on the act. See In re Waite, [Case No. 17,044.]

But they never carried this doctrine to the extent of saying that a creditor might lawfully take an assignment of all the property of a trader. On the contrary, that was always and conclusively an act of bankruptcy, from which even pressure could not free it, because it must have been obvious to the creditor at the time that if he got the whole, no one else could get any thing. Accordingly the English law has two conclusive presumptions. One is that a trader who conveys his whole property to a pre-existing creditor, must have contemplated a preference of that creditor; and the other, that a debtor who pays an honest debt, with a part only of his assets, does not intend any [technical] [3] fraud, [which should render the payment void,] [3] if the payment was in consequence of the threats or demands of the creditor.

Our law adopts neither of these presumptions as conclusive. It defines a preference in the statute itself; or rather it has language which is inconsistent with the English definition. It makes the intent to prefer, or give an advantage to one creditor, the important thing; and this may evidently concur with pressure on the part of the creditor. For instance, in the leading case of Denny v. Dana, 2 Cush. 172, which is more important in construing our statute than the English decisions are, because the statutes are more alike, pressure was not allowed to avail in answer to a manifest preference. The doctrine of that case has been followed in many decisions under the bankrupt act, and denied, so far as I know, in none.

It must be remembered that by our law the assignee's title dates only from the filing of the petition, and that the bankrupt may be guilty of a preference which will subject him to the act, without involving the preferred creditor, unless the latter had reason to know or suspect the illegal intent.

On the other hand, the fact that the conveyance was of all the property will not perhaps in all cases conclusively show a preference. It is a very important circumstance, and almost decisive, but the presumption is still one of fact, and the question in every case is whether a preference was intended. It would be very difficult to explain so suspicious a fact, but I am not ready to say that there may not arise a case in which it could be explained.

No explanation is made in this case, and the discharge is refused.

[The other objection is overruled. It is not right to condemn a trader for not keeping proper books of account without full evidence of the facts, and of their bearing upon the business of the debtor. The books themselves are not produced, and the parol statements are vague and inconclusive. The case, on this head, is not made out.] [4]

NOTE, [from 3 N. B. R. 151, (Quarto, 37.)] See Wilson v. City Bank of St. Paul, [17 Wall. (84 U. S.) 473,] requiring intent to prefer to be shown.

Case No. 1,099.

In re BATCHELDER.

Ex parte LUCE.

[2 Lowell, 245.] [1]

District Court, D. Massachusetts. May Term, 1873.

BANKRUPTCY—SALE—VENDOR'S LIEN.

1. A., the owner of certain goods, deposited them with a warehouseman in the name of B., who was A.'s broker, and afterwards sold them to B., gave him a receipted bill of parcels, and took his note for the price. *Held*, that no further delivery of the goods was necessary, and that A.'s lien as vendor was lost.

2. Another parcel of goods was warehoused in the name of C., another broker, and was sold by A., the owner, to B., and a receipted bill given, and a negotiable promissory note taken for the price, which note was signed by B., and indorsed by D. for B.'s accommodation. B. and D. failed before the note became due. Notice of the sale had been given to C., the broker, but not to the warehouseman. *Held*, that the possession was not changed, and the lien of A. revived on the failure of B. and D.

3. As affecting the lien it was immaterial whether the note was taken as payment or security. A. was not bound to surrender the note, but might require the goods to be sold, and indorse the amount of the proceeds upon the note, and prove against the estates of B. and D. for the balance.

In bankruptcy. The petitioner, [D. W.] Luce, sold several lots of pickled salmon to [M. T.] Batchelder, at sundry times, and took his notes for the price, payable in four months from their several dates, indorsed by a third person. Both the buyer and the indorser failed, and became bankrupt, leaving the notes unpaid; and the petitioner proved for the full amount of the notes at the first meeting of

[2] [From 3 N. B. R. 150, (Quarto 37.)]

[3] [From 3 N. B. R. 151, (Quarto 37.)]

[4] [From 3 N. B. R. 151, (Quarto, 37.)]

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

Batchelder's creditors. He soon after filed his petition, averring that his proof was made unadvisedly, in the absence of his counsel, and that he was now informed that he had a lien on such of the salmon as remained in warehouse, and prayed that the goods might be sold, and the proceeds be applied to the payment of his debt, and that his proof should be so modified as to stand good only for any balance that might remain due him, after crediting the proceeds of sale. The parties agreed, in writing, to a statement of facts. Sixty barrels of the salmon were put by Luce into the hands of Beaman Brothers, brokers, for sale, and were by them stored in the warehouse of Lombard & Co., in their own names. When this lot was sold to Batchelder, a receipted bill of the same was given him, and Beaman Brothers were notified by Luce that the sale had been made, and were ordered to deliver the sixty barrels to Batchelder; but the latter never called upon Beaman Brothers, nor upon Lombard, the warehouseman, for the goods, or any part of them, and no transfer of them was made on Lombard's books. There were three other lots, all of which were stored with Lombard in the name of Batchelder, who was a broker as well as a dealer, and while so stored were bought by him; and parts of two of these lots were delivered, from time to time, by Lombard to Batchelder before his failure.

No notice was given by Luce to Beaman Brothers, nor to Lombard, of his intention to claim a lien, until three months after the failure of Batchelder, and after protracted negotiations for a settlement with him had resulted in nothing. The notes which Luce took for the price of all these goods were pledged by him to a bank as collateral security for a loan; but it was agreed at the argument that they were afterwards taken up by Luce, and were now held by him. He did not offer to cancel or surrender the notes, intending to prove them against the indorser's estate in bankruptcy. By consent of both parties an order was passed, a few days before the hearing, authorizing a sale of the goods, the proceeds to be held subject to the further order of the court.

C. G. Keyes, for Luce.
J. B. Harris, for assignee.

LOWELL, District Judge. It seems equally evident that Luce retains a vendor's lien upon the sixty barrels, and that he has none upon the other lots. If goods at the time of their sale are in the possession of a warehouseman or other bailee of the vendor, the lien is not lost by a simple notice to the bailee of the sale; but he must do some act, or come under some obligation, by which he is to be considered as having changed his relation to the vendor, and transferred his allegiance, so to say, to the vendee. Notice may be enough to put him on his guard, and to render him liable to an action if he does any thing inconsistent with the notice; and a notice silently received may be evidence of acquiescence, and it may even be conclusive evidence thereof, by way of estoppel, if third persons have been misled; but, as between the vendor and vendee, I understand that the possession is not changed until the warehouseman has in some way acknowledged the change, and has become the agent of the vendee. In the analogous law of stoppage in transitu, the carrier who receives goods very often has notice that the consignee has bought them, and is, in fact, their owner, and he is notified and directed to deliver to the vendee; but until he has either delivered them, or changed his relation in some way so as to become the exclusive agent of the vendee, they may be stopped, if the occasion arises. In short, such an order is revocable in the case of the failure of the vendee, unless it has been acted on.

This case, however, does not show that even notice was given to the warehouseman. The notice was to the brokers in whose name the goods were stored, which is one step further off. Such a notice could not be held to work a constructive change of possession. McEwan v. Smith, 2 H. L. Cas. 309. See, too, Dixon v. Yates, 5 Barn. & Adol. 313; Whitehead v. Anderson, 9 Mees. & W. 518; Griffiths v. Perry, 1 El. & El. 680; Donath v. Broomhead, 7 Barr, [7 Pa. St.] 301. It was argued with much earnestness that, after a payment for the goods by note, the right was lost, or rather had nothing to rest on. This would be so, if the debt were really paid; but when it turns out that what was accepted as payment does not bear the fruit of payment, the law does not insist on taking the word for the thing. The cases are all one way on this point. The special doctrine of the courts of Massachusetts which was insisted on, that a negotiable note is presumed to be payment, unless the contrary is proved, is of no consequence, because it is admitted in many cases decided by other courts that the notes in those cases were expressly received as payment; but the vendor has been permitted to assert his lien. It is enough to cite, upon this point, Arnold v. Delano, 4 Cush. 33, and Mohr v. Boston & A. R. Co., 106 Mass. 67.

The only remaining question as to this lot of sixty barrels is, whether the petitioner can prove for the remainder of his note after giving credit for what he may receive by the sale of the goods. One of the notes which he holds was given for the sixty barrels, and for one of the other lots which was sold at the same time, though for a distinct price, and was included in one receipted bill. This note was indorsed by Brown, Chickering, & Co., who are in bankruptcy. So far as appears, the indorsement was given for the accommodation of Batchelder. It was not insisted that the sale was so far one and indivisible that a delivery of part

of the fifty-barrel lot ended the lien on the sixty-barrel lot; and the facts do not seem to admit of any such ruling. I therefore pass that point by. The argument is, that if the debt and lien are to be revived, the note must be given up and cancelled. I do not see any necessity for such action. When a suit is brought for goods sold, no doubt the vendor, before he can have judgment, must give up the vendee's note which he holds for the same debt; but when the note has been dishonored, and is in the possession of the vendor, I do not see what difference it makes in bankruptcy whether the money received from the realization of the lien be indorsed on the note or credited on the original debt, and whether the proof is made on the one or the other. Indeed, I think it more regular that the proof should be made on the note, for that really represents the debt. Again, I know of no reason why the vendor is obliged to lose any dividend he may receive from the indorser. In such a case it seems consistent with the rights of the parties to hold that the lien is held for the security of the note; else the vendor is put to the election between different securities, both of which he holds. Suppose the indorser to be a surety, as he is here, and to be nearly solvent, has not he or his assignee the right to require the vendor to obtain what he can out of his lien, and exonerate the surety's estate to that extent? I see no reason why the petitioner need surrender any of his security.

No reason has been assigned why the proof may not now be modified, as having been made under a mistake. In one case in Massachusetts a creditor was not permitted to change his proof after voting for the assignee and for the discharge of the debtor, though ignorantly. That was upon the ground that the rights of other creditors had been interfered with, or modified by the vote: New Bedford Sav. Inst. v. Fairhaven Bank, 9 Allen, 175. In most cases no such effect could fairly be attributed to a mere vote for assignee, and none is shown here. The other lots were already warehoused in the name of Batchelder when the sale was made. No notice or attornment was necessary or possible. There was nothing in the books of Lombard to show that Batchelder was an agent: his possession was Batchelder's; and when the latter bought the goods, and took delivery of a receipted bill, the possession and property coincided, and the lien was gone. It is the simple case of the vendee being in possession of the goods when he buys them.

I understand that the goods have depreciated in value in the lapse of time while the ownership was uncertain, and that they will not now bring enough to pay in full that part of the note which represents their price, and which is definitely shown and agreed to be $960.

The other lots were already standing in the name of the buyer, at the time of his purchase, and no further act was necessary or possible to complete the transfer than to receipt the bill.

The order is: That the sixty barrels be sold under the direction of the petitioner and assignee, as heretofore ordered, and the proceeds of sale, not exceeding the original price and any interest that may have accrued thereon, be paid to the petitioner and indorsed on the note, and that the proof heretofore made on said note in bankruptcy be reduced by the amount so indorsed. If the whole debt is paid, the proof to be cancelled, and if a surplus remains, it is to be held by the assignee. The remaining goods mentioned in the petition, or their proceeds, are to be transferred to the assignee, to be by him disposed of as assets in the bankruptcy.

BATCHELDER v. The SUCCESS. See Case No. 13,586.

BATCHELDER, (UNITED STATES v.) See Cases Nos. 14,540 and 14,541.

BATELSON v. The CYNTHIA. See Case No. 1,067.

BATEMAN, (GREENE v.) See Case No. 5,762.

Case No. 1,099a.

In re BATES et al.

[Betts' Scr. Bk. 574.]

District Court, D. South Carolina. Sept. 10, 1858.

CRIMINAL LAW—COMMITMENT—PRELIMINARY EXAMINATION.

[1. The crew of a brig were committed for piracy in engaging in the slave trade in violation of Act May 15, 1820, (3 Stat. 600,) c. 113, §§ 4, 5, upon a warrant issued on the affidavit of an officer of a United States vessel that his vessel had taken possession of the brig, and on examination had found her to be a slaver, having on board 300 Africans, with a crew composed of the persons charged. *Held*, on habeas corpus proceedings, that probable cause was shown for the issue of the warrant.]

[2. Stat. 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10, in force in South Carolina prior to 1839, provided that, when a party accused was admitted to bail or committed, the officer before whom he was brought, previous to committing him, should take his examination and information of those that brought him, of the facts and circumstances, and the same, or so much thereof as was material to prove the felony, should be put in writing, etc. An act of South Carolina passed in 1839, concerning the office and duties of magistrates, provided, in section 9, that "it shall not be necessary for any magistrate, when any prisoner is produced before him for commitment to bail on a charge of felony, to examine such prisoner and those who bring him, as heretofore prescribed by law." *Held* that, notwithstanding section 10 provides that the "magistrate may take the examination of any witness on behalf of the state in the presence of the prisoner, allowing the prisoner the right of cross-examination," this act repeals the prior statute, and a commitment may be valid without any examination of prisoner or state witnesses.]

[3. The constitutional rights of the prisoner to be confronted by the witnesses against him, and to be represented by counsel, have reference to the trial only, and are not infringed by proceedings before the committing magistrate.]

[4. A commitment for further examination is valid, as well as a commitment for trial; and persons so committed under a valid warrant are not entitled to a discharge on habeas corpus, where the detention has lasted only 12 days, for it cannot be said that that is an unreasonable time for the purpose.]

[At law. On habeas corpus. Motion of R. T. Bates and others to be discharged from custody. Motion denied.]

MAGRATH, District Judge. In the matter of R. T. Bates and others. The return of the marshal of the United States for this district to the writ of habeas corpus, ordered to issue in this case, sets forth that the petitioners in whose behalf the writ has been issued, were taken, and are detained in custody by him as marshal, in the jail of Charleston district, for further examination on a charge of piracy, in violation of the 4th and 5th sections of the act of congress approved May 15, 1820, [3 Stat. 600, c. 113,] by virtue of warrants and commitments issued on 28th August, 1858, under the hand and seal of Robert C. Gilchrist, a commissioner of the United States for the district of South Carolina. The return then sets forth the warrant, which is directed to the marshal, requiring him to convey and deliver into custody of the keeper of the jail the bodies of said parties, charged before the commissioner on the oath of Lieut. Joseph M. Bradford, U. S. navy, with being of the crew or ship's company of the brig Echo, engaged in the slave trade, in violation of the act of 1820, [3 Stat. 600,] c. 113, §§ 4, 5. And the keeper of the jail is directed to receive the said parties into his custody in the jail, and them there safely keep for further examination. A motion is now made to discharge these prisoners; and the various grounds upon which this motion was urged, may be considered under two general propositions: 1. That the proceedings on the part of the commissioner were irregular and insufficient to justify a commitment. 2. That the commitment is, in itself, improper and illegal. These proceedings, it appears, were on affidavit of Joseph M. Bradford, a lieutenant in the U. S. navy, which states that on the —— day of August, 1858, the U. S. brig Dolphin took possession of the brig Echo; that on examination she proved to be a slaver, with a cargo of three hundred and twenty negro slaves on board, a crew of Spaniards and Americans, who gave their names, which are the same as are signed to this petition; and that he, with certain persons named, are material witnesses. The warrant which issued upon this affidavit, commanded the marshal to apprehend the said prisoners, and to bring them before the commissioner, to be dealt with and disposed of according to law. No return is endorsed on this warrant. Its execution appears only in the commitment already referred to and set forth in the return.

In countries which regard the personal liberty of the citizen, wherever laws have been passed for the suppression of crime and the punishment of offenders, it has been found necessary to provide certain preliminaries, operating as safeguards, which must precede either the arrest or the commitment or both. In the constitution of the United States it is thus provided: that no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized, (article 4, Amend. Const.;) and at other stages of the investigation, additional provisions have been made, intended to make the liberty of the citizen secure from unreasonable violation. In Ex parte Bollman, [Case No. 14,622,] it is said, "The cause of issuing a warrant is a crime committed by the person charged. Probable cause, therefore, is a probability that the crime has been committed by that person. Of this probability, the court or magistrate issuing the warrant must be satisfied by facts, supported by oaths or affirmation." The subject matter of the crime alleged in these proceedings is the prosecution of the slave trade. Is there probable cause to believe that the crime has been committed by the persons charged? They are found in a vessel, composing the crew or ship's company, with three hundred Africans on board. This is not conclusive; but at this stage of the criminal procedure, it is not expected to be conclusive. If a prima facie case is made out, it is sufficient. 1 Chit. Crim. Law, 106. The commissioner is to be satisfied of this probable cause before he issues the warrant, and it must be supported by oath or affirmation. In U. S. v. Johns, [Case No. 15,481,] it is laid down that upon a habeas corpus the only enquiry is whether the warrant of commitment states a sufficient probable cause to believe that the person charged has committed the offence. And in this state the law is thus stated by Judge Earle: "It is a great mistake to suppose that a warrant for apprehension, or a warrant of commitment, need contain any statement at all of the evidence on which it is founded, or need enumerate any of the facts and circumstances accompanying the offence." Dud. 300.

It is at the next stage of the proceedings that the objections have been most strongly urged. And the consideration of these objections is not only affected with the responsibility of deciding any question in a case of so much interest and importance; but it is moreover important as involving the direction of the criminal procedure of this court. It is objected that these parties have never been brought before the commissioner, nor examined, nor have the witnesses against them been examined in their presence, nor

they allowed the cross-examination of their witnesses. That their commitment in the absence of these prerequisites and without the benefit of counsel, involves a denial of their constitutional and legal rights, and affects the whole proceedings subsequent to the arrest with such gross irregularity, that the commitment must be set aside. In the United States there is no law by which an established mode of criminal procedure is provided, and an uniform system of practice pursued. In the criminal as in the civil administration of justice, legislation, as far as it has gone, has professed to assimilate in each state the practice of the courts of the United States with that of the highest courts of law in that state. The act approved 24th September, 1789, c. 20, § 33, in cases of crime provides that "the offender may, by any justice or judge of the United States, or by any justice of the peace or other magistrates of any of the United States, where he may be found, agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States, as by this act has cognizance of the offence." 1 Stat. 91. By this act, if the proceedings are in the hands of an officer of the United States, he must conduct them agreeably to the usual mode of process against offenders in such state. And by the act of 23d August, 1842, (5 Stat. 516,) commissioners of the United States to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes, shall and may exercise all the powers that any justice of the peace, or other magistrate of any of the United States, may now exercise in respect to offenders for any crime or offence against the United States, by arresting, imprisoning or bailing, under and by virtue of the 33d section of the act of 1789.

Previous to the act of assembly of the state of South Carolina, in 1839, the statute of 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10, were among the English statutes retained in force after the Revolution; and their provisions governed the proceedings in criminal cases. By these statutes, when a party accused was admitted to bail, or committed, the parties before whom he was brought, previous to a commitment, were commanded to take his examination and information of those that bring him, of the fact and circumstance, and the same, or so much thereof as shall be material to prove the felony, shall be put in writing within two days after the said examination, and the justices shall certify the same. 1 Chit. Crim. Law, 74. It is true that it has been said, under this act, the accused may decline to testify; but it is also said that, in cases of felony, the examination of the accused must be taken. 1 Chit. Crim. Law, 83. And although it is declared to be a privilege operating in favor of the party accused, it may well be doubted how far that is the object accomplished, when we remember that by its provisions in certain cases these depositions may be given in evidence at the trial of the accused. How far the security of the accused was promoted by the statutes may be questioned, when, while it was professed to confront the accused and the witnesses, and allow the benefit of cross-examination, in practice the right of counsel for the accused to be present as a matter of right was denied, and at first not even the cross-examination was allowed to be under oath. This was an innovation upon the rule of the common law, that no one could be forced to criminate himself, a principle adopted in all its force in that provision of the constitution of the United States which declares that no one "shall be compelled in any criminal case to be a witness against himself." Article 5, Amend. Const. These statutes may have secured the production, before commitment, of all the evidence which could be produced against the accused; but, in my judgment, that privilege was secured to him at the expense of others far more important. Be that, however, as it may, these statutes, until 1839, furnished a rule for criminal proceedings in South Carolina. By the act of the general assembly of the state of South Carolina, entitled "An act concerning the office and duties of magistrates," and passed in that year, it is in the 4th section provided, that when complaint on oath shall be made before a magistrate that a felony or misdemeanor has been committed, or that the informant has good reason to believe and does verily believe the same, or when such magistrate is reasonably satisfied thereof, he is required, under his hand and seal, to issue his warrant against the party charged, directed to any lawful officer within the state, wherein shall be plainly expressed the offence charged, and supposed time of commission, commanding him to arrest and bring such offender before himself or next magistrate, to be further dealt with as the law may direct; and in the 9th section it is provided that it shall not be necessary for any magistrate, when any prisoner is produced before him for commitment or bail, on a charge of felony, to examine such prisoner and those who bring him, as heretofore prescribed by law. Such magistrate may take the examination of any witness in behalf of the state, in the presence of such prisoner, allowing such prisoner the right of cross-examination, and reduce the testimony so taken to writing, read the same over to the witness and require him to subscribe; and the magistrate shall return the testimony so taken to the office of the clerk.

The counsel for the accused truly stated the point in this matter when they addressed themselves to the question whether the act of 1839 was a repeal of the statutes of Philip & Mary, and insisted that this act was the repeal of those statutes only so far as the examination of the accused was concerned, but

that it virtually re-enacted the provisions of the statutes of Philip & Mary in relation to witnesses. I cannot so consider it in a case of felony. Indeed, the mode of proceeding directed in the 4th and 9th sections seems plainly intended, and is so expressed to be the change for that "heretofore prescribed by law," and which was the mode provided in the statutes of Philip & Mary; the 4th section of the act of 1839 requiring the magistrate to have the offender dealt with according to law, and the 9th section making it not necessary to examine the party produced for commitment. Indeed, there cannot be a doubt, so far as the examination of the accused is concerned, that the act of 1839 repealed the statutes previously in force. But is the provision of the statute of Philip & Mary changed as to the examination of witnesses? That is, must the witness be examined in the presence of the prisoner, with the right to cross-examine, before the accused can be committed? This seems to me to be equally plain, and the act appears to me also to express its manifest intention in relation to the witnesses to substitute that rule which it sets out, for that "heretofore prescribed by law."

The statutes of Philip & Mary are mandatory; they command the justice, "before he (or they) shall commit," "shall take examination of each prisoner and information of those that bring him." The act of 1839 directs that the warrant so issued, as already described, "shall authorize the arrest and detention of any person so charged," and that the magistrate before whom the prisoner is produced for commitment shall not hold it necessary to examine "such prisoner and those that bring him, as heretofore prescribed by law." It is true in the 10th section it is said, "The magistrate may take the examination of any witness in behalf of the state," and it has been argued with great zeal that "may," in this section, should be read as if written "must" or "shall." This is the rule where a statute directs the doing of a thing for the sake of justice; the word "may," in such cases, means the same thing as "shall." Dwar. St. 712. But the principle of the rule so stated has no application here. For what was formerly prescribed by law, that which, as has been seen, in the statute of Philip & Mary, it was said that the magistrate "shall" do, is the same thing which the act of 1839 declares it shall not be necessary for him to do. And the authority given in the latter part of the section, that the magistrate may take the examination of any witness in behalf of the state, provided it is done in the presence of a prisoner, is neither the re-enactment of the positive command of the statutes of Philip & Mary to take that examination, nor a qualification of the positive declaration in the first paragraph that such an examination, although formerly necessary, shall no longer be so. How far that examination of the witnesses permitted by the act of 1839 can make the deposition, so taken, competent evidence at the trial of the accused, I will not now discuss farther than to say that to be confronted with the witness at the trial of the case seems to me the constitutional right of the accused. 3 Story, Comm. § 1785. I have to regret that no adjudged case in the courts of this state has settled the construction of this section of the act of 1839. Had there been any such case it would have been our duty to have adopted its construction, and so to enforce it, unless there shall be special legislation by congress. In the absence of any construction by the courts of the state, I have been obliged to give it that construction which, to me, seemed not only proper, but in fact the only construction which could be given to it consistently with the admonition that judges "ought not to make any construction against the express letter of the statute, for nothing can so express the meaning of the makers of the act as their own direct words." Dwar. St. 725; 5 Rep. 118. And I feel more confidence in the opinion that the 4th and 5th sections of the act of 1839 repeal the statutes of Philip & Mary, and furnish a rule of procedure in themselves in all criminal proceedings, from the fact that such was the received opinion while I was at the bar; nor do I know of any case in the courts of the state where the practice did not conform to the construction which I have given. If this construction were exposed justly to the objection that by it the accused was not confronted with the witnesses against him, and had not the assistance of counsel for his defence, it would be inconsistent with the guaranty of the constitution in these particulars; and the provision, therefore, if rightly construed, would be void, because it would tend to impair a constitutional right. But it should be remembered, in the language of Judge Marshall, that, "before the accused is put upon his trial, all the proceedings are ex parte." [Ex parte Bollman,] 4 Cranch, [8 U. S.] 129. That these constitutional rights, which are supposed to be invaded by this construction, are rights which are not contemplated by the constitution in connection with preliminary proceedings; that the privilege of confronting the witness is a privilege which pertains to the trial in court; that it does not extend to all periods in the proceeding, is manifest in the fact that it cannot be claimed before the grand jury: a period, when, if allowed, it would be far more available for the accused than in the preliminary proceedings before the magistrate. And that the right to have the assistance of counsel is not invaded, since, if the statutes of Philip & Mary were in force, it is beyond dispute that, in proceedings under them, the accused was not entitled to the benefit of counsel as a matter of right. 3 Story, Comm. §§ 1785, 1786; 3 Cranch, C. C. 377, note 1. [Robinson v. Cathcart, Case No. 11,947.] That course of proceeding, then, which is usual in the

state, under this act of 1839, is the proper course to be pursued by the commissioner of the United States. "My opinion (says Judge Curtis) is that it was the intention of congress by these words, agreeably to the usual mode of process against offenders in such state, to assimilate all the proceedings for holding accused persons to answer before a court of the United States, to proceedings had for similar purposes by the laws of the state where the proceedings should take place." U. S. v. Rundlett, [Case No. 16,208.] If anything were wanting in confirmation of what I have said it will be found in the 14th section of the same act, (1839,) in which any magistrate of the state may order arrest, imprisonment or bail of a person, charged with a crime or offence against the United States, alleged to have been committed within this state, at the expense of the United States, and to be tried in the courts thereof, according to the established forms of proceeding for offences against this state.

But it is said the commitment or detention for further examination is improper. Is it unlawful? The 4th section of the act of 1839 directs the accused to be arrested and brought before the magistrate, to be dealt with as the law directs. And in this case, the detention of the accused has been ordered for further examination. Now, it will be observed that the act of 1839 does not forbid any examination; it only provides that it shall not be necessary before commitment. There may be, as in this case, a number of persons accused; it may become a matter of duty for the magistrate to examine, and ascertain whether they are all equally guilty, and whether they shall all be committed for the same offense. Nor can I understand why, in this case, the accused complain of a commitment for further examination. If the warrant contains probable cause for commitment, and rests upon an oath for its support, the magistrate may commit for trial, or for further examination. But the commitment for further examination is not regarded as a proceeding of which the accused can complain, unless it is abused. "If (says Lord Eldon, in the house of lords) I understand the law upon the subject, a commitment for further examination is not a proceeding against the party, but a proceeding for his benefit. It is a proceeding with a view to protect him against a commitment for trial, if * * * it can be found that there is no ground upon which there ought to be a commitment for custody in order to trial." 3 Dow, 184. And where it appears that a party is detained, even without a warrant, for further examination, Abbott, C. J., expressed a doubt whether habeas corpus would be issued where the accused was held for further examination, and refused a discharge. Ex parte Krans, 8 E. C. L. 110. It was said in the argument that this detention was in jail. But it was overlooked that a detention elsewhere than in jail would not be lawful; for thereby the accused might be deprived of the benefit of the jail delivery. 1 Chit. Crim. Law, 73. I readily concede that commitment for further examination must not be so used as to operate in place of a commitment for trial; and this, or any other abuse of the power of the magistrate, will be corrected. The court will not only relieve, but the party will have his action against the magistrate. Is there in this case any evidence of an abuse by the commissioner of his authority? The arrest is said to have been made on the 28th August, and the accused from that day until the present time are held under a commitment for further examination. In the examinations under the statutes of Philip & Mary, it is laid down that there is no precise limitation of the time, which must depend upon the circumstances of each particular case; there are many instances, it is said, of prisoners being detained more than twenty days between their first being brought before a justice and their commitment for trial. 1 Chit. Crim. Law, 73. I am not to presume that the delay which has taken place is unreasonable; and if it were, and had continued so long as to induce me to think that the original cause of it could not be valid, or worthy of further investigation, I might discharge the accused, (8 E. C. L. 112,) or relieve them upon adequate security being given for their appearance, (1 Chit. Crim. Law, 130.) But within that period of time, which elsewhere, and for the purposes of an examination, has been held not unreasonable, I could not undertake to say that the delay which in this case has taken place is unreasonable.

It is true that the offense charged in the warrant is a felony, and is therefore excepted specially in 31 Car. II., c. 2; but in such case the common law gave relief. And in the constitution of the United States, the provision is broadly declared, "that the privilege of habeas corpus shall not be suspended unless when in cases of rebellion or invasion, the public safety may require it." Article 1, § 9. For whatever cause he may be imprisoned, one who is entitled to the writ may obtain it. But its end is not to assert an exemption from all imprisonment, which would be inconsistent with every idea of law and political society, (3 Bl. Comm. 132, Wendell,) but to relieve from "a confinement without lawful warrant, without legal cause, on vague, indefinite and uncertain charges," (Dud. 299.) If anything had been wanting in this case to secure for it my careful consideration, it would have been found in the zeal with which the motion for the discharge of the prisoners was urged. I do not see any ground upon which I could rest that exercise of the power with which I am vested. The motion, therefore, is refused.

BATES, (DEAN v.) See Case No. 3,704.

Case No. 1,100.

BATES v. DRURY.

[4 Mason, 118.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1825.

CUSTOMS DUTIES—FEES OF COLLECTORS.

Where a collector's term of office expires under the act of 1820, [3 Stat. 582,] he is entitled to one half of the commissions upon bonds taken by him and then outstanding, and collected by his successor, as being a case within the equity of the [tariff] act of 1799, c. 129, [Bior. & D. Laws; 1 Stat. p. 704, c. 23.]

At law. Assumpsit [by Barnabas Bates against Luke Drury] for money had and received. Plea, the general issue. At the trial it appeared that the defendant was collector of the customs for the port of Bristol; and the plaintiff was his immediate predecessor in that office. The plaintiff was not removed from office, but his commission expired according to the provisions of the act of 15th of May, 1820, c. 102, Bior. & D. Laws; 3 Stat. 582,] the senate having refused to ratify his reappointment. The suit was for commissions upon bonds for duties taken by the plaintiff while in office, and outstanding at the time his commission expired, and since collected and received by the defendant. It was admitted, that the sums due for commissions on these bonds were in the hands of the defendant, and not claimed by the government.

Bridgham for the plaintiff, and Searle for the defendant, submitted the cause shortly on these facts, and a verdict was taken for the plaintiff for $681.93, being half the commissions, subject to the opinion of the court. It was afterwards delivered as follows.

STORY, Circuit Justice. Upon consideration we are of opinion, that the verdict for the plaintiff ought to stand. Before the act of [May 15,] 1820, c. 102, [Bior. & D. Laws; 3 Stat. 582,] the collectors held their office, without limitation of time, at the pleasure of the president. That act cut down the term of office to four years. The act of 2d of March, 1799, c. 129, [Bior. & D. Laws; 1 Stat. p. 704, c. 23,] provided for the only cases, except removals, in which one collector could take the bond, and another receive the money. The cases of death and resignation were expressly provided for; the case of removals, being presumed to be for good cause, was probably not thought fit, upon motives of policy, to be embraced in any universal rule. The act, in the second section, gives a commission to collectors of a certain percentage "on all moneys by them respectively received on account of the duties arising on goods &c. imported into the United States, and on the tonnage of ships and vessels." This section attaches the right to the receipt of the moneys, and of course would seem to give the whole compensation to the collector who receives, and to him only. But it is obvious, that great injustice and inequality would arise from such an universal provision. The collector who takes the bond, and does the other incident duties on the importation, incurs a great responsibility. He may be made liable for any loss occasioned not merely by malfeasance, but by negligence in taking the bond, as by taking insufficient sureties, by mistakes of calculation, by omissions in the bond, &c.; and the receiving collector may have incurred only the slight responsibility of a safe custody of the money after it was received. A rule that should always give it to the latter, excluding the former, would therefore be inequitable. It would deny compensation where there had been service, and give it for a service very slight. Under such circumstances the court would, if the section stood alone, be driven to the conclusion, either that this hardship was intended by the legislature, or that the section contemplated only cases where the same collector took the bonds and received the moneys. My own opinion would incline to the latter construction. But the fourth section, in cases of death and resignation, divides the commissions equally between the predecessor, or his representative, and the successor. This furnishes an equitable rule, applicable to all the cases, to which any distinct legislative policy could be presumed to apply before the act of 1820. We think the case of an expiration of the term of office under this last act falls within the equity of the act of 1799, or at least, that it furnishes the true rule to govern the court, in what we deem a casus omissus. The government interposes no objection to the allowance of these commissions; the fund is in the hands of the defendant, and may be justly considered as a sum left by the government to be distributed between the two collectors according to their proportion of services. Each has performed some service; each is entitled to some compensation; neither can justly claim the whole. Ex aequo et bono the money ought to be apportioned between them; and the act of 1799 having furnished a rule in analogous cases, we apply it to the present case, and affirm the verdict, because it has made an equal division between them. Judgment accordingly.

[1] [Reported by William P. Mason, Esq.]

Case No. 1,101.

BATES v. EQUITABLE FIRE & MARINE INS. CO.

[3 Cliff. 215.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1868.[2]

FIRE INSURANCE—BREACH OF CONDITION—TRANSFER OF POLICY—CONSENT OF COMPANY.

1. A stock of sugars was insured under a time-policy, which contained the condition that if the property should be sold or conveyed in whole or in part, or if the policy should be assigned without the consent of the company, the risk should cease; but if the assured should sell the property, or part thereof, before the expiration of the policy, the same might be continued for the benefit of the purchaser, if the company gave their consent, to be evidenced by a certificate of the fact or by indorsement on the policy. Shortly after the date of the policy the assured sold the property to the plaintiff, and on the day of the completion of the delivery indorsed the policy to him as follows: "Payable in case of loss to Edward C. Bates." The policy was sent to the defendants with the request that they would approve the indorsement. It was approved in the following terms: "Consent is hereby given to the above indorsement." At the time of the loss the plaintiff had on hand a quantity of sugars equal to that which was owned by the assured at the date of the policy. *Held*, that the indorsements on the back of the policy were not a compliance with the conditions of the policy in case of sale. Under those conditions the policy would not continue for the benefit of a purchaser, and the consent of the company to the change of ownership must be evidenced substantially as required in the conditional clause.

[Cited in Sias v. Roger Williams Ins. Co., 8 Fed. 188.]

[See note at end of case.]

2. Upon sale of the property without the antecedent consent of the company the risk ceased, and the policy became void, unless the consent of the company thereto was subsequently obtained.

[Cited in Sias v. Roger Williams Ins. Co., 8 Fed. 188.]

3. The purchase was made, but the consent of the company to the transfer was not obtained, and they had no notice of it prior to the loss. They consented, in case the property of the assured was destroyed, they would pay the amount to the plaintiff, not that the policy should continue for the benefit of any one other than the insured.

[Cited in Sias v. Roger Williams Ins Co., 8 Fed. 188.]

[See note at end of case.]

[At law. Action by Edward N. Bates against the Equitable Fire & Marine Insurance Company.] Assumpsit upon a policy of insurance. Plea the general issue, and verdict for the plaintiff, subject to the opinion of the court upon questions of law, reserved at the trial. [Verdict set aside. This was afterwards affirmed by the supreme court in Bates v. Equitable F. & M. Ins. Co., 10 Wall. (77 U. S.) 33.]

The policy was dated October 11, 1861, and it was issued to William D. Philbrook in the sum of $3,000, for one year from date, on a stock of sugar, raw, wrought, and in process, contained in the frame building, with composition roof, occupied by the assured, for refining sugar, situated on Sargent's wharf, in Boston, Mass. The terms of the policy material to be noticed were, "that if the situation of the property or the circumstances affecting the risk should be during the existence of the policy altered or changed, by or through the advice, consent, or agency of the assured, or if said property should be sold, or conveyed in whole or in part, or if the policy should be assigned, without the consent of the company, ... then, and in every such case, the risk assumed should cease, and the policy become void. But the company agreed that if the assured should sell the property, or any part thereof, before the expiration of the policy, a proportion of the premium received should be repaid, upon receiving notice of such sale, before loss, reserving, however, three months' premium on the sum insured, over and above the amount which would be due at the time of receiving such notice; or the policy might continue for the benefit of such purchaser if the company gave their consent thereto. Consent was to be evidenced by a certificate of the fact or by indorsement on the policy. The execution of the policy was admitted, and the evidence showed that the assured was at that date the owner of $60,000 or $70,000 worth of sugars on that wharf, of the description specified in the policy. Shortly after the date of the policy the plaintiff purchased the sugars of the assured, and the same were all delivered to him, pursuant to orders of the seller, on or before November 23 following. Delivery of the sugars to the plaintiff was completed on that day, and on the same day the assured indorsed the policy to the plaintiff in the terms following, to wit, "Payable in case of loss to Edward C. Bates," and signed the same and delivered the policy to the plaintiff. The proofs also showed, that he made the indorsement in pursuance of the contract of sale, and that the premium for the unexpired portion of the term of the policy was taken into account between the parties in making the contract. On the 28th of the same month the policy with the indorsement thereon, signed by the assured, was enclosed to the president of the company, requesting him to approve of the indorsement; and on the following day the policy was returned indorsed, "Consent is hereby given to the above indorsement," and the same was signed, "Equitable Insurance Company, Fred W. Arnold Secretary." Subsequent to the purchase and delivery of the sugars, the plaintiff carried on the business of refining sugars at that refinery, substantially in the same way that the business prior to that time had been conducted by his vendor, and at the time of the loss he had on hand a quantity of sugars equal to that which was owned by the assured at the date of his policy, and of the

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirmed in 10 Wall. (77 U. S.) 33.]

same descriptions. During the night of the 24th of February, 1862, the entire stock of sugars in that refinery was destroyed by fire. Due notice was given of the loss by the plaintiff on the following day, and two days later the defendants admitted the receipt of the notice, but declined to pay the amount, upon the ground that the assured ceased to be the owner of the property before the loss, and that they had never assented to any change of ownership in the property insured. They set up the same defence at the trial, but the court overruled it and directed a verdict for the plaintiff, reserving the question for further consideration.

E. Metcalf and C. B. Goodrich, for plaintiff.
Geo. H. Browne, for defendants.

CLIFFORD, Circuit Justice. Time-policies upon a stock in trade, especially where they cover a considerable period of time, and where from the nature of the business it appears that the parties must have understood that the stock would be continually changing, apply to goods in the place of business from time to time, as purchases are made to supply the place of goods sold in the usual and regular course of business within the lifetime of the policy. 1 Phil. Ins. §§ 489–491; Ang. Ins. § 203; Lane v. Maine Mut. F. Ins. Co., 12 Me. 44; Hooper v. Hudson R. F. Ins. Co., 17 N. Y. 426.

Partial sales of the stock, therefore, under such a policy, if the vacuum is regularly supplied by new purchases of equal value, and of the same description of goods, will not render the policy void, even though the entire stock may change before the loss occurs. Unless the rule were so, a policy of insurance upon a stock in trade for any considerable period of time would cease to be an indemnity against loss. Such partial sales in the usual course of business are not prohibited by the terms of the policy in this case. Both parties knew that the sugars on hand were to be manufactured and that the product was to be sold, and that the unmanufactured sugars were to be supplied by new purchases to keep the stock good, and it is not pretended by the defendants that any such sales and purchases had the effect to impair the right of the assured to recover on the policy. On the other hand, the plaintiff concedes that in case of the sale of the property, such as was made by the assured to the plaintiff, the risk would cease and the policy become void, unless the company gave their consent thereto within the true intent and meaning of that condition in the policy. Whether conceded or not, it is clear that without such consent the policy would not continue, for the benefit of the purchaser, and it is equally clear that the consent to be valid, must be evidenced substantially as required in that clause of the policy.

Parties make their own contracts, and courts are bound by their terms and conditions. The express words of the condition are, that "the policy (in case of a sale) may continue for the benefit of the purchaser if this company give their consent thereto," to be evidenced by a "certificate of the fact or by indorsement on this policy."

None of these views are directly controverted by the plaintiff, but he insists that the indorsement appearing on the back of the policy is a substantial compliance with the condition in that behalf, as before recited, which is the principal question between the parties.

Reference is made by the plaintiff to the case of Hooper v. Hudson River F. Ins. Co., 17 N. Y. 426, as supporting his views, that the indorsement on the policy in this case affords sufficient evidence that the defendants had notice that he had purchased the property of the assured. Careful examination of that case, however, will show that it is not analogous, and that it does not support the proposition as applied to the case before the court. The statement of the case shows that the entire stock in trade of the assured was sold at auction, and that the plaintiff in the suit on the policy became the purchaser, and on the same day he applied to the insurance company and obtained their consent in writing, indorsed on the policy that the interests of the assured in the policy might be assigned to him, and he subsequently took such an assignment in writing before the loss.

Right to the benefit of the policy was denied, because the purchaser did not disclose his interest when he applied to the company for their consent that the policy might be transferred, but the court held that the act of applying for consent that the policy might be assigned was notice to the company that the applicant had acquired or was about to acquire, some interest in the property insured.

Destitute as this case is of every feature of resemblance to that one, it hardly seems necessary to point out the differences. Suffice it to say, that in this case there was no application for consent that the policy might be assigned; no consent to that effect was ever given, nor did the assured ever execute any assignment of the policy.

Sale of the property by the assured without any antecedent consent of the company is proved and admitted, and of course the risk ceased and the policy became void at that time, unless the purchaser subsequently secured the consent of the company thereto, as required by the terms of the policy. Carpenter v. Providence Wash. Ins. Co., 16 Pet. [41 U. S.] 502; Foster v. Equitable Ins. Co., 2 Gray, 216; Grosvenor v. Atlantic F. Ins. Co., 17 N. Y. 391; Loring v. Manufacturers' Ins. Co., 8 Gray, 29.

The next inquiry is, what is the true meaning and legal effect of the indorsement in this case, to which the defendants consented through their secretary?

In the case of Grosvenor v. Atlantic F. Ins. Co., 17 N. Y. 391, the direct adjudication was that where a fire policy names the owner as the person insured, and declares that the damages in case of loss shall be payable to another person, therein named as mortgagee, the latter cannot recover in case of a breach of the conditions of the policy by the mortgagor. In such case the contract is with the mortgagor, and for the insurance of his interest, and the mortgagee can recover only where the mortgagor could have done so, had the money been payable to himself instead of being payable for his benefit to the mortgagee. Howard F. Ins. Co. v. Chase, 5 Wall. [72 U. S.] 516.

The present case is no stronger than those cases where the appointée to receive money in case the property of the assured is lost, is named in the policy itself instead of being appointed by an indorsement on the back. Neither such a stipulation in the policy nor such an indorsement on the back of the policy amounts to an assignment of the policy, or operates as a transfer of the property insured.

Decided cases to this point are quite numerous, and they are all one way. Hale v. Mechanics' Ins. Co., 6 Gray, 169; Young v. Eagle F. Ins. Co., 14 Gray, 153; Fogg v. Middlesex F. Ins. Co., 10 Cush. 337; Ketchum v. Protection Ins. Co., 1 Allen, (N. B.) 136; Loring v. Manufacturers' Ins. Co., 8 Gray, 29.

The argument of the plaintiff is, that the application to the defendants for consent that the sum insured in case of loss should be payable to him, was notice of the sale of the property and of the assignment of the policy; but it is clear that neither branch of the proposition can be sustained. Fogg v. Middlesex Ins. Co., 10 Cush. 348; Howard F. Ins. Co. v. Chase, 5 Wall. [72 U. S.] 516.

Viewed in any light, the plaintiff cannot recover. Purchase of the property insured was made by the plaintiff, but he did not procure the consent of the company to the sale, and they had no notice of the transfer prior to the loss. They consented, in case the property of the assured was destroyed, that they would pay the amount to the plaintiff, but they never consented that the policy should continue for the benefit of any one except the insured.

Verdict set aside.

[NOTE. In the report of this case as heard in the supreme court on writ of error, the statement is made that the secretary of the company defendant swore that he had no knowledge of the sale until after the loss. There was no evidence that any other officer of the company had notice of it other than as implied from their consent to the indorsement. In the course of the opinion of the court, Mr. Justice Miller referred to the very common use of similar indorsements as a mode of appointing that the loss of the insured shall be paid to a third person, thus furnishing a species of security to a creditor, and said: "In the face of this frequent use of the two indorsements on the policy, it cannot be held that they imply of themselves a knowledge of the sale, or a consent to insure the purchaser." As there was no evidence of usage or a course of dealing recognizing such indorsements as evidence of a sale, the judgment of the circuit court was affirmed. Bates v. Equitable F. & M. Ins. Co., 10 Wall. (77 U. S.) 33.]

Case No. 1,102.

BATES et al. v. The NATCHEZ.

[Newb. 489.][1]

District Court, E. D. Louisiana. Nov. Term, 1854.

COLLISION — MISSISSIPPI RIVER — ASCENDING AND DESCENDING BOATS — RULES OF NAVIGATION.

1. The general rules of navigation of the Mississippi and the law of Louisiana require a descending steamboat to keep the middle of the river.

[Cited in Shirley v. The Richmond, Case No. 12,795.]

[See Sinnot v. The Dresden, Case No. 12,908; The Magnolia, Id. 8,958; Goslee v. Shute, 18 How. (59 U. S.) 463.]

2. Although a steamboat descending when near a bend, may have the right to run near the right bank, yet she is guilty of great imprudence in continuing to run near that shore, when she saw another boat ascending, apparently near the same shore.

3. When a boat ascending on the right bank, signals a boat descending, by two taps on her bell, that she intends keeping to the larboard, there is no necessity that the descending boat should run any risk in passing.

[In admiralty. Libel by Bates, Benson & Co., owners of the steamboat Pearl, against the steamboat Natchez, for collision. Libel dismissed.]

Wolfe & Singleton, for libelants.
Durant & Hornor, for respondents.

McCALEB, District Judge. In this case the libelants as owners of the steamboat Pearl, have filed their libel against the steamboat Natchez, to recover the sum of $16,500 damages, which they allege they have sustained in consequence of the sinking of their boat in a collision with the Natchez, at about half past two o'clock in the morning of the first of January, 1854. The collision occurred nearly opposite to what is known as Brusli Landing, in the parish of West Baton Rouge. The Pearl was descending and the Natchez ascending the river. The libel states that the Pearl sank in one minute after the collision, and the testimony of the witnesses shows that she sank almost immediately.

Without commenting at length upon the mass of testimony introduced in evidence, I shall present briefly the prominent facts upon which my conclusions on the questions put at issue by the pleadings and arguments of counsel, have been formed. Fortunately I have not been subjected to the usual difficulty of deciding the case upon the conflicting evidence of the officers of the two boats alone. Several disinterested witnesses have

[1] [Reported by John S. Newberry, Esq.]

been examined. Some of these witnesses were attentive spectators of the collision, from the banks of the river, and give for the most part a clear and concurring account of the situation of the boats in the river and the circumstances of the disaster. Their testimony substantially agrees with evidence given by the officers of the Natchez, and has led my mind to the conclusion that the libelants have failed to make out such a case as entitles them to relief from this court.

In the first place, it is extremely doubtful whether the signals were given on the Pearl at all; and if they were I am satisfied they were not heard on board the Natchez. The witnesses on the latter boat concur in declaring that they heard no signal bells from the Pearl, and the witnesses who were on shore at the time of the collision, testify to the same effect. The witness Hart (the overseer on Mr. Stewart's plantation) says that he heard the "bell of the Pearl tap about three seconds before the collision. You could scarcely distinguish between the time of the tap and the crash." It is needless to say that a signal given at such a moment was too late to give the necessary warning to the other boat.

In the next place, I am satisfied from the evidence, that the Pearl was not descending in her proper place in the river. The general rules of the navigation of the river and the law of Louisiana on the subject, require a descending boat to keep in the middle of the river; but admitting that in this instance, she was, according to the opinion expressed by the witness Orr, entitled to run down the bend, and that she would have been in her proper place at the distance of 200 yards from the Brusli Landing, it is yet obvious that she was guilty of great imprudence in continuing to run so near to the right bank descending, when she saw another boat ascending apparently very near the same shore. The witness Orr testifies that at the point of collision there are 800 yards width of good navigable water, and there was certainly no necessity of running any risk in passing an ascending boat, whose signals of two taps repeatedly given, and indicating her determination to keep to the larboard, were distinctly heard: for while we are left in doubt whether any signals were given on board the Pearl, it is rendered perfectly certain by the testimony of the libelants, that the taps from the larger and louder bell of the Natchez were distinctly heard by the pilot of the descending boat. Instead of obeying those signals and keeping out in the middle of the river, we find the Pearl continuing to run so close to the right bank descending, that she came in collision with the Natchez so near to that bank that when the pilot of that boat turned her bow out at the moment of the collision, her stern was against the shore. This fact contained in the testimony of the pilot Dunboy, is corroborated by that of Hofroge, who was on shore at Brusli Landing, and by that of Sands, who was a passenger on the Natchez. It is furthermore corroborated by Lisk, who went to the place of the collision with his diving bell with the view of saving the wreck. This witness declares that he found that the bow of the Pearl was about fifty or sixty yards from the shore. The pilot of the Pearl, on the contrary, testifies that at the time of the collision, she was 150 yards from the Brusli shore. When we take into consideration the fact that she sunk almost immediately after the collision, it is difficult to believe that the testimony of this witness can be correct.

It is by no means clearly established by the evidence, that the engines of the Pearl were stopped before the collision. I am satisfied that she had headway, and that her sinking was the consequence of a concussion produced by her own motion; for the evidence is very strong to the effect that the Natchez had not only stopped her progress, but was actually backing at the moment of the collision. Much stress is laid by the proctors of the libelants upon the fact that the Natchez was running up near the left shore ascending before she reached the Brusli Landing. But the witness Orr examined on their behalf, shows that she had a right to cross from the bar shore, when she came up as far as the Brusli Landing; and if she was already over before the Pearl could reach that point, what just ground of complaint can the latter have? The evidence is clear that she was plainly visible running up close along the western shore—so close that the witness Dr. Vaughn, who was riding along the bank on horseback at the time, thought she had made a landing and was just getting under way again. The evidence is equally clear that she continued regularly on her course, without crossing the track of the descending boat, and that she repeatedly gave her signals in accordance with the rules established by the inspectors, indicating distinctly her determination to keep the shore on which she was running. There could be no mistake at any moment from the time she was first descried by the pilot of the Pearl, as to her real position in the river. After an attentive examination of all the evidence, I am unable to discover any fault on the part of the officers of the Natchez. They seem to have managed their boat with prudence and skill; and their exertions after the collision, in rescuing passengers and others from the sinking boat, entitle them to the commendation of this court.

The libel must therefore be dismissed, with costs.

Case No. 1,103.

BATES v. PAYSON.

[4 Dill. 265.][1]

Circuit Court, D. Colorado. 1877.

FEDERAL COURTS—ADMISSION OF COLORADO INTO THE UNION—DISPOSITION OF CAUSES OF A FEDERAL CHARACTER PENDING IN THE SUPREME COURT OF THE TERRITORY — ACT JUNE 26, 1876, CONSTRUED.

Under the act of congress [of June 26, 1876,] (19 Stat. 61, § 8.) establishing federal courts in the state of Colorado, and providing for the disposition of cases pending in the supreme and district courts of the territory at the time of the admission of the state into the Union, cases of a federal character pending on appeal or writ of error in the supreme court of the territory at the time of the admission of the state, may be heard and decided in the proper federal court created by said act, which may affirm the judgment below or reverse it and order a new trial in the federal court, and in either case enter final judgment.

[Followed in U. S. v. Lynde, 44 Fed. 216.]

At law. [Joseph R.] Payson, assignee in bankruptcy of the Republic Insurance Company, of Chicago, Illinois, sued [Joseph E.] Bates in assumpsit in the district court of Arapahoe county, to recover a balance alleged to be due from the latter on his subscription to the capital stock of the company. The suit was brought and judgment was entered against Bates under the territorial government, and he, pursuant to a law of the territory, removed the cause into the supreme court of the territory by appeal. This appeal was pending in that court on the 1st day of August, 1876, when the territory became a state. It appears that the record of the case then passed to the supreme court of the state, from whence it was transferred to this court by agreement of parties.

It was suggested that this court has not jurisdiction to review the record of a territorial court, or to give any judgment whatever respecting it. It was also urged that if this court can, in any case, review a record of a territorial court, as to a judgment at law, the proceeding must be by writ of error, and not by appeal, as in this case.

The eighth section of the act of [June 26,] 1876, (19 Stat. 61,) which, it was conceded, must govern, is as follows: "That in respect of all cases, proceedings, and matters pending in the supreme or district courts of the territory of Colorado at the time of the admission of said state into the Union, whereof the circuit or district courts" (of the United States) "by this act established might have had jurisdiction under the laws of the United States, had said courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said territory; and all the files, records, and proceedings relating thereto shall be transferred to said circuit and district courts, respectively, and the same shall be proceeded with therein in due course of law."

Thomas Macon, for appellant.
J. W. Blackburn, for appellee.

MILLER, Circuit Justice, presiding, overruled the objection. It was admitted that the case was one which might have been brought in a federal court, if such courts had existed at the date of the commencement of the suit. As such, the case was within the eighth section of the act. By that section this court is declared to be the successor of the supreme court of the territory as to all such cases, with power to proceed therein "in due course of law." This means that this court may do all that was left undone in the supreme court of the territory. The cause was pending in that court for review, and we may proceed as that court would have proceeded if it had retained the case. The way in which, under the territorial statutes, the cause was taken to the supreme court of the territory, is not material to be considered. The act of congress applies to all cases of federal character pending in that court at the date of the admission of the state, and it matters not whether they were removed into that court by writ of error or appeal.

If it were necessary to remand the cause to the state court there would be a difficulty in disposing of it, but that was not required. Whether the judgment should be affirmed or reversed, we could enter the proper judgment here, and, if necessary, we could try the case again in this court.

Afterwards, and at this same term, argument was heard on the errors assigned, and the court finding no error in the record, the judgment was affirmed, and it was ordered that the said judgment be entered of record in this court.

Judgment accordingly.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

Case No. 1,104.

BATES v. SEABURY et al.

[1 Spr. 433;[1] 21 Law Rep. 666.]

District Court, D. Massachusetts. Oct. Term, 1858.

SEAMEN—WRONGFUL DISCHARGE — DURESS—DAMAGES—ADMIRALTY PRACTICE—PROCTOR'S POWER TO COMPROMISE.

1. Where a seaman is induced to assent to his discharge, upon payment of a nominal sum, from just apprehension of future ill treatment, arising from the misconduct of the master, such assent is given under a species of duress, and is no bar to a recovery of the amount actually due to him, at the time of his discharge.

[Cited in Gove v. Judson, 19 Fed. 524. See, also, Mayshew v. Terry, Case No. 9,361; Jenks v. Cox, Id. 7,277; The Ringleader, Id. 11,850.]

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

2. If, subsequently to such discharge, the seaman ships in another vessel, at an advanced lay, it is not a correct principle, in settling his claim against the first ship, to reckon full wages for the entire voyage of such ship, and to deduct therefrom his earnings in the second ship, during the time.

3. The amount due at the time of his discharge, from the first ship, is an absolute debt.

4. A seaman wrongfully discharged is entitled to an indemnity [for his loss of time and other damage subsequent to the discharge.]

5. In ascertaining such indemnity, subsequent expenses and earnings may be taken into the account.

6. A proctor in admiralty cannot release, or compromise, a debt due to his client, without special authority.

7. But he is authorized to receive payment. And an insufficient amount paid to a proctor, in settlement, is a discharge pro tanto.

8. Seamen, in the whaling service, discharged abroad, are entitled to the benefit of the statute giving three months' extra wages, [Act Aug. 18, 1856, § 26; 11 Stat. 62.]

[Cited in Frates v. Howland, Case No. 5,066; Gove v. Judson, 19 Fed. 524.]

9. A charge of 2½ per cent. commissions on sales of oil, was disallowed.

[Cited in Frates v. Howland, Case No. 5,066.]

10. So also were charges for fitting and discharging ship.

[Cited in Frates v. Howland, Case No. 5,066.]

11. Interest allowed from the filing of the libel.

[Cited in Frates v. Howland, Case No. 5,066.]

[In admiralty. Libel for seaman's wages by Bates against Seabury and others. Decree for libellant.]

The libellant was a boat-steerer of the ship Scotland, which sailed from New Bedford on the 20th of June, 1851, on a whaling voyage. After taking a considerable quantity of oil, he was, in the month of November, 1852, discharged, with his own consent, at Lahaina, in the Sandwich islands. The circumstances attending that discharge sufficiently appear in the opinion of the court. Some weeks after that discharge, the libellant shipped in the whale ship Orizimbo, at an advanced lay, and returned in her to New Bedford, in the spring of 1854. He then made a claim upon the owners of the Scotland, for his lay in that vessel. A suit was commenced, and settlement afterwards made by his proctor, in the absence of the libellant, and without any other authority from him than the retainer of the proctor. Upon this settlement, the proctor gave to the respondent a full discharge of all claims of the libellant. The grounds upon which that settlement was made are stated in the opinion of the court. Upon the libellant's return from another voyage, in 1857, he first learned of the settlement, and thereupon filed the present libel.

R. C. Pitman, for libellant, cited, upon the question of the basis of settlement, Hutchinson v. Coombs, [Case No. 6,955;] The Rovena, Id. 12,090;] as to the advance wages, Emerson v. Howland, [Id. 4,441;] Wells v. Meldrun, [Id. 17,402;] and to the authority of the proctor, Lewis v. Gamage, 1 Pick. 347; Jackson v. Bartlett, 8 Johns. 281; Wilson v. Wadleigh, 36 Me. 496; 2 Greenl. Ev. § 141; Betts, Pr. 10.

Wm. W. Crapo, for respondents, cited, as to the power of proctors, Ben. Adm. 188; Dunl. Adm. 105; The Frederick, 1 Hagg. Adm. 220; Mynn v. Robinson, 2 Hagg. Ecc. 169; The Whilelmine, 1 W. Rob. Adm. 340; Durant v. Durant, 2 Addams, Ecc. 267; The Harriett, [Case No. 6,096.]

SPRAGUE, District Judge. I have first to consider the agreement made at the time of the discharge. The libellant, a boat-steerer of the ship Scotland, was discharged, at a foreign port, upon payment of $5, and being released from what he owed to the ship. The terms upon which a seaman shall be discharged, before the completion of the voyage, are a matter of mutual agreement. A new contract is made in dissolution of the former. And such contract, or settlement, made by a seaman upon his discharge, will be binding on him, if he act freely, and be fairly dealt with. But, in this case, the seaman did not act freely. He was under a species of duress, and the agreement should not deprive him of what was actually due him. He had been treated with unjustifiable harshness, for a very trivial offence. The master, with language of violence and passion, had given orders to his mate to keep the libellant employed in duties not belonging to his office, nor suitable to his station, but which were degrading and humiliating. From the language and conduct of the master, he had good grounds to anticipate undeserved ill treatment, and for that reason he consented to his discharge, upon the terms prescribed by the master. Consent so given should not deprive him of what was actually due him at the time.

In regard to the subsequent settlement, in August, 1854, I have had some doubt. The rule at common law is well settled. An attorney has no power to compromise a claim that is left with him to prosecute. That is matter in the discretion of his client. A mere retainer gives no such power, but a special authority is often given. Have proctors in admiralty any greater authority in this respect? The citations made by the respondent's counsel give some countenance to the idea that proctors have the power he contends for. But I do not think they are sufficient to establish that doctrine. And not finding it established, I am not inclined to introduce it. It would be inconvenient, and not readily apprehended by clients. No one of the cases, or text-books cited, goes to the extent of saying that proctors may release the claim of their client, by receiving less than his due. They say that courts will not uphold settlements made behind the back of the seaman's proctor, under certain circumstances; also, that they are more satisfac-

tory when made with the advice of the proctor, who is better situated to resist undue influence. All this is for the protection of seamen.

It is laid down by Judge Betts, in his Admiralty Practice, and by Mr. Benedict, in his treatise, that after a decree, the proctor cannot release the judgment for a part payment. This is an authority to the extent that, where a certain amount is known to be actually due to the client, the proctor has no authority to receive less, in full discharge. This applies in principle to the present case, there being here a certain amount really due. I am of opinion, that this settlement does not preclude the court from going behind it.

The mere fact of a settlement with the proctor is not, of itself, a sufficient defence. The court will go further, and inquire whether the settlement was such that it ought to be upheld.

In looking into this settlement, I think it proceeded on a manifest error. The proctor intended to receive all that the party could by law recover; he supposed that he had adopted a correct principle. The settlement really proceeds on a mistake. The basis of settlement was this: to allow the libellant his lay in the Scotland, his first ship, for her whole voyage, embracing as well the time after the libellant left the service of the ship, as that while he was on board of her, deducting therefrom what he had earned in the meantime in the Orizimbo. But as his lay on board of the Orizimbo was greater than his lay had been while on board of the Scotland, the result of this mode of settlement was to reduce the claim of the libellant below the sum which he had actually earned while on board the Scotland. This was an error. To that sum he was absolutely entitled. However great his earnings afterward, he would still be entitled to receive what was due him before. Another claim of the libellant, viz., for a wrongful discharge, stands on a different footing. That is a claim for damages consequent upon the discharge. Where such a claim is sustained, the court will give an indemnity; in ascertaining which, they will inquire what the libellant has suffered. If he has had to work or pay his passage home, then the court will pay him for his time and necessary expenses. All that he has lost in time, expenses, or suffering, by the wrongful discharge, he may recover. But if, in fact, he has immediately found another vessel, and earned full wages, then the court say, "You have not suffered any loss of time or wages." But this all goes to the question of damages. The antecedent wages are as much due as a promissory note; the libellant's success subsequent to this wrongful discharge, cannot extinguish or diminish that debt.

Considering, then, that the libellant's proctor had no authority to make the settlement, and that it proceeded upon an error, I must now give to the libellant what he ought, in law and justice, then to have received. In so doing, I shall take care that the respondents do not suffer from that settlement. I shall deduct the whole amount paid by them to the libellant's proctor. He was authorized to receive payment, and what he actually received is to be deemed payment pro tanto. That leaves the respondents in as good a situation as if that settlement had not been made.

As to the three months' wages, they were not taken into account in either of the settlements, but there is no sufficient answer to the claim. It is due by an absolute provision of the statute, [Act Aug. 18, 1856, § 26; 11 Stat. 62,] and the seaman may recover the portion that belongs to him, that is, two months' wages, in this suit.

There is a difficulty in fixing the rate at which his wages shall be estimated. The practice by consuls abroad, in the case of seamen of whale ships, has been to allow $12 per month; what it has been in the case of boat-steerers, or other officers, I do not know. In the present case, I see no better criterion than to take what his average earnings were per month; or, in other words, to extend his lay for two months. I do not mean to say that this rule would be applicable to all cases.

NOTE, [from original report.] After the delivery of the above opinion, objections being made by the libellant to certain items of the account furnished by the respondents, the court disallowed a charge of 2½ per cent. guaranty-commission on sales of oil, and the charges for fitting and discharging ship. The libellant claimed interest from the arrival of the Scotland; but the court only allowed it from the filing of this libel.

BATES, (UNITED STATES v.) See Cases Nos. 14,542–14,544.

BATES, (WHEELER v.) See Case No. 17,492.

BATES COUNTY, (HARSHMAN v.) See Case No. 6,148.

BATLEY, (COLE v.) See Case No. 2,977.

BATON ROUGE, (SPALDING v.) See Case No. 13,200.

Case No. 1,105.

BATTEN v. CLAYTON.

Circuit Court, E. D. Pennsylvania. Dec. Term, 1848.

PATENTS FOR INVENTIONS—COMBINATION—NOVELTY—EVIDENCE—EXPERT WITNESS—PROVINCE OF COURT AND JURY—DISCLAIMER.

[1. Cited in 2 Whart. Dig. 408, to the point that a patent for a combination cannot be supported by evidence of novelty of one of its parts.]

[2. Cited in 2 Whart. Dig. 408, to the point that a combination, to be patentable, must effect a new result, or an old result by a new mode of action. There must be novelty either of product or of process.]

[3. Cited in 2 Whart. Dig. 409, to the point that the interpretation of the specification is for the court. Experts are examined only to

aid in interpreting the language of art, as other translators are; and semble their evidence on this point is for the court, not the jury.]

[4. Cited in 2 Whart. Dig. 413, to the point that semble a patent under the act of 1836 is itself prima facie evidence of novelty and usefulness, and that plaintiff cannot give cumulative evidence on these points till they are controverted by defendant.]

[5. Cited in 2 Whart. Dig. 413, to the point that the seventh and ninth sections of the act of 1839, authorizing a disclaimer, do not apply where the patent is for combination of parts.]

[KANE, District Judge.]

[NOTE. This case has not been reported. It appears from the records of the circuit court of the United States for the eastern district of Pennsylvania that this was an action at law by Joseph Batten, patentee, and Samuel Batten, assignee, against Joseph Clayton and Enoch W. McGinnis, for infringement of letters patent. A nonsuit was awarded, subject to review by the court in banc on points presented. No further record of the case can be found.]

Case No. 1,106.

BATTEN v. SILLIMAN.

[3 Wall. Jr. 124.][1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1855.

PATENTS FOR INVENTIONS —PRELIMINARY INJUNCTION BEFORE RIGHT ESTABLISHED AT LAW — IRREPARABLE INJURY.

1. Where an alleged infringement of a patented invention, consists in the use of some improvement in expensive machinery, which has been adopted in good faith by a defendant, and where the profit of the patentee consists not in the monopoly of selling his machine, but in the price of licenses given to others to use it; it being the interest of the patentee that all persons should use his improvement, provided they pay him his fee for a license; and the injury being, not in their using his invention, but in their not paying him for using it—this court, sitting in chancery—though it does not in such capacity necessarily act as auxiliary to a court of law, but may render a final decree on a patent—will not, before a right is established at law, grant a preliminary injunction except in a clear case; since it might ruin the defendant, without doing any corresponding benefit to the patentee; and since the main objects of an injunction can be obtained by making the defendant keep an account until the right is decided at law.

[See Morris v. Lowell Manuf'g Co., Case No. 9,833.]

2. The court distinguishes such a case as that just mentioned from the case of a medicine, for example, where the patentee's profit consists in a monopoly of sale, and the defendant has been at little or no expense, while his competition might be highly injurious to the complainant; and would refuse an injunction in the former case, when it might, perhaps, grant it in the latter.

In equity. This was an injunction bill filed by Batten, claiming to be the inventor of a machine—certain rollers for breaking and screening coal—against the defendant, Silliman, who, it was admitted, was using a machine similar in several respects to the one of which the complainant alleged himself to be the inventor. [Injunction denied.]

Most or all of the ordinary formal allegations (though not those usual in such bills, that the plaintiff had enjoyment and possession, and in consequence thereof had made sale of licenses or rights) were made in the bill; and it was further alleged that the validity of the patent had been tried at law, in this court, in three cases (one of them being Batten v. Taggert, reported in its conclusion, on a point of law, supra, [Case No. 1,107,] in which after ample preparation and numerous notices, no witness was produced or could be produced to impeach or disprove the originality of the invention; and that although these verdicts were afterwards set aside by the court, upon a technical question in no way affecting the originality of the invention, this decision was finally reversed in the supreme court of the United States, on error, and the patent sustained. See Battin v. Taggert, 17 How. [58 U. S.] 74.

Numerous ex parte affidavits were filed in behalf of the complainant, stating that the defendant had put into operation, and was still using, a machine constructed on the same plan and substantially like the machine described in the patent and bill of the complainant, of which patent, as these several deponents verily believe, the machine used by the defendant was an infringement.

The defendant, on the other hand, swore in his answer that he had a good defence both as to matter of law and matter of fact; that he was advised that the complainant never had such possession and enjoyment of the alleged invention as is required in applications of the sort now made by him; that he had never made sale of licenses, rights or interests in consequence thereof—a matter which, on an injunction bill, he ought, if he had so made sale, to aver,—but that on the contrary, machines substantially like the one described in his patent had been extensively and were still so used, and the complainant's right in almost all cases resisted or denied. The answer then went into a history of the suits alleged by the complainant to have been brought by him under his patent, and set forth some blunders and carelessness in his specifications at the patent office, and delays consequent thereon, and showed also that a much greater delay than was either indispensable or necessary had taken place on his part in urging trials at law of his rights; that in regard to these suits motions had been made by the defendant for continuances on the ground of evidence, the discovery of which was obtained at too late a period to be included in the notice of defence; but that these motions were unsuccessful, and that the causes were therefore submitted to the jury solely upon the question of damages; all evidence as to the want of novelty being excluded; and that the verdicts given for the plaintiff were given independently of any evidence

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

on the point last mentioned; that moreover these verdicts were afterwards set aside and new trials granted in each case upon views of law applicable to the whole merits, and not, as the bill alleged, upon a mere technicality; that while, as the complainant alleged, it was true that on writs of error being taken by him, the decision of this court was reversed, yet, that the cases were remanded by the court above with directions to award a venire facias de novo; that no farther proceedings had been taken by the complainant in those actions at law; that notwithstanding the verdicts given, as mentioned by the complainant, in his favor, no judgments had ever been entered on them, and that therefore the complainant had failed to obtain a verdict and judgment, and that his right had in no wise been established by any legal proceedings, but on the contrary, was still unsettled and in dispute, and that the actions at law were still pending, and the defendants preparing to make defence in them.

The answer alleged further that machines quite similar to that claimed by the complainant as his, had been extensively used for breaking coal before and since he obtained his patent; and that notwithstanding the granting of the patent, many such machines had been run and used by the workers of mines in consequence of the opinion generally entertained that the complainant, Batten, had no valid rights under such patent, also by reason of his apparent indifference in prosecuting such claims, together with his failure successfully to establish them in the suits in this court; and that the defendant believed and expected on a trial at law to prove an entire want of originality in the invention. The answer further stated that the defendant had not himself erected the machine now sought to be enjoined, but had bought it at Marshall's sale on an execution from this court, about five years ago, and had never any notice to desist from its use; and concluded with the allegations that he was competent to satisfy any damages which might be recovered against him by the complainant at law; that the breaking apparatus, its fixtures, &c., had cost him several thousand dollars; that he employs over one hundred operatives at his works, and that an injunction as prayed for, would produce great and irreparable damage to him.

The defendant on his side also, brought ex parte affidavits, to prove a want of originality in the complainant.

About two hundred machines which the complainant alleged were infringements of his patent, were in use in different places, in violation of his alleged rights. The patented machine formed but a small, though an important part of the combined machinery used for breaking coal; steam enginery and other apparatus, the cost of which is several thousand dollars, being requisite. The complainant did not desire an exclusive use of his machine; but desired to prevent the use of machines like it, except under his license; he being willing to let similar machines be used by others, they paying him one per cent. per ton of coal broken and screened upon them.

Mr. Porter and W. H. Rawle, for complainant.

Mr. Cadwalader, for defendant.

GRIER, Circuit Justice. The remedy by injunction in patent cases is given by courts of equity, on account of the insufficiency of that given by a court of law. It is in its nature preventive, where irreparable mischiefs are apprehended, or when the patentee is likely to be vexed by litigation and a multiplicity of suits against stubborn pirates of his invention. The circuit courts of the United States have original jurisdiction as courts of chancery in all patent cases. They do not act merely as auxiliary to courts of law, and may therefore render a final decree on a patent whose validity is contested, without sending the parties in law to try their rights. It is no reflection on juries or trial by jury to say that many disputes about the originality and infringement of patents depending upon complex mathematical calculations, upon a knowledge of the principles of chemical science, and of mechanical philosophy, cannot be satisfactorily decided by the verdict of twelve men, a majority, if not all of whom, have no knowledge or experience on the subjects they are called to decide on.

But while courts of equity will in some cases decide such questions on final hearing, without the assistance of courts of law, it does not follow that in every motion for preliminary injunction, the court will try and determine the whole case on ex parte affidavits, on five days' notice, like a court of "pied poudre."

In cases of waste, purpresture and nuisance, where the mischief done by their continuance till final hearing, may be irreparable; or where the injury or loss to the defendant by this interposition may not be of importance, or the delay in exercising his rights could be easily compensated; such preliminary interference may be necessary to the ends of justice, even where the equity of the bill is denied by the defendant. In the case of infringement of patents, such can seldom be the case, and such preliminary intervention can only be invoked in case of wanton and stubborn persistence in pirating an invention, the title to which has been clearly established either by trial at law, or by long and peaceable possession. Hence we have refused to grant a preliminary injunction where the defendant denies on oath either the originality of the invention or the infringement of the patent, leaving the decision of the question till final hearing. It must be a very strong case in-

deed, either of impending mischief to the complainant, or where the court, by having the machines or models before them, can see clearly that the defence set up is a mistake or a mere pretence, that the court will thus summarily interfere by granting execution before final judgment, where the defendant alleges under oath a valid defence, and denies the equity of the plaintiff.

There are cases, also, in which this preliminary injunction would cause irreparable injury to the defendant, with no corresponding benefit to the patentee.

Where the profits from a patented invention arise from a monopoly of the sale of the machine, medicine, or composition invented, and the competition of the defendant may be highly injurious to the established legal rights of the patentee, it may be a very proper exercise of the discretion of the chancellor to restrain the defendant from infringing till he has established his right, if he pretends to have any. But the case is very different where the supposed infringement consists in the use of some improvement in expensive machinery, which has been adopted in good faith by a defendant, and where the profit of the patentee consists, not in the monopoly of selling his machine, but in the price of licenses given to others to use it. In such a case it is the interest of the patentee that all persons should use his improvement, provided they pay him his fee for a license. The injury to him is not in using his invention, but in not paying for such use. It would be an abuse of the discretion of the court to stop a mill or furnace because it may have used some patented improvement in its machinery. It may ruin the defendant without any corresponding benefit whatever to the patentee. The only injury to him is the nonpayment of his license, which will be remedied by the final decree of the court, if the defendant shall be found a wrongdoer. The patent in this case is for certain rollers used in the machinery for breaking and screening anthracite coal; they form but a small, though important part of the combined machinery for the purpose. The steam engine and other apparatus necessary to the operation cost many thousands of dollars. The patentee has a fixed price for the use of his invention, one cent per ton. As between these parties alone, it is the interest of the complainant that the respondent should continue to use his invention, provided he pays the cent per ton. An injunction, by stopping the business of the defendant, may be ruinous to him. The only use to complainant would be an unjust one. It would deliver the defendant over to him with a rope around his neck, and compel him to accept any terms dictated by the patentee. The defendant has sworn to his belief that he has a good and sufficient defence. Witnesses have sworn that the patentee is not the original and first inventor of the machine. The defendant has a right to a hearing before he is condemned as a pirate or infringer of the complainant's rights. Yet the granting of this injunction would compel him to accept the complainant's terms, and buy his peace without a hearing. And not only so, but it is alleged, and not denied, that some two hundred others would be compelled to do the same.

"It seems to me," says Lord Cottenham, in Neilson v. Thompson, [Webst. Pat. Cas. 286,] "that stopping the works by injunction, under these circumstances, is just inverting the purpose for which an injunction is used. An injunction is used for preventing mischief; this would be using the injunction for the purpose of creating a mischief—because the plaintiff cannot possibly be injured. All that he asks, all that he demands, all that he ever expects, is one shilling per ton (and in this case, a cent per ton.) The injunction would be extremely prejudicial to the defendants, and do no possible good to the plaintiff, for the purpose for which it may be used. It may, by operating as a pressure upon the defendant, produce a benefit. But that is not the object of the writ. The object of the court is to preserve to each party the benefit he is entitled to, until the question of right is tried, and that may entirely be secured by the defendants undertaking to keep an account. If the plaintiff is entitled, the court will have an opportunity of putting him precisely in the position he would have stood in if this question had not arisen."

But it is contended that the court are bound to give the plaintiff the benefit of this interlocutory injunction, whatever use he may be disposed to make of it, because there has been a verdict of a jury establishing the validity of this patent, and a peaceable possession of the rights conferred by it.

Admitting the court would be justified for these reasons, to grant this motion, without any exercise of discretion founded on the reasons we have given, we do not think that these assertions are supported by the evidence. It is true there has been a verdict on a former trial between other parties. But that verdict was set aside by the court as contrary to law, and it moreover appears that the defence now offered to the validity of the patent, was not before the jury, nor passed upon by them. They were instructed by the court to assess the damages, without reference to any other question. In a subsequent trial, the same court decided against the validity of the patent, on questions of law, which were afterwards reversed by the supreme court. But in none of these trials did either the court or jury pass upon the defence, as to the originality of the plaintiff's invention, on the facts now submitted. The verdicts in the cases can therefore have neither a technical nor moral effect in the decision of the present motion.

Neither can the evidence of long possession benefit the plaintiff; for it has not existed.

On the contrary, after the decision of the circuit court against the validity of the plaintiff's patent, those who had previously agreed to pay the plaintiff for the use of his invention, have ceased to do so, and many others, acting in good faith, have used the invention in their coal breaking machines, in hostility and adverse to the plaintiff's claims. It has been admitted on the argument, that some two hundred machines are in use by persons who resist the claim of the patentee.

In every view I can take of the case, I think the granting of this motion would be an injudicious use of the discretion of the court, and wrong to the defendants, who, for anything that appears, may believe that they have an honest defence to this action, and are, therefore, entitled to full and final hearing before they are condemned.

If this motion were granted, they would be compelled to submit without a trial of their rights, which would be contrary to the first principles of practice, and an act of sheer tyranny in the court. Without intimating any opinion as to the validity of this patent, or the truth of the defence, the court must refuse this motion, with costs, and order an issue between the parties as to the validity of this patent, to be tried before a jury on the first Monday of April next.

Injunction refused, but defendant ordered to keep an account.

[NOTE. Patent No. 3,292 was granted to J. Batten October 6, 1843; reissued September 4, 1849, (No. 142.) For another case involving this patent, see Batten v. Taggert, Case No. 1,107.]

Case No. 1,107.

BATTEN v. TAGGERT.

[2 Wall. Jr. 101;[1] 8 Leg. Int. 126; 53 Jour. Fr. Inst. 96.]

Circuit Court, D. Pennsylvania. Sept. 11, 1851.[2]

PATENTS FOR INVENTIONS—DEDICATION OF AN INVENTION TO THE PUBLIC—SURRENDER AND REISSUE.

1. A description, by an applicant for a patent, of a machine in which he sets forth his invention to be for a combination of machinery, not giving notice that he claims any part as new, is a dedication of that part to the public.

[See note at end of case.]

2. After such part has passed into public use, the dedication cannot be revoked by surrender and re-issue of the patent, nor otherwise; neither the 13th section of the act of [July 4,] 1836, [5 Stat. 122,] nor the seventh section of the act of [March 3,] 1837, [5 Stat. 193,] relating to amending of patents, authorizing a new patent for an invention different from that originally patented.

[Disapproved in Hussey v. Bradley, Case No. 6,946. Cited in Smith v. Merriam, 6 Fed. 718.]

[See note at end of case.]

[At law. Action by Batten against Taggert for infringement of letters patent. Plaintiff heretofore had a verdict in his favor. Heard on defendant's motion for a new trial. Granted. Afterward, upon the new trial, defendant had judgment, but this was reversed by the supreme court in Battin v. Taggert, 17 How. (58 U. S.) 77. See note at end of case.]

Batten obtained a patent in 1843 for a machine, specifying his invention to be for the manner in which he had arranged and combined certain parts, and not specifying that he had invented any of the parts. In truth, he was the inventor of one or more of the parts. Accordingly in 1849, under the acts of congress hereafter quoted, he surrendered his patent of 1843, and took out a new one describing essentially the same machine as the former one did, but claiming as new a particular part. On this new patent he brought this suit, and having clearly shown great merit in his invention of this part, recovered heavy damages. A motion for a new trial was made, the strong ground for the new trial being that he had dedicated his invention to the public by his specification of 1843, not claiming it, and by making no claim of it otherwise until his specification of 1849.

One act of congress—July 4, 1836, § 13, [5 Stat. 122]—relating to patents, and above referred to, ordains, that whenever any patent shall be inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee's claiming in his specification as his own invention more than he had a right to claim as new; if the error has arisen by inadvertency, accident or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, to cause a new patent to be issued to the said inventor for the same invention. And another act—March 3, 1837, § 7, [5 Stat. 193]—ordains "that whenever any patentee shall have, through inadvertence, accident or mistake, made his specification of claim too broad, claiming more than that of which he was the original or first inventor, some material and substantial part of the thing patented being truly and justly his own, any such patentee may make disclaimer of such parts of the thing patented as the disclaimant shall not claim to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent. And such disclaimer shall thereafter be taken and considered as part of the original specification."

THE COURT, in an elaborate opinion by KANE, District Judge, held that the invention having been in use six years before Batten claimed it as his, had become public; and that having become public, he could not reclaim it by his patent of 1849; that the sections of the act of congress above quoted did not help his case; that the patentee under them might make his specification more ac-

[1] [Reported by John William Wallace, Esq.]

[2] [The judgment rendered upon a subsequent trial of this cause was reversed in 17 How. (58 U. S.) 77.]

curate, or restrict the limits of his claim, but that his re-issued patent, taking the place of the one he had surrendered, could only be for the same invention. The invention of the part being very ingenious, the court reluctantly entered an order of

New trial granted.

[NOTE. Upon the new trial the defendant had judgment. This was reversed by the supreme court in Battin v. Taggert, 17 How. (58 U. S.) 77. Mr. Justice McLean, in the course of his opinion, said: "The plaintiff, by a surrender of that patent, and the procurement of the patent of 1849, with amended specifications, abandoned his first patent, and relied wholly on the one reissued. The claim and specifications in this patent, as amendatory of the first, were within the 13th section of the act of 1836. It is said with entire accuracy in the charge, in regard to the amended specification of the patent of 1849, that it 'described essentially the same machine as the former one did. but claimed, as the thing invented, the breaking apparatus only.' And this the patentee had a right to do. He had a right to restrict or enlarge his claim, so as to give it validity, and to effectuate his invention. * * * It was the right of the jury to determine from the facts in the case whether the specifications, including the claim, were so precise as to enable any person skilled in the structure of machines to make the one described. This the statute requires, and of this the jury are to judge. The jury are also to judge of the novelty of the invention. and whether the renewed patent is for the same invention as the original patent; and they are to determine whether the invention has been abandoned to the public. There are other questions of fact which come within the province of a jury, such as the identity of the machine used by the defendant with that of the plaintiff's, or whether they have been constructed and act on the same principle."

[For another case involving this patent, see Batten v. Silliman, Case No. 1,106.]

BATTEY, In re. See Case No. 14,169.

BATTIE v. TAGGERT. See Case No. 1,107.

Case No. 1,108.

BATTIN v. BIGELOW.

[Pet. C. C. 452.] [1]

Circuit Court, D. New Jersey. Oct. Term, 1817.

EJECTMENT—MESNE PROFITS—NOTICE TO DEFENDANT—ACKNOWLEDGMENT—AGE OF FEME COVERT—PRESUMPTION.

1. The plaintiff in an action of ejectment may recover mesne profits, on giving notice to the defendant that he means to proceed for them.

2. Where the certificate of a magistrate who took the privy examination of a feme covert, does not state that she was of the age of twenty-one years, the presumption is that the person examined was of full age until the contrary is shown by proof.

3. The grantor of land is presumed to be alive, until the contrary appear.

At law. Ejectment for five-ninths of a tract of land. Upon the death of Jacob Browning, who died seized of the tract of land in question, it descended to his three sons and three daughters. The title of the lessor of the plaintiff is derived under deeds from one of the sons, and from the daughters and their husbands. The plaintiff, after proving notice to the defendant that he should in this action claim mesne profits from the time of the demise laid in the declaration, proceeded to prove the value of the same.

It was objected by the defendant, that the plaintiff could not recover mesne profits in this action, or any thing more than nominal damages.

BY THE COURT. It is true, that in practice the plaintiff in ejectment only goes for nominal damages, and follows up his judgment in that action by an action of trespass to recover the value of the mesne profits. But if to avoid the expense of two actions, he chooses to proceed for mesne profits in the action of ejectment, there is no legal reason to prevent him from recovering them. The objection of surprise upon the defendant is removed by the notice to him that the mesne profits would be claimed.

The defendant acknowledged that he had no title at law, but he objected to the plaintiff's title on the following grounds: First, that the certificates of the magistrate who took the privy examination of the feme coverts, to two of the deeds under which the plaintiff claims title, do not state that they, the feme coverts, were of the age of twenty-one. Second, that the certificates do not state that the feme coverts acknowledged that they executed the deeds voluntarily, or that the examinations were taken privately. They merely state that they were examined apart from their husbands, and that they acknowledged that they executed the deeds freely, without any fear, threats, or compulsion of their husbands. Whereas the law of New Jersey requires, that the feme covert should acknowledge, on a private examination apart from her husband, that she executed the deed as her voluntary act, freely, &c.

WASHINGTON, Circuit Justice, delivered the opinion.

As to the first objection, there is nothing in it. The presumption is that the feme coverts were of full age, until the contrary is proved. It is a matter of defence if they were under age, and must be proved if the defendant would avail himself of the fact to defeat the conveyance.

As to the second objection, the court is of opinion that the omission of the word "voluntarily," is substantially supplied by the expressions that "she freely executed the deed, without the threats, &c. of her husband."

There is more difficulty in the other objection, and the court forbears giving an opinion

[1] [Reported by Richard Peters, Jr., Esq.]

upon it, being satisfied that, though upon a critical construction of the law, the examination must be private as well as apart from the husband, still the husbands were entitled to freehold estates in the lands of their wives and might convey the same without their wives, upon which titles the lessor of the plaintiff may recover in this ejectment. It is true that no evidence was given that the husbands are still living, but this must be presumed till the contrary is proved.

The jury found a verdict for five-ninths of the land, and the mesne profits in damages. An exception was taken to the last opinion.

BATTIN v. TAGGERT. See Case No. 1,107.

BATTISTE, (UNITED STATES v.) See Case No. 14,545.

Case No. 1,109.

BATTLE v. MUTUAL LIFE INS. CO.

[10 Blatchf. 417.] [1]

Circuit Court, S. D. New York. Feb. 12, 1873.

EQUITY—PLEADING—AMENDMENT—ADMISSIONS IN ANSWER.

1. A plaintiff, in a suit in equity, can recover only upon the case made by his bill, and not upon that made in the evidence.

2. An admission in the answer will be of no use to the plaintiff, unless it is put in issue by some charge in the bill.

3. On final hearing, the court announced, that, on the pleadings and proofs, as they stood, it was impossible to grant to the plaintiff the relief prayed for. The plaintiff then moved for leave to amend the bill. It appearing, that, by making the amendments proposed, the bill and the answer would agree in their statements, in the particulars covered by such amendments; that the evidence and the answer made out a case for relief to the plaintiff, but a case different from the one stated in the bill; that the purposes of substantial justice required that the amendments should be made; that the amendments did not change the subject matter of the bill; and that no decree had been passed: *Held*, that the motion ought to be granted, on payment of costs.

[Cited in Hardin v. Boyd, 113 U. S. 765, 5 Sup. Ct. 775; Maynard v. Tilden, 28 Fed. 703.]

4. *Held*, also, that, although some testimony on the part of the plaintiff might be in conflict with the amendments, yet, as the amendments harmonized with the allegations of the answer, and such testimony was not testimony sustaining the allegations of the answer, the point was immaterial.

5. The case of Neale v. Neale, 9 Wall. [76 U. S.] 1, commented on, and held to warrant the allowance of such amendments.

[In equity. Bill by Madeline C. Battle against the Mutual Life Insurance Company of New York. Heard on complainant's motion for leave to amend. Granted.]

Charles F. Sanford, for plaintiff.

Henry E. Davies, for defendants.

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

BLATCHFORD, District Judge. It is a well settled rule, in a suit in equity, that the plaintiff can recover only upon the case made by his bill, and not upon that made in the evidence. It is equally well established, that, if an admission is made in the answer, it will be of no use to the plaintiff unless it is put in issue by some charge in the bill. Hence, the plaintiff is frequently obliged to ask leave to amend his bill, although a clear case for relief is apparent upon the face of the pleadings. Thus, where a bill against an executor prays an account of the personal estate of the testator, on the ground that the executor has received assets, but does not charge any acts of mismanagement in the executor, no decree for an account can be had as to acts of mismanagement, although the answer discloses such acts, and shows that, in consequence of them, no assets were received. The reason is, that such matter is not matter in issue. Story, Eq. Pl. (8th Ed.) §§ 262a, 264.

In the present case, the answer admits and avers that the plaintiff duly made payment of the premiums on the policies in question in each year to and including the year 1861, (such payments for the year 1861 falling due on the 21st of May in that year. It also avers, that the appointment of McCoy, as agent of the defendants at Mobile, was revoked by the defendants on the 26th March, 1861; that notice thereof was given to McCoy and to the plaintiff; and that, since that date, the defendants have had no agent in the state of Alabama. The substance and effect of the allegations in the answer is, that the plaintiff had notice of the revocation of March 26th, 1861, whenever, after that date, she made, or attempted to make any payment of premium to McCoy, as agent of the defendants. There is, moreover, a distinct allegation, in the answer, that if the plaintiff, after the 26th of March, 1861, made any payments to McCoy, as the agent of the defendants, she made the same in her own wrong, with full knowledge that he had no power or authority to receive the same, or to act as such agent. Yet the answer admits that the plaintiff paid the premiums due May 21st, 1861. The bill avers that such payment was made to the defendants through McCoy, as their agent. The answer avers that such payment was made to the defendants by the plaintiff through McCoy, and that the defendants received the money from McCoy as the agent of the plaintiff.

The bill avers the due payment of premiums, by the plaintiff, to the defendants, through McCoy, as their agent, for the years 1862, 1863 and 1864. At the hearing, the counsel for the plaintiff stated that the plaintiff desired to abandon the position of the bill, that there was any payment of premiums made by her after the payment of 1861, and to accept the position of the answer, that the appointment of McCoy, as agent, was revoked in March, 1861, and that she had notice of

such revocation, and, consequently, to admit, that no payment made to McCoy after the payment of 1861 was a valid payment to the defendants, and to claim the benefit of all the legal consequences flowing from such revocation and notice. But the court found it impossible, consistently with the principles before stated, to allow the plaintiff to take such a course, on the allegations found in the bill, for the reason, that the bill avers, that the plaintiff paid, through McCoy, as the agent of the defendants, on the 21st of May in each of the years 1862, 1863 and 1864, the premiums due on those days; that, on the 21st of May, 1865, she did not pay the premium then payable, because the agency of McCoy, as she was informed and believed, had been theretofore revoked, and no one had been appointed in his place; that the defendants pretend that the agency of McCoy was revoked on or before the 21st of May, 1862; that the contrary of such pretence is true; that she had no notice of any such revocation; and that she dealt with McCoy, as such agent, in good faith. The purport of these allegations is, that the payment for 1862, through McCoy, was valid, because his agency was not revoked on or before the 21st of May, 1862; that she had no notice, before that date, of any such revocation; that she dealt with McCoy, as the defendants' agent, in good faith, in paying the premiums due in 1863 and 1864 as well as in 1862; and that she failed to pay the premium due May 21st, 1865, because the agency of McCoy, as she had by that time been informed, had been before that time revoked, and there was no agent in his place. In other words, it is substantially alleged, in the bill, that the agency of McCoy was not revoked on or before the 21st of May, 1864, but was revoked before the 21st of May, 1865, and the plaintiff was informed thereof by the latter day; that the plaintiff made due payment, through McCoy, as the defendants' agent, for the years 1862, 1863 and 1864; and that such revocation and information, and the fact that there was no new agent in McCoy's place, was the reason why the plaintiff did not pay through McCoy, or through any agent of the defendants in Mobile, the premiums due May 21st, 1865.

The allegations of the answer, of which the plaintiff desired to take advantage as admissions, could not be regarded as admissions, because they were not alleged, as facts, in the bill. On the contrary, facts inconsistent with them were alleged in the bill to be facts of the case. The court, on the pleadings and the evidence, found it impossible not to say, that, as respected the plaintiff, the agency of McCoy, as agent of the defendants at Mobile, continued until after the 21st of May, 1863; that she could have made payment to him there of the premiums due on that day; and that, she having failed to do so, there was a default on her part in complying with the conditions of the policies, whereby they were forfeited. The court, therefore, announced, that, on the pleadings and proofs as they stood, it was impossible to grant to the plaintiff the relief prayed for.

The plaintiff now moves for leave to make sundry amendments to the bill, alleging, on affidavit, that the bill is in error in stating that she paid, through McCoy, the premiums for 1862, 1863 and 1864, and that the amendments which she desires to make accord with the admissions and averments of the answer, and with the facts of the case, and with the proofs heretofore taken in the cause.

The first three amendments proposed are these: The bill alleges that the plaintiff, "until the 21st day of May, in the year 1865," paid to the defendants, through McCoy, their duly authorized agent, the premiums as they became due, and so paid in each of the years 1862, 1863, and 1864, the sum of $403, making, with previous payments, a total of $4,836. By the amendments proposed, the bill will allege, that the plaintiff, "until the 21st day of May, in the year 1862," paid to the defendants, through McCoy, their duly authorized agent, the premiums as they became due, making an aggregate of payments, of $3,627. The answer alleges, that the premiums were paid until and including those for 1861, and that none were paid after those for 1[illegible]. It is true, that the answer, while admitting that McCoy was the agent of the defendants at Mobile, for certain purposes, from 1853, until March, 1861, and that he received from the plaintiff and forwarded to the defendants, the premiums she paid, from and including 1853, to and including the premiums due May 21st, 1861, avers that, in receiving and forwarding such premiums, he acted as the agent of the plaintiff. But, as the bill, with such three proposed amendments, and the answer, will agree in the statement that the plaintiff paid, and the defendants received, the premiums payable until and including those for 1861, and none after those for 1861, the question as to how those acknowledged payments were made, becomes immaterial. The bill and the answer will agree in the only statement that is material.

The next amendment proposed is this: The bill alleges that the plaintiff, on the "21st of May, 1865," and thereafter, was ready to pay all premiums as they became due, but that she did not, on or after the "21st of May, 1865," pay any of such premiums, because the agency of McCoy, as she was informed and believed, had been theretofore revoked, and no one had been appointed in his place. By the amendments proposed, the bill will allege, that the plaintiff, on the "21st of May, 1862," and thereafter, was ready to pay all premiums as they became due, but that she did not, on or after the "21st of May, 1862," pay any of such premiums, because the agency of McCoy, as she was informed and believed, had been theretofore revoked, and no one had been appointed in

his place. The answer alleges, that the defendants, on the 26th of March, 1861, revoked the agency of McCoy, and gave notice thereof to him and to the plaintiff, and that if she, after that date, made any payments to him, as the agent of the defendants, she made the same in her own wrong, with full knowledge that he had no power or authority to receive the same, or to act as such agent. The defendants, in the answer, acknowledge the receipt of the premiums of 1861, through McCoy, not as the agent of the defendants, but as the agent of the plaintiff. The bill, with this proposed amendment, and the answer, will, therefore, agree in the statement that before the time for making the payments due May 21st, 1862, came around, the agency of McCoy had been revoked by the defendants, and notice thereof had been given to the plaintiff.

The next amendment proposed is this: The bill alleges, that the defendants pretend that the agency of McCoy had been revoked by them on or before the 21st of May, 1862. By the amendment proposed, the bill will allege, that the defendants pretend that the agency of McCoy had been revoked by them on or before the 21st of May, 1861. The answer, as before shown, alleges, that the agency of McCoy had been revoked by the defendants on the 26th of March, 1861. The bill, with this proposed amendment, and the answer, will, therefore, agree in the statement, that the defendants pretend that the agency was revoked on or before the 21st of May, 1861. The bill will then, if the above amendment is allowed, go on to say, that it is not true that the agency of McCoy was revoked on or before the 21st of May, 1861. One object of such amendment appears to be, to have the bill thus aver, that the agency of McCoy continued until after the 21st of May, 1861, so as to make valid the payments, through McCoy, of the premiums due on that day. As before stated, such averment is not material for such purpose. In this connection, the bill is further proposed to be amended, so as to deny that the plaintiff had any notice, until after the 21st of May, 1861, of any revocation made on or before the 21st of May, 1861. One object of this amendment appears to be, to have the bill deny any notice of any revocation of the agency of McCoy, which could invalidate the payments, through McCoy, of the premiums due May 21st, 1861. But, as before stated, such a denial is not material for such purpose. But, there is a point of view in which the last named two proposed amendments are material. The bill now avers, that it is not true that the agency of McCoy was revoked by the defendants on or before the 21st of May, 1862, and denies that the plaintiff had any notice of any such revocation. Changing this to an averment that it is not true that the agency of McCoy was revoked by the defendants on or before the 21st of May, 1861, and to a denial that the plaintiff had any notice of any such revocation until after the 21st of May, 1861, is a necessary change, so far as concerns the making the bill no longer aver that it is not true that the agency was revoked on or before the 21st of May, 1862, and the making it no longer deny that the plaintiff had any notice of such revocation, because, one of the previous amendments will have made the bill aver, that, on the 21st of May, 1862, the agency of McCoy, as the plaintiff was informed and believed, had been theretofore revoked. Such object will be effected by the statement, that the agency was not revoked on or before the 21st of May, 1861, and by the denial that the plaintiff had any notice of any such revocation until after the 21st of May, 1861. These two amendments, therefore, will be consistent with the other amendments, and with the allegations of the answer.

It is strenuously insisted, on the part of the defendants, that no case can be found where a plaintiff in an equity suit has been allowed to amend the bill at the stage of the cause which has been reached in this suit. But I understand the decision of the supreme court in Neale v. Neale, 9 Wall. [76 U. S.] 1, as fully warranting the allowance of the amendments now asked for. In that case, a bill was filed by a husband and his wife, against the father of the husband, alleging a promise by the father to give to the son or to his wife, a lot of land, so that a house might be erected on it, with her money, for their home, and the erection of the house with her money, and the refusal of the father to give a deed of the house and lot to her, and his occupation and possession of the same, and praying that he might make such deed to her and her heirs, or to some one in trust for her and their benefit, and account for the rents. The evidence showed a promise to give the lot to the wife, so that a house might be built on it with her money, and the erection of the house on the lot with her money, with the consent of the father, and on the faith of such promise; and the answer, in substance, set forth that state of facts. The case was heard, and, after hearing it, and after considering the proceedings, the court, of its own motion, and without assigning any reason, ordered that the plaintiffs have leave to amend their bill, on payment of costs. The bill was amended, so as to allege, that the father promised to give the lot to the wife, on the understanding that her money should be expended in building a dwelling house on it for herself and her heirs. On the amended pleadings, and on substantially the original evidence, the case was heard again, and a decree made, that the father should make a deed to a trustee, of the house and lot, for the sole use and benefit of the son's wife, and account for the rents since the filing of the bill. It is apparent, that the court considered that, although the answer and the evidence showed a case for relief, in favor of the wife, the relief prayed for could

not be given on the bill as originally framed. The court considered the proofs, on the pleadings as they were, and made a decision, that, on the bill as it was, the relief asked could not be given. But, instead of entering a decree to that effect, it gave the plaintiffs, without a motion to that effect by the plaintiffs, leave to amend the bill. The defendant appealed from the decree of the supreme court, and it was there urged, for him, that the bill could not be amended, after publication had passed, and the case had been set down for hearing, in any other respect than by making new parties; that the original bill recognized the marital rights of the husband, and the amended bill set up a claim adverse to such marital rights; and that this changed the framework of the bill and made a new case. On this point, in its decision, the supreme court say: "It would seem clear, from the manner in which the court below, of its motion, and without assigning any reasons for this action, gave the complainants leave to amend their bill, that, on the original hearing, it was satisfied that the evidence made out a case for relief, but a case different from the one stated in the bill; and that, as the pleadings must correspond with the evidence, it was necessary either to dismiss the bill without prejudice, or to give the leave to amend. The court adopted the latter alternative, doubtless, with a view to save expense to the parties, and because such a course could not, by any possibility, work any harm to the defendant. It is insisted that this proceeding was erroneous; that, after a cause has been heard, the power of allowing amendments ceases, or, if it exists at all, cannot go so far as to authorize a plaintiff to change the framework of his bill, and make an entirely new case, although on the same subject matter, as, it is contended, was done in this instance, under the leave to amend. This doctrine would deny to a court of equity the power to grant amendments after the cause was heard and before decree was passed, no matter how manifest it was that the purposes of substantial justice required it, and would, if sanctioned, frequently embarrass the court in its efforts to adjust the proper mode and measure of relief. To accomplish the object for which a court of equity was created, it has the power to adapt its proceedings to the exigency of each particular case, but this power would very often be ineffectual for the purpose, unless it also possessed the additional power, after a cause was heard and a case for relief made out, but not the case disclosed by the bill, to allow an alteration of the pleadings on terms, that the party not in fault would have no reasonable ground to object to. That the court has this power and can, upon hearing the cause, if unable to do complete justice by reason of defective pleadings, permit amendments, both of bills and answers, is sustained by the authorities. Necessarily, in a federal tribunal, the matter of amendment, at this stage of the progress of a cause, rests in the sound discretion of the court. At an earlier stage, this discretion is controlled by the rules of equity practice adopted by this court, but not so upon the hearing, for there is no rule on the subject of amendments, applicable to a cause which has advanced to this point. As, therefore, the leave to amend, in this instance, was within the discretion of the court, we will proceed to dispose of the case on its merits. It is unnecessary, in the view we have taken of the power of the court over amendments at the hearing, to discuss the question whether the amended bill is materially different from the original bill. It is enough to know, if different, that the subject matter of both bills is the same, and that the contract, consideration, promise, and acts of part performance, stated in the amended bill, are stated with sufficient precision, and, if supported by proof, entitle the complainants to the relief which they seek at the hands of a court of equity." The court then, on the merits, affirm the decree.

In the present case, I was satisfied, on the hearing, that the evidence and the answer made out a case for relief to the plaintiff, but a case different from the one stated in the bill, and that the case was a proper one for an amendment of the bill. I did not grant the leave to amend at once, but left the plaintiff to move for such leave, and to suggest the amendments desired. I only stated that I could not, on the pleadings and proofs as they stood, grant to the plaintiff the relief prayed for, and I pointed out the difference between the allegations of the bill in the Hamilton case and the bill in this case, in reference to the facts attending the revocation of McCoy's agency, and the correspondence between the averments of the answer in the Hamilton case and the answer in this case, as to such facts, and the fact that the parties agreed, in their pleadings, in the Hamilton case, as to such facts, and that they did not agree, in their pleadings, in this case, as to such facts. The power of the court now to grant leave to make the amendments is none the less than if it had granted such leave at the hearing, and of its own motion. The purposes of substantial justice require that the amendments shall be made. The amendments do not change the subject matter of the bill, and no decree has been passed.

It is urged, that the proposed amendments are in conflict with the testimony on the part of the plaintiff; and that the plaintiff proved that premiums on the policies were paid to McCoy, at Mobile, on the 6th of May, 1862, and on the 30th of May, 1863, and also proved that she, or her agents, dealt with him as the agent of the defendants, and that he acted as such down to and including May 30th, 1863. The witness who made the payments at Mobile in 1861, 1862 and 1863 states, that he made them to McCoy, "then residing:

in Mobile, and acting as the agent of the company;" that the witness made such payments on account of the plaintiff's husband, (the moneys to pay them having been, as is shown, furnished by the latter;) and that the witness made the payments supposing that McCoy was the agent of the defendants, as he had been so for many years, and the witness had no knowledge of any change of affairs. This evidence was given under an averment in the bill that McCoy continued to be the agent of the defendants until after the alleged payment of 1864 was made, and, in the absence of proof that the letter of revocation was received by McCoy, or that the plaintiff had notice of such revocation, such evidence tended to prove such averment. An allegation that the agency terminated before May 21st, 1862, is, of course, in conflict with an allegation that it continued until after May 21st, 1864, and evidence to support the latter allegation is, of course, in conflict with the former allegation. But, as the amendments to the bill will perfectly harmonize with the allegations of the answer, it is of no consequence to the defendants that some testimony on the part of the plaintiff may be in conflict with the amendments. If the testimony referred to had been testimony sustaining the allegations of the answer, there might, perhaps, be some force in the objection. But, the answer maintains throughout that the agency terminated, with notice of the revocation to the plaintiff, before the payment of 1862 was due, and none of the testimony referred to, given on the part of the plaintiff, tends to sustain such averment of the answer.

As the case falls directly within the principle of the decision in Neale v. Neale, [9 Wall. (76 U. S.) 1,] I must grant leave to make the amendments, on payment of costs.

Case No. 1,110.

BATTLES v. MILLER.

[3 Cranch, C. C. 296.] [1]

Circuit Court, District of Columbia. May Term, 1828.

SLAVERY—IMPORTATION INTO DISTRICT OF COLUMBIA.

If a citizen of Virginia, the owner of a slave there, who had resided in Virginia three whole years, remove into the county of Washington with the bona fide intention to settle therein, and bring the slave with him, at the time of his removal or within one year thereafter, to reside in the said county, such importation is not contrary to law; but a sale of such slave, in the said county, within three years after such importation, may entitle him to his freedom; although such sale be made to a person residing out of the District of Columbia, and in a state wherein slaves are lawfully held, and intending to take the said slave out of the District of Columbia to the place of the purchaser's residence, and with that intent removing him from Washington to Alexandria, where he ran away and came to Washington and the sale was by mutual consent rescinded; and although the sale, (commenced in Washington,) was not consummated till the removal of the slave to Alexandria; and although the agreement for the sale was made in Alexandria, out of the county of Washington, and was not to be complete till the slave should be delivered by the seller to the purchaser at Alexandria, where the delivery, in fact took place; and although the agreement for the sale was made at Alexandria, out of the county of Washington, and was completed at Alexandria by the delivery of the slave, from the vendor to the vendee, there.

Petition for freedom [by the negro John Battles against Miller.]

Upon the trial, the defendant's counsel, Mr. Ashton and Mr. Jones, after stating the evidence, prayed the court to instruct the jury,

1. That if they should be of opinion, from the evidence, that James Richard Miller was a citizen of the United States, and came into the county of Washington, in the District of Columbia, with the bona fide intention of settling therein, and imported or brought into the said county, at the time of his removal into the said county, or within one year thereafter, the petitioner, to reside in the said county, and that the said petitioner was the property of the said James Richard Miller at the time of his said removal; and that the petitioner was at the time of his said owner's removal a slave who had resided in the state of Virginia, one of the United States, for three whole years next before such removal, then, and in such case, the petitioner was not imported, or brought into the said county, contrary to law.

Which instruction THE COURT gave as prayed.

2. The defendant's counsel then further prayed the court to instruct the jury, that if they should be of opinion from the evidence, that the petitioner was imported or brought into the said county, under the circumstances and in the manner aforesaid, then the subsequent sale of him by his said master, although within the county of Washington, and within three years next ensuing the time of such removal, would not entitle the petitioner to his freedom.

Which instruction THE COURT refused to give.

3. The defendant's counsel then prayed the court to instruct the jury, that if they should find, from the evidence, that the said sale was made to a person residing out of the District of Columbia, and in a state where slaves were lawfully held; and that the immediate and known intent and purpose of the purchaser, in making the said sale, were to take the said slave out of the said district to the place of the purchaser's residence; and that he did immediately, and in fulfilment of such original intent and purpose, remove the said slave from Washington to Alexandria, on his way to his ultimate destination; that the said slave, after being so purchased and removed to Alexandria, was never brought back, by his owner, to Wash-

[1] [Reported by Hon. William Cranch, Chief Judge.]

ington; but while temporarily detained in Alexandria till the said purchaser was ready to proceed on his journey, absconded and returned to Washington of his own accord, and that the sale was then rescinded by agreement of parties, then the petitioner did not become entitled to his freedom in virtue of such sale.

Which instruction was also refused by THE COURT.

4. The defendant's counsel, then, further prayed the court to instruct the jury, that if the said sale was not, in the opinion of the jury, from the evidence, consummated till the removal of the petitioner to Alexandria as aforesaid, though the treaty for the sale commenced before, then the petitioner became not entitled to freedom in virtue of such sale.

Which instruction was also refused by THE COURT.

5. Whereupon the defendant's counsel further prayed the court to instruct the jury, that if they should find, from the evidence, that the agreement for the said sale was made at Alexandria, out of the county of Washington, that in the terms of the said agreement the sale was not to be complete till the petitioner should be delivered by the seller to the purchaser at Alexandria, and that such delivery in fact took place there, then such sale and delivery do not entitle the petitioner to freedom.

Which instruction THE COURT also refused to give.

6. Whereupon the defendant's counsel further prayed the court to instruct the jury, that if they find from the evidence, that the agreement for the said sale was made at Alexandria, out of the county of Washington, and was completed at Alexandria by the delivery of the slave from the vendor to the vendee, there, the said sale is not competent to entitle him to his freedom.

Which instruction THE COURT also refused to give.

In all these opinions, except the last, the judges concurred. In the last THRUSTON, Circuit Judge, did not concur.

Upon the point that the sale within three years entitled the prisoner to freedom, THE COURT referred to the case of Dunbar v. Ball, [Case No. 4,128,] as conclusive. They also referred to Jordan v. Sawyer, [Id. 7,521.]

CRANCH, Chief Judge, was of opinion that if the slave was sold by the importer within the three years, the importer is not protected by the 2d section of the act of 1796, c. 67, from the prohibition contained in the first section. The 1st section contains the general principle—the prohibition to import slaves. The 2d section contains the exception in favor of those who come to reside. The 3d section is an exception to the second. If the case be within the 3d section, it is not within the 2d, and if not within the 2d it is within the first. He was also of opinion that it was immaterial whether the sale was made in or out of the county of Washington. Verdict for the petitioner.

Case No. 1,111.

BAUBIE v. AETNA INS. CO.

[2 Dill. 156.][1]

Circuit Court, E. D. Missouri. 1873.

INSURANCE—POWER OF LOCAL AGENTS—VERBAL CONTRACT TO RENEW INSURANCE.

A local agent of a foreign insurance company, empowered to solicit insurance, receive premiums, and to issue and deliver policies, has, in favor of third persons dealing with him in good faith, and without notice of any restriction on his authority, power to bind the company by parol as well as by written contracts for insurance, and may thus bind it by a parol contract to renew the policy from time to time during the plaintiff's ownership of the property.

At law. This is an action to recover the sum of $4,000, which the plaintiff alleges the defendant had verbally agreed to insure upon a hotel building, at Cameron, in this state, of which property the plaintiff held the title in trust. [Judgment for plaintiff.]

The principal question of fact controverted on the trial was whether there was any such contract subsisting between, and binding upon, the parties at the time the building was consumed by fire. The company denied that in point of fact any such contract was made by its agent, and denied, also, if its agent undertook to make such a contract, that he had any power or authority to bind the company thereby. It was admitted, or not controverted, that the local agent of the defendant for that part of Missouri where the property in question was situate, was, in 1869 and the early part of 1870, one McMichael, who resided at Plattsburg, and not at Cameron. It appears he was entrusted with blank policies, signed by the officers of the company, and was empowered to fill up and deliver such policies without first consulting the company. He was the company's agent for taking risks and making insurances within the district above referred to. It is also an admitted fact that on the first day of May. 1869, the company, through McMichael, did issue a policy of insurance, in writing, to the plaintiff, for $4,000, for six months, on the hotel building in question; that when this six months expired the policy was renewed for another term of six months; that there was no written renewal after that; and the property was destroyed by fire on or about June 21, 1870. The jury were instructed by the circuit judge as appears below.

Hitchcock, Lubke & Player, for plaintiff.
Mr. Clover and Mr. Eaton, for the company.

Before DILLON, Circuit Judge, and TREAT, District Judge.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

DILLON, Circuit Judge. I. The plaintiff seeks to recover in this action not upon a written policy, but by virtue of an alleged parol or verbal contract, which he claims was made at the time the first policy was issued, to the effect that while the plaintiff continued to hold the title to the property, as trustee, the company would keep the same constantly insured, by renewing the policy at the expiration of every six months and drawing on plaintiff (who resides at a different place from the agent of the company) for the premium, unless notified by the plaintiff to the contrary before the expiration of any period of six months.

This contract being denied by the defendant, the burden of proof is on the plaintiff to establish its existence.

And in view of the fact that contracts of insurance are almost universally reduced to writing, and especially in view of the indefinite duration of the engagement which the plaintiff asserts the company made, we feel it our duty to say that not only is the burden upon plaintiff to establish the existence of the contract he sets up, but to make clear, precise, and satisfactory, proof of it. Bear in mind that it is a contract—that is, a definite and completed agreement, which the plaintiff alleges and must prove; a contract, binding upon both parties, and subsisting between them at the time of the loss, and which bound the plaintiff to pay the premium had the loss not happened, as well as bound the defendant to pay the amount insured if the loss did happen. Conversations or negotiations about expecting to renew during the period of the plaintiff's ownership, not resulting in a definite agreement, are not binding. It must be a concluded contract subsisting between and binding both parties which must be established. If you find from the evidence that the only agreement which the agent made was to make one renewal, to-wit: in November, 1869, and did not agree to continue to renew, without request, after that, then you should find for the defendant.

II. But if you find from the evidence that the contract set up by the plaintiff has been established as one which was, in fact, entered into between the local agent of the defendant and the plaintiff, then the next question to be considered is, whether the agent of the defendant had authority to bind the company by such a contract.

Now, in law, as settled by the supreme court of the United States, the powers of an insurance agent are presumed to be co-extensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency is held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal. Union Mut. Ins. Co. v. Wilkinson, 13 Wall. [80 U. S.] 222, 235.

We instruct you on this subject, that if the agent of the defendant, McMichael, was empowered to transact the business of insurance for it at his local agency, to solicit insurance, to receive premiums, to issue and deliver policies, then he would, in favor of third persons dealing with him in good faith, have authority to bind the company by parol contracts as well as by written contracts for insurance, unless notice of restrictions on his power in this respect is brought home to the persons dealing with him; and under these circumstances, and with these limitations, he would have authority to make (if he in fact did make, of which you are to judge from the evidence), such a contract as the plaintiff alleges, and such contract, if made, would be binding upon the company.

Judgment for plaintiff.

NOTE, [from original report.] There was a verdict for the plaintiff and judgment upon it. A bill of exceptions was signed. It has been decided by the court of appeals of New York that an agreement to the effect that until notice by the one party to the other, a fire policy of insurance shall be renewed from year to year, is not within the statute of frauds, and may be by parol. Trustees of Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305, 28 N. Y. 153, reversing 18 Barb. 69. Parol contracts for insurance, see Hening v. United States Ins. Co., [Case No. 6,366;] Taylor v. Germania Ins. Co., [Id. 13,793.] Power of local insurance agents to act for and bind the company: Union Mut. Ins. Co. v. Wilkinson, 13 Wall. [80 U. S.] 222; Geib v. International Ins. Co., [Case No. 5,298.]

BAUDIN, (MORAN v.) See Case No. 9,785.

Case No. 1,112.

BAUDUY et al. v. UNION INS. CO.

[2 Wash. C. C. 391.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

MARINE INSURANCE—FRAUD—CONCEALMENT—TRADE WITH BELLIGERENT COUNTRY.

An insurance was made by R., a citizen of the United States, and a resident merchant of Philadelphia, on specie, from Cape Francois to Philadelphia, with a warranty of neutrality. Upon the happening of a loss, R. received from the defendants nineteen hundred and ninety-seven dollars, the amount of the specie shipped; but finding that of this sum, only eleven hundred and fifty-two dollars were his property, he returned the balance to the defendants, against whom afterwards the plaintiffs, resident merchants at Cape Francois, brought this suit for the money so returned by R. The plaintiffs being persons established, and carrying on trade in a belligerent country, cannot recover against the defendants, even if the insurance had been made for their account, as there was no disclosure of their belligerent character, at the time of the insurance, which was so obviously material, as to avoid the policy.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

[At law. Action by Peter Bauduy & Co. against the Union Insurance Company. Verdict for defendants.]

Mr. Ralston of Philadelphia, having consigned to the house of Peter Bauduy & Co., established at Cape Francois, two cargoes, on account of which he had received some remittances, but without account of sales, received a letter from a Mr. Hogan of the Cape, informing him that he had shipped, on his account, three thousand dollars in specie, in a certain vessel, for his government in making insurance. Ralston, not knowing on what account this shipment was made, and suspecting that the intention was to cover property in his name, determined not to insure it. But soon after, meeting with Peter Bauduy, one of the partners, residing in the state of Delaware, the said Bauduy informed him that Hogan was an agent for the house of Peter Bauduy & Co.; and he presumed that the three thousand dollars were the proceeds of the cargoes, which he, Ralston, had consigned to that house. Upon this, Ralston insured this money with the defendants, in his own name, and in the name of all persons concerned, (as usual,) with a warranty that the property was neutral. Only nineteen hundred and ninety-seven dollars were put on board, and the vessel was captured, and the cargo condemned at Jamaica. On notice of the loss, Ralston applied to the defendants for payment, and received from them the sum shipped and the policy was cancelled. Some time afterwards, Ralston was put into possession of the books of Peter Bauduy & Co., and then found, from the account of sales of his cargoes, that only eleven hundred and fifty-two dollars of this money belonged to him; upon which he repaid to the defendants, the balance of what he had received from them. This suit was brought to recover the sum so repaid, upon the ground that it was the property of the plaintiffs, and was covered by the policy. It was admitted, that the plaintiffs were all American citizens.

WASHINGTON, Circuit Justice, charged the jury. There are three questions in this cause, neither of which is involved in any difficulty. First; did the plaintiffs authorize Mr. Ralston to insure their part of the money shipped? secondly; did he insure it? and, thirdly; if he had insured it, can the plaintiffs recover in this action. The two first depend upon the facts proved in the cause, and nothing can be more clear, than that Mr. Ralston was not requested to insure any part of this money, as the property of the plaintiffs; and that he did insure it, believing it to be his own. He has stated, that whilst he supposed his name was intended to be used to cover the property of others, he declined insuring at all, and was only induced to do so, from the representation of one of the partners, that the money was his own. But if he had insured it as the property of the plaintiffs, still they could not recover in this action, inasmuch as the non-disclosure to the defendants, that it belonged to persons established and carrying on trade in a belligerent country, was so obviously material to the risk, as to avoid the policy.

Verdict for the defendants.

Case No. 1,113.

BAUENDAHL et al. v. HORR.

[7 Blatchf. 548.][1]

Circuit Court, D. Connecticut. Sept. 20, 1870.

CONDITIONAL SALE — MODIFICATION OF CONTRACT —REPLEVIN — CONNECTICUT STATUTE — CONDITIONAL DELIVERY.

1. Where a sale of merchandise was made on condition that payment therefor should be made in a certain manner, and, in accordance with a custom of the trade, the merchandise was delivered to the buyer before the terms of payment were complied with: *Held*, that the vendor could recover the goods from the buyer, by an action of replevin, under a statute of Connecticut, which gives such remedy whenever any goods are unlawfully detained, except by attachment, from the owner or other person entitled to possession.

[Cited in Re Binford, Case No. 1,411; The Marina, 19 Fed. 764.]

2. Where the vendor, after delivering the merchandise, proposed to the buyer a modification of the contract, in respect to the terms of payment, and the buyer did not accept such proposition: *Held*, that this left the original terms of sale in full force.

3. The sale, and the delivery having been conditional, and the condition not having been complied with by the buyer, it was not necessary to the vendor's right of reclamation, that he should return to the buyer a promissory note which the buyer had sent to him but which he did not accept in payment.

At law.—This was an action of replevin, brought [by Bauendahl & Co. against William L. Horr] under a statute of the state of Connecticut, which gives this remedy: "Whenever any goods shall be unlawfully detained, except by attachment, from the owner or other person entitled to possession." The property embraced in the suit consisted of certain bales of wool, the title and right to possession of which was claimed by the plaintiffs and denied by the defendant. The case was tried by the court, the parties having stipulated to waive a jury. The plea was the general issue. No question was raised on the pleadings. [Judgment for plaintiffs.]

On the evidence produced on the trial, and after argument thereon, the court found the following facts to have been duly proved: (1.) That, on the 19th of August, 1868, the plaintiffs, wool merchants in the city of New York, made a contract with the defendant, a manufacturer and consumer of wool, in

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

Brookfield, Connecticut, by which they agreed to sell him seventeen bales of wool, amounting, with the usual incidental charges, including interest on the same during the term of credit, to $3,396.19. (2.) That one of the express conditions of the contract was, that the defendant should pay for the wool by his own draft on Messrs. G. P. & B. W. Fay, accepted by the latter, and payable in four months. (3.) That the plaintiffs performed the contract, on their part, on the 20th of August, 1868, by forwarding the wool to the defendant, which the latter received, in due course of transportation, and accepted, and that the wool was so forwarded by the plaintiffs to the defendant on the condition above set forth. (4.) That the defendant never performed his part of the contract, by furnishing the plaintiffs with his own draft on G. P. & B. W. Fay, accepted by the latter, but wholly refused so to do. (5.) That, on the 26th of August, 1868, the defendant forwarded to the plaintiffs Messrs. G. P. & B. W. Fay's note for the amount of the purchase price of said wool, payable four months from the 19th of August, 1868, to the makers' own order, and by them endorsed, and endorsed by no one else, and that, in the letter of the defendant accompanying said note, it was stated, that the same was in settlement of the bill of wool, "as per your agreement." (6.) That, on the 27th of August, 1868, and immediately on the receipt of said note, the plaintiffs replied by letter, stating that this mode of settlement was not according to the contract, reminding the defendant that the same was to be by draft on G. P. & B. W. Fay, accepted by the latter, and adding: "Nevertheless, we will accept the settlement this time, but must hold you responsible for the payment of the note, which please confirm by return mail." (7.) That the plaintiffs received no reply to the last named letter, and, on the 3d of September, 1868, again wrote the defendant, and demanded settlement in accordance with the terms of the original contract, at the same time stating to the defendant, that they would return to him said note, or hand the same over to the Messrs. Fay, as he might desire; that the defendant replied to this letter only by insisting that the payment was, by the original agreement, to be made by the note of G. P. & B. W. Fay, instead of the defendant's own draft on, and accepted by, them; and that, thereupon, the plaintiffs again demanded a compliance with the terms of the original contract, or a return of the wool, both of which the defendant refused. (8.) That it is a custom of the trade, in contracts of this character, for the seller to deliver the goods before the terms of payment are complied with by the buyer.

Thomas C. Perkins and Charles E. Perkins, for plaintiffs.

Sidney B. Beardsley, for defendant.

SHIPMAN, District Judge. On the facts found by the court, this was a conditional sale. One of the terms of the contract was an express condition that payment was to be made by the defendant's draft on G. P. & B. W. Fay, with the latter's acceptance thereof. Upon this condition the goods were delivered, in accordance with a custom of the trade. This condition was never complied with by the defendant, but compliance therewith was steadily refused.

Nor was there any waiver of the condition by the plaintiffs. It is true that they offered, in their letter of the 27th of August 1868 to accept the note in settlement, if the defendant would hold himself responsible for its payment, by an acknowledgment to that effect by return mail. The defendant never accepted this proposed modification of the contract. This left the original terms of sale in full force. Their never having been complied with by the defendant, no title to the wool ever passed to him, and the plaintiffs had the right to reclaim it. It would seem, from the authorities, that they would have had this right as against attaching creditors and bona fide purchasers, provided there had been no laches on the part of the plaintiffs. But, as between the parties, there can be no doubt, I think, that the right of reclamation existed. Hill v. Freeman, 3 Cush. 257; Tyler v. Freeman, Id. 261; Coggill v. Hartford & N. H. R. Co., 3 Gray, 545.

It was claimed, on the argument, that the plaintiffs should have returned the note to the defendant, and that this was necessary before their right of reclamation could accrue. If there had been a mere fraudulent contract, by which the title had vested in the defendant, making it incumbent on the plaintiffs to return the consideration, in order to rescind the contract and revest the title in them, this claim of the defendant might be material. But here the sale was not absolute, with a taint of fraud in the contract. It was conditional, and the delivery under it was conditional. No title ever vested in the defendant, for the condition was never performed. No act of the plaintiffs was necessary to revest in them the title with which they had never parted.

The plaintiffs never accepted this note in payment. They, indeed, offered to accept it, but only on a condition with which the defendant refused to comply. The title and right of possession of this wool remained, therefore, in the plaintiffs, and judgment must be rendered for them.

BAUER, (UNITED STATES v.) See Case No. 14,546.

BAUERT, (ECKERT v.) See Case No. 4,266.

Case No. 1,114.

BAUGH v. NOLAND.

[2 Cranch, C. C. 2.][1]

Circuit Court, District of Columbia. June Term, 1810.

BAIL—INSOLVENT.

The defendant had been discharged under the insolvent law of Maryland, in 1809, since the cause of action. The bail produced a copy of the record of discharge, and an exoneretur was allowed.

Case No. 1,115.

BAULIGUY v. UNITED STATES.

[The case reported under this title in 1 La. Law J. 184, is the same as Bouligney v. U. S., Case No. 1,696a.]

Case No. 1,116.

In re BAUM.

[1 Ben. 274;[2] 1 N. B. R. 5; Bankr. Reg. Supp. 2; 6 Int. Rev. Rec. 28.]

District Court, S. D. New York. July Term, 1867.

PRACTICE — TIME TO FILE SPECIFICATIONS OF OPPOSITION—EXAMINATION OF BANKRUPT.

1. A creditor who has proved his claim may, at any time thereafter, and before the expiration of the time limited by rule 24 of the general orders in bankruptcy, file specifications of the grounds of his opposition to a bankrupt's discharge.

2. That rule is enabling and not prohibitory.

3. The filing of such specifications is not a necessary prerequisite to the making of an order, under section 26 of the bankruptcy act, [of March 2, 1867; 14 Stat. 529,] for the examination of the bankrupt, or of other persons.

In bankruptcy. In this case a register in bankruptcy certified to the court that a creditor had given notice of his intention to oppose the discharge of the bankrupt, and had handed in a list of objections to the discharge; that the bankrupt opposed the reception of the objections at that stage of the proceedings, it being the first meeting of creditors specially for the proof of debts and the choice of an assignee; and that the opinion of the court was desired on the question as to whether the objections could now be received. The register referred to section 31 of the bankruptcy act, which provides that any creditor opposing the discharge of a bankrupt may file a specification in writing of the grounds of his opposition, and the court may, in its discretion, order any question of fact so presented to be tried at a stated session of the district court. The register stated that in this case the petitioner represented no assets whatever in his schedule; that the creditor was not satisfied with this, and had declared his intention of applying, as soon as the appointment of the assignee, which had been made, was approved, for an order to examine the bankrupt and other persons, under section 26, with a view to finding assets, as well as proving the specific charges of fraud which the creditor had specified in the paper filed by him. The register stated that this seemed to suggest the following questions: (1) When shall a creditor so file his objections? (2) When the objections are so filed, may the register make an order that the bankrupt and others should appear to be examined? (3) Is it competent for the creditor to examine the bankrupt and others ad libitum to find property, as well as to establish his specifications of fraud and other objections to the discharge? The register observed that if the provisions of the act would permit, it would seem to be well if something of this kind could be done at an early period of the proceedings, first, to quiet all groundless fears, and second, to ascertain what facts and what issues it was worth while to bring before the court for trial; that such a proceeding would be quite in analogy with the provisions of section 391 of the Code of Procedure of the State of New York, which had at times a very healthy operation; that if, after such examination, the register could certify to the court the precise issues that existed between the respective parties, and which the court must try, very much labor and vexation would be spared to the court, which really has less conveniences for getting at such issues than the register, before whom the testimony is taken, and who fully knows the whole case; that the provisions of rule 24 of the "general orders in bankruptcy," to the effect that "a creditor opposing the application of a bankrupt for discharge shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file his specification of the grounds in opposition in writing within ten days thereafter, unless the time shall be enlarged by order of the district court in the case, and the court shall thereupon make an order as to the entry of said case for trial on the docket of the district court, and the time within which the same shall be heard and decided," are not in antagonism with this view; that rule 24 contains nothing prohibitory, and may be fully operative on those who have not theretofore appeared; that the creditors who have filed objections and examined the bankrupt and other witnesses, and got out all the facts which they desire, may well come into court at the time prescribed in rule 24, enter an appearance, and file such specifications as they on the whole have concluded they will be able to sustain, and thereupon proceed as specified in rule 24; that he could see no objection to any creditor who may see fit to file objections with the register, or perhaps without that, proceeding at once to ex

[1] [Reported by Hon. William Cranch, Chief Judge.]

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

amine the bankrupt and other witnesses, and thereby fully preparing himself to take the steps prescribed in rule 24, and that the 26th section of the act would fail in having some of its specifications carried out if an opposite view were taken, as power is there given to the court "at all times" to require the bankrupt to attend and be examined.

BLATCHFORD, District Judge. I fully concur in these general views of the register. A creditor who has proved his debt may file at any time the specification in writing of the grounds of his opposition to the discharge of the bankrupt, referred to in section 31 of the act. Rule 24 of the "general orders in bankruptcy" is enabling, and not prohibitory. A creditor who does not file his specification by the time specified in rule 24 will lose his opportunity of doing so. But he has a right to file such specification at any time after he has proved his debt, and before the expiration of the time limited by rule 24. The filing of such specification is not, however, a necessary prerequisite to the making of an order, under section 26 of the act, that the bankrupt or other persons attend and be examined as to the matters specified in that section. Such order may be made, and such examinations may be had, on the application of the assignee, or of any creditor who has proved his debt, or on the suggestion of the register himself, and without any application, and without the previous filing of any specification under section 31 of the act. The bankrupt and all other persons are subject to examination at all times, at the instance of the assignee or of any creditor who has proved his debt, or of the court, or of the register, in regard to any of the matters specified in section 26.

Case No. 1,117.

BAUMAN v. UNION PAC. R. CO.

[3 Dill. 367.][1]

Circuit Court, D. Nebraska. 1875.

FEDERAL COURTS—JURISDICTION OVER UNION PACIFIC RAILROAD—ACT JULY 1, 1862.

Under the charter of the Union Pacific Railroad Company, it may sue and be sued in the circuit court of the United States for the district of Nebraska, without reference to the citizenship of the adverse party.

[See Pacific Railroad Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113.]

[Suit by Charles J. Bauman against the Union Pacific Railroad Company.] Motion by the defendant to dismiss the action for want of jurisdiction in the court. [Denied.]

A. J. Poppleton and E. Wakely, for the motion.

W. M. Francis, contra.

MILLER, Circuit Justice. The petition alleges that the plaintiff is a citizen of the state of Nebraska, and that the defendant is a corporation created by and existing under the laws of the United States; and the question is whether it is suable in this court by a citizen of the state of Nebraska. Under the charter of the defendant company, I have heretofore held that it was suable in this court by a citizen of another state,—Smith v. Union Pac. R. Co., [Case No. 13,121,]—and I am of opinion, on consideration of the provisions of the charter, that it may sue and be sued in this district, without reference to the citizenship of the adverse party—[Act July 1, 1862;] 12 Stat. 489.

See Turton v. Union Pac. R. Co., [Case No. 14,273, and Act March 3, 1875; 18 Stat. 470.]

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

Case No. 1,118.

In re BAXTER.

[5 Am. Law Reg. (N. S.) 159, note.][1]

Circuit Court, E. D. Tennessee. Jan., 1866.

EX POST FACTO LAWS — ATTORNEYS—TEST OATH.

[1. Act Jan. 24, 1865, (15 Stat. 424, c. 20,) provided that no person should be allowed to practice in the federal courts, by reason of any previous admission thereto, without having first taken an oath that he had never borne arms against the United States, aided its armed enemies, supported any pretended authority hostile thereto, nor sought or exercised any office under such hostile authority. *Held*, that the act is ex post facto and void; for the right of an attorney to practice his profession is his property, and the act declares a forfeiture of such property for offenses which were not so punishable when committed.]

[See Cummings v. Missouri, 4 Wall. (71 U. S.) 277; Pierce v. Carskadon, 16 Wall. (83 U. S.) 234.]

[2. The act cannot, however, be held to impair the obligation of a contract; for, even if the constitution prohibits congress from passing such laws, the admission of an attorney to practice is not a contract, within the meaning of the constitution.]

John Baxter and T. A. R. Nelson, for the objection.

Horace Maynard, opposed.

One John Baxter had been an attorney of the court, but, the authority of the United States in that district having been suspended during the part of the Rebellion, he was readmitted in May, 1864. On the 24th January, 1865, [15 Stat. 424, c. 20,] an act was passed by congress declaring that no persons should thereafter be admitted to the bar of the United States courts, or be allowed to be heard by reason of any previous admission, without having first taken the oath prescribed in the act of July 2, 1862, [12 Stat. 502, c. 128.] The terms of the oath are as follows: "I do solemnly swear that I

[1] [Nowhere fully reported; opinion not now accessible. The statement of facts and of the holding of Trigg, District Judge, is taken from a note to Hughes v. Litsey, 14 Am. Law Reg. (5 Am. Law Reg. N. S.) 159.]

have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto. And I do further swear that, to the best of my knowledge and ability, I will support and defend the constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion. So help me God."

On the said Baxter attempting to address the court from the bar, at the present term, he was informed by THE COURT that he could not be heard until he had taken the oath above set forth, whereupon he objected that the said law was unconstitutional, and the court had therefore no right to compel him to take the said oath. The matter was subsequently argued by the objector in person, and T. A. R. Nelson against, and Horace Maynard in favor of, the constitutionality of the law. The ground first assumed for the objector was that the act impairs the obligation of a contract, because an attorney is examined in Tennessee by the judges of the state courts, and by them licensed to practice, and therefore to receive fees and emoluments of his profession. Upon this point, THE COURT, (TRIGG, District Judge,) after noticing the doubt whether congress has power to pass an act impairing contracts, and inclining to think that it has not, expressed the opinion that the admission of an attorney was not a contract, within the terms of the constitution.

It was further urged that the law was an ex post facto law, and therefore unconstitutional. Upon this point THE COURT stated the question to be, whether the act was to be considered as prescribing additional qualifications for office under the government, or as a criminal enactment inflicting a penalty upon those who refuse to comply with its terms. THE COURT then proceeded to show that an attorney is an officer of the court, but not of the government, and that, as to him, the act must be considered as penal. But an attorney has a right to practice his profession, and such profession is his property, within the protection of the constitution, and the law, therefore, punishing an attorney, by forfeiture of his property in his profession, for acts not so punishable when committed, is ex post facto, in its operation as to such cases, and therefore unconstitutional. Admitting the correctness of the assumption that his profession is an attorney's property, and the act requiring him to swear in his own case, the same conclusion as to the unconstitutionality of the law is reached by reference to the fifth article of the amendments, which declares that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law." For these reasons, THE COURT pronounced the law unconstitutional and void.

Case No. 1,119.

In re BAXTER et al.

[18 N. B. R. 62.][1]

District Court, S. D. New York. June 7, 1878.

BANKRUPTCY — PARTNERSHIP AND PRIVATE DEBTS —AGENCY.

1. The bankrupts were the general business agents of a corporation, and as such were authorized to receive and disburse all the moneys of the corporation "except subscriptions to its capital stock." B., one of the bankrupts, who was treasurer of the corporation, received subscriptions to the capital stock, which he paid into the business of his firm. It did not appear that any stockholder or director of the corporation, except B. and his partner, had any knowledge of the misappropriation of the funds. *Held*, that B. was liable personally therefor; that the firm, having taken the funds with knowledge that it was not entitled to receive the same, was equally liable; and that proof could be made against both estates. [Emery v. Canal Nat. Bank, Case No. 4,446, followed.]

2. The bankrupts, as such agents, consigned goods of the corporation for sale to an English firm, of which B. was a member. Prior to the receipt of the goods, said firm had accepted and paid drafts of the bankrupts to an amount exceeding the value of all their consignments, and on that account claim that they have accounted with the bankrupts, and paid over the proceeds of the goods to them. *Held*, that this was not a payment which would discharge said firm from liability, and that the claim for such proceeds, being for a partnership liability of B.. ranks in the distribution of his individual estate after his individual debts.

[In bankruptcy. In the matter of Archibald Baxter and Duncan C. Ralston.]

W. H. Arnoux and Mr. Macrea, for receiver.

W. A. Abbott, for assignee.

CHOATE, District Judge. Re-examination of claims under stipulation. One of the bankrupts, Archibald Baxter, was treasurer of a corporation, the International Packing Co. His firm, Archibald Baxter & Co., were the general business agents of the corporation, under an appointment by written resolution, authorizing them to receive and disburse all the moneys of the corporation "except subscriptions to its capital stock." Archibald Baxter, as treasurer, received subscriptions to the capital stock to the amount of one hundred and fifteen thousand four hundred dollars. which, notwithstanding this prohibition, he paid into the business of his firm.

[1] [Reprinted by permission.]

It needs no argument to show that he is personally liable to the corporation therefor, unless the corporation has acquiesced in and consented to the disposition which he made of the money.

There is an entire failure to prove such acquiescence. It is true that the fact was known to Baxter and his partner Ralston, who were both directors and officers of the corporation, and there were entries on the books of the corporation, which were kept by Baxter & Co., which might have led others to a discovery of the fact, but no proof is given that any other director or stockholder had any knowledge of the misappropriation of the funds.

The firm of Archibald Baxter & Co., having taken the funds with knowledge that they were not entitled to receive the same, are equally liable to the corporation with Baxter personally, and, on the authority of Emery v. Canal Nat. Bank, [Case No. 4,446,] I think proof can be made against both estates.

The goods of the corporation were consigned for sale by their agents, Archibald Baxter & Co., to Baxter, Steedman & Co., an English firm, of which Archibald Baxter is a member, and a claim is made against the separate estate of Archibald Baxter for the amount of these consignments. Baxter, Steedman & Co., received the goods with notice that they belonged to the corporation. Undoubtedly, so long as the proceeds remained in their hands, they would be liable directly to the corporation therefor.

It is claimed, however, that they have accounted with Archibald Baxter & Co. therefor, and paid over the proceeds of the goods to them. This would discharge Baxter, Steedman & Co., from liability to the corporation, as Archibald Baxter & Co. were its agents to receive the same. The only way, however, in which they have so paid over the proceeds is by the acceptance and payment, prior to the receipt of the goods, of the drafts of Archibald Baxter & Co. to an amount exceeding the value of all their consignments. This is not a payment which discharges Baxter, Steedman & Co. from liability. The transaction was, in substance and effect, not a payment to Archibald Baxter & Co. of the proceeds of the goods, but the application by Baxter, Steedman & Co. of the proceeds of the goods of the corporation to the payment of a debt due to them from Archibald Baxter & Co.

The receiver of the corporation has, in making proof of this claim, set it forth in his deposition as a claim for goods sold by the corporation to Baxter, Steedman & Co. He was evidently misled by the entries in the books. He should make new proof of the debt, setting it forth according to the fact. This claim being for a partnership liability of Archibald Baxter, will of course rank in the distribution of his individual estate after his individual debts.

Case No. 1,120.

In re BAXTER et al.

[18 N. B. R. 497; 26 Pittsb. Leg. J. 140.]

District Court, S. D. New York. July 3, 1878.

BANKRUPTCY—PROOF OF DEBTS—DRAFTS—PAYMENT BY ACCEPTOR.

[After certain drafts had been accepted, the drawer became bankrupt, and they were dishonored. The holder received 50 per cent. of their amount from the acceptor in full satisfaction of all claims against him, expressly reserving his rights against all other parties to the drafts. The acceptor then released the drawer from all liability to him. *Held*, that notwithstanding this release the holder of the drafts was entitled to prove for the whole amount of the drafts, and to receive a dividend —if the estate was able to pay it—which with the payment made by the acceptor, would equal that amount.]

[Cited in Re Hicks, Case No. 6,456. Distinguished in Re Hollister, 3 Fed. 455.]

[In bankruptcy. In the matter of Archibald Baxter and Duncan C. Ralston.]

Abbott Bros., for assignee.

Redfield & Hill, for creditor.

CHOATE, District Judge. Re-examination of proof of debt. The Canadian Bank of Commerce became the holder for value before maturity of two drafts drawn by the bankrupts on their correspondents in Liverpool, who accepted the same. Since the dishonor of the draft, the bank has received from the acceptors' fifty per cent. of the amount due on them, without prejudice to the rights of the bank against other parties. The drafts were drawn against consignments of merchandise, which the drawers undertook to make, but which they failed to make. It is claimed that the acceptor has released the drawer from all demands. It is now insisted by the trustee of the bankrupt that the holder of the draft can only prove for the amount thereof, after deducting the payment made by the acceptor, but the register allowed the proof for the whole amount.

The bankrupt is in this case the principal debtor, and the acceptor is the surety. It is conceded that, but for the release of the drawer by the acceptor, the creditor would have the right to prove for the whole amount. Downing v. Traders' Bank, [Case No. 4,046.] But it is insisted that in this case, as the acceptor has released all his claims against the drawer, the creditor cannot prove for the whole, because the acceptor has no claim on the surplus after the creditors shall be paid in full. There is no merit in this position. If the dividend which the creditor shall be entitled to shall, with the sum received from the surety, exceed the whole amount of the drafts, that may be a proper case for an application to the court to have this surplus disposed of, according to the equities of the parties, if the acceptor is then properly before the court; meanwhile, to reduce the amount for which the creditor is to prove would certainly prejudice his rights, contrary to the

conditions under which he accepted the money from the surety. He is entitled to prove for the whole amount, and if there shall be a surplus it can then be determined to whom it belongs. The entry of a judgment does not affect the right to prove the debt. Petition dismissed.

[A rehearing was granted, and on August 10, 1878, the following opinion was rendered:]

CHOATE, District Judge. This case was submitted on briefs of counsel, and a further oral argument has been granted on application of the assignee, on acount of the very large amount involved in the decision. After a careful reconsideration of the matter, I am still of opinion that the bank has a right to prove against the bankrupts for the whole amount of the drafts held by it. The receipt by the bank from the acceptors of the drafts, who, on the facts shown, stood in the relation of sureties for the bankrupts, of fifty per cent. in release of all claims on them, did not operate to discharge any part of the debt of the bankrupts to the holder of the drafts. It was not accepted as payment in part of their debt to the holder, nor was the sum so paid endorsed on the drafts as part payment, nor was there any agreement to that effect. On the contrary, it was agreed to be received without prejudice to the rights of the holder as against other parties on the drafts. The rights thus expressly reserved certainly included the right to present their claim against the bankrupt for its full amount.

There is no question that the holder of commercial paper may prove for the full amount against all the parties liable, as he may maintain actions against them all. The holder was not bound to receive this dividend from the surety. He might have rested on his right to sue him, which would not in any way have prejudiced his right to prove the debt for the full amount against the bankrupt, unless and until the surety should have paid the drafts in full, in which case, by the terms of the bankrupt law, the surety would have been subrogated to the rights of the holder. Instead of suing the surety, the holder accepted fifty cents in full as against him, without prejudice to his rights against the bankrupt. Even without this reservation, the surety, having paid part of the debt only, would have no right to prove for that part against the bankrupt unless the holder should fail to prove the debt; but the right of the holder would still remain to prove for the whole debt, partly for himself and partly as trustee for the surety. Rev. St. § 5070. Now, the reservation of rights agreed upon in this case had no meaning, it seems to me, if it did not save the existing right of the holder to prove, for his own benefit, on the whole debt, until he received, with the payment made by the surety, full satisfaction of the debt. Such being the rights of the parties at the time the dividend was received from the surety, the subsequent release by the surety of all claims against the bankrupt cannot possibly affect the rights of the holder, who was no party to that release, except so far as those rights are held by him, not for his own use and benefit of the surety. The surplus that the holder may receive from the bankrupt, upon proof of the debt in full, after full satisfaction of the debt, would indeed, but for the release, belong to the surety; and this surplus the surety might, as against the holder, deal with as he chose; but the surety is not a party to this proceeding, and therefore what may be the effect to this surplus may and should be left till it appears that there will be such a surplus. As it is conceded in this case that there will be none, the point is not material; but the proper order to make in the matter is, that the holder be allowed to prove for the whole amount of the drafts, reserving all questions that may arise in case he should be entitled upon such proof to dividends, which, together with the sum received from the surety, will exceed the whole amount of the drafts and interest.

Case No. 1,121.

In re BAXTER et al.

[18 N. B. R. 560.]

District Court, S. D. New York. Aug. 30, 1878.

BANKRUPTCY—PROOF OF CLAIM—AMENDMENT—GENERAL ORDERS.

[The receiver of a corporation presented a claim in its favor against the bankrupts, which was disputed by the trustee, who objected that no deposition of an officer of the corporation was presented with the proof, as required by general order No. 34. The claim was re-examined, and held valid and provable, in the course of which proceedings the treasurer of the corporation was examined under oath, and his deposition then taken furnished part of the grounds on which the claim was sustained. *Held*, that the receiver was entitled, by leave of court, to file this deposition with the proof of claim, with the same effect as if it were originally made conformably to order No. 34.]

[In bankruptcy. In the matter of Archibald Baxter and Duncan C. Ralston.]

Abbott Brothers, for trustee.

Kelly & Macrae, for receiver.

CHOATE, District Judge. The receiver of the International Packing Co., having presented proof of a claim against the bankrupts, which was disputed by the trustee, the claim has been re-examined and held to be a valid and provable claim. One objection made by the trustee was that no deposition in support of the claim was presented with the proof conformably to general order No. 34. In the order sustaining the claim, leave was given to the receiver to amend his proofs by producing the deposition of an officer of the corporation, the International Packing Company, to whose rights the receiver has succeeded. It now appears by the petition of the receiver that he has applied to the proper officer of the cor-

poration, who refuses to make the necessary deposition. In the course of the proceedings upon the re-examination of the claim, the treasurer of the corporation was examined under oath, and his deposition then taken was part of the case upon which the decision sustaining the claim was made. The ground on which the officer now refuses to make the deposition does not appear. It is suggested by the counsel for the trustee that it is because he cannot truthfully make it.

A motion is now made by the receiver that the deposition of the treasurer of the corporation, made on the re-examination of the claim, be filed, with the proof of claim, with the same force and effect as if originally made as a deposition conformably to general order No. 34. It is insisted on behalf of the trustee that this cannot be done; that the court cannot dispense with the requirements of the general order in this respect. The motion must be granted.

There can be no question of the power of the court, where it is impossible to comply with this requirement of the general order, to relieve the creditor so that he can obtain the benefit of the dividend to which he is entitled. The general rules and orders made by the supreme court, under authority of the bankrupt law, are designed to systematize and facilitate the practice of the bankrupt courts, and so far as they apply must be strictly followed. But they were not designed to create or declare, nor do they create and declare, the rights of creditors in the estate of bankrupts; still less do they abrogate and annul those rights. Many cases may arise where it is impossible to procure the deposition of the assignor to the claim. He may be out of the jurisdiction, or dead, or insane, with no legal representative within the jurisdiction competent to act for him in this matter. He may not be able truthfully and in good faith to make the deposition, as is suggested in this case. It would be a great stretch of authority to attempt to coerce him to swear to what he does not believe to be true. In all such cases to hold that the general order was peremptory and without exception, and absolutely excluded the proof, would be to hold that it deprives the creditor without just cause of his proper share in the bankrupt's estate, and divides it among the other creditors. In the particular case the leave to file the deposition of the officer of the corporation was given because it did not appear that it could not be obtained, and this permission seemed to meet this technical objection. Probably it was necessary because the proceedings taken amount to an adjudication of the court upon the creditor's claim, and it would seem that after such an adjudication in the very cause itself formal proof is unnecessary.

It appears now to be impossible to comply with the general order in this respect. Motion granted.

Case No. 1,122.

In re BAXTER et al.

[19 N. B. R. 295.]

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

BANKRUPTCY—COMMITTEE—MAJORITY VOTE—COUNSEL FEE.

[1. When a committee is appointed under Rev. St. § 5103, to assist the trustee in the management of the bankrupt's estate, unanimity of action by them is not required, but the act of a majority, where all have the right to be heard, is the act of the committee.]

[2. The question how much the trustee shall pay counsel for services is left by the statute in the discretion of such committee; and when they act in good faith they cannot review their decision, though the amount allowed is greater than would appear to the court reasonable. In re Cooke, Case No. 3,169, followed.]

[3. Cited in Re Hicks, 2 Fed. 854, to the point that the approval of the committee cannot affect or cure positively unlawful applications of the fund, nor inequality of distribution among creditors.]

[In bankruptcy. In the matter of Archibald Baxter and Duncan C. Ralston.]

Kelly & Macrae, for petitioner.

Abbott Bros., for trustee.

CHOATE, District Judge. This is an application by one of a committee chosen by the creditors to assist the trustee in the management of the bankrupt's estate under Rev. St. § 5103, for relief against the action of the trustee in the allowance of what are alleged to be excessive counsel fees for services rendered to the estate. It is not claimed that the allowances made by the trustee, and approved by the majority of the committee, are not made in good faith. It is claimed that they are grossly excessive for the services performed; that it is within the power of the court to correct such an error of judgment on the part of the committee; and especially that the committee can only act by unanimous vote, and that as one of them dissents from the allowances made, their action on this matter is thereby nullified, and of necessity the court must decide the question.

I think the question how much the trustee shall pay counsel for services is clearly one of those matters which under the statute are submitted to the discretion of the committee, and that the court cannot, if their discretion is exercised in good faith, interfere with their decision, even though the amount allowed is largely in excess of what the court would think reasonable. The purpose and construction of that part of the bankrupt law providing for an administration of the estate by a trustee, under the direction of a committee of the creditors, [Act March 2, 1867, (14 Stat. 529, 538, §§ 27, 28, 43,)] are so fully and carefully stated in the case of In re Cooke, [Case No. 3,169,] by Mr. Justice Strong, that it is only necessary to refer to that case as an authority on this point. The present case comes clearly within the reasoning of that

decision. There is nothing in the statute indicating that the committee must be unanimous in all their directions to the trustee. The number to be appointed on the committee is not fixed by the statute. It may be larger or smaller, as the creditors at their meeting shall determine. The theory of the statute is, that they will represent the whole body of the creditors, giving the trustee the benefit of their advice, and restraining his action by their action in the management of the estate. It is to be presumed that they are fairly representative of the views of the creditors, or intended so to be. To require entire unanimity of them, either in opinion or direction on all the diverse matters they are called upon to decide, would in my judgment be impracticable, and go far to defeat the very purpose had in view by the statute. and unduly embarrass the administration of the estate, leaving many questions of administration insoluble, except by an appeal to the court, for which no provision is made by the act, and which seems to be contrary to its primary intent of an administration of the estate by the creditors themselves, through their own chosen agents. It seems, therefore, to be the intent of the statute, that the committee by a majority vote shall decide all questions duly submitted to them, and that the act of the majority, all having an opportunity to be heard, is the act of the committee. This application must therefore be denied.

Case No. 1,123.

BAXTER v. BIAYS.

[Brunner, Col. Cas. 254;[1] 4 Law J. 276.]

Circuit Court, D. Maryland. May Term, 1812.

BAIL—SURRENDER OF PRINCIPAL.

Bail cannot surrender their principal before a judge at his chambers.

Biays was bail for one Merrihu. After the scire facias issued, and within the time allowed by the rule for a surrender of principal, Biays surrendered Merrihu before HOUSTON, District Judge, during vacation, who ordered an exoneretur to be entered.

But by DUVAL, Circuit Justice: There is no law authorizing a surrender before a judge at his chambers, nor is there any rule of court to that effect. It was once attempted before Judge Hanson, and refused.

Case No. 1,123a.

BAXTER v. The DONA FERMOAS.

[Betts' Scr. Bk. 570.]

District Court, S. D. New York. May 14, 1858.

ADMIRALTY—PROCEDURE—FILING CLAIM—DEFAULT.

[The filing of a claim in admiralty proceedings does not stay proceedings ex parte by the libellant unless it is interposed on the return day of the process when the proclamation is made; and, when no one appears on the return day, it is proper to enter interlocutory and final decree in favor of libellant as upon default, although the claimant had theretofore filed his claim.]

[In admiralty. Libel by Samuel G. Baxter against the Dona Fermoas. There was a decree for libellants upon default, and claimant moves to set aside the default.]

Scudder & Carter, for libellants.

Beebe, Dean & Donohue, for claimant.

The vessel was seized under the process, and before the return-day the claimant appeared and filed his claim in court on Feb. 16, 1858. On the return of the process, Feb. 16, 1858, proclamation was made in open court, and no one appearing, interlocutory and final decrees were perfected in favor of the libellants. The claim alleges that after the filing of his claim no proceedings could be taken by the libellants without notice to him.

HELD BY THE COURT. That the fact of putting in a claim does not stay proceedings ex parte by the libellant, unless it be interposed on the return-day of the process, when the proclamation is made. Then the libellant must regard it as at his peril, although he receives no personal notice of its being filed. The libellants, therefore, have been regular in their proceedings, and the motion must be denied.

BAXTER, (LA SOCIETE ANONYME DES MINES v.) See Case No. 8,099.

Case No. 1,124.

BAXTER et al. v. LELAND et al.

[1 Abb. Adm. 348.][1]

District Court, S. D. New York. Nov. Term, 1848.[2]

SHIPPING—BILL OF LADING—PERILS OF THE SEAS—SWEAT—CARRIERS — LIABILITY — CUSTOM OF TRADE.

1. As between the original parties to a shipment. it is competent for them to show the actual condition of the goods at the time of the shipment.

[Cited in The Wellington, Case No. 17,384.]

2. The phrases, "the dangers of the seas," "the dangers of navigation," and "the perils of the seas," employed in bills of lading, are convertible terms.

3. A dampness or sweating of the hold of a vessel, shown to be the ordinary accompaniment of a voyage from southern to northern ports, and to result not from tempestuous weather, but from occult atmospheric causes, is not a "peril of the seas."

4. Wherever a cause of injury to a cargo lies very near the line which separates excusable perils of the seas from those dangers for

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

[1] [Reported by Abbott Brothers.]

[2] [Affirmed in Case No. 1,125.]

which carriers are responsible, regard is to be had to the custom of the trade in determining whether it is to be classed with the perils of the seas or not.

[Cited in Barstow v. Wilmot, Case No. 1,066.]

5. Where there is a notorious custom in a particular branch of commerce, of stowing goods of a particular description on board ship in a certain way, shippers, who consider such mode of stowage hazardous, must notify carriers of their wish to have a different one adopted, or they will not be entitled to charge the latter with injuries received in consequence of its adoption.

[Cited in Barstow v. Wilmot, Case No. 1,066; The Cheshire, Id. 2,658.]

6. The propriety of the common-law rule respecting the liability of common carriers considered.

In admiralty. This was a libel in personam, by Sylvester Baxter and others, owners of the ship Cleone, against Horace Leland and others, to recover freight and primage on a cargo of flour. [Decree for libellants. This was afterwards affirmed by the circuit court in Baxter v. Leland, Case No. 1,125.]

The libel showed that the libellants had transported a cargo of 1076 barrels of flour in the libellants' vessel, from New Orleans to New York, which were consigned to the respondents at the latter port, and were duly delivered to them there. The libellants demanded $430.40 freight, and $21.52 primage. The answer set up that the flour was delivered in a damaged condition, and that the loss incurred by the respondents and chargeable to the libellants amounted to $531.50. It appeared upon the proofs in the cause on the part of the respondents, that on an inspection of the flour, when delivered at this port, 601 barrels were marked "B. bad," and 69 barrels were marked "xd. bad;" and it was further proved that the deterioration in price upon those marked "B. bad" was from seventy-five cents to one dollar a barrel; that upon the others was about twenty-five cents a barrel. For the libellants, evidence was offered tending to show that the flour was not put on board the vessel in good condition. Thus they showed that ten barrels were stained on the outside when shipped at New Orleans, though it appeared that the residue of the shipment was, so far as was indicated by external appearances, in good order. Evidence was also put in by the libellants, tending to show that by the method of transportation adopted for bringing the flour from the interior of the country to New Orleans, and also by exposure on the wharf at New Orleans, while waiting to be laden on board ship, the flour had been liable to get wet, and that it was taken on board under circumstances which might well cause its injury in the manner disclosed upon its arrival at New York. To rebut the inference sought to be drawn from these facts, the libellants gave evidence that the flour, when manufactured and put up, was perfectly sound and sweet, and that such care and attention were bestowed in forwarding it as to leave no ground to presume that it was put on board the ship in a damaged condition. It was manufactured at Ewing Mills, in the county of Muskingum, Ohio, and early in December, 1847, was forwarded by canal boat and flat-bottomed boats from the mills to New Orleans, where it arrived about January 20, 1848. The bill of lading, signed by the master of libellants' vessel, and dated February 1, 1848, contained an admission that the flour was received on board the ship in good order and well-conditioned; but a memorandum in the words "weight and contents are unknown," was added by the master before his signature. Other facts, especially such as relate to the usage prevailing amongst persons engaged in the business of shipping and forwarding like goods from New Orleans to the North, are stated in the opinion.

E. C. Benedict, for libellants.
A. P. Man, for respondents.

BETTS, District Judge. As between the original parties to the shipment, it is competent for them to show, by evidence outside the bill of lading, the actual condition of the flour at the time of shipment, (Howard v. Tucker, 1 Barn. & Adol. 712,) without the aid of this exception; and the reservation by the master, in executing the bill of lading, imposed on the shipper no obligation to give other evidence than the bill of lading itself, that the contents of the casks corresponded with the admissions in it, until affirmative evidence is furnished tending to show a mistake in the receipt in that respect.

The memorandum made by the master, that the contents and weight of the casks were unknown, does not change the character of the instrument. It operates as it would without that reservation, as prima facie evidence that the shipment corresponded with the representation, but subject to be rectified by proof that it was otherwise.

The libellants show that ten barrels were stained upon the outside when received on board, but they furnish no evidence raising a reasonable presumption that the contents of any part of the shipment were injured.

The gist of the controversy has been, on the part of the libellants, to show that the damage the flour had received arose from its inherent qualities,—from dangers of the sea,—or from the usual and ordinary damp and sweating of the ship on the voyage.

The struggle on the part of the respondents has been to make it appear that the cargo of the ship was improperly stowed, and that the injury received by the flour was occasioned by placing it in the hold of the ship on the top of hogsheads of new sugar, and laying over it sacks or bags of Indian corn.

The libellants deny their liability for the damage, should it be found to have been so occasioned, upon the assertion that the stor-

age was in consonance with the common and well-known usage of ships engaged in freighting from New Orleans to the northern Atlantic ports.

I do not think a custom has been established in this respect, which, if the loss sustained by the respondents is owing to wrongful stowage of the ship's cargo, will, of itself, exonerate the libellants from their liability as carriers. As to the essential damage, the case hinges, then, in my view of it, on the point whether it is satisfactorily made out by the respondents that the injury to the flour was caused by stowing it in juxtaposition with the sugar and corn, and that such stowage was improper and unsafe.

There seems to be no essential disagreement in the evidence respecting the condition of the hold when opened to unlade the cargo. It was found heated to a high degree. The corn in some of the bags had sprouted, and the grain was so hot as to render moving it by hand painful. This part of the vessel was filled with a strong vapor and dampness. The flour in many of the barrels was found caked or coagulated, so that it could not be separated by the hand, and in others it was soured; and there is no reason to question, upon all the proofs, that the condition and temperature of the hold would ordinarily and probably produce the consequences found to exist in respect to the flour, had it been sweet and in good condition when laden on board at New Orleans. The disagreement in the testimony is as to the probable cause of that state of the hold of the vessel.

The ship, when she took in cargo, was in sound condition, and on her arrival here was found not to have leaked at all.

It is proved, by numerous witnesses of great experience in the New Orleans trade, that vessels running north will almost invariably sweat, or disclose an interior moisture or dampness, sufficient often to be productive of serious injury to goods on board, and that this condition of the ship, except as to degree, is irrespective of the cargo she carries. The cause of this cannot be ascertained with certainty, but it appertains in no way to the insufficiency of the ship; it is generally ascribed to the sudden change of climate, and augmented, as has been usually noticed, by rough weather, and also by any natural moistness in the cargo, yet exhibiting itself to the highest degree in the cold seasons of the year.

The libellants contend that if the damage to the flour is imputable to the state of the vessel, whether produced by the sweating of the ship or the character of the cargo, they are exonerated from liability;—on the first supposition, because their undertaking does not guarantee against loss; and on the second, upon the custom or usage of the trade, which justifies this method of stowage; and also on both, by the exception in the bill of lading, of "the dangers of the seas," in one copy, or "the dangers of navigation," as expressed in the other. It is to be remarked that this change of phraseology is not to be understood to indicate any different intent with the parties; and either mode of expression, standing without qualification in an instrument of this character, should be accepted as equivalent to "perils of the sea," and all are treated in the cases as convertible terms. In The Reeside, [Case No. 11,657,] and Aymar v. Astor, 6 Cow. 267, the exception was of "dangers of the seas," and in Fairchild v. Slocum, 19 Wend. 329, the "dangers of Lake Ontario;" and these exceptions were regarded by the courts as of the same significance as the common one of perils of the seas. It is, however, plain that the exception is not to be understood as embracing those losses flowing from culpable or negligent stowage of cargo,—2 Sumn. 568, [The Reeside, supra,]—or other improper acts of the master or owner, which are proximate causes of the loss,—Story, Bailm. § 512; Abb. Shipp. 384, 385; 3 Kent, Comm. 300.

So, also, upon the authorities referred to, the dampness or sweating of the ship cannot properly be ranked in the class of perils of the sea. Tempestuous and violent weather tends to increase this difficulty, but does not produce it; all the testimony showing that it occurs in smooth and quiet voyages, when there is no straining or unusual rolling or pitching of the ship. Its causes are probably atmospheric, but whether ascribable to that source or to others more occult, it is attended but imperfectly with those characteristics which might class it with perils of the sea. Story, Bailm. § 512; 3 Kent. Comm. 216, 217. It is of ordinary occurrence, scarcely failing to exist in any case of navigation from New Orleans to northern ports, in the cold seasons of the year. It does not result from, nor is it accompanied by, any irresistible force or overwhelming power, nor does it take the aspect of inevitable accident, in the sense of a sudden or violent occurrence, although it cannot be guarded against by the ordinary exertion of human skill and prudence. Story, Bailm. § 512. It is a quiet, secret exhalation, generated from the hold of the vessel, and in no other known way produced by winds and waves and navigation than that these are the agents and accompaniments of her transit out of a warm into a cold climate.

But although within the fair import of the exception in the bill of lading, the master or owners may not be protected from answering for such injury, I think they are not, in their capacity of carriers by water, absolutely responsible for the injury, in so far as the damage is not incontestibly traceable to faulty stowage; because, if occurring otherwise, or if the testimony leaves it doubtful whether the damage was not occasioned as well by other causes as the manner of stowage, they are entitled to the benefit of the

known custom or usage of trade in this respect as a protection against liability for the loss.

The testimony in the cause proves a uniform and well understood usage in the trade between New Orleans and New York, that injuries received by goods from the sweating of the vessel should be borne by the goods alone.

Chancellor Kent says, what is an excusable peril depends a great deal upon usage, and the course and practice of merchants; and it is a question of fact to be settled by the circumstances peculiar to the case. 3 Kent, Comm. 217; Trott v. Wood, [Case No. 14,190.] And in the case of Gordon v. Little, 8 Serg. & R. 533, a general usage was admitted in evidence to lessen the responsibility of carriers.

In a case, then, hovering very closely upon the verge of the well-settled doctrine which would exempt the master from liability because the loss was incurred by a peril of the seas, I think there is just propriety, if the particular instance merely fails to fall within that rule, in applying to it the principle that the usage of the trade shall determine the question of liability. There is no evidence that the loss was ever claimed, in such cases, of the owners of the ship. It was, for a period of time, attempted to charge these losses upon the underwriters of the ship, under a special clause then inserted in policies, and supposed to cover this peril. Since that clause has been excluded, it is in proof that the uniform usage has been to charge the loss upon the goods as a peril belonging to them, and not covered by the responsibility of the carrier. I shall adopt that as the principle governing the question as to part of the damages claimed in this case. That will discharge the libellants from the claim of damages for the injuries to sixty-nine of the barrels, there being no evidence of any injury to them beyond what would probably be sustained from the sweating or dampness usually occurring in ships on such voyages. If, as is contended, the flour was soured by the steam arising from the sugar, that fact could be shown by its smell or taste, as in such case the flavor of the sugar, it is proved, is imparted to the flour. There is no proof that this was so affected. So, also, in respect to this portion of the cargo, the small damage occurring might be with much reason ascribed either to causes inherent in the article, or to those engendered in its consecutive changes of climate, in the transportation from the mills where it was manufactured to this market, although it was apparently merchantable and sound when delivered to the ship. The evidence shows that cargoes of flour thus circumstanced are so frequently found slightly deteriorated when delivered here, as to establish that to be a probable if not necessary concomitant of such course of transportation.

The remaining inquiry relates to the six hundred and one barrels, and involves two considerations:—

1. Whether the sugar and corn, or either, have been direct and active agents in producing the damage sustained by the flour.

2. Whether it was improper stowage to place the flour in proximity with those articles, in the manner in which this cargo was laden, so as to subject the master to answer for the consequences.

There is no evidence but that the sugar casks were sound and properly coopered, or that there was any actual leakage from them. I do not rehearse the proofs as to the effect of stowing flour in a close hold in connection with sugar and corn. Very many witnesses were examined, and the result of the testimony on this point must be taken as establishing that such stowage as was made in the lower hold of this ship would account for the damage received by the flour, and that these consequences would most probably follow from it. The stowage, itself, was every way proper in securing the hogsheads, barrels, and bags in their places; but the sugar and corn exposed the hold to an extraordinary heat and dampness by their exhalations, which would naturally be prejudicial to the flour exposed thereto.

Five hundred and fifty-three barrels were taken from the lower hold, all in a very bad state. These had been placed on hogsheads of sugar, and sixty or eighty bags of corn thrown in among the barrels, or on them, and then the hatch between decks was battened down. The rest of the flour was placed between decks, where cotton and corn were also stowed.

I do not find enough in the proof to satisfy my mind that any part of the flour between decks was injured by the evaporations or fumes from the sugar, and think whatever damage it sustained may be imputable to the ordinary sweating and dampness of a sound, tight ship on such voyage.

But it appears to me that the evidence very satisfactorily establishes that a moving cause, if not the proximate one, of the damage to the flour in the lower hold, was the placing it in tiers over hogsheads of sugar, and stowing amongst and over the barrels, bags of Indian corn. The proof is direct and full from persons conversant with like shipments, and employed in receiving such cargoes from New Orleans and storing them here, that the common consequence of placing sugar near flour, even in open situations, is to impart a smell and flavor to the flour, diminishing its value, and that the manner in which this cargo was stowed, in the lower hold of the ship, would naturally tend to communicate a like damage.

The testimony of several shipmasters of large experience, and also of marine surveyors and stevedores, has been given, all concurring that for many years past it has been

the familiar usage with general ships, freighted at New Orleans, to lade cargoes in the manner done in this case; that the great bulk of shipments at New Orleans for this port, consists of cotton, sugar, and provisions, including flour; and that there is no objection raised by shippers, or hesitation on the part of stevedores and masters, in stowing flour in barrels properly dunnaged, over hogsheads of sugar, in any part of the ship, and that without regard to the time the sugar has been manufactured; and that this mode of lading cargoes in general ships at that port is notorious here and at New Orleans, to persons concerned in forwarding or receiving produce; and these witnesses are of opinion that such stowage does not of itself necessarily cause injury to flour laden in that manner.

The agents and shippers at New Orleans, and the respondents, are connected in business; and the bookkeeper of the respondents testifies that he wrote for them to their agents in New Orleans not to ship flour with sugar and corn on board.

Independent of the implied recognition of the course of business, this is direct evidence that the claimants were aware of the usage, and if they intended to have their goods carried in any other than the customary manner, it was incumbent on them to give the master specific directions.

A case involving a similar principle was decided in this court, in Sabbich v. Prince, [Case No. 12,192.] The agents of the respondents shipped at Bordeaux, in France, a quantity of mulberry trees on board of the libellant's vessel. The agents knew the vessel was laden with wines, and that the trees would be stored in the hold with the wines. No notice was given the libellant that such stowage would be hazardous to the trees. On delivery at this port they were all found to be dead; and it was contended by the respondents, on the proofs, that the destruction of the trees was occasioned by the effluvia and fumes generated in the hold by leakage or exhalations of the wines.

The decision of the court upon that branch of the case was, that the shipmaster was not liable for the destruction of the trees by that cause, for want of notice or caution to him, that the claimants would charge him with the risk, inasmuch as it appeared to be the usual and customary method of lading that description of cargo at the port of shipment.

The case of Faber v. The Newark, [Case No. 4,602,] decided in this court in February, 1844, turned in some measure upon the same doctrine; although in that case the additional particular was determined by the court, that the loss was occasioned by perils of the sea.

The action there was to recover damages to a lot of tobacco shipped with oil, grease and lard, and stained by the grease or oil which had leaked from the casks. The court intimated the opinion that the ship was discharged from liability by proving the casks to have been safely and properly stowed and secured by dunnage, and not so placed in relation to the tobacco as to expose the latter to be directly affected by the drainage or leakage of the casks, if such leakage had occurred as an ordinary incident of transportation.

So, also, I understand the rule to be laid down by Judge Story, in the case of The Reeside, [Case No. 11,657.] He rejects, to be sure, the proof of usage or custom in the trade, throwing, under like circumstances, the loss on the owners of the cargo, but only because it was offered in contradiction of and at variance with the express terms of the bill of lading.

The libellant, in that case, shipped on board the schooner several bales of carpeting, which were greatly injured on the voyage by oil which leaked from casks stowed contiguously to the carpeting. The libel alleged that the carpeting was improperly stowed near the oil casks. The judge says, in his opinion, "It would have been very fit and proper to have stowed the carpeting in a more prudent manner, in some other part of the vessel." But he determines that "there was no bad stowage in the case."

The decision against the vessel turned upon the fact that the master had taken the casks on board in very bad order, and very improperly coopered. 2 Sumn. 572, [The Reeside, supra.] The manifest implication is, that but for the positive fault of neglecting to cooper the casks sufficiently, the ship would not have been liable for a damage which was occasioned by the improvident proximity of the carpeting to the oil casks, and not to perils of the sea.

The question is one of great moment in relation to the mercantile navigation of this country, and viewed in connection with the common-law doctrine of the responsibility of common carriers, is not free from embarrassment and doubt.

The stringency of the common law, in respect to common carriers on land, is certainly relaxed in many particulars of importance, in its application to ships and ship-owners in the carriage of goods by water. Story, Bailm. §§ 509, 512, 513. If some of the English judges have recently indicated a disposition to fall back upon the rigor of the old doctrine, and enforce it against carriers by water, (Riley v. Horne, 5 Bing. 217,) and some American authorities have echoed the sentiment, (21 Wend. 190; 2 Story, 17, [Citizens' Bank v. Nantucket Steamboat Co., Case No. 2,730;] 3 Story, 349, [King v. Shepherd, Case No. 7,804,]) and have pushed it to the extremity that the liability cannot be restricted or qualified by notice of usage, (19 Wend. 234, 251; 21 Wend. 153, 354; 26 Wend. 591,) yet I think it is manifest that the gradual though slow advance in the amelioration of the ancient dogma in respect to common carriers, tends to place their implied respon-

sibility on a footing, in its essential features, in harmony with that of other parties performing undertakings of trust for a reward, (2 McLean, 157, 540, [Maury v. Talmadge, Case No. 9,315; Hubbard v. Turner, Id. 6,819;] [Venable v. Bank of U. S.,] 2 Pet. [27 U. S.] 115; [Stokes v. Saltonstall,] 13 Pet. [38 U. S.] 181; 2 Brev. 178; 16 Vt. 52.) And, indeed, it is difficult to reconcile the anomalous severity of the liabilities imposed by law upon common carriers with the rational obligations of a hiring or trust, except upon the assumption that they undertake their employments with full assent to become insurers. If the rule and measure of their liability were now to be first introduced into our jurisprudence, it can scarcely be expected that it would be framed or sanctioned upon the implication that they were to be dealt with as common thieves and robbers; yet that seems the essential groundwork of the old rule.

No reason, very palpable to the understanding, exists for discriminating between the responsibility of a person undertaking to transport goods from place to place, and that of another who is the depositary of them. In the ordinary course of things there is an equal opportunity to the depositary as to the carrier to convert the goods, if such be his disposition, to his own use; and the same risk of having them lost to the owner through accident or exposure, involuntarily on the part of the depositary, and without any means of proving fault or negligence against him. Yet warehousemen, wharfingers, &c., are relieved of the operation of the rule governing the carrier who brings goods to or takes them from his charge. 2 Kent, Comm. 591, 600, 601, and notes.

In the decision of this cause, however, I do not intend to trench upon the rules fixing the liability of carriers, further than those rules may be claimed to bind them as absolute insurers of the goods transported, irrespective of the custom or usage of the business or trade with which the transaction is connected, and regardless of deterioration or loss of the goods by inscrutable natural agencies, without fault of the carrier.

I hold, in this case, that the flour was stowed conformably to the usage of the trade in freighting in general ships, known to the respondents; that the ship was sound and tight; that the shipment was delivered in apparently like condition to that in which it was received on board, except slight stains upon the barrels from mould or damp, which are not proved to have affected their contents; that the libellants are not responsible for injuries received by the flour in consequence of the mere sweating of the ship, or in consequence of exhalations or vapors arising from other parts of the cargo, which was well stowed and secured. I accordingly pronounce in favor of the libellants for the freight and primage demanded, and costs of suit to be taxed. Decree accordingly.

Case No. 1,125.

BAXTER et al. v. LELAND et al.

[1 Blatchf. 526.][1]

Circuit Court, S. D. New York. Oct. Term, 1849.[2]

SHIPPING—STOWAGE—CUSTOM OF TRADE—CARRIER'S LIABILITY.

1. Where an established and well known usage exists in a particular trade, in regard to the stowage of a general ship, both as to the manner of stowing and as to the different articles to be stowed together, one who ships goods by such a vessel is chargeable with notice of the usage and must give special instructions if he desires a change in the mode of stowage.

[Distinguished in The Fanny Fosdick, Case No. 4,641. Cited in The Colonel Ledyard, Id. 3,027; The Free State, Id. 5,090; Fleishman v. The John P. Best, Id. 4,861.]

2. Where such usage exists, a shipper who is chargeable with notice of it, and gives no special instructions, and whose goods are stowed in accordance with the usage, is deemed to have assented to the mode of stowage, and cannot, in case his goods are injured on the voyage in consequence of the mode of stowage, set that up as a ground of complaint, or as a foundation for depriving the owners of the vessel of their freight.

[Cited in Goddefroy v. The Live Yankee, Case No. 5,496; Lamb v. Parkman, Id. 8,020. Distinguished in The Fanny Fosdick, Id. 4,641. Cited in The Colonel Ledyard, Id. 3,027; Fleishman v. The John P. Best, Id. 4,861; The T. A. Goddard, 12 Fed. 177; The Chasca, 23 Fed. 159; The City of Alexandria, Id. 829; The Keystone, 31 Fed. 414; Hills v. Mackill, 36 Fed. 704; The Dan, 40 Fed. 692.]

[Appeal from the district court of the United States for the southern district of New York.

[In admiralty. Libel by Sylvester Baxter and others against Leland, Adams & Co. The district court rendered a decree for libellants. Baxter v. Leland, Case No. 1,124. Respondents appeal. Affirmed.]

This was an appeal from the district court, where Sylvester Baxter and others, owners of the ship Cleone, filed a libel in personam against Leland, Adams & Co., to recover the freight and primage on a quantity of flour transported for the respondents from New-Orleans to New-York in that vessel. The principal ground of defence was, that the cargo of the ship was improperly stowed, and that the flour was damaged during the voyage, in consequence of its being placed in the hold of the ship on the top of hogsheads of new sugar, and under sacks or bags of Indian corn. In reply, the libellants urged that the storage of the cargo was in consonance with the common and well known usage in the case of general ships engaged in freighting from New-Orleans to the northern Atlantic ports. The district court pronounced in favor of the libellants, and the respondents appealed to this court.

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

[2] [Affirming Case No. 1,124.]

Erastus C. Benedict, for libellants.
Albon P. Man, for respondents.

NELSON, Circuit Justice. The evidence is conclusive in favor of the libellants, that the stowage of the cargo was according to the well known and well established custom and usage in the case of a general ship in the trade from New-Orleans to New-York, carrying the products of the country which are usually shipped from that port; and this, in respect not only to the manner of stowage, but also to the different articles and products stowed together in the hold of the vessel—such as the stowage of barrels of flour and bags of corn upon the top of hogsheads of sugar. The most experienced merchants, surveyors, and stevedores in the trade, with scarcely an exception, affirm the usage. The respondents are chargeable with notice of this usage and custom, and consequently must have known that their flour would be thus stowed in the absence of instructions to the contrary.

But, besides being thus chargeable with notice, it appears that the respondents were in fact aware of the usage, and had sent orders to their agents not to ship flour stowed upon hogsheads of sugar, thereby, impliedly at least, conceding the usage; and also, that instructions to the ship-owner were necessary, to ensure a change in the practice of lading. Several witnesses, who state that experience has shown that flour when stowed with sugar is subject to particular damage from heat and vapor arising from fermentation occasioned by the mixing of the drainings of the sugar with water in the hold of the vessel, add, that they have given standing instructions to their agents at New-Orleans, not to ship their flour with hogsheads of sugar.

It further appears, from some of the witnesses, that it is within the past year the discovery has been made, that flour stowed in the way complained of is subject to special damage from the drainings and vapor of the sugar; and that it is only within this period that orders have been given by some of the houses in the trade to change the mode of shipment. Mr. Sherwood, of the house of Suydam, Sage & Co., largely engaged in this trade, says, that a great deal of the flour received from New-Orleans previous to the last year arrived in a damaged state; but that, since ordering it not to be shipped with sugar or corn, it has arrived in better order. It appears to me, therefore, that under the strong and very decided evidence that this cargo was stowed as every other cargo of the kind is stowed in a general ship in this trade, and it being, of course, well known and understood by the respondents that their flour would be thus shipped unless they gave instructions to the contrary, they must be taken and deemed to have assented to the mode of shipment, and are not now at liberty to set it up as a ground of complaint, or a foundation for depriving the owners of their freight. The flour was shipped in the way in which they must have supposed it would be shipped, and in which the flour of others had always been theretofore shipped from New-Orleans to New-York, unless special directions were given to the contrary. If there was any fault, it was that of the trade and of the dealers engaged in it, including shippers, as well as ship-owners, surveyors, and stevedores; in a word, of all persons connected with or concerned in it.

Without, therefore, enquiring into the origin or cause of the damage, or determining the particular head under which it would properly fall were it not attributable to the stowage of the articles of flour and sugar in juxtaposition, with a view to exempt the ship from responsibility, but assuming that even the principal part arose from the stowage, as upon the evidence it probably did, yet, on the ground briefly stated, it seems to me it cannot be chargeable to the ship, even upon the most stringent principles applicable to the common carrier, regard being had to the weight and force of the evidence concerning the usage in the stowage of the vessel.

Decree affirmed.

Case No. 1,126.

BAXTER et al. v. MAXWELL.

[4 Blatchf. 32.] [1]

Circuit Court, S. D. New York. April 21, 1857.

CUSTOMS DUTIES—PROSPECTIVE PROTEST AND SUBSEQUENT ENTRY—HEMP CARPETING.

1. Semble, that the term, "a manufacture of hemp," used in a tariff act, cannot properly include an article generally known in commerce as "hemp carpeting," but in the manufacture of which no material is used which is in fact hemp, or is so called in commercial parlance.

2. Where 30 per cent. duties were charged on an article, under Schedule C of the tariff act of July 30th, 1846, (9 Stat. 44, 45,) as being "carpeting," and, on the payment of the duties, a protest was made, claiming that the article was non-enumerated, and subject to a duty of 20 per cent. under the act, and, on the trial of a suit to recover back the excess, the jury found that the article was "a manufacture of hemp," on which, under Schedule E of the act, the duty was 20 per cent.: *Held*, that, as the jury found that the article was an enumerated one, the protest was insufficient.

3. A clause, in these words, "and hereby protest on all future entries of the same goods," added at the end of a protest, cannot have any effect as a prospective protest, to aid an insufficient specific protest, subsequently made.

4. Whether such a sweeping prospective protest ought to be held good, in respect to entries at such a port as New York, under the act of February 26th, 1845, (5 Stat. 727,) quere.

5. The case of Marriott v. Brune, 9 How. [50 U. S.] 619, was peculiar, and should not be extended.

6. Where the article in the entry in which such prospective protest was made, was de-

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

scribed therein as "linens," "hemp covering," and "jute rove:" *Held*, that such prospective protest could not apply to a subsequent entry, without protest, of the same article, as "linens," or as "hemp carpet covering." or as "hemp carpeting;" but that it was sufficient to cover a subsequent entry, without protest, of the same article, as "jute rove," the two importations being within three weeks of each other, and no protest having been made on any intermediate importation of the article.

7. Where, after such prospective protest was made, five successive importations of the same article were made and entered, with specific protests, some of which were sufficient and some insufficient, and afterwards importations of it were made and entered without protests: *Held*, that such prospective protest could not extend to these last importations.

[Cited in Fauche v. Schell, 33 Fed. 343.]

8. A specific protest, which does not refer to or affirm a prior prospective protest, must be regarded as evidence of the abandonment of all grounds of objection.

At law. This was an action [by Edward Baxter and William E. Baxter] against [Hugh Maxwell] the collector of the port of New York, to recover back an alleged excess of duties, paid under protest, on an article known in commerce as "hemp carpeting." [Verdict was given for plaintiffs, subject to the opinion of the court on certain points in the case. Judgment for plaintiffs.]

It was shown, on the trial, before Betts, [District Judge,] that the article was generally known in commerce by that name; that it was sometimes bought and sold as jute carpeting; that it did not contain a single fibre of hemp, in the proper and ordinary signification of that term; that it was manufactured at Dundee, wholly from jute, the material from which gunny-bags and gunny cloth are made; that jute was extensively produced in Bengal, and was sometimes called "Indian hemp;" that, although it was the fibre of a plant which resembled the nettle family more than it resembled the article generally designated, in trade and commerce, by the simple name of "hemp," it was sometimes called "jute hemp;" and that it had been sometimes classed as "hemp" or "flax," at the custom-house. Reference was made to McCulloch's Commercial Dictionary, London edition of 1850, article "Hemp." The duties were assessed at 30 per cent. ad valorem, under Schedule C of the tariff act of July 30th, 1846, (9 Stat. 44, 45,) the collector claiming that the article was embraced in that schedule, under the description of "carpeting, being either Aubusson, Brussels, ingrain, Saxony, Turkey, Venetian, Wilton, or any other similar fabric." The plaintiff claimed that the article was chargeable with only 20 per cent. duty, either as falling within the description of "manufactures of hemp, not otherwise provided for," under Schedule E of that act, or as a non-enumerated article, under section 3 of the act. The entries of the article were eighteen in number, and were made at various dates between April 29th, 1852, and April 23d, 1853. The jury found a verdict for the plaintiffs for $1900, subject to adjustment at the custom-house, and subject also to the opinion of the court as to the sufficiency of the protests.

John S. McCulloh, for plaintiffs.
John McKeon, Dist. Atty., for defendant.

HALL, District Judge. Looking only to the testimony, as stated in the case, I should infer that the jury must have found that the commercial name of the article in question is "hemp carpeting," and not that it is "a manufacture of hemp." If it is, in fact, "a manufacture of hemp," it should be classed under Schedule E, which embraces "manufactures of hemp, not otherwise provided for," and be deemed an enumerated article, chargeable with a duty of 20 per cent. If it is not "a manufacture of hemp," (even though, by a long continuance of an original misnomer, it had acquired the commercial name of "hemp carpeting," and might be properly classed as such,) then it must be deemed a non-enumerated article, and be chargeable with a like duty of 20 per cent., under the third section of the act. If the verdict had found, in express terms, that it was "a manufacture of hemp," or that it was not a manufacture of hemp, but its commercial name or designation was "hemp carpeting," though manufactured wholly of jute, there would have been little ground for controversy. But I do not understand, from the language of the case, that the verdict was special upon these two points, and I am left to infer the finding of the jury in respect thereto, from the evidence stated in the case, the charge of the judge, the general verdict of the jury, and the admissions of the counsel upon the argument of the case.

The case sets forth, that the court, in charging the jury, stated that it was their province to ascertain the commercial name of the article in question, and how it was bought and sold in commerce; that they were to find whether it belonged to the 30 per cent. schedule, as Wilton, Brussels, Aubusson, or other carpeting of similar fabric, or to the 20 per cent. schedule, as a "manufacture of hemp;" that, if it was known as "hemp carpeting," and not by any other name, then it belonged to the 20 per cent. schedule; that, if the evidence did not satisfy the jury that the article came under the head of "a manufacture of hemp," nor under the head of "wool carpetings," then it was not known by any denomination in the act; that the case was resolved into a question of fact for the jury; and that, if the article was not known as "hemp carpeting," and if they found it had no commercial name, then they were to find it to be a non-enumerated article. The case then adds: "The jury, under the instructions of the court, rendered a verdict for the plaintiffs for $1900, subject to adjustment at the custom-house, and subject also to the opinion of the court as to the sufficiency of the protests."

The concluding portion of the charge is evidently not fully and correctly set forth in the case; and the verdict, if correctly set forth, is silent upon the question as to whether the jury deemed the article to be "a manufacture of hemp," and therefore properly classed under Schedule E, or to be "hemp carpeting," or "jute carpeting," and therefore properly dutiable as a non-enumerated article. It was, apparently, assumed, on the part of the defendant, on the argument, that the jury had found it to be "a manufacture of hemp," though no hemp entered into its composition; and the charge of the court, as stated, may, perhaps, justify the inference, that the jury understood the court as ruling, that if the true commercial name of the article in question was "hemp carpeting," they might properly find it to be "a manufacture of hemp," although it was incontestably proved that no hemp was used in its manufacture, and that they were simply to say whether it was "a manufacture of hemp," or embraced within the description of "carpeting" as defined in Schedule C. If the question were now before me for decision, I should, whilst recognizing the principle that the denomination of articles in tariff laws must be construed according to the commercial understanding of the terms used, and that, if the term "hemp carpeting" had been used in the tariff act of 1846, it would, under the evidence stated in the case, have included the article in question in this suit, although it had been conclusively proved that it was manufactured from a fibre entirely different from, and never classed as, hemp, have great difficulty in adopting the opinion, that when the term, "a manufacture of hemp," is used, it can properly include any article in the manufacture of which no material has been used which, in its raw state, or in the state in which it existed before its introduction into the particular manufacture, is, in fact, or in commercial parlance, embraced within the generic term, "hemp." But this question is not directly before me, and I am inclined to think that, under the peculiar circumstances of the case, and the course adopted by the counsel upon the argument, it is not even incidentally in controversy.

The only question reserved by the case is that of the sufficiency of the protests. On the argument, it was conceded by the counsel for the defendant, that the protests upon seven of the entries were sufficient. It was, in like manner, conceded by the counsel for the plaintiffs, that there were no specific protests in respect to seven others of the entries, and that the plaintiffs had no right of action in respect to the payment of duties on those entries, or any of them, unless the prospective portion of the protests on two of the first mentioned seven entries could be extended to and made to embrace entries subsequently made. The particular protests in regard to the sufficiency of which there was an argument at the hearing, were those made in the cases of the Lady Franklin, the Columbia, the Ocean Queen, the American Eagle and the Invincible.

In the case of the Lady Franklin, the entry was of eleven bales, containing linens; and, in the invoice presented at the time of the entry, two of the packages were invoiced as "padding," and the others as "carpeting." The custom-house marks on this entry and invoice indicate, (as I understand them), that the contents of all the packages were returned, or denominated by the appraisers, as "jute carpeting," and subjected to a duty of 30 per cent. The protest is "against paying 30 per cent. duty on the 'jute carpeting,' contained in this entry, claiming that, by the act of 30th July, 1846, [9 Stat. 44, 45,] said goods are considered a non-enumerated article, and, as such, liable to a duty of 20 per cent." This protest must, I think, be held to be insufficient. It claims that the article invoiced is non-enumerated, and that its true commercial designation is "jute carpeting," while the jury have, as I think I am bound to assume, found it to be "a manufacture of hemp." If they have found that it was "a manufacture of hemp," (as the counsel on both sides have assumed,) it was an enumerated and not a non-enumerated article. Indeed, the parties have, by their counsel, deliberately agreed, that the protests which claim the article to be "a manufacture of hemp," are sufficient; and this agreement necessarily involves the admission, for the purposes of the questions here presented, that it is a manufacture of hemp, and an enumerated and not a non-enumerated article. I therefore hold, that the protest in the case of this entry is not sufficient, and that the plaintiffs cannot recover in respect to any excessive payment made upon it.

The protest in respect to the payments under the entry by the Columbia, is based upon the claim, that the article is a "manufacture of jute;" and, for the reasons just given, this protest must be held to be insufficient.

The protest in respect to the payments under the remaining three entries are severally based upon the claim that the article entered is "manufactured hemp," which is a non-enumerated article. "A manufacture of hemp" and "manufactured hemp" are different articles, and there can be no pretence for claiming that the articles in question are properly designated as "manufactured hemp," either in common or in commercial parlance. These protests are therefore clearly insufficient, and the plaintiffs cannot recover in respect to these entries, unless they are covered by the prospective portion of the two prior protests before mentioned.

Those prior protests were conceded to be good in respect to the particular entries in which they were made; but it was insisted that they were insufficient to cover the subsequent entries. In the only one of the two prospective protests which is at all full and explicit, the plaintiffs, after stating their pro-

test, and the grounds thereof, add: "We pay the amount exacted, in order to get possession of the goods, claiming to have the difference refunded, and hereby protest on all future entries of the same goods." In regard to the subsequent cases in which a specific protest was made, placing the objection to the payment of the 30 per cent. upon other and distinct grounds, I feel no difficulty in deciding that this prospective protest can have no effect. The fact that it has been held that such particular and specific protests were insufficient, because no good objection was distinctly and specifically stated therein, can make no difference. When these specific protests were subsequently made, without any reference to or affirmance of the prior prospective protests, the collector had a right to assume that all grounds of objection except those distinctly stated in the specific protest were abandoned; at least, in regard to the entry to which such specific protest applied. Therefore, the plaintiffs cannot recover any excess of duty paid on the entries as to which insufficient specific protests were made.

In respect to the cases in which no specific protests were made, and as to which the plaintiffs rely upon the prospective protest before mentioned, it appears that the articles entered in the case in which such prospective protest was made, are described in the entry as 2 packages of "jute rove," 12 packages of "hemp covering," and 13 packages of linens; and the claim in the protest is, "that, under the existing tariff, said goods are liable to a duty of 20 per cent. only, because they are manufactures of hemp." In the entries which are sought to be covered by this protest, the articles are described as 23 bales of "hemp carpet covering," 99 bales of linens, 7 bales of "hemp carpeting," 1 bale of "jute rove," 1 bale of "hemp matting," and 3 bales of "hemp covering." It may well be doubted whether such a sweeping prospective protest ought, under any circumstances, to be held good in respect to entries made at such a port as New York. The entries made there are so numerous, the necessity for the rapid transaction of business so pressing, and the number of persons employed in the custom-house so great, that such a prospective protest would not be likely to be kept in constant remembrance by the collector, or the subordinates having charge of his accounts, especially as such subordinates must be sometimes changed; and it certainly would not be a strict and full compliance with the act of February 26th, 1845, (5 Stat. 727,) which requires that the party protesting against the payment of duties shall set forth "distinctly and specifically the grounds of objection to the payment thereof." The case of Marriott v. Brune, 9 How. [50 U. S.] 619, was peculiar, and certainly should not be extended. Warren v. Peaslee, [Case No. 17,198.] Can it be possible that such a prospective protest, annexed to an entry of "linens" only, could be extended to all other importations of articles embraced within that very general and comprehensive term? I think not, and shall hold that this protest, as to the articles subsequently entered as "linens," is insufficient. The term "hemp covering" is a different term from "hemp carpet covering," and "hemp carpeting," used in the subsequent entries, and the collector was not bound to know that they were used to describe the same article, if such was indeed the fact. The "jute rove" is mentioned in one of the subsequent entries, and the two importations were within three weeks of each other, and no protest was made on any intermediate importation of the article. I am, therefore, inclined to hold, under the decision in Marriott v. Brune, [supra,] and the decisions in this circuit, that the protest in regard to the single bale of "jute rove," subsequently entered, is sufficient. In regard to the other subsequent entries, I shall hold the protest insufficient. The two entries next in order of date after the one in which the prospective protest referred to was made, were made without any protest, and, in regard to these, it may be assumed that the party relied on such prospective protest. These two entries describe the article as "hemp carpet covering," "linens," hemp carpeting," and "jute rove." On each of five successive importations thereafter a separate and specific protest was made, and I think the collector had a right to infer that the former prospective protest was not further relied upon. Two of those five specific protests were conceded to be sufficient, and the others have been adjudged insufficient. Following these five importations and entries with specific protests, four other importations and entries were made without any protest. Under such circumstances, it strikes me that the former prospective protests ought not to be extended to these last importations and entries, even though, in respect to them, no specific protest was made.

The plaintiffs must have judgment according to this opinion, unless the parties stipulate to reargue the matter, upon an amended case, or otherwise, which would seem to be the better course. Indeed, the case omits very many of the facts necessary to the determination of the questions reserved, and they have been decided upon the admissions of counsel made on the argument, and papers then furnished, which do not strictly form any part of the case. On the admissions of the counsel, and what I regard as an inaccurate statement of the charge of the court, I have held, (and I think necessarily,) that the jury found the articles in question to be "a manufacture of hemp"—a finding which, in my judgment, was wholly unwarranted by the testimony; and I have consequently ordered judgment for the plaintiffs on the ground that some of the protests are sufficient, whilst I am quite confident

that, under a proper finding, they would necessarily be adjudged insufficient. I am, besides, clear, that the charge of the court is not fully and fairly set forth, and I entertain some doubts whether the verdict of the jury is properly stated in the case. If it was specific and distinct in regard to the character or true designation of the article in controversy, or if they found that it was "a manufacture of hemp," or that it was a non-enumerated article, known in commerce as "hemp carpeting," this should have been distinctly stated on the face of the case. For these and other reasons, I hope the case will be amended, and the cause again argued.

Case No. 1,127.

BAXTER v. NEW ENGLAND INS. CO.

[3 Mason, 96.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1822.

MARINE INSURANCE—REPRESENTATIONS—TIME OF SAILING—RISK.

If the agent, in procuring insurance, represents, that the ship was not to sail until four days after another vessel, which came from the same port and had arrived, and, in point of fact, she had sailed four days before, and the difference of sailing is material to the risk, the policy is void.

At law. Assumpsit [by Robert Baxter against the New England Insurance Company] on a policy of insurance, dated on the 28th Sept. 1821, whereby Aaron Baldwin, "for whom it may concern, and payable to him in case of loss," procured insurance of "$4,000, on property on board the brig Robert, at and from Kingston, Jamaica, to St. Andrews, (N. B.) four per cent. on specie, and two per cent. on merchandise." Loss averred to be on the 24th of August, 1821, by pirates, of certain gold on board. Plea the general issue. [Judgment for defendant.]

At the trial the loss and interest in the plaintiff was proved or admitted; and the principal question was, whether there was not a misrepresentation avoiding the policy. On the 6th of August, 1821, the plaintiff (who was the master of the Robert) wrote to C. Curry (the agent in procuring the insurance through Baldwin), "I shall leave this on the 12th inst." On the 20th of September, Curry wrote to Baldwin for the insurance, and added in a postscript, "Mr. Patterson's brig James has arrived, with specie and produce, in thirty-two days." On the next day Curry wrote to Baldwin, "I am informed to-day by the master of the James, that she (the brig Robert) would not sail until four days after the James." Upon the communication of these letters, the insurance was procured. In fact the James sailed from Kingston on the 20th of August; the brig Robert sailed three or four days before that time; and the brig John and Robert was to sail three or four days after the James.

It was proved, that the difference of time, whether the brig Robert sailed before or after the James, whether on the 12th or 24th of August, was very material to the risk, as the very delay in her passage would give rise to suspicion of her being captured by pirates.

Mr. Shaw, for plaintiff.

Mr. Hubbard, for defendant.

STORY, Circuit Justice. I think upon this evidence, the plaintiff is not entitled to recover. There has been a material misrepresentation, and whether it be innocent or otherwise does not vary the legal result. It was represented in the first letter, that the brig Robert would sail on the 12th of August; in the second, that she would not sail until the 24th of August. In point of fact, she had sailed about the 16th of August. And this difference of time is proved to be material to the risk. See Fillis v. Brutton, Marsh. Ins. bk. 1, c. 10, § 2, p. 463. But see, also, Barber v. Fletcher, 1 Doug. 305; Marsh. Ins. p. 454; Bowden v. Vaughan, 10 East, 415.

Plaintiff nonsuit.

BAXTER, (WILLIAMS v.) See Case No. 17,715.

BAXTER, The EDGAR. See Case No. 4,278.

Case No. 1,128.

The BAYARD v. The COAL VALLEY.

[3 Pittsb. Rep. 165; 16 Pittsb. Leg. J. 204.]

District Court, W. D. Pennsylvania. Oct. Term, 1869.

COLLISION—EVIDENCE—REASONABLE DOUBT—DAMAGES.

[Where, in a collision case, the evidence leaves it open to a reasonable doubt as to which party was in fault, the loss must be sustained by the one upon whom it has fallen. The Grace Girdler, 7 Wall. (74 U. S.) 196, followed.]

[See Lucas v. The Thomas Swann, Case No. 8,588; The Nautilus, Id. 10,058; The Comet, Id. 3,050.]

[In admiralty. Libel for collision by the steamboat Bayard against the steamboat Coal Valley. Dismissed.]

Mr. Barton, for libelant.

E. P. Jones and Mr. Howard, for respondent.

McCANDLESS, District Judge. This is a case of collision of steamers navigating the Ohio river. The Coal Valley and the Arab, with a tow of eleven flats and barges, were ascending, when, at night, near Grave creek below Wheeling, they sighted the steamboat Bayard descending the river. They gave the authorized signals, indicating to the Bayard

[1] [Reported by William P. Mason, Esq.]

to take the starboard, or Virginia shore, which were properly and affirmatively answered by the Bayard. From this point of time there is a mass of conflicting and contradictory testimony, sufficient to unsettle the nerves of any admiralty judge, but from which I deduce this conclusion, that the lights required by law, were properly placed both upon the steamers and the tow; that both the ascending and descending boats designed to avoid a collision, and that it was caused by the defective steering apparatus of the Bayard. In any phase of the case it is not without doubt, and must therefore be decided upon the principle of The Grace Girdler, 7 Wall. [74 U. S.] 196, that where, in case of collision, with loss, there is reasonable doubt as to which party is to blame, the loss must be sustained by the one upon which it has fallen. The libel is dismissed with costs.

Case No. 1,129.

BAYARD v. BAYARD.

[3 Pa. Law J. 261; 5 Pa. Law J. 160.]

Circuit Court, E. D. Pennsylvania. Nov. 15, 1845.

COURTS — FEDERAL AND STATE JURISDICTION — PROPERTY IN HANDS OF MARSHALL — LEVY BY SHERIFF.

1. Where the proceeds of goods levied on by the marshall under process from the United States' courts exceeds the amount of the executions in his hands, although a sheriff under process from the state courts cannot take possession of the property in the hands of the marshall, yet the defendant's interest in the surplus becomes vested in the sheriff, on the delivery to him of the execution from the state courts; nor can this be defeated by any process subsequently issued out of the United States' courts.

[Cited in Re Johnston, Case No. 7,424.]

2. The proceeds will be treated as if but one jurisdiction existed, and moneys paid into court will be awarded to the party who could have recovered from the marshall, had the money remained in his hands.

[At law. Action by R. H. Bayard against Henry M. Bayard. Judgment was given for plaintiff.] Sur rule to show cause why R. H. Bayard should not take money out of court, [the surplus of proceeds of defendant's property after satisfying prior judgments. Rule discharged. Heard also on motion by the Bank of Middletown for the same purpose. Granted.]

William Rawle, for R. H. Bayard.

Benjamin Gerhard, for the Farmers' Bank of Delaware.

Benjamin H. Brewster, for the Bank of Middletown.

RANDALL, District Judge. On the 23d of August, 1845, several writs of fieri facias were issued out of this court at the suits of various plaintiffs, against Henry M. Bayard, and were on the same day delivered to the marshall, who by virtue thereof, levied upon and sold the personal property of the defendant, situate in Dauphin and Lancaster counties; the sale commencing in Dauphin on the 8th and ending in Lancaster county on the 11th of September; the sales in Dauphin county not being sufficient to satisfy the executions then in the hands of the marshall, but the aggregate amount of both sales, producing a surplus of about $1500 after satisfying all the executions then in his hands. This surplus having been demanded by several claimants, the marshall has paid the money into court, where the several parties have urged their respective claims to receive it. On the 28th of August, 1845, the Farmers' Bank of Delaware issued a fieri facias on a judgment obtained against the defendant in the court of common pleas of Dauphin county, which was delivered to the sheriff of that county on the same day. On the 9th of September, 1845, two writs of fieri facias were issued on judgments entered in the court of common pleas of Lancaster county in favour of the Bank of Middletown, against the defendant, and delivered to the sheriff of Lancaster county on the morning of that day. Verbal notice of these last mentioned writs was given to the marshall on the 10th of September, by the sheriff of Lancaster county, who made return as follows: "September 11th, 1845, levied on a quantity of ore on the bank of the canal, near Columbia, a quantity of tools, &c., at the ore bank, subject to the levy made by the United States' marshall." On the 11th of September, R. H. Bayard issued a fieri facias on a judgment obtained by him in this court, which was delivered to the marshall at 1 o'clock p. m. of that day. To this writ the marshall returned, that "Before this execution came to hand, I had levied on property of the defendant under prior executions, and sold the same from the 8th to the 11th of September."

The plaintiff in this judgment (R. H. Bayard), claims the money paid into court, and contends that the executions issued from the state courts could have no effect, inasmuch as the property sold was in the custody and possession of the marshall, by virtue of his prior levy when these executions issued, and therefore not liable to any process issued from the courts of the state; and the case of Hagan v. Lucas, 10 Pet. [35 U. S.] 400, is cited in support of this claim. In that case it is decided, that "property once levied on remains in the custody of law and is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under a different jurisdiction." To this doctrine I most fully assent, and agree that "a most injurious conflict of jurisdiction would be likely often to arise between the federal and state courts, if the final process of the one could be levied on property which had been taken by the process of the other." The sheriff of Dauphin or of Lancaster county, could not therefore by virtue of the process placed in his

hands, take the property levied on out of the custody of the marshall. The executions in his hands, vested the property in him to the extent of the debt, interest and costs on those executions, but no more: if he levied on property of the defendant exceeding in value the amount of the executions in his hands, then for the excess he was a trespasser. Wats. Sher. 175. It is true, the law does not require a marshall or sheriff to determine exactly the value of the property levied on by him, and if his proceedings appear to have been bona fide, will not visit him with vindictive damages, if the goods levied on produce more than the amount of the execution; but the property in the excess remains in the defendant, who may execute an assignment or transfer of such property, and the assignee would have a right to receive it from the marshall in preference to any subsequent lien; or if no subsequent change of property takes place, the defendant would be entitled to receive any surplus remaining in the hands of the marshall after satisfying the executions. The defendant then retained an interest in the property subject to the levy by the marshall, and although the sheriff could not take possession of the property levied on or remove it from the custody of the marshall, the delivery of the executions from the state courts to the sheriff, divested the interest of the defendant (whatever that may have been), and vested it in the sheriff for the use of the plaintiffs in the executions, as firmly as if he had executed a formal and voluntary assignment of such interest, —Act of 16th June, 1836, [P. L. 761,]—and this could not be defeated by any process subsequently issued by the courts of the United States,—Prince v. Bartlett, 8 Cranch, [12 U. S.] 431; Beaston v. Farmers' Bank of Delaware, 12 Pet. [37 U. S.] 136. The sheriff could maintain an action to recover the amount of that interest before the return day, although no levy had been made by him. 2 Serg. & R. 157; 1 Wash. C. C. 29, [Barnes v. Billington, Case No. 1,015;] 3 Wash. C. C. 60, [Berry v. Smith, Case No. 1,359;] 1 Baldw. 246, [Thompson v. Phillips, Case No. 13,974;] 1 Pa. Law J. 317, [Ex parte Dudley, Case No. 4,114.] In this view of the law there can be no conflict between the federal and state courts; each will proceed within the limits of its prescribed jurisdiction, and if from any cause, property or its proceeds which is legally subject to the jurisdiction of the one, should come under the equitable control of the other, it will be disposed of as though there had been but one jurisdiction. And in the distribution of moneys paid into court, the court will always award it to the party who would have a right to recover it from the marshall or sheriff, had it remained in his hands. In the present case, the amount of money in court, not being sufficient to satisfy either of the executions issued from the state courts, prior to the fieri facias of R. H. Bayard, the rule to show cause why he should not take the money out of court, is discharged.

At a subsequent day, B. H. Brewster moved for leave for the Bank of Middletown to take the money out of court, the surplus having been raised by sales of the property in Lanacster county. This was opposed by Mr. Gerhard, who contended that the executions in Lancaster county had been prematurely issued. THE COURT said, if the executions were irregular, the court from whence they issued ought to have been moved to set them aside; they were not void, and the sheriff could have justified under them. [Blaine v. The Charles Carter,] 4 Cranch, [8 U. S.] 332. But time would be allowed to apply to the common pleas of Lancaster county; this was done, and that court refused to interfere, when Mr. Brewster's motion was granted and the money paid to the Bank of Middletown.

Case No. 1,130.

BAYARD v. COLEFAX et al.

[4 Wash. C. C. 38.] [1]

Circuit Court, D. New Jersey. April Term, 1820.

TRUSTS—ABUSE OF TRUST—REMEDY—EJECTMENT—PLEADING—PARTIES.

1. By the conveyance of the trustee in 1770, under whom the plaintiff claims the legal estate, the possession passed to him in like manner as if he had actually entered; and having been once in him, the law presumes it to have continued until a dispossession is shown.

2. The plaintiff is one of the cestui que trusts among whom the trustee made partition, and by deed conveyed the legal estate of the plaintiff's share to him. It does not lie with the defendant, who has no title, to question the conduct of the trustee. The trustee had a legal right to pass the legal estate to the plaintiff, and he has done so, which is a sufficient title in ejectment. If the trustee has abused his trust, he may be called upon to account for it by those who have been injured, in a court of equity, but not in a court of law, which can only notice legal titles.

3. The correct rule relative to joining parties in ejectment, is stated in 5 Johns. 278; that when two or more persons, holding separate and distinct possessions of the land sued for, are united in the same declaration, jointly enter into the same common rule, and plead jointly, judgment may be given against them separately, if their separate possessions are found by the jury; and there is no difference whether the separate possession of each defendant is found by the jury, or stated in the demurrer to evidence.

[Cited in Gibbons v. Martin, Case No. 5,381.]

At law. Ejectment [by the lessee of Bayard against Colefax and Schuyler] for a part of a certain tract of land lying in the county of Morris, called the Bog or Fly meadow. The cause came before the court upon a de-

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

murrer to the evidence, taken by the defendants, and joined by the lessor of the plaintiff. [Judgment for plaintiff.]

The facts stated in the demurrer are as follows:

The heirs and legal representatives of Anthony Brockholst, Aarent Schuyler, and Nicholas Bayard, who had died seised of the above tract of land, each entitled to one equal third part thereof, in common; finding it inconvenient, if not impossible, on account of their number, to settle and adjust various disputes which had arisen with persons who had taken possession of, and claimed title to parts of the said tract of land, deemed it best, (as the recital in the deed states) to vest the legal title to this land in certain trustees, to enable them to commence and prosecute suits for the recovery of the same. They accordingly executed a deed, bearing date the 26th of September 1770, whereby they conveyed the whole of the same bog to three trustees, and to the survivor of them in fee simple. This deed having by some means been lost, or destroyed, the demurrer states that its contents are set forth in the recital, in an act of the legislature of New Jersey, passed on the first of June 1786, [Sess. Laws, 320,] upon the petition of the cestui que trusts in the said deed, or a large majority of them in number and value; which prayed that the legislature would invest the trustees named in the said deed with additional powers, and would vest the title to the said bog, as far as the same was originally vested in Brockholst, Schuyler, and Bayard, in the said trustees in fee simple, for the purposes mentioned in the said deed of 1770, and for the further purpose of reclaiming, dividing and making partition of the property amongst those who should appear to be entitled to the same under the original owners. The act is in strict conformity with the petition.[2]

Ejectments were brought by the trustees against the intruders on the above land, and the boundaries of the bog were particularly ascertained and settled by a report of the referees, which was confirmed by a judgment of the court sometime in the year 1794. By another act of the legislature, dated the 28th of February 1806, [Sess. Laws, 597,] passed upon the application of the representatives of Henry Brockholst, one of the sons of the above mentioned Anthony Brockholst, all the estate whereof the said Henry died seised was vested in certain trustees, in trust to divide the same, or to sell it and distribute the proceeds amongst the devisees of the said Henry, and their legal representatives. These trustees took possession of two thirds of the bog, being, as they supposed, the right of the said Henry Brockholst, as the share of Anthony Brockholst, and another third, as the share of Nicholas Bayard, which they supposed had been conveyed by him to Anthony Brockholst. In point of fact, Henry Brockholst was entitled to only one fifth of the one third part which had belonged to his father, and the trustees were mistaken in supposing that Bayard's part had been conveyed by him to A. Brockholst. Acting however under this mistake, those trustees sold two third parts of the said land in the years 1809 and 1810, and upon the petition of the purchasers under those sales, the legislature, on the 18th of February 1813, passed an act to repeal the aforesaid act of 1786, and making certain provisions as to the money received by the trustees upon the above sales. Elias Boudinot, the surviving trustee under the deed of 1770, after due notice given in the public papers, proceeded to make partition of the bog, (except the part laid off for the payment of the costs and expenses,) amongst the legal representatives of the three original proprietors, allotting, by metes and bounds, one third part thereof to the representatives of each; and Stephen N. Bayard, the lessor of the plaintiff, being entitled in his own right, as one of the representatives of Nicholas Bayard, and as assignee of others of the said representatives of the said Nicholas Bayard to the quantity of two hundred and forty-four acres, Mr. Boudinot, by deed dated the 15th of September 1818, conveyed to him, in fee simple, the above mentioned quantity, by metes and bounds. This deed recites the trust deed of 1770, and the act of 1786; by virtue of which two instruments, the deed states, the said Boudinot and his co-trustees in their life

[2] The first section of this act vests in the trustees named in the deed of 1770, in fee simple, all the right and title of the original proprietors to this bog, and declares that the title of the said original proprietors shall be taken, and admitted in all courts of law and equity, as vested in the said trustees, subject, however, to the conditions, trusts and directions afterwards mentioned. The second section directs the trustees, as soon as might be, to ascertain according to due course of law, by compromise or arbitration, the boundaries of the bog, and to cause the same to be marked. The third section declares that it shall be lawful for the trustees to cause the said bog to be drained in such manner as they may judge most beneficial for its improvement, the expenses whereof, having been audited and allowed by the chief justice of the state, were to be a lien on the said land. The fourth section enacts that after the said charges have been so audited and allowed, the trustees should lay off so much of the said bog, as in their opinion would be sufficient for satisfying and paying all such charges and expenses, as well as such that might attend the partition of the property as thereafter mentioned, and thereupon the trustees are directed to sell the part so laid off, for defraying the said charges, &c. and after paying the same to divide the residue of the purchase money, if any, amongst those entitled to partition of the remaining part of the bog. The fifth section declares that thereupon the trustees shall proceed to examine into, and ascertain the title of each person claiming any part of said bog, under the original proprietors, and to make a just partition of the same among the claimants according to equity and justice, and to execute deeds to the several claimants for their respective shares so adjudged and determined by the trustees.

time, were seised of the said bog as joint tenants. The demurrer to evidence further states, that the above deed to the lessor of the plaintiff, comprehends the premises in dispute; and that, at the time of the service of the declaration in ejectment in this action, the defendant Schuyler was in possession of part of the premises in dispute, holding the same by himself in severalty; and that Colefax, the other defendant, was in possession of another part of the premises, holding the same by himself and in severalty.

In support of the demurrer, it was contended by Ewing and Wall, for the defendants, that the plaintiff cannot recover:

1. Because it is not stated in the demurrer that the lessor of the plaintiff or those under whom he claims, was in possession of the premises within twenty years prior to the bringing of the action. See the act of limitations, (Patterson's Laws, 353, 354.)

2. Because the act of 1786 was repealed by that of 1813, and consequently Mr. Boudinot the trustee had no powers but what he derived under the deed of 1770; which gave him no authority to make partition and conveyances of the property. Or that, if it was not repealed, then under the act of 1786, the trustees were not authorized to perform those acts until the bog was drained and a number of other acts performed, none of which appear to have been performed.

3. Because the possessions of the defendants being stated to be several, they could not be jointly sued in one ejectment. Runn. Ej. 69.

In answer to the first objection, Griffith and Richard Stockton, for the plaintiff, contended that the deed of bargain and sale to the trustees passed the actual possession to them, which the law presumes continued in them, unless an ouster had been shown. Patterson's Laws, 6.

2. Admitting the act of 1786 to have been repealed by that of 1813, the legal estate continued in the trustees under the act of 1770, and they had a right to convey it to the cestui que trusts, who alone can question the validity of the deed to the lessor of the plaintiff, or any other of the acts or omissions of the trustees. The defendants who set up no title, have certainly no such right.

In answer to the third point, they relied upon 2 Johns. 438; 5 Johns. 278.

[Before WASHINGTON, Circuit Justice, and PENNINGTON, District Judge.]

WASHINGTON, Circuit Justice, after stating the case, proceeded.

Upon the facts stated in the demurrer, the defendants' counsel have raised the following objections to the plaintiff's recovery:

1. That it does not appear that the lessor of the plaintiff, or those under whom he claims, was in possession of the premises at any time within twenty years prior to the bringing of this action, and consequently that his action is barred by the act of limitations of this state, passed in the year 1799, [Feb. 7; 23 Sess. Laws, 456.]

To this objection, it is a conclusive answer, that by the conveyance to the original proprietors Schuyler, Brockholst and Bayard, the possession passed in like manner as if the grantees had taken actual possession, and that the trust deed of 1770 operated in like manner to vest the possession in the trustees. The law of this state, passed on the 17th of March 1713, (Patterson's Laws, 6,) is express upon this subject. Independent of this, the demurrer states that in 1772, the trustees entered upon the land and took actual possession. The possession then having once been in the trustees, the law presumes it to have continued in them, until an ouster of dispossession is shown by the other side. There is nothing stated in the demurrer which can be construed into a disturbance of the possession then shown to have existed in the trustees prior to the years 1809 and 1810, when sales were made to certain persons under the act of 1806. But this was far short of twenty years prior to the bringing of this action, which was in 1818, and consequently the case is clear of this objection.

The next objection is, that the act of June 1786, having been repealed by that of the 18th of February 1813, the surviving trustee was thrown back upon the deed of 1770, which gave him no power to make partition of the land, or to execute conveyances to the cestui que trusts. Or if the act of 1786 was not repealed, then by force of its provisions, the trustees were not authorized to make partition and conveyances until after the bog was drained, the expenses paid, and the title of the several claimants under the original proprietors examined into and ascertained. Then these acts not having been performed, the deed to the lessor of the plaintiff passed no title to him. The view which I take of this objection will render it unnecessary to examine the arguments of the counsel, on the one side to maintain, and on the other to deny the validity of the repealing law of 1813; because, if the defendants' counsel be right in asserting its validity, it nevertheless does not follow, nor is it even contended that the trust deed was not in as full operation after the repeal, as it was at and previous to the passage of the repealed law. It is clear that the title of the trustees under the deed of 1770 to the legal estate in this property, was not, and could not have been divested by the act of 1786; and that no estate passed under that act to the trustees, which could impugn their former title, although it might operate as a statutory confirmation of it. This being the case, the right of the surviving trustee, clothed as he was with the legal estate in fee simple, to convey the same to whom, and in what manner he might think proper, cannot be questioned in a court of law, nor can the

title of his grantee be impugned, unless it be by some person having a better legal title in himself to oppose to it. The defendants have shown no title, either legal or equitable; but did they even stand upon the high ground of cestui que trusts, they could not be permitted, in a court of law, to set up their equitable, against the legal estate of the trustee.

It is contended that the trustees had no authority, by the deed of 1770, to make partition of the land, and to convey the same to those entitled to the equitable estate. Let this be granted; still they were the legal owners of the estate, subject to the trusts declared in the deed; and if none were declared, they held for the grantors by way of a resulting trust. If they have exercised powers not conferred upon them, and performed acts in violation of their duty as trustees, it is in a court of equity only that they can be called to answer, and it is there only that their errors, or mal-administration can be scrutinized and corrected. The reason is, that before that tribunal, an equitable title may be opposed to a legal one; besides which, there is no other tribunal which can so conveniently investigate the conduct of trustees, and administer an adequate remedy to the parties. If they have conveyed away the trust property in derogation of the rights of the cestui que trust, the purchaser, if he had notice of the trust, is treated in that court as a trustee, in relation to the property so purchased; but he is nevertheless considered as the legal owner of the estate, for the use of those entitled to the equitable title. The case is in no respect varied, if we should agree with the plaintiff's counsel, that the act of 1786 was not repealed. For upon that supposition, Mr. Boudinot and his associates were constituted trustees for other purposes than those mentioned in the deed of 1770, but equally for the use of the grantors in that deed, and their representatives. I am aware of no distinction between a statutory trustee, and one who is so constituted by deed. Whether he be the one or the other, his legal title cannot, in a court of law, be questioned or opposed by an equitable claimant. In either case he is answerable to his cestui que trust for breaches of duty, before a court which places an equitable title upon as high ground as a legal one, and merely inquires which of the parties has the superior equity.

3. The last objection is formal. It occurred in the case of Jackson v. Woods, 5 Johns. 278, where it was decided, that when two or more persons holding distinct and separate possessions of the premises mentioned in the declaration of ejectment, are united in the same declaration, and jointly enter into the common rule, and plead; judgment may be given against them separately, if their separate possessions are found by the jury. With this opinion I concur; nor can I distinguish that from the present case, on the ground that the question there arose on a verdict, and here on a demurrer to evidence. The latter states that at the time of the service of the declaration, the defendants held their possessions in severalty, which is, in effect, the same as was found by the jury in the case referred to. It adds nothing to the objection in either case, that the particular parcels so severally held are not stated in the demurrer, or found by the jury. The plaintiff is to execute the writ of possession at his peril, and must take care that no more is taken from each defendant than he is entitled to.

PENNINGTON, District Judge. The case turns on the validity of the deed to Stephen Bayard, the lessor of the plaintiff, dated in 1818. The authority for making that deed is derived, as the recitals in it set forth, from the deed of 1770, and also from the act of the first of June 1786. This act had been repealed about five years before the deed to Bayard was executed; and I cannot perceive any constitutional objection to the repealing act. No rights to third persons had been gained under the repealed act. I cannot consider that act as any thing more or less than appointing the persons named in it commissioners, to perform towards this estate certain acts which it seems had not been done. The deed to Mr. Bayard then must rest on the authority of the deed of 1770. This, it is true, conveys a fee to Mr. E. Boudinot, and two other persons; in trust however to "to enable them to commence and prosecute suits, for the recovery of the land thereby conveyed; and to bring the same to an immediate settlement." The conveyance to Mr. Bayard was no part of their duty, and appears very extraordinary at this time, nearly fifty years after the trust was created. But it is contended that the legal estate being in Mr. Boudinot, and he leaving the same to Mr. Bayard, it is now vested in him, and I incline to think that this must be so, and that a court of law cannot take notice of a departure of a trustee from a strict adherence to the trust. In such a case the grantee must be considered as a trustee, for the benefit of the cestui que trust. I am not however satisfied, that in case of a conveyance fraudulently and collusively obtained from a trustee, a court of law would be compelled to carry it into effect. But if this character had been intended to be stamped on this deed, it ought to have been put to the jury to find the fact, and not left to the court to infer fraud. Judgment against Colefax for such part of the premises as is in his possession, and against the defendant Schuyler for the part in his possession.

BAYARD, (GRUBB v.) See Case No. 5,849.
BAYARD, (KONING v.) See Case No. 7,924.

Case No. 1,131.

BAYARD v. LATHY.

[2 McLean, 462.][1]

Circuit Court, D. Illinois. June Term, 1841.

NEGOTIABLE INSTRUMENTS—ACCEPTANCE—WHAT CONSTITUTES.

1. A letter written within a reasonable time before, or after, the date of a bill of exchange, describing it, and promising to accept it, is a virtual acceptance.

2. An authority to draw several bills of exchange, payable at specified periods with an assurance that the bills should be paid, is an acceptance to the person who takes the bill on the credit of such an authority.

At law.

Cowles & Krum, for plaintiff.
Mr. ——, for defendant.

OPINION OF THE COURT. This was an action of assumpsit against the defendant, as acceptor of two bills of exchange, for $1,000 each, dated Dec. 13, 1838, drawn on the defendant, in favor of plaintiff, at Pittsburg, where plaintiff resides, by one James Gonsalis. [Verdict for plaintiff.]

Issue was joined on the defendant's plea of nonassumpsit, and a jury impanneled to try the same. The plaintiff gave in evidence to the jury the following letter, written by the defendant to the said Gonsalis, the drawer of the bills in question:

"Upper Alton, Oct. 12, 1838. James Gonsalis, Esq.: Dear Sir—You are hereby authorized to draw on me for one thousand dollars, at ten days sight; for one thousand dollars, at four months; for two thousand dollars, at eight months, and for one thousand dollars, at twelve months, and your drafts shall be duly paid. Yours, &c., H. K. Lathy."

Proof was made of the hand writing of Gonsalis, the drawer of the bills, and the bills then were permitted to be read to the jury.

It was contended by the plaintiff's counsel before the jury, and the principle so laid down by the court, that a letter written within a reasonable time, before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise. In the case of Mason v. Hunt, 1 Doug. 296, Lord Mansfield said: "There is no doubt but that an agreement to accept, may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawer. If one man, to give credit to another, make an absolute promise to accept his bill, the drawer, or any other person, may show such promise upon the exchange, to get credit, and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances between the drawer and the acceptor."

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

It has been held, however, that this rule only extended to a bill in esse, at the time of making the promise. More recent decisions, made upon a careful review of all the adjudicated cases, extend the rule to a bill not in esse, at the time of making the promise to accept. McKim v. Smith, 1 Hall, Law J. 486; Payson v. Coolidge, [Case No. 10,860.] Which latter case was affirmed by the supreme court of the United States. [Coolidge v. Payson,] 2 Wheat. [15 U. S.] 66; 1 Gall. 630, [Van Reimsdyk v. Kane, Case No. 16,872;] McEvers v. Mason, 10 Johns. 207; 15 Johns. 6. In the case of Wilson v. Clements, 3 Mass. 1, it is held, "that an agreement to accept a bill when drawn, if shown to a third person within a reasonable time after the agreement was made, and he take a draft on the credit of it, such agreement is a virtual acceptance." In Pillans v. Van Mierop, 3 Burrows, 1663, it was held that "a promise to accept bills, to be drawn at a future day, was tantamount to an acceptance of them." Lord Ellenborough, in Clarke v. Cock, 4 East. 57, 70, says: "It has been laid down in so many cases, that a promise that a bill, when due, shall meet due honor, amounts to an acceptance, and that, without sending it for a formal acceptance in writing, that it would be wasting words to refer to books on the subject." An authority to draw a bill, is virtually an acceptance of the bill, drawn in conformity to it. [Sheafe v. O'Neil,] 9 Mass. 11; [Parker v. Grule,] 2 Wend. 545; [Trotter v. Grant,] Id. 414; [Ontario Bank v. Worthington,] 12 Wend. 593; Boyce v. Edwards, 4 Pet. [29 U. S.] 121; Parsons v. Armor, 3 Pet. [28 U. S.] 426; Townsley v. Sumrall, 2 Pet. [27 U. S.] 182.

The jury found a verdict for the plaintiff.

BAYARD, (LOMBARD v.) See Case No. 8,469.

Case No. 1,132.

BAYARD v. MANDEVILLE et al.

[4 Wash. C. C. 445.][1]

Circuit Court, D. New Jersey. Oct. Term, 1824.

FEDERAL COURTS—FOLLOWING STATE PRACTICE.

The rule of the supreme court of New Jersey, made in 1805, that after a cause has slept on the docket for twelve months, a term's notice of trial must be given, never having been adopted by this court, is not obligatory on the practice here.

[At law. Action of ejectment by Bayard against H. Mandeville and N. Mandeville.]

This cause being noticed for trial, Elmer, for the defendants, objected to the notice, 1. That it is signed by Griffith, as counsel, and Kinzey, attorney, in place of R. J. Coxe.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

2. Because this cause having slept for more than a year, a term's notice ought to have been given, according to the English practice, as well as the practice of the supreme court of this state; whereas this notice is dated on the 11th of last month.

Griffith, for the defendant, stated that he was the attorney as well as counsel of the plaintiff, and insisted that his signing the notice, in the latter character, is immaterial. As to the other objection, he denied that the practice of the supreme court existed until 1805, when a rule to the effect stated, was made by that court.

BY THE COURT. The rule of the supreme court having been made long since the year 1790, it of course could not have been adopted by this court, nor has the practice of this court ever conformed to it. As to the first objection, it is altogether untenable.

NOTE, [from original report.] The court made a rule, that where a cause has slept for eighteen months, notice of trial must be served sixty days at least before the sitting of the court to which it relates.

Case No. 1,133.

BAYARD et al. v. MASSACHUSETTS FIRE & MARINE INS. CO.

[4 Mason, 256.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1826.

MARINE INSURANCE—WARRANTY OF AMERICAN PROPERTY.

Policy of insurance whereby the plaintiffs, for whom it may concern, insured "10,000 dollars, viz. 2326 dollars on the cargo, 1860 dollars on the freight, and 5814 dollars on the profits on board of the brig Dick, freight valued at 30,000 dollars, and profits at 25,000 dollars, premium included, at and from her port or ports of loading in Europe to, at, and from any port or ports, place or places, the risk to continue for the term of 18 months, and to attach on merchandise or specie, both or either. Warranted American property. It is understood, that the assured are owners of the cargo, but the valuation of freight and profits hereby agreed to, shall be binding, whether the lading of the vessel is the property of the assured or of others, or whether, at the time of the loss, there shall be any cargo on board or not." The warranty extends to all the cargo put on board, on which the policy was to attach. Quaere, whether it does not apply to all the subjects insured.

At law. Assumpsit [by William Bayard and others against the Massachusetts Fire & Marine Insurance Company] on a policy of insurance, dated 2d of April, 1824, whereby Leroy, Bayard, & Co. were insured, for whom it may concern, "$10,000, viz. $2326 on the cargo, $1860 on the freight, $5814 on the profits on board of the brig Dick, freight valued at $30,000, and profits at $25,000, premium included, at and from her port or ports of loading in Europe, to, at, and from any port or ports, place or places, the risk to continue for the term of eighteen months, and to attach on merchandise or specie, both or either. Warranted American property. It is understood, that the assured are owners of this cargo, but the valuation of freight and profits, hereby agreed to, shall be binding, whether the lading of the vessel is the property of the assured or of others; or whether, at the time of loss, there shall be any cargo on board or not. It is hereby agreed, that the captain or agent has leave to tranship the property hereby insured, in whole or in part, by any other American vessel or vessels, including vessels of war, British or American, upon which this policy shall attach, as if this insurance had been declared upon American vessel or vessels; and that this risk on any such transhipment to end on the arrival of the vessel or vessels in Europe or America." Premium 6 per cent. per annum, warranting 6 per cent. &c. &c.

The declaration in the first count stated, that the policy was made for the benefit and risk of one John O'Sullivan, late of New York, deceased, and that he was interested in the freight and profits to the amount insured, the goods being fully insured by prior policies; that the risk commenced at Cadiz on the 11th of September, 1824; that the vessel sailed from thence with goods on board on account of O'Sullivan, to Marseilles, and there took on board other goods, on account of O'Sullivan and other persons, and thence sailed on her voyage to South America; and then averred a total loss by shipwreck and perils of the seas, on the 11th of April, 1825. There were other counts, one stating the interest in the profits jointly, in the plaintiffs and O'Sullivan, and another the sole interest in the profits in the plaintiffs. There was also a count for money had and received. At the trial upon the general issue, the evidence was as follows.

A letter from the plaintiffs to William B. Swett & Co. dated March 24, 1824, inclosing the application for insurance, as follows:

"Gentlemen,—Will you be good enough to make inquiry at your offices, and let us know the result of the following application for insurance on freight and profits for the American brig Dick, Hudson, Master."

"Application.—Le Roy, Bayard, & Co. want insurance for twelve months, commencing from the period the Dick begins loading in Europe, to be extended six months longer if required, at the same rate of premium, at and from her port of loading in Europe, to any port or ports during said period, with liberty of touching and loading at, and to attach on merchandise or specie, both or either, taken in at, all or either ports, with a return for each entire month not used, for whom

[1] [Reported by William P. Mason, Esq.]

it may concern. The whole premium to be returned, should not the voyage go into effect. To give you an idea of this vessel, we state, that we have insured her at our offices for $20,000 for 18 months, at 9 per cent. to return a half for each entire month not used; $90,000 on her cargo for 12 months, at 6 per cent. to return a half, and, if required, for 6 months longer, at the same rate of premium. The Dick is coppered and copper fastened, just from the carpenter's hands, on which vessel nearly six thousand dollars has been expended in new sails, rigging, and on her hull; registers about 240 tons, destined from Cadiz and Gibraltar to South America, and will leave this for Europe in about two or three weeks, where her cargo will be waiting for her. We shall want from $15,000 to $20,000 covered on profits, valued at $25,000, and about $12,000 on freight, valued at $30,000, having done the rest here at the same rate as the cargo, which fills our offices, having insured here $130,000. We will thank you for as early a reply as possible."

Also a copy of the letter of William B. Swett & Co. in reply to the above, dated Boston, 27th March, 1824, as follows:

"Messrs. Le Roy, Bayard, & Co.—We proposed to several of our insurance offices the risk on your brig Dick (the premiums 5 per cent. per annum, and even less on similar voyages.) They inquire the age of the vessel, and object to the interest on profits and freight; if your offices will take the interest you propose here, property or vessel, or a proportion of freight and profits, and part property, could be done here at about 5 per cent., provided your description of the vessel is satisfactory. If it is a simple trading voyage on American account, the rate would be less, than if there was a prospect of having foreign or belligerent property, as constituting the cargo on which the freight is to be at the risk of the insurer. Premiums to Batavia and Europe two and a half per cent.; Canton and United States or Europe, 3."

Also a letter from the said Le Roy, Bayard, & Co. to the said William B. Swett & Co. dated New York, March 29, 1824, which was as follows:

"Your favor of the 27th we have received. With respect to insurance on the brig Dick, we can state, that she is a first rate vessel, built at Baltimore in 1819, rates A 2 at our offices. The property that will be shipped in her is for American account; the object, a trading voyage. She is coppered and copper fastened, and commanded by an experienced master, who has been long on the South American coast. We have insured at our offices here, on cargo, $90,000, and want $10,000 more covered; also, on freight, $17,000, and want $13,000 more; valued at $30,000; and on commissions, $20,000, valued at $25,000. If you can effect these insurances agreeable to our application, say 6 per cent. for a twelve month, to return a half per cent. for each uncommenced month, please do it, with the privilege of extending it six months longer, if required, after that period, at the same rate of premium. What we want insured with you is as follows: $10,000 on cargo, $10,000; $13,000 on freight, valued at $30,000; $20,000 on profits, valued at $25,000. Your early reply will oblige your humble servants, Le Roy, Bayard, & Co.

"The reason, that we could not get a further amount done here, is, that all our offices are full on her."

Also a copy of a letter from the said William B. Swett & Co. to the plaintiffs, dated April 2, 1824, which was as follows:

"We have to day your valued favor of the 29th ult. and have effected the insurance on cargo, profits, and freight of the brig Dick. The large amount of freight and profits was considered as implying great risk in the expedition. We were therefore obliged to divide the amount among several offices, and give 6 per cent. per annum, with return as you presented."

Also a letter from the plaintiffs to the said William B. Swett & Co. dated New York, April 16, 1824, which was as follows:

"Gentlemen,—This will be handed you by our much respected friend, John O'Sullivan, Esq. the owner of the brig Dick, who visits Boston respecting the insurances we wrote you to effect for his account, which does not accord with the application we transmitted, nor the wording of the policies exactly meeting his ideas. He wishes some alterations made, which he will fully explain, and which, we trust, your offices will readily accede to, as they have all done here; the policies of which he takes with him to show you. He will also have to arrange for an excess amount of freight, which we did here during the interval that we wrote you for this insurance, which probably Mr. O'Sullivan may wish to have transferred to profits. After he has made his final arrangements, we will send you our notes for the premium, &c. We beg your kind attention and courtesies to our friend, which will greatly oblige your humble servants, Le Roy, Bayard, & Co."

The plaintiffs then called Tascar H. Swett as a witness, who testified, that he was one of the firm of William B. Swett & Co. who received the foregoing letters from Le Roy, Bayard, & Co. and who wrote the foregoing letters in reply; that he caused various policies of insurance to be underwritten at various insurance offices in Boston, as mentioned in the foregoing letter of April 2d, and among the rest a policy by the said Massachusetts Fire and Marine Insurance Company, which varied from the policy declared upon in this action, in the following respects: Instead of the words included between "assured, lost or not lost," and "whereof is master," the words were, "ten thousand dollars on the cargo, freight, and profits, on board the brig Dick, at and from her port or ports of loading in Europe, to, at, and

from any port or ports, for trade and refreshment. The risk to continue for the term of eighteen months, and to attach on merchandise or specie, both or either. Warranted American property. Freight valued at $30,000. Profits valued at $25,000. On cargo $2326; on freight $3022; on profits $4652= $10,000." And the said Tascar further testified, that he sent the original policies to the said Le Roy, Bayard, & Co. and they were brought back to Boston by the said John O'Sullivan; that he went with the said O'Sullivan to the various insurance offices, where the original policies were written, and among the others to the office of the defendants. The said Swett did not precisely recollect the conversation that took place between the said O'Sullivan and the president of the said Massachusetts Fire and Marine Insurance Company, but the purport of it was, that the said O'Sullivan, in consequence of having been a long time in South America, had acquired advantages there which would enable him to realize a great profit, if he met with no accident in the voyage, and on this account he wished to be insured so large an amount on freight and profits. The new policies were then made in the form specified in this declaration, and the old policies were given up to the different offices.

The plaintiffs then gave in evidence a certified copy from the custom-house, where the said vessel was registered, showing her to be the property of the said O'Sullivan.

The plaintiffs also produced two letters of credit from the plaintiffs to the said O'Sullivan, dated ——, authorizing him to draw on them, on his arrival in Europe, for forty thousand dollars in the whole; one of which letters authorized him to draw on them generally, and the other, which was for $15,000, authorized him to draw on them to that amount, in the event of his not succeeding in getting funds in Europe, and to interest them in the voyage to that amount accordingly.

The plaintiffs also gave in evidence various letters to them from the said O'Sullivan, one of them dated Gibraltar, 3d June, 1824, stating his arrival there in the brig Dick; another letter, dated June 21, 1824, at Cadiz, in which the said O'Sullivan alludes to a certain contract he had entered into, and that he had arranged it to his satisfaction, and that he should despatch the brig in the course of the next month, loading her with more than a hundred thousand dollars. In another, dated August 24, 1824, he refers to various bills he had drawn on the plaintiffs, and states, that the brig will not be ready to sail before the middle of the next month. In another letter of the same date, he refers to other bills, drawn by him on the plaintiffs. In another letter, dated Marseilles, 4th December, 1824, he refers to a former letter, sent by him to the plaintiffs, of the 20th November preceding, requesting the plaintiffs to arrange the insurance to commence from the time of loading at Cadiz, 6th September, 3 P. M. civil account, that it may run equally with the cargo, freight, and profits. This letter contained a postcript, dated 23d January at Marseilles, in which he states, that he shall sail on the 27th of that month, with a cargo well assorted, and exceeding $100,000. The defendants admitted, that the said plaintiffs paid bills drawn upon them by the said O'Sullivan at Cadiz, amounting to $42,314 18. An invoice was also produced by the plaintiffs of sundry goods shipped on board the said vessel at Cadiz, on account of said O'Sullivan, in which the estimated value was $62,948 47. This was dated Sept. 11, 1824.

Another invoice was also produced by the plaintiffs of all the goods on board the vessel at Marseilles, including those shipped at Cadiz. The whole was invoiced as the property of the said O'Sullivan, and the nominal value thereof, including all charges and premium of insurance, was $104,444 75. This was dated January 31, 1825.

A bill of lading of the same was produced, in which the goods were stated to be shipped for account and risk of the said John O'Sullivan, in which the freight was stated to be nothing, being owner's property, but valued, as insured, at thirty thousand dollars.

The plaintiffs also produced in evidence the deposition of Francisco X. Harmony, of Cadiz, the merchant who transacted the business of the said O'Sullivan at that place. In this deposition he testified, that the real value of the goods shipped at that place was $35,071 05, and that he prepared and gave to the said O'Sullivan an invoice thereof, together with a simulated invoice, in which the goods were estimated at $62,948 47, and that he supposed that the latter invoice was intended to sell by. Also the deposition of Frederick Rabaut of Marseilles, stating, that he was informed, that various goods were laden on board the brig at that place, for the account of a Spanish merchant named Calvet, who took passage on board the brig. He states also, that he did not think Mr. O'Sullivan made any advances on the goods, for he the said O'Sullivan endeavored to procure himself, and requested also the said Rabaut to procure for him, freight to complete the loading of the vessel, having employed at Cadiz the disposable funds which he had, and he appearing disappointed in respect to more considerable funds which he expected to find.

The plaintiffs also admitted, that the said O'Sullivan acknowledged, at the time the said brig met with the accident which was the cause of the loss, that part of the goods on board the brig belonged to certain Spanish passengers, who claimed them at that time, and most of those that were saved were accordingly given up to them.

The defendants admitted, that the said brig and cargo were lost by the perils of the sea,

without any fraud or negligence on the part of the master, or of the said O'Sullivan.

Webster & Hubbard, for the defendants, contended, that the plaintiffs were not entitled to recover, because the warranty of "American property," in the policy, had not been complied with. That warranty covers all the cargo, freight, and profits. The goods taken on board on Spanish account at Marseilles, was a breach of the warranty.

Nichols & Prescott, for the plaintiffs, contended, that the warranty applied to the goods insured, and not to the freight and profits. It was not warranted, that all the property on board should be American; but that the part of the cargo insured by the policy should be American.

STORY, Circuit Justice. My opinion, upon full consideration of this case, is, that upon the true construction of the policy, the property, on which the profits and freight were to accrue was warranted to be American property during the whole voyage. I think this would have been the true construction of the words of the original policy, for which the present was substituted. The prior correspondence might not be unimportant to ascertain the meaning of the parties, as to any words of doubtful interpretation used in the policy; and under this aspect of the case, that correspondence would show conclusively, that in the preliminary negotiations the insurance company contemplated a voyage exclusively on American and neutral account. But I found myself, upon the words of the policy, stripped of all aid from collateral sources. Let us examine the words. The insurance is "$10,000, viz. $2326 on the cargo, $1860 on the freight, and $5814 on the profits on board of the brig Dick, freight valued at $30,000, and profits at $25,000, premium included." Now stopping here, the construction must be, that the word "cargo" here means, not the property on board exclusively belonging to the ship-owner, but all the property constituting the ship's lading, all the property on which freight and profits were to accrue. The freight and profits were upon a valuation of them as growing out of the whole cargo, and not merely upon any small portion which might belong to the ship-owner. Then the policy proceeds, "at and from her port or ports of loading in Europe, to, at, and from any port or ports, place or places, the risk to continue for the term of eighteen months, and is to attach on merchandise or specie, both or either. Warranted American property." It is very probable, that this clause, so far as it speaks of merchandise and specie, was inserted to guard against a possible doubt, whether specie could be deemed "cargo," within the words of the policy. But it is unnecessary to place any stress upon this suggestion made at the bar. Suppose, for the sake of argument, the words of warranty were to be deemed a part of the preceding sentence, instead of standing by itself (as it in fact does in the policy and after a period), in an independent sentence, what would be its true interpretation? "The risk is to continue for the term of eighteen months, and to attach on merchandise or specie, both or either." On what merchandise and specie? Certainly on the merchandise and specie, which were on board of the ship, and constituted her cargo, and out of which the freight and profits were to grow; for these were at the risk of the underwriters. The term "risk," as here used, necessarily refers to all the subjects insured, for the risk is to continue for eighteen months, and plainly the risk on the freight and profits was designated to be coextensive in duration with that on the cargo. Then, if the words, "warranted American property," are to be connected with merchandise and specie, as the next antecedents, the warranty is equivalent to a warranty that the cargo, or all the merchandise and specie on board are American property. If, therefore, the warranty were construed in this limited sense, there would be a plain breach of it, for the Spanish property on board constituted a part of the cargo, and the warranty covers the whole cargo. But, in fact, the warranty stands as an independent sentence. I do not say, that this would be decisive against any connected interpretation. Instruments, like the present, are to be construed, so as to give effect to all the words, and in such a manner as fulfils the obvious intention of the parties. But the circumstance of a separate period intervening, entitles the court to look to the subject matter, to which it is appropriated. If the words had occurred immediately after the words in the first clause, "premium included," the natural interpretation would have been, that the warranty applied to all the subjects of the insurance, cargo, freight, and profits. The principal insurance was on the freight and profits, and to suppose that the warranty was intended to apply only to such goods on board as belonged to the ship-owner, would be to suppose, that the underwriters were solicitous to guard against belligerent risks as to what might ultimately be of very little value, and to expose himself, at a very moderate premium, to all the belligerent risks on freight and profits. For upon this supposition, the ship is not warranted American, and the ship-owner's goods on board only are warranted American, and if the principal part or the whole of the cargo were belligerent, and either on freight or on half profits, the underwriters must run all the belligerent risks on both. A construction leading to such obvious results ought not to be adopted, unless it be the natural and fair import of the language. The words, "warranted American property," may well be applied to all the subjects insured, for all of them are, in

the common language of commercial life, "property." The premium leads to no conjecture, that belligerent risks were included; and perhaps it would not be improper to hold, that the warranty was, that freight, profits, and cargo are American property. It is sufficient, however, if the warranty extends only to the latter. And I cannot entertain a doubt, that the word, "property," here means the same thing as cargo in the preceding sentence. If the other parts of the policy are critically examined, they fortify this conclusion. The succeeding words are, "It is understood, that the assured are owners of this cargo; but the valuation of freight and profits, hereby agreed to, shall be binding, whether the lading of the vessel is the property of the assured or not, or whether at the time of the loss there shall be any cargo on board or not." Here the words cargo, lading, property, occur in the same sentence, and are applied to the same thing, as words equivalent and synonymous. It is the cargo, the lading, and the property, out of which the freight and profits are to arise. This cargo, lading, and property, are not such as may be on board belonging to the ship-owner only, but all on board, whether it belongs to him or to others. "It is understood that the assured are owners of this cargo," but it may belong to others. Whether the one or the other be the fact, it must be deemed, that the warranty of American property extends to it. We must otherwise hold, that in a voyage to South America, then in a belligerent state, the underwriters, knowing that other property than the ship-owner's might be on board, were content to take a warranty, which might be utterly nugatory as to the most material risks. The clause, as to the transhipment of the property in other vessels, leads to the same conclusion. But I forbear any further commentary. My judgment is, that the warranty has been broken, and that the plaintiffs are not entitled to recover.

There is another point of view, in which the cause may be considered, upon which, however, I do not dwell, because it has not been argued by counsel, but which appears to me equally decisive against the plaintiffs. I suggest it merely for consideration, if a superior tribunal should deem the other opinion erroneous. It is this. The assured in their correspondence, upon the faith of which the insurance was made, represented, that "the property, that will be shipped in her, is for American account; the object a trading voyage." If the warranty does not cover the whole cargo, as there is no pretence to say, that this representation was ever varied by the parties, the legal effect is, that pro tanto the representation remains in force, and it has been falsified by the event.

Verdict for the defendants.

BAYER, (UNITED STATES v.) See Cases Nos. 14,547 and 14,548.

Case No. 1,134.

BAYERQUE v. COHEN et al.

[1 McAll. 113.][1]

Circuit Court, D. California. July Term, 1856.

QUIETING TITLE—JURISDICTION—PLEADING—DEMURRER—TITLE.

1. A demurrer admits the allegations of the bill for the purposes of a motion on the bill and demurrer.

2. The circuit courts will entertain a bill filed by one in prior possession, accompanied by title, to remove a cloud upon title.

3. Where a state law authorizes a party in possession of real estate to sue for a settlement of an adverse claim, the circuit courts will look to it in aid of their general chancery powers.

4. Although the laws of a state cannot affect the equity jurisdiction of the circuit courts, when the former afford rules as to what shall be deemed clouds on title, the circuit courts of equity, in the exercise of an ancient chancery jurisdiction, may remove such clouds.

[Cited in Griswold v. Bragg, 48 Fed. 520.]

[5. The bill sufficiently shows complainant's title to the land when it alleges that his grantors and he were legally seised by virtue of a grant from a former governor of the territory of California, and that they have had possession thereunder for seven years.]

[In equity. Bill by Bayerque against Jacob S. Cohen and others. Heard on demurrer to the bill. Overruled.]

This bill is filed, to remove a cloud from complainant's title, for the cancellation of a deed, and for an injunction. The bill alleges, that complainant is lawfully seized and in peaceable possession of certain real property described. That plaintiff, and those under whom he claims, derive title under a grant made by Juan B. Alvarado, at the time governor of the then territory of California, to one Manuel Garcia, under date of 10th July, 1839; and alleges that complainant, and those under whom he claims, have been in peaceable possession of the premises under said grant for a period last past of seven years and upwards. That on the 9th day of September, 1850, an act of congress was passed admitting California as a state into the Union. That at the time of said admission, the premises in dispute were above high-water mark, and had been since filled in and built upon by those under whom complainant claims. That Jackson street, on which the premises are situated, was, at the time of the admission of California into the Union, a public street of the city of San Francisco, and a thoroughfare; and the block of which the premises in dispute formed a part, was bounded by various public streets, the whole of which block had been wholly reclaimed from the waters of the bay, and built upon. That on the 18th of May, 1853, the legislature of this state passed an act, by which the gov-

[1] [Reported by Cutler McAllister, Esq.]

ernor of this state was authorized to appoint five commissioners to sell and dispose of the interest of the state to certain property therein mentioned. That in pursuance of said act, one "Hermance," and four others, were appointed said commissioners, to ascertain the extent of the State's interest in said property, and sell the same. That on the 10th of September, 1853, various persons, among them David Beck and Robert Elam, grantors under whom complainant claims, commenced an action in the superior court of the city of San Francisco against the said commissioners, praying that the water-mark or line through said premises, should be settled as it existed at the time of the admission of California into the Union, to fix what portion of the premises had been then reclaimed, and that said commissioners might be enjoined from selling any portion thereof. That judgment was obtained in said action; and on appeal therefrom, said judgment was affirmed by the supreme court of this state. That by said judgment it was decreed, that said premises (including those now in possession of complainant, and the subject of the present controversy), at the time of the admission of California into the Union, formed no part or portion of the shores or waters of the Bay of San Francisco; that prior thereto they had been reclaimed, and that the state of California had no title to the premises; and said commissioners were enjoined from selling any portion of the premises as belonging to the state of California. That on the 1st day of May, 1855, the legislature of this state passed an act, supplementary to the previous act of 18th May, 1853, whereby the governor, secretary, and comptroller of the state were constituted a board to dispose of the interest of the state in all the property of the state authorized to be sold by the preceding act of 18th May, 1853, remaining unsold, and by it, it was provided that the said board should supersede the commissioners appointed under the previous act, from and after the time when the official term of said commissioners should expire; and that said board was authorized by said act to appoint an agent or agents to attend, from time to time, all such sales. That one Jacob S. Cohen was appointed agent of said board; that said board appointed under the last-mentioned act, were the successors of the commissioners appointed under the act of 18th May, 1853, and their powers limited and controlled by that act. That said Cohen, well knowing the premises, caused a sale of the property; and upon such sale the board, on the 10th day of October, 1855, executed and delivered a deed for the premises to two of the defendants, Calloway and Coryell, the former of whom, on the 8th day of November following, conveyed to the latter his interest in the premises; which deeds were duly recorded. That said sale was fraudulent: that the conditions prescribed by the act of 18th May, 1853, were not observed; that no consideration was paid, the said Cohen crediting as a payment the amount of a judgment held against the state, which was a nullity, as so much paid by said purchasers. That said Cohen holds an interest in said sale by and through the purchasers. That by the terms of the act of the legislature under which said sale was made the deeds given by the said board to the two co-defendants, are made prima facie evidence of title and right of possession, and thus cloud the title of complainant. The bill concludes with a prayer for the cancellation of said deed, and for an injunction. To this bill a general demurrer was filed.

Parsons & Ganahl, for complainant.

Bigler, Thomas & Hempstead, for defendants.

McALLISTER, Circuit Judge. The demurrer filed to the bill in this case admits, so far as the present action of the court can extend, the facts alleged. Among these are the following: the legal seizin of the complainant; his peaceable possession of the premises in dispute, by himself and those under whom he holds, for upwards of seven years; that the premises had been reclaimed from the waters of the bay, prior to the admission of this state into the Union, and had been built upon and occupied by private persons, from some of whom the complainant claims; and which premises then formed a part of the city, bounded by public streets, and were above high-water mark. The demurrer also admits that those under whom complainant claims have heretofore obtained an injunction against the sale of the premises in dispute, upon the ground that the same formed no portion of the waters of the bay, and that the state held no interest in them. It further admits that such adjudication was, on appeal to the supreme court of this state, affirmed in all respects; that under a second act of the legislature of this state, directing a sale of its interest in said premises, a sale was made, and two of the defendants became the purchasers; that Jacob S. Cohen, who was agent of the state in the conduct of said sale, and also a defendant, is interested in the premises; that such sale was fraudulent, because no consideration was paid, and the conditions of the act of the legislature, under which said sale was made, were not complied with. Lastly, that a deed to consummate such fraudulent sale was made and delivered to the purchasers.

All the foregoing facts being admitted by the demurrer to be true, two questions arise: first, whether this court has the power to administer the relief prayed for; and, second, whether this case calls for such relief.

By the general principles of equity jurisprudence, a party who is in the peaceable and actual possession, accompanied by title, can invoke chancery jurisdiction to remove a cloud from his title. Independently of

these principles, the legislature of this state has spoken upon this subject. Section 254 of the act entitled, "An act to regulate civil proceedings in the courts of justice in this state" (Comp. Laws Cal. 519), declares that "an action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest." In Clark v. Smith, 13 Pet. [38 U. S.] 195, the principle is enunciated that, although the laws of a state cannot affect the jurisdiction or mode of proceeding in equity in the courts of the United States, they may afford rules as to what shall be deemed a cloud upon the title, and the circuit courts of equity may remove such clouds. The supreme court of this state has enunciated in several cases the doctrine in regard to the removing of clouds upon title: Shattuck v. Carson, 2 Cal. 588; Guy v. Hermance, 5 Cal. 73. In this last case, the title of the plaintiff, in a contest between different parties, was passed upon and sustained. In this case, the demurrer admits seizin by complainant, accompanied by a title supported by the decision of the highest judicial tribunal in this state, and by a peaceable possession of seven years; and further admits the fraud alleged in the sale under which the deed was made to defendants. It is clear that the complainant has a standing in a court of equity, and is entitled to relief.

It has been urged by defendant's counsel that the complainant should have set forth his title, as non constat it is legal. The answer is, that the allegation in the bill is that his seizin is legal, accompanied by title to which a reference is made, and with possession during seven years; and these allegations are admitted by the demurrer to be true. Nor am I aware that even in a court of law a pleader is bound to set forth his seizin in more special terms than is done in this bill. In Christy v. Scott, 14 How. [55 U. S.] 282, the plaintiff alleged his seizin in his demesne as of fee. Defendant demurred. The allegation in the declaration was deemed sufficient; and it being admitted by the demurrer, the court considered defendants trespassers, and estopped from denying the title of plaintiff. The allegations, admitted as they have been, are amply sufficient to sustain the bill.

On the day of the argument of this case, a paper was filed, which has not escaped the attention of the court. It seems to be a statement of the argument on the whole case. Some of the matters embraced within it are such as would be more appropriately discussed on the trial of the case, when the issues will be raised and the facts developed by testimony.

The demurrer must be overruled, and costs paid by the defendants. An order to that effect will be entered accordingly.

Case No. 1,135.

BAYERQUE v. HALEY et al.

[1 McAll. 97.][1]

Circuit Court, D. California. July Term, 1856.

FEDERAL COURTS—JURISDICTION—CITIZENSHIP—HUSBAND AND WIFE.

1. An averment of citizenship equivalent in import to a direct allegation, is sufficient to give jurisdiction.

2. The doctrine at common law that the deed of a feme covert is void, does not apply to this case. The proceeding is for foreclosure of a mortgage. Until foreclosure it is a chose in action. Endorsement of note and assignment of mortgage by the husband alone would have been sufficient.

3. The act of the legislature of this state [California] of 17th April, 1850, [page 254, c. 103,] as to "husband and wife," has no application to this case, the parties having been married out of this state, and never having been within her limits.

4. Bills of exchange and promissory notes constitute an exception to the rule that choses in action of the wife, other than chattels real, are assignable only in equity.

In equity. In this case a bill was exhibited for the foreclosure of a mortgage, to which a demurrer was filed. The grounds assigned are given in the opinion of the court.

Parsons & Ganahl, for complainant.
J. B. Haggin, for defendants.

McALLISTER, Circuit Judge. The first ground taken in support of the demurrer is, that the averment of the citizenship of Samuel Moss, Jr., is not sufficiently made to give jurisdiction to the court. It is in these words: "That the said Samuel Moss, Jr., during his lifetime was a citizen of the United States and of the state of Pennsylvania." Although this averment might have been made with more precision, it still must be deemed sufficient. If during his life he was a citizen of Pennsylvania, the idea that he was a citizen of this state at the time of the commencement of this suit is excluded. The averment is equivalent in import to an averment of citizenship in Pennsylvania in more direct terms. In the case of Gassies v. Ballon, 6 Pet. [31 U. S.] 761, the defendant was represented as "now residing in the parish of West Baton Rouge, where he caused himself to be naturalized an American citizen." On the ground that such description was of equivalent import to a more direct and precise averment, the description was held sufficient. At all events this case cannot be permitted to go off on that ground, for if decided against the plaintiff he would be permitted to amend instanter.

The second ground of demurrer is the principal point. It is, "that it appears by the bill that the complainant derives title to the note and mortgage set forth, by virtue of a certain instrument of assignment executed by one Zoe Mouroult and her husband, one

[1] [Reported by Cutler McAllister, Esq.]

P. L. Lefevre, by one Lucien Hermann, their attorney in fact duly constituted, when in law the said Zoe Mouroult, being a married woman, has no power to constitute an attorney, either with or without her husband, for that purpose, and that no title or right can be derived through such an assignment, and therefore complainant is not entitled to the relief prayed for."

The transaction to which the assignment refers claims attention. To secure the payment of certain moneys advanced by Zoe Mouroult, the wife of Pierre J. Lefevre, the defendants Haley and Thompson, in consideration of the sums of money received by them, on the 14th day of January, 1854, made and delivered their joint and several promissory note for the sum of $12,000, payable to the order of the said Zoe, the wife of the said Pierre L. Lefevre, in the sums and at the times mentioned in said note. To secure payment of the same, defendants at the same time executed and delivered a deed of mortgage to the said Zoe, her heirs and assigns. Subsequently, the said mortgagee and her husband, the said Pierre L. Lefevre, by their attorney, the said Lucien Hermann, for value received, assigned, sold, and transferred the said note and mortgage-deed to one Samuel Moss, Jr., from whom the plaintiff directly claims. Now, it is urged that no interest passed to Moss, because Zoe Mouroult, being feme covert, could not make a valid power of attorney to Hermann. To sustain this proposition, reliance is placed upon the act of the legislature of this state, passed April 17, 1850, entitled "An act defining the rights of husband and wife." In relation to this statute, the supreme court of this state have said, "We have repeatedly held that our statute does not change the relation of husband and wife, except in the particular cases expressly provided for by the statute." Rowe v. Kohle, 4 Cal. 285. Various provisions are made by the act of the legislature as to what shall constitute the separate property of the married woman, and what steps shall be taken to protect it. But for the purposes of this case it is only necessary to refer to the fifteenth section of the act. It extends the provisions of the law to persons who were married out of this state, and who had never resided within it. Upon the principle that "expressio unius est exclusio alterius," it is evident that the clear intent of the act was to exclude from its operations persons who were married without the limits of the state and never lived within them. It was eminently proper to exclude those who were married without, and never came within, the jurisdiction of the state. The facts of this case show, that Zoe Mouroult was not wedded to her husband in this state, that neither of them resided in this state at the time of the execution of said note and mortgage deed, nor has either of them at any time resided therein, but both of them have always been aliens, and citizens of the empire of France. This case cannot, therefore, be brought within the operation of the act of the legislature on which reliance has been placed by the counsel for the demurrer. The court has been also referred to the 2d, 19th, 21st, 22d and 23d sections of the act of the legislature of April 16, 1850, entitled "An act concerning conveyances." The second section prescribes the mode by which husband and wife by their joint deed may convey the real estate of the wife; and the remaining sections cited all refer to the mode of such conveyance. Whether all these sections have not been repealed, it is unnecessary now to decide. It is sufficient to say, that all the sections of the law which relate to married women are confined to real estate exclusively. But it has been urged for this demurrer that, independently of all statutory enactments, at common law a married woman could make no deed, and her act was deemed a nullity. It is true that a married woman could by that law make no conveyance of real estate except by fine, or common recovery, or some equivalent act of record. The proceeding by fine or common recovery never prevailed in this country. A common law grew up, which became a rule of property, by which a joint conveyance by husband and wife was held to pass the property conveyed. Then came statutory enactments in different states, providing for the security of married women by requiring from them examinations and acknowledgments separate and apart, when they joined in conveyance with their husbands. Such is the law in the different states. But in the view the court takes of this case, the doctrine that at common law the deed of a feme covert is void, does not touch it. The bill is filed to foreclose a mortgage to recover the payment of the note. Until foreclosed, the mortgage, as well as the note, is a mere chose in action; and the endorsement of the note and assignment of the mortgage by the husband alone, and his delivery, would be sufficient to transfer the interest, without the signature of the wife. A debt was due to the wife, a chose in action, —"debitum in praesenti, solvendum in futuro." A bona-fide assignment for valuable consideration of this debt by the husband, divests in a court of equity the interest of the wife. In the case of Cassell v. Carroll, 11 Wheat. [24 U. S.] 134, an agreement was entered into by certain parties; and among them was John Browning, the husband of Louisa Browning, and the committee of Louisa Browning, wife of John Browning, she being at the time a lunatic. By the agreement, certain quit-rents belonging to the wife were to be surrendered. It was contended that John Browning, the husband, as such, could not convey the title to these rents belonging to his wife, so as to bar her, in case of survivorship, from the right of recovery; and, she being a lunatic, no act done by her committee could affect her. In

relation to these rents, the court say, "They were not future, contingent, or reversionary interests vested in her. How far, in respect to such interests, the husband or the committee of a lunatic is by law authorized, by a conveyance or assignment, to dispose of her rights, is a question which we are not called upon to decide, and upon which we give no opinion. The case here is of choses in action actually due to the wife. * * * It does not appear to us that it has ever yet been decided, that a bona-fide assignment for a valuable consideration, made by a husband to a third person, of a debt actually and presently due to his wife, does not divest, in equity, the title of the wife."

By the terms of the mortgage-deed in this case, it is provided that the whole amount of principal shall be deemed due, in case failure be made in the payment of any part of the interest as it shall grow due. The absolute sale, bona fide, of such a chose in action by the husband, amounts to a reduction of it into his possession. He has a qualified interest in the choses in action of his wife, as well as in her real chattels; but if he do not reduce them into possession during life, they survive to her. The difference between the two is, the chattels real are assignable at law; the choses in action, with the exception of bills of exchange and promissory notes, are assignable for valuable consideration, and the transfer will be sustained in equity. Clancy, Mar. Wom. 109, 110. The husband may bar the right of survivorship in the choses in action by a release. Thus he may release any wrong done or promise made to her alone, or to her and himself during marriage. He may discharge his wife's bond; as, also, not only the debt actually due, but even that which is not payable till a future day. So he may release any right or duty that may possibly accrue during marriage. Again, if the husband reduce his wife's choses in action into possession, her right is barred. And there are various acts of his falling short of a reduction into possession, which are deemed equivalent to it; as, if a husband alone, or with his wife, authorized a third person to receive her chose in action, who accordingly receives, the right of the wife is barred although the avails never reach the husband. Id. 111, 112. And where, on a bond executed to the wife, the husband gave a letter of attorney to another to receive, and who did receive it, the wife died, and then the husband deceased,—Held, the action was properly brought by the executor of the husband. Id. In the case of Bates v. Danby, 2 Atk. 207, where the husband was entitled, in right of his wife, to two mortgages, borrowed a sum of money from A, and agreed in writing that he had left them with plaintiff, and that he would assign them to him forthwith, the husband died before making the assignment. On a bill to foreclose the mortgages, it was insisted on the part of the wife that they were choses in action, and that not having been assigned by her husband, they survived to her. Lord Hardwicke held that the husband, being entitled to the trust of these mortgages, had the power to assign them for his own use, and that leaving them with the plaintiff, and promising that he would procure them to be assigned, amounted to a disposal of them for so much as to satisfy plaintiff's demand, but no more; for although he might have disposed of the whole in the manner he did, his intention was only to secure the plaintiff's debt, which being done, they belong to the widow as her choses in action. Clancy, Mar. Wom. 121. The correct rule deducible from the authorities is, that where the assignment by the husband is voluntary, without consideration, it will not bind her right should she survive him; but where the transfer is for a valuable consideration, the purchaser takes the interest assigned discharged from the wife's right of survivorship.

Again, we have seen that bills of exchange and promissory notes constitute an exception to the rule, that choses in action of the wife, other than chattels real, are assignable only in equity. Now, in this case, the note having been made payable to a married woman, the endorsement by the husband would effect a legal transfer, inasmuch as the note became his property. Shuttlesworth v. Noyes, 8 Mass. 229. As the joining of the wife was not indispensable to transfer the interest, it is useless to discuss the right of a married woman to execute a deed or other instrument under seal.

The demurrer must be overruled.

Case No. 1,136.

BAYERQUE v. JACKSON WATER CO.

[1 McAll. 85.] [1]

Circuit Court, D. California. July Term, 1856.

EQUITY — PRACTICE — DECREE BY STIPULATION OF PARTIES—PROCEEDING TO SET ASIDE.

1. When orders and a final decree have been taken in a case pending in a court of equity, in vacation, [in accordance with a stipulation of the parties, but] without the sanction or knowledge of the chancellor, the proceeding, including the decree, will not be set aside on summary motion.

2. When all the proceedings taken were in strict conformity with a written stipulation entered into by the parties, and filed in court, and there was no mistake or fraud, and moneys have been paid and received by the respective parties on the faith of the decree, and the property has changed hands, the proceedings are at least only voidable, not void.

3. If injury has accrued to a party, he must file his bill and bring the whole case on its merits before the court, so that a decree may be rendered on terms doing justice to both parties.

[In equity. Bill of foreclosure by Bayerque against the Jackson Water Company.] A motion was made in the case to set aside, or

[1] [Reported by Cutler McAllister, Esq.]

so amend a decree as to render it unavailable to the complainant. [Denied.]

The circumstances disclosed by the record are as follows:—On the 26th February, 1856, process was served upon defendant. On the 3d March ensuing, an order upon motion was made, appointing a receiver, who gave bond and security. On first day of April ensuing, the bill was amended by adding new parties. On 23d day of April, 1856, a stipulation was entered into between the parties, in writing, and filed in the cause on the same day. Among other things it was agreed, that in addition to the sum of money to recover which this bill of foreclosure was pending, there should be added at the reference, which it was stipulated should take place, any and all sums of money paid or advanced by complainant at the sale of the works of the said Jackson Water Company, by virtue of a certain judgment against the said company, obtained in Amador county in this state; that the said sums of money should bear the same rates of interest, and be entered into the final judgment in this cause on the same terms, as the amount due on the mortgage to foreclose which this bill was instituted, the interest to accrue from the date of the advances; and the certificate of sale by said sheriff should be conclusive as to the amount advanced by complainant on said sale, and said amount should be entered by the master in his report. Such stipulation further provided, that complainant might enter in the final decree afterwards to be filed, in addition to all foregoing sums of money, the sum of one hundred and seventeen thousand five hundred and nine dollars, twenty-four cents; and that said master was authorized to insert in said decree said last mentioned sum of money, upon said terms, and to bear same interest as the amount due in said mortgage. It was further stipulated there should be entered in such decree all and every sum or sums of money that have been already paid, or may hereafter be paid by complainant on account of the said Jackson Water Company on account of taxes; such sums of money to bear interest from the date of the several payments thereof, at the same rate as the money due on said mortgage; and the said master was authorized to enter up the same in his said report and the final decree in this suit. It was further stipulated and agreed, that upon the filing of the stipulation, the bill of complaint should be taken pro confesso, and final decree in this suit should be entered in accordance with the prayer of the bill and this stipulation. And, lastly, it was agreed that defendants have six months, from the date of the final decree and sale, to redeem the mortgaged premises. A literal compliance with the provisions of this stipulation took place. On the 24th April, 1856, the bill was dismissed as to all the defendants save the present defendant, the Jackson Water Company. Against them the bill was taken pro confesso, and an order taken referring the whole matter to a master in equity. On his report, a final decree was entered in the clerk's office; also an order confirming the report of the master, and ordering a sale of the property. The decree was enrolled, and on the 7th July, 1856, by virtue of said decree and order, the mortgaged property was sold and purchased by complainant for the sum of one hundred and ninety-six thousand dollars. Lastly, at a term of this court, upon the presentation of the stipulation, orders, and decree, an order was entered confirming the sale of the mortgaged premises. Every provision of the stipulation was complied with by the complainant. In March, 1856, the defendant, by his solicitor, moved to set aside the orders and decree made subsequent to 3d March, 1856, on the ground that they were all taken in vacation (with the exception of the decree of 2d September, 1857, confirming the sale), in the clerk's office, although purporting to bear date in term-time; which motion was denied, and which motion is renewed at present term.

Parsons & Ganahl, for complainant.
H. P. Irving and T. Wise, for defendants.

McALLISTER, Circuit Judge. This is a motion to set aside a decree made by consent of parties in this court, on the ground that the orders which preceded it and the decree itself, were taken in vacation, although bearing date in term-time. It is true that there was no judicial action by the court in relation to such orders, save the signature of the judge to the final decree, and the order confirming the sale. After the return of the judge from a temporary absence from the city, upon a presentation of the documents on file in the case, the said decree, dated as of the preceding term, was signed by him, and an order confirming the sale. To ascertain the condition of the case at that time, it is necessary to fix a construction upon the written stipulation. It provides, that upon its being filed certain proceedings should take place. In strict conformity to this agreement, the complainant acted, he took the bill pro confesso, and pursued all the other steps prescribed. But what is more important than the conduct of complainant, is that of the defendants. On this motion the following facts are established by affidavits, and stand uncontroverted. That complainant, after promptly taking all the steps prescribed by the stipulation, relying on said stipulation, orders, and decree, paid to defendant, who received the same, the balance of the sum stipulated to be paid in agreement, and entered by virtue thereof into and forming a part of the decree, the sum of $117,509 34 over and above the amount mentioned in the mortgage. That said sum was paid immediately after the entry of said decree, and same was accepted by the defendant with full knowledge that said decree had been

entered, and that the money so received by defendant was paid by complainant relying upon the said decree. That no portion of the moneys paid has been refunded. That defendant has become insolvent. That, although the time has expired within which by the terms of the stipulation, the defendant has a right to redeem, the complainant is willing to convey to defendant all the property he (the complainant) holds under the master's deed, on being reimbursed for the moneys advanced by him, on the faith of the stipulation and decree. Now, if it be assumed, that all the proceedings in this case were irregular and voidable, the utmost this court could do on a bill filed to set them aside, would be just what the complainant proffers to do. But defendant asks this court, on a motion summarily to set aside the decree, and sale of the property, and leave it together with the purchase-money paid to the defendant in the possession of the latter. The court would be lending itself to the propagation of a gross fraud, did it do so.

Another fact is developed on this motion, which is uncontroverted. It appears, that one James Creighton, on 12 Sept., 1856, subsequent to the proceedings and sale in this case, obtained a judgment against the defendant for the sum of $39,000 in the district court for the fifth judicial district of this state. That the claim on which said judgment was recovered, was a claim assigned to said Creighton by one John C. Harn, who was father-in-law of said Creighton, and the president and one of the trustees of the said Jackson Water Company, and who, as such, signed the said stipulation upon which the said decree was entered. That a suit was commenced in said court in August, 1856, which was discontinued. That a second suit was commenced on the same demand, and summons served upon the said John C. Harn, president of said company, and no answer having been filed, judgment by default was taken. Various charges of fraud are made, growing out of this transaction, with which on the present motion this court has nothing to do; it can only look to the facts as alleged in the bill and set forth in the affidavits.

In view of these facts the inquiry is, whether this court has the power to set aside the decree of this court on summary motion; and if it has the power, is this a case which calls for its exercise? Now, there is no positive or actual fraud suggested in this case. There is nothing to indicate anything further than can be inferred of a constructive fraud derived from the fact that the proceeding did not receive judicial sanction. It is not pretended that the terms of the written stipulation were not in good faith carried out by the complainant. It is not denied that he paid all the money he was legally bound to do; that said payments were made by him relying on the stipulation and the decree; that defendant received the moneys with full knowledge of the transaction, and the reliance placed upon it by the complainant. In view of all these facts, it is insisted that this court upon this motion should set aside the decree, or so amend it as to render it inoperative for all the purposes for which it was agreed on by the parties to be rendered. The practical result of which is to leave the property, and the money which complainant has paid for it, in the hands of defendant. Such is not the mode in which a court of equity administers justice. Equity always sets aside a deed upon other grounds than positive fraud on the part of the holder of it upon terms, and requires a return of the purchase-money, or that the conveyance shall stand as security for its payment. This constitutes the essential difference between relief in equity and that afforded in a court of common law. The latter can hold no middle course. The entire claim of each party must be determined at law on the single point of the validity of the instrument; but it is the ordinary case in the former court that a deed or decree, not absolutely void, yet under the circumstances inequitable as between the parties, may be set aside on terms. Coiron v. Millaudon, 19 How. [60 U. S.] 113. In this case, so far as the facts appear on this motion, the court can see nothing but irregularity. If on that ground it shall be deemed good cause for setting aside the proceedings, it must be done on terms just to both parties. This can only be done on a bill filed bringing the whole case upon its merits before the court, when equal justice may be done between the parties.

The motion must be denied.

Case No. 1,137.

BAYERQUE et al. v. SAN FRANCISCO.

[1 McAll. 175.][1]

Circuit Court, D. California. July Term, 1856.

NEGOTIABLE INSTRUMENTS—CITY WARRANTS—PAYMENT FROM PARTICULAR FUND—TRADING CORPORATIONS:

1. A warrant issued by the controller of a city, whose payment is restricted to a particular fund, cannot be regarded as a bill of exchange.

2. Trading corporations may, independently of statute, issue negotiable paper in the course of their business.

3. If admitted in its broadest interpretation, it [this rule] cannot apply to a warrant issued by the officers of a municipal corporation.

4. It [such a warrant] is rather the conditional payment of a debt already created, than the creation of a new one, or the expression of a new promise.

At law. The present action is brought by the plaintiff as holder of certain warrants alleged to have been assigned to him for a valuable consideration. The warrants are in the following form:

"$1,000. City Comptroller's Office, San

[1] [Reported by Cutler McAllister, Esq.]

Francisco, ——, 1854. City Treasurer,—Pay to Jesse L. Whitmore, or bearer, the sum of one thousand dollars, for grading &c. Powell street from Washington to Bay, out of the street assessment fund. S. R. Harris, Comptroller."

The facts necessary to be set forth are given in the opinion of the court, on the demurrer filed to the complaint. [Demurrer sustained.]

Parsons & Ganahl, for complainants.
H. H. Byrne, for defendant.

McALLISTER, Circuit Judge. Various grounds of demurrer have been assigned. A consideration of the third and last will dispose of the case on the present pleadings. It is in these words, "That the instruments in law do not constitute any evidence of indebtedness, nor does it appear from the complaint that the defendant is otherwise indebted to plaintiff. Nor do the said instruments establish in law any obligation or liability on the part of the defendant."

The defendant is a municipal corporation, owing its existence to a charter, through which "it moves, and breathes, and has its being." It stands on a different footing from an individual. The latter, may do all acts and enter into all contracts not prohibited by law; the former, created for specific purposes, can make no contract forbidden by its charter, or into which it is not authorized to enter by that instrument. Nor is a corporation, when an action is brought against them on a contract, estopped from denying their competency to make it; for if so, the estoppel would apply equally to the other contracting party, and the limitations upon the power of the corporation would be of no avail. The authority of the city to issue the warrants in this case, is placed upon the third section of its charter. It is in these words. "Every warrant upon the treasury shall be signed by the comptroller, and countersigned by the mayor, and shall specify the appropriation under which it is issued, and the date of the ordinance making the same. It shall also state from what fund and for what purpose, the amount specified is to be paid." It will be observed, that these warrants, in addition to the signatures of the mayor and controller, and a statement from what fund and for what purpose the money was to be paid, must also specify the appropriation under which it is issued, and the date of the ordinance making the same. This cannot be regarded as matter of form. It is a substantial requirement, and inserted to carry out the policy contemplated to be pursued for the protection of the public from the recklessness of city officers, and the collusion with them of third parties. The 7th section of the charter inhibits the common council from issuing or putting in circulation any paper or design as a representative of value or evidence of indebtedness; and the 8th section declares, that no money shall be drawn from the treasury unless the same shall have been previously appropriated to the purpose for which it was drawn; and, with a view to enforce that provision and guard against the infidelity of officers of the corporation, and the fraud of third parties, the existence of the previous appropriation, and the date of it, must be specified in the warrant. In case at bar, while some of the warrants, amounting in the aggregate to $14,500, are issued in conformity to the act, the balance—and by far the larger amount—do not specify the appropriation under which they are made, or issued, or the date of the ordinance making the same. These cannot be deemed to have been legally issued, nor would the treasurer have been authorized to have paid them. They cannot be recovered on as warrants, even in the hands of the original holder. But the plaintiff takes a position, which, if sustainable, covers all the warrants. He sues upon them exclusively. There is but one count in the complaint. He does not sue upon them as agreements setting forth the consideration; but as negotiable, as bills of exchange, which imply a consideration. We do not regard them as such. The defendant is not a private, trading corporation, but a public, municipal one. In the distribution of its powers among its agents, the legislature has interposed a check upon the officer having the custody of the public money, by authorizing him to pay only such warrants as purport on their face to have been issued under some previous appropriation; and the date thereof must be given. None other could lawfully issue. They are merely what they purport to be when legally issued, warrants, or authority to the officer to pay out public money in his custody. They are drawn by one officer of a corporation upon another, and intended rather as a conditional payment of a pre-existing debt already audited, than as instruments creating a new debt, or expressing a new promise. They are designed to give facility, regularity, and security in the disbursement of the public money. They are intended as a check on the treasurer by forbidding any payment unless authorized in a particular manner, and to facilitate the transaction of the business of the corporation by defining strictly the duties of their functionaries. To the holder they are of use, by enabling him to draw money from the treasury when his debt has been allowed by the proper officer; and probably he might compel by mandamus the treasurer to pay the warrants in case, having funds, he refuses. But in no sense do they constitute a promise on the part of the city to pay, as the drawer of a bill of exchange. There are other considerations which conduct to the conclusion that these warrants cannot be treated as bills of exchange. A fatal objection is the fact, that upon their face the payments are restricted to, and must come out of a particular fund. It is true, that the mention of a particular fund out of which a pay-

ment is to be made, will not in some cases prove fatal to the character of the instrument as a bill or note. But it is confined to that class of cases where the mention of a particular fund is directory, and reference made to it with a view simply to enable the drawee to look to his reimbursement. But in all cases where the payment is expressly limited, and is to come out of a specific fund mentioned, however ample it may seem, it is fatal to the character of paper as a bill of exchange. Pars. Merc. Law, 87.

In Dawkes v. De Lorane, 3 Wils. 207, the court thus defines the essential qualities of a bill of exchange, "It must carry with it a personal credit given to the drawer, not confined to credit upon any thing or fund,—it is upon the credit of a person's hand who negotiates it; he who takes it, does so upon no contingency except the failure of the general credit of the person drawing or negotiating it." In Jenney v. Herle, 2 Ld. Raym. 1361, A drew on B, to pay plaintiff on demand a sum of money out of a particular fund mentioned,—held to be a mere appointment for the payment of money out of a particular fund; and where A drew on the agent of a regiment, to pay an amount out of his growing subsistence,—held not to be a bill of exchange, "because the money was payable out of a particular fund." In Yeates v. Groves, 1 Ves. Jr. 280, A drew a bill "payable out of the purchase-money of a house." This order, said the lord chancellor, "is not a bill of exchange, being payable out of a particular fund." In Van Vacter v. Flack, 1 Smedes & M. 393, the plaintiff sued on a bill made payable out of the notes left in drawer's possession. "This instrument," say the court, "is not a bill of exchange, because payable out of a particular fund; it is to be distinguished from that class in which the particular fund is mentioned merely as a direction to the drawee how he may reimburse himself." The case of Kelley v. Mayor, etc., 4 Hill, 263, illustrates the distinction between the two classes of cases. It was there held, that a draft signed by the mayor, and directed to the treasurer, was a bill of exchange. If this be law, it does not touch the case. The payment of the money was not confined to a particular fund. The words as to payment were "and charge to Bedford assessment;" the court say, "The bill was not restricted to the particular fund arising from the Bedford-road transaction, yet for reimbursement the treasurer was directed to charge that fund." On that ground the instrument was considered a bill. The form of the draft in that case was also decided to have complied substantially with the statute. This is unlike the case at bar. In Lake v. Trustees of Williamsburgh, 4 Denio, 520, a draft was drawn for a sum of money to be charged to the account of the Union avenue. The payment was not to come out of any particular fund; and the court say, "If it was not a sealed instrument it perhaps might be regarded as a bill of exchange." This intimation of a "perhaps" is sustained by a reference to Kelley v. Mayor, etc., 4 Hill, 263. When we turn to the latter case we find the following proposition: "Independently of any statute provision, a corporation may issue negotiable paper for a debt contracted in the course of its proper business." To sustain this proposition reference is made to the case of Moss v. Oakley, 2 Hill, 265; and in this case reliance is placed on the case of Mott v. Hicks, 1 Cow. 513, and to Barker v. Mechanic Fire Ins. Co., 3 Wend. 94. All these cases on which reliance was placed for the general proposition above stated, "that a corporation, independently of statute, may issue negotiable paper in the course of its proper business," are trading and business corporations; and the authorities above cited by counsel for plaintiff do not, for that reason, apply to the defendant, who is a public and municipal corporation, whose powers are confined strictly by its charter. But they are all unlike this case in the fact that in no one of them was the payment of the money restricted to a particular fund.

The demurrer in this case must, therefore, be sustained.

BAYLESS, (MANUFACTURERS' & FARMERS' BANK v.) See Case No. 9,050.

Case No. 1,138.

BAYLESS v. TRAVELERS' INS. CO.

[14 Blatchf. 143;[1] 6 Ins. Law J. 109; 9 Chi. Leg. News, 201; 23 Int. Rev. Rec. 111; 24 Pittsb. Leg. J. 140.]

Circuit Court, E. D. New York. Feb. Term, 1877.

ACCIDENT INSURANCE—DEATH BY MEDICAL TREATMENT—OVERDOSE OF OPIUM.

1. A policy of insurance against accident provided for the payment to the plaintiff of a specified sum within a specified time, after sufficient proof that the insured "shall have sustained bodily injuries effected through external, violent and accidental means," "and such injuries alone shall have occasioned death," "provided, that this insurance shall not extend to any death or disability which may have been caused wholly or in part by any surgical operation or medical or mechanical treatment for disease." A specified dose of opium was prescribed to the insured by his physician, to allay nervousness and restlessness. By inadvertence, he took more opium than he intended and his death was caused thereby: *Held*, that his death was caused wholly or in part by medical treatment for disease, and was not covered by the policy.

[Cited in Crandal v. Accident Ins. Co., 27 Fed. 45.]

2. *Held*, also, that the case was not one of bodily injury effected through external, violent and accidental means, occasioning death, within the meaning of the policy.

[Cited in Crandal v. Accident Ins. Co., 27 Fed. 45.]

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

At law.

Redfield & Hill, for plaintiff.

Mather & Ennever, for defendant.

BENEDICT, District Judge. This action is brought upon a policy of insurance against accident, issued by the defendants, whereby they agreed to pay to the plaintiff the sum of $10,000, "within ninety days after sufficient proof that the insured, William E. S. Bayless, at any time within the continuance of the policy, shall have sustained bodily injuries effected through external, violent and accidental means, within the intent and meaning of this contract, and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof." The contract contained the following proviso: "Provided, that this insurance shall not extend to any death or disability which may have been caused wholly or in part by any surgical operation, or medical or mechanical treatment for disease." The cause was tried before the court and a jury, when, upon the evidence adduced, a verdict for the plaintiff was directed, subject to the opinion of the court upon the question whether the facts proved were sufficient to render the defendants liable upon their policy. The following are the facts, as derived from the evidence, and, in stating them, I adopt the conclusions of fact most favorable to the plaintiff, that the evidence will permit to be drawn. The insured died on the 20th of November, 1872. A week or so previous to his death he was suffering from influenza, the result of a cold, and was then treated therefor by his physician. He began to get better, when, on Friday night before his death, he had an attack of cholera morbus, accompanied with convulsions, which seemed to completely shatter his nervous system and left him in a wholly nervous state. On Monday following he was again better, proposed to go to his business, and asked his physician, on account of restlessness, to give him some opiate for a quiet night's sleep. The physician ordered a preparation of opium and directed him to take twenty drops of it before going to bed. He was at this time taking chloral, under the same medical advice, and the opium was directed to be taken in addition to a prescribed dose of chloral. That night the insured took the prescribed dose of chloral, and, as may be inferred from the facts shown, a dose of opium also. There is no direct evidence as to the quantity of opium he took, but I shall treat the case as if the evidence respecting the symptoms that followed and the actions of the insured was sufficient to warrant a jury in finding that, through inadvertence, the insured took more opium than he intended to take, and such a quantity that his death was caused thereby. It is by no means clear that such finding would be warranted by the evidence given, and it is certain that no conclusion more favorable to the plaintiff can be drawn from the proofs. I am, therefore, to determine whether, as matter of law, such a death is within the scope of the policy sued on. Upon this question, my opinion is adverse to the plaintiff. As I view the evidence, the death was caused by "medical treatment for disease," and, if so, it was excepted by the terms of the policy.

The contention in behalf of the plaintiff is, that the opium was not administered by the hand of a physician, and, moreover, was not the dose directed by the physician to be taken, but was a dose taken by the insured upon his own judgment, and that these facts take the case out of the exception in the policy. But, it must be conceded, that the opium which caused the death was taken by the insured with the object of allaying the nervous excitement from which he was suffering. Certainly, then, this was disease. The advice of a physician had been taken as to its cure. It is equally certain that there was a treatment of this disease, for, the remedy prescribed by the physician was taken, although in excessive quantity, and the opium taken was so taken because the physician had prescribed it to remedy the disease. The opium was taken with no other object than to effect the result which the physician had advised should be attained by using opium. Under these circumstances, the fact that the patient deviated from the direction given by the physician in the matter of amount, and, upon his own judgment, took a larger dose than had been directed, does not change the character of the act. The object of the insured in taking the opium he did was to cure or else to kill. The facts repel the idea of an intention to kill and prove the intention to cure. Death caused by such an act, done with such an intent, is, in my opinion, a death caused wholly or in part by medical treatment for disease and, therefore, is not covered by the policy. I am also of the opinion that the facts do not disclose a case of bodily injury, effected through "external, violent and accidental means," occasioning death, within the meaning of the policy. I do not consider that violence can fairly be said to be an ingredient in the act of taking a dose of medicine, although the medicine be destructive in its action, and death the result.

These considerations compel to a denial of the motion for judgment in favor of the plaintiff, and a direction that judgment for the defendants be entered.

Case No. 1,139.

BAYLEY v. DUVALL.

[1 Cranch, C. C. 283.][1]

Circuit Court, District of Columbia. Dec. Term, 1805.

CONDITIONAL SALE—PARTIAL PAYMENT—FORFEITURE.

If money paid in advance is to be forfeited in case the residue be not paid by a certain day, the party who is to pay must tender or use his best endeavor to tender the balance due on or before the day limited.

[At law. Action for] money had and received, to recover one hundred and eighty dollars paid in advance for the purchase of the horse Yorick. The plaintiff paid the defendant one hundred and eighty dollars, in advance, for the horse, which was to be delivered to the plaintiff at a future day, on payment of the balance, and if the balance should not be paid on or before that future day, the advance-money should be forfeited. The defendant's prayer in effect was that the plaintiff must prove an actual tender of the balance, or that he attended at the defendant's house on the last day ready to pay, and that the defendant was not at home, &c.

THE COURT was of opinion, that if it was understood by the parties that the money was to be paid and the horse delivered to the plaintiff at the defendant's house, it was incumbent on the plaintiff to prove a tender within the time, or that he attended at the defendant's house on the last day ready to pay, and that the defendant was not there. If no place was understood between the parties, the plaintiff should have used reasonable diligence and endeavors to find the defendant and tender him the money, on or before the last day.

BAYLEY, (LINGAN v.) See Case No. 8,370.

BAYLEY, (WATSON v.) See Case No. 17,276.

Case No. 1,140.

BAYLISS et al. v. LAFAYETTE, M. & B. RY. CO. et al.

[8 Biss. 193;[2] 10 Chi. Leg. News, 213.]

Circuit Court, D. Indiana. March Term, 1878.

CORPORATIONS—FRAUD OF DIRECTORS—RIGHT OF STOCKHOLDERS TO BE MADE PARTIES TO SUIT.

1. Where any fraud has been perpetrated by the directors of a company, by which the property or interest of the stockholders is affected, the stockholders have a right to come in as parties to a suit against the company and ask that their property shall be relieved from the effect of such fraud.

2. Whether they would have this right where it appears that there would be no surplus remaining after liquidating all the just claims against the property, quaere?

[Cited in Lafayette Co. v. Neely, 21 Fed. 741.]

[In equity. Bill by Abram B. Bayliss and others against the Lafayette, Muncie & Bloomington Railway Company and others. For further proceedings in this litigation, see Bayliss v. Lafayette, M. & B. Ry. Co., Case No. 1,141.]

H. Crawford and McDonald & Butler, for complainants.

Templer & Gregory and Harrison, Hines & Miller, for defendants.

DRUMMOND, Circuit Judge. This is an application made by certain stockholders of the road to be let in as defendants in a bill filed to foreclose the mortgage on the eastern division of the road. The application is based upon alleged frauds perpetrated by certain directors of the road in connection with the contractors who built the eastern division. It seems that in consequence, as is alleged, of an understanding between Mr. Eells, the contractor, and certain parties, directors of the road, a proposition was made by him to construct the road, which was accepted by the company. He was to purchase and lay the iron and furnish the rolling stock, and construct depots, round houses, etc.

The company was to grade the road, build the bridges and culverts, and get the right of way, etc. It is claimed that in consequence of this arrangement the contract was made with Eells, and it is also apparent that the consideration to be given to Eells for the construction of the road—that is, all the part of it which he was to construct—was greatly in excess of the value of the work to be done by him. It is also alleged that the parties who were directors, and had made a contract for the construction of the road, were to participate in the profits—in other words, they, as directors, made a contract in which they had a pecuniary interest, and, as is alleged, in fraud of the company. There is, therefore, a sufficient allegation that the parties who made this contract were directors, that they had a pecuniary interest therein, that some of the contracts were secret, and that they were in fraud of the company and of the stockholders.

I think, therefore, on this ground, that there is ample reason given for the interference of the stockholders, and for the application which they make to become defendants, so that they may have the right to prove, if they can, the allegations they have set forth.

It is, besides, alleged that $1,600,000 of stock and $1,600,000 of the first mortgage bonds were given to Eells, and that there was an arrangement made by which the bonds were to be sold at a certain price. It is also alleged that, in consequence of the agreement and understanding between Eells and those who were directors and parties to

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

some of the contracts, when Eells proposed to the company that he should be released from his contract, they agreed to it, though he did not comply with his contract, and did release him from his contract, in fraud of the rights of the company. Taking all these various allegations together, I think the charge of fraud and conspiracy is sufficiently stated, or at least enough to show that, if true, a court of equity would not tolerate a contract such as is set forth in this case, made by the directors with themselves, in which they had a pecuniary interest. The court will make an order allowing these parties to come in and file an answer as defendants to the bill on the foreclosure of the mortgage upon their giving bond to secure the payment of the costs.

The only difficulty about the case consists in this: That whatever might be the result of the proposed litigation on the part of the stockholders who shall file an answer, and say that it is for the benefit of all the stockholders who will join them, that, in any event, whatever has been expended upon this road would have to be paid. This division of the road is about eighty-four miles long, and it may be questionable whether or not the amount that has been actually expended, and for which, of course, there would be a valid claim against the road on the part of the bondholders, if we consider the value of roads generally in this part of the state and the northwest, would not absorb it all, and whether, therefore, there would be anything left for these stockholders, and whether it is an application made to defend against a mortgage simply because in certain aspects of the case their pecuniary interests would be jeopparded.

This question was not argued before the court, and there is nothing said in the proposed answer as to the value of the stock after all the just claims are paid. The answer admits that some of the bonds are valid and should be paid, and it admits further that there has been about eight or nine hundred thousand dollars expended upon the road. Now, whether or not there would be anything in any event coming to the stockholders is a matter of very grave doubt; and, I think, before this litigation proceeds further, that issue had, perhaps, better be distinctly made, so that the court shall be informed whether or not there would be a pecuniary interest for any of the stockholders remaining after liquidating all the just claims against the property. If there is not, it would give rise to this question: Whether a court of equity would allow the stockholders to come in and be made defendants for the purpose of making an example of these directors and teaching a wholesome moral lesson as to transactions of this kind. I do not say absolutely that it may not be the duty of a chancellor to allow it; that is, set aside all fraudulent acts of this kind, even though the stockholders may not have any residuary interest in the property after the payment of claims against it, but it is doubtful whether or not a court of equity ought to permit the great labor, expense and litigation which must follow, and which will have no pecuniary results in favor of the parties who are applying to the court, even if they succeed in all they have undertaken to do, namely: to prove the fraud against the directors of this company and the contractor. Therefore, I have thought that I would submit this question to the parties in this case and let them inform the court distinctly whether or not they desire to proceed in that view of the case, and wish to be made defendants and defend against the mortgage, involving, of course, as it would, all the costs, counsel fees, and labor which may be connected with such litigation.

I think the authorities are very clear that where any fraud has been perpetrated by the directors, by which the property or interest of the stockholders is affected, the stockholders can come in as parties and ask that their property shall be relieved from the effect of such fraud; but in all cases which have been decided in the supreme court, and I think by other courts upon this subject, it is assumed that the stockholders will have an interest or property remaining after it is relieved from the effect of the fraud of the directors or the officers of the company.

Case No. 1,141.

BAYLISS et al. v. LAFAYETTE, M. & B. RY. CO. et al.

[9 Biss. 90;[1] 8 Reporter, 579; 11 Chi. Leg. News, 391; 25 Int. Rev. Rec. 280; 1 Month. Jur. 123; 4 Cin. Law Bul. 624.]

Circuit Court, D. Indiana. Aug. Term, 1879.

CORPORATIONS—COUNSEL TO RECEIVER—COMPENSATION OF—SURETIES ON APPEAL BOND.

1. A decree appointing a receiver for a railroad and giving priority to claims for "labor in operation of the road" will be held to include proper compensation for counsel to the receiver for services necessary to the successful management of the road.

2. Sureties on appeal bond will be protected by the court when they have acted in good faith.

[In equity. Bill by Abram B. Bayliss and others against the Layfayette, Muncie & Bloomington Railway Company and others. For prior proceedings in this litigation, see Case No. 1,140.]

Abram B. Bayliss filed a bill to foreclose, on the western division of the railroad, a mortgage of which he was the trustee. Afterwards Joseph Colwell filed a cross-bill to foreclose a mortgage of the eastern division of the railroad, of which he was trustee.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

The district judge appointed a receiver of the whole road, who operated it for a considerable time under the direction of the court. A decree of foreclosure was entered upon the original and cross-bill, and the road was sold, and the proceeds of the sale were paid into court; and thereupon various parties who had claims against the road applied to the court for their payment, out of the fund arising from the sale. The company was insolvent, and the road was sold for much less than the amount due on the mortgages. The various claims are referred to in the opinion of the court.

H. Crawford and McDonald & Butler, for claimants.

Templer & Gregory and Harrison, Hines & Miller, for defendants.

DRUMMOND, Circuit Judge. When the bill was filed asking for a receiver, the appointment was made by the court, subject to some conditions, one of which was that he should pay certain claims against the railroad. We have not the precise form of the order, but as I understand, it was substantially this: That he was to pay all claims existing on the pay-roll, for services rendered, and for labor and supplies subsequent to the first day of January, 1877. That being the condition upon which the receiver was placed in possession of the property, and the policy marked out by the court as a guide to all parties in interest, and it having remained as the order of the court without change, I must assume that it was, and is, still binding upon all parties. Therefore, I shall reject all claims that have been filed which go back of the first day of January, 1877, and hold that they cannot be paid, save upon a contingency which possibly may be found hereafter to occur, namely, the existence of funds in the hands of the receiver, arising from the operation of the road, after the payment of all claims allowed by the order appointing the receiver. If there shall be any surplus money in the hands of the receiver, after providing for all the claims allowed under this order, then it may be that the court would permit some of these claims to be paid. If we were to allow these claims, it would open a door to the presentation of a flood of claims as just as any now presented to the court. Take the claim of "the Bee Line" for ties. It is undoubtedly an equitable claim against the railroad, and ought to be paid. the only question being whether it should be paid out of funds belonging to the bondholders. I think, under the circumstances, it ought not to be—certainly not unless there should remain a surplus arising out of the income of the road, after providing for all the claims payable under the order of the court. So that all these claims will be rejected, as matters stand at present.

The claims for services rendered by counsel, are, perhaps, the most embarrassing among those presented for the consideration of the court, and involve questions of the greatest difficulty. I do not think it is possible for me to lay down any absolute rule upon the subject. I assume the order made by the court to be as stated, and proceed to dispose of the questions discussed.

It is objected that services rendered by counsel do not come within the term "labor." These services were not upon the pay-rolls, and must come within the meaning of the term "labor"—labor done subsequent to the 1st of January, 1877. It is, as I have said, rather difficult to lay down any absolute rule upon this subject, and I think I can only adopt this principle: that whatever may be said fairly to be work done in the operation of the road is comprehended by the word, "labor." It is not necessary that it should be manual, in the sense of an act done by a person who works with the spade, the pick, or the hoe. It is sufficient if it be labor, and this would fairly include all services performed by any employe of the company, for instance, in making out and keeping accounts, and in doing anything necessary in the operation of the road; and in that sense I think that the services rendered by counsel, not in all cases, but in many cases, may be said to come within the meaning of the term "labor."

They are partly physical and partly mental. Take the case of a bill being prepared for a railroad company. The drawing up of the bill consists as well of manual as of intellectual labor. It is a work of the hand as well as of the head, and, therefore, is of the same class of labor, in one sense, as that of the ordinary laborer who uses his hands with the hoe, or the axe. Of course there is something higher and more important than this last, but it constitutes one of the elements of the service. I think it may be said, therefore, to come within the term "labor," and if it shall be necessary for the operation of the road, then, I think, like a large class of services performed, as by an ordinary employe or clerk, it ought to be considered labor in running the road, and so entitled to compensation.

Now, to illustrate and apply it to one matter in hand, namely: the service that was performed by counsel in preventing the seizure of a portion of the road by force, as it was said. Undoubtedly that may be fairly considered as work performed in the operation of the road. It was to keep possession of the road, and to allow the company to operate it as much as any service or work done by brakemen, or engineers. If, for example, the company had not the power to operate the road, then it had ceased to perform the duty which devolved upon it under the law. I am not speaking of the various incidental and outside questions that undoubtedly arose in the case; but only of the matter as a fact which existed, and which the court must

consider as bearing on the services so performed by the counsel.

So I think that species of labor is fairly within the terms of the order of the court, but in saying this, I am not prepared to admit that all the services performed by counsel were necessarily within the meaning of such language. It may be that some of the services performed were not, and that is one of the reasons for requiring the counsel to specify the character of the service in order that I may distinctly understand, and make the application of this principle to the various services performed by them.

Take the case, for example, of the services performed by counsel in obtaining the right of way on land for depots and other purposes. That may also fairly come within this class of service. It is said that it is part of the construction of the road. That is true in one sense, but it may also be a part of the operation of the road. After a road has its roadbed made, its iron down, and has run cars over it, it is not a finished road. There are always more or less things to be done besides, in order to make the road complete, and to enable the company to operate it successfully; and it often is necessary to obtain additional facilities for the purpose, and additional ground; and where it comes within that description, I think it is also fairly within the meaning of the term, "labor in the operation of the road," and for which the counsel is entitled to compensation. And so with any similar service performed by counsel.

There may be, and perhaps there are, in this case, services performed which do not necessarily come within the description I have given, and where I would not be willing to allow the compensation to be paid as coming within the term, "labor in the operation of the road."

It may be said this is a nice distinction, but one, I think, it is indispensable we should make in a case of this kind, and we must, for the purpose of doing equity, give to some extent a liberal construction to the language the court used on this occasion; and, it seems to me, under this view of the case, the labor performed by counsel may be just as important, indeed more important, than the labor performed by the ordinary laborer, or by the brakeman, engineer or fireman.

As to the claim of Mr. Heath for the payment of any amount due which he may have paid on an appeal bond, executed as security; whenever he pays that amount, I shall direct the master to pay it to him. Whenever a party in legal proceedings has become security for a railroad, in good faith, I think the court ought to protect him.

This disposes of all the various questions presented to the court.

BAYLISS, (MANN v.) See Case No. 9,034.

Case No. 1,142.

BAYLISS v. POTTAWATTAMIE COUNTY.

[5 Dill. 549.][1]

Circuit Court, D. Iowa, 1878.

DEDICATION OF PUBLIC SQUARE—IOWA STATUTE—ESTOPPEL.

The public square in the city of Council Bluffs *held* to be effectually dedicated to the public by force of the platting and acknowledgment thereof, and acts in pais by the dedicator.

[In equity. Bill by Martha Bayliss, devisee of Samuel S. Bayliss, deceased, and administratrix of his estate, against the board of supervisors of Pottawattamie county, (the city of Council Bluffs, intervenor.) Bill dismissed.]

This suit involves the right of the plaintiff and the city of Council Bluffs (since the county sets up no claim in its own behalf or as the representative of the public) to what is called the "public square" in that city. The plaintiff is entitled to it as against the city, unless her husband, in his lifetime, made a valid dedication thereof to the public. On September 26th, 1853 (while the title to the forty acres afterwards laid off as Bayliss' addition to Council Bluffs was in the United States), Mr. Bayliss, the occupant, caused a plat to be made of that forty acres, subdividing it into fifteen blocks, with streets and alleys in the usual form, near the center of which is an open, unnumbered block, not subdivided into lots, four hundred feet square, surrounded by streets; on the middle of which block are the letters "P. S." Indorsed on the plat is the following certificate of the surveyor, and the following certificates of acknowledgments:

"I, A. D. Jones, city surveyor, hereby certify that all the streets, alleys, and public square lie as above represented on the above plat of Bayliss' addition to the city of Council Bluffs, and that the lots, streets, and alleys are described as follows: "All the lots in blocks eight, nine, and fifteen are fifty feet in width by one hundred and two feet in length. * * * The public square is four hundred feet square. * * * Surveyed and platted by A. D. Jones, April 13th, 1853. Given under my hand this 13th day of June, 1853. A. D. Jones, City Surveyor of Council Bluffs."

"State of Iowa, Pottawattamie County: Know all men by these presents, that I, Samuel S. Bayliss, proprietor of Bayliss' addition to Council Bluffs, do hereby declare and acknowledge the above plat and surveyor's certificate of the survey of said addition, as surveyed and platted by A. D. Jones, June 12th, 1853, to be correct; and I further hereby give, grant, and donate all the streets and alleys as represented on said plat to the public as highways, and for general use and

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[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

convenience. Given under my hand this 13th day of July, 1853. Samuel S. Bayliss."

"State of Iowa, Pottawattamie County: Before me, A. D. Jones, notary public in and for said county, appeared the above named Samuel S. Bayliss, personally known to me to be the identical person who subscribed the above conveyance, and as proprietor of said addition, and as grantor of said deed, and acknowledged the signing of said instrument to be his voluntary act and deed. Given under my hand and official seal, the 14th day of July, 1853. (Seal.) A. D. Jones, Notary Public."

"State of Iowa, Pottawattamie County: I, Frank Street, judge of said county, do hereby certify that on this day personally appeared before me Samuel S. Bayliss, and acknowledged that the description of the land as shown by the map or plat hereto attached is with his free consent, and in accordance with his desire. Given under my hand and the seal of said county, this 26th day of September, A. D. 1853. (Seal.) Frank Street, County Judge."

"To the Recorder of Pottawattamie County, Iowa: Sir:—Having, upon examination, become fully satisfied all the requirements of the law have been complied with in regard to the survey and plat of a town as shown by the map herewith attached, you are therefore authorized to record the same and the annexed certificate, in accordance with the law in such cases. Frank Street, County Judge. September 26th, 1853."

This plat, with all of the said certificates, was duly recorded September 26th, 1853.

Another plat was also made and recorded June 1st, 1854, on which the streets and the square in question were represented in the same manner. On this plat the following was indorsed:

"Know all men by these presents, that all the streets, and public square, and alleys, and lots, are of width and length as represented on the within plat by figures; all lots are one hundred and ninety-two feet in length by fifty feet in width, except where the length and width are noted on the respective lines. The lots in blocks eight, nine, and fifteen are one hundred and two feet in length. The variation of the needle, eleven degrees eleven minutes; course of lines north and south, eleven degrees; the upper regular lines are at right angles; and the irregular lines as represented on the plat as surveyed by A. D. Jones. In witness whereof, I have hereunto set my hand this —— day of May, 1854. Know all men by these presents, that I donate all the streets and alleys to the public for common use and benefit as highways. In testimony whereof, we have hereunto set our hands this —— day of May, 1854. (Signed) Samuel S. Bayliss."

"State of Iowa, Pottawattamie County: On the 1st day of June, 1854, personally appeared before me, the undersigned, a notary public within and for the state and county aforesaid, Samuel S. Bayliss, who is personally known to me to be the identical person who executed the above instrument or donation, and acknowledged the same to be his voluntary act and deed for the purposes therein expressed. Witness my hand and notarial seal, this 1st day of June, A. D. 1854. (Seal.) Jefferson P. Casady, Notary Public."

Under the act of congress entitled "An act for the benefit of citizens and occupants of Council Bluffs, in Iowa," approved April 6th, 1854, [10 Stat. 273,] Franklin Street, as county judge, entered this forty acres in trust. See chapter 88, Laws Iowa 1853, entitled "An act regulating the disposal of lands purchased in trust for town sites," approved January 22d, 1853. In disposing of this land, the above plats of Bayliss were recognized, and the square in question treated as public, and the occupants of lots were charged for their proportion of the purchase money paid to the United States on that basis. Bayliss was admitted to be the cestui que trust, and deeds were made to him and to his grantees, from time to time, by the county judge, for the lots in the addition. Bayliss sold and conveyed lots to purchasers according to the recorded plats.

Mr. Ballard testifies, in substance: "In the fall of 1853 or spring of 1854, Bayliss wanted to sell me lots in his addition on the public square, and then known as the public square. He urged them as desirable for residence lots because of their fronting on the public square. He claimed to own lots he was showing me, and spoke of their being on the public square. I have no recollection of his claiming any individual interests in the square itself." Mr. Rice testifies, in substance: "I knew Samuel S. Bayliss from 1853 to the date of his death. Am acquainted with the square in controversy, and have been since Bayliss' addition was laid out, in the fall of 1853. Bayliss showed me his plat on two occasions and took me on the ground several times, with a view to purchase a church lot on east side of the square; and afterwards he took me on the south and west sides of the square. On these occasions we conversed in relation to the square and the lots contiguous to it. He showed me lot four in block nine, with a view to my purchasing this for a church site. He represented it as fronting on the public square, and more desirable on that account. He pointed out the block bounded by Pearl, Willow, Court, and Center streets as the public square." Mr. Lewis testifies that, in 1853, Bayliss showed him the plat of his addition with the square in question shown thereon; that witness purchased of Bayliss lots on the square, Bayliss pointing out the square on the plat and speaking of the advantages of lots near the square, and of their value being greater than elsewhere, and he charged more for that reason for lots on the square. Cumulative evidence to the same general ef-

fect was also given by Mr. McBride, Mr. Dennis, Mr. Officer, Mr. John T. Baldwin, and Mr. W. H. M. Pusey.

The records of the city council show that, in 1857, the city improved the streets around the square, and in the same year the city council adopted a resolution providing for sealed proposals to fence the public square, in Bayliss' addition, provided the citizens around the square shall furnish the money and take city orders at par for the same; and many subsequent resolutions for the improvement of the square and regulating its uses, both before and after the present suit was brought, which was on July 13th, 1866.

In March, 1853, Bayliss entered into an agreement with the county judge of the county, by which he "agreed to deed to the county the ground for a public square in and for said county, as follows" (here describing the ground now in controversy). "Also another piece of ground as a site for the courthouse for said county" (here describing two lots fronting on the square). And also to make a certain donation to aid in the erection of the court-house. The county judge thereupon (March 11th, 1853) ordered as follows: "Therefore, ordered, that if the said materials shall be furnished and said lots donated according to the tenor and intent of the aforesaid bonds and instruments of agreement, the said square shall be, in that case, hereby located and established as the public square for said county, and the last described lot, in that case, be established as the site for the court-house in and for said county. T. Burdick, County Judge."

In 1866, the county definitely determined to build the court-house in another part of the city, and soon afterwards this suit was brought. But meanwhile, July 12th, 1855, on Bayliss' demand, the county judge reconveyed the court-house lots on the square to Bayliss, with this provision: "To hold the same in trust for the county of Pottawattamie until the same shall be needed to build a court-house on, or until a court-house shall be built upon the public square adjoining, and if the court-house should neither be built on said public square nor lot, then the lot becomes, absolutely, the property of the said Bayliss; and I, as such trustee, warrant the title against the claims of all persons whomsoever. Signed, July 12th, 1855. Franklin Street, County Judge."

Judge Street testified that "Bayliss never, at any time, demanded of me a conveyance of the public square." There are many minor facts in evidence, but the foregoing sufficiently show the essential features of the case.

Clinton, Hart, & Brewer, for the complainant.

L. W. Ross, solicitor for intervenor, and of counsel for the defendants.

DILLON, Circuit Judge. If the county were the only adverse claimant to the plaintiff, and were insisting that this square had been effectually dedicated to it, it may, for the purposes of this case, be conceded that the plaintiff would be entitled to the relief sought. But after the transaction with the county judge, in 1853, Mr. Bayliss made two separate plats of the property, on which this square was indicated as open and unnumbered, with the initials "P. S." therein, and containing words referring to it as a public square. It would seem, from a reference to his acknowledgment of July 14th, 1853, and to the latter part of the grant to the public of May, 1854, acknowledged June 1st, 1854, that Mr. Bayliss omitted all reference to the square. But in the surveyor's certificate indorsed on this plat, the surveyor twice refers to the square in question as a public square, and Mr. Bayliss "declares and acknowledges the above plat and surveyor's certificate to be correct;" and on September 26th, 1853, he acknowledged the plat in conformity with the statute on that subject. In the writing indorsed on the plat of 1854, the ground in question is referred to as a public square. This makes an effectual dedication under the statute—certainly when it is accepted by the city. The proofs sufficiently show such acceptance by appropriations of money for its improvement and by the exercise of legislative and municipal power over it as a public square. If Mr. Bayliss intended to exclude this square from the ground dedicated to the public, he failed to accomplish his intention.

A purchaser consulting the recorded plats, with the acknowledgments and certificates, would be justified in concluding (as several intelligent witnesses state they did in fact) that the square was dedicated to the public.

Whether we look at the recorded plats, with their certificates and acknowledgments, or to the extrinsic evidence as to Mr. Bayliss' repeated statements to persons proposing to purchase lots, that this was a public square, and that not only the immediate purchasers, but the public, have acted upon these plats and these statements, it is clear that Mr. Bayliss and his representatives are brought within the principle of equitable estoppel which so often applies to this class of cases. Cincinnati v. White, 6 Pet. [31 U. S.] 431; Dill. Mun. Corp. §§ 493, 494. It is claimed, however, that, Mr. Bayliss being dead, his statements and declarations are not competent evidence against the plaintiff. Code Iowa 1873, § 3639. I do not stop to examine or determine the point, for, if well taken, it would not exclude evidence of acts of his testified to by many witnesses, such as that he charged and received more for lots fronting on the square (simply for the reason that it was public) than for lots elsewhere, which, in every other respect, were worth as much, and the other significant fact, that, although he demanded and received a deed for the court-house lots, he made no such demand in respect of the square.

The city was incorporated before either of

the plats was recorded. The statute declares that "the acknowledgment and recording of such plat is equivalent to a deed in fee-simple of such portion of the land as is therein set apart for public use, or is dedicated to charitable, religious, or educational purposes." The city is the representative of the public rights in this square.

A decree will be entered dismissing the plaintiff's bill against the county, and also against the city, which, by intervention, also became a party to the suit. Decree accordingly.

Case No. 1,143.

BAYLOR et al. v. NEFF et al.

[3 McLean, 302.][1]

Circuit Court, D. Ohio. Dec. Term, 1843.

EJECTMENT—PRACTICE—DEATH OF LESSOR.

1. A demise in the name of a dead man will be stricken out on motion. And so, if the lessor of the plaintiff be dead, at the commencement of the suit.

2. The death of the lessor does not abate the suit. The title is supposed to be in the plaintiff.

3. A title acquired after the date of the demise, cannot sustain the action.

Mr. Douglass, for lessors of plaintiff.

Stansbury & Olds, for defendants.

OPINION OF THE COURT. This is a motion to strike out the demise in the declaration laid in the name of David Meade, Jun., of Kentucky, on the ground that the said Meade was dead at the time the suit was commenced, and when the declaration was filed. Also upon the ground that there was no subsisting title to the premises in controversy in Walker Baylor, John W. Baylor, Elijah Pritchard and David Meade, Jun., at the time of the commencement of the suit, and at the time of the service of the declaration in ejectment. A motion was also made to strike out another demise laid in the declaration, on the ground that the lessor of the plaintiff was dead at the date of the lease.

A demise laid in the name of a dead person is unsustainable. Although the lease is now a fiction, yet the party alleged to have executed it, must be in life and capable of making such a contract. The court order the demise referred to, to be stricken out.

The death of the lessor of the plaintiff will not abate the action, nor can it be pleaded puis darrein continuance; because the right is supposed to be in the lessee, the plaintiff; although he cannot obtain possession of the land. Till. Eject. 320. But, it seems that a plaintiff in ejectment cannot recover on a demise from a person who is dead, at the time of action brought. See v. Greenlee, 6 Munf. 303.

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

The demise laid in the name of Baylor and others must also be stricken out. A title acquired subsequently to the demise laid cannot sustain the action.

Case No. 1,144.

In re BAYLY et al.

[19 N. B. R. 73; 26 Pittsb. Leg. J. 172.]

(Circuit Court, D. Louisiana. Feb. Term, 1879.)

BANKRUPTCY—COMPOSITION—DEFAULT—RIGHTS OF CREDITORS.

[1. Where, in bankruptcy proceedings, a composition is arranged and confirmed, the case is not thereby taken out of the jurisdiction of the court; and hence, where the debtor fails to carry out the terms of the composition, a creditor cannot thereupon claim the right to proceed against him for the collection of the whole debt, for the bankruptcy proceedings are still pending, and his remedy is to be sought therein.]

[Cited in Re Tifft, Case No. 14,034; Re Michel, 6 Fed. 709.]

[2. A creditor obtained a judgment against his debtor pending voluntary bankruptcy proceedings, in which a composition was effected and confirmed by the court, and thereupon an injunction issued against the enforcement of the judgment. The debtor failed to pay either of the installments provided by the composition, and the creditor moved to dissolve the injunction against his judgment. *Held*, that the debtor's default did not entitle the creditor to enforce his judgment, and it was proper to make an order that the injunction should only be dissolved in case the debtor should fail to carry out the composition, or go on with the bankruptcy proceedings, within 30 days.]

[Distinguished in McGehee v. Hentz, Case No. 8,794.]

[Petition for review of a decision by the district court of the United States for the district of Louisiana.]

In bankruptcy. On petition of review of Paul Fourchey. The case was this: On March 2, 1876, Bayly & Pond, a commercial firm in the city of New Orleans, filed in the district court their voluntary petition in bankruptcy, in which they proposed and prayed for a composition with their creditors. Notwithstanding the filing of said petition, the petitioner in review, Paul Fourchey, on March 13, 1876, instituted a suit, in the fourth district court of the parish of Orleans, against said firm of Bayly & Pond, to recover the sum of one thousand two hundred and thirty-seven dollars due to him on the promissory note of said firm. Bayly & Pond, on March 27, 1876, pleaded to said action the certificate of protection of said United States district court, and on April 10, 1876, they filed an amended answer, in which they set out that the creditors had held, in the bankruptcy proceedings, a meeting and accepted a composition proposed by them, to wit: The payment of twenty-five cents on the dollar, one-half on the confirmation by the court of the composition proceedings, and the other half in sixty days thereafter. Notwithstanding their defences, the state court rendered judgment in favor of Fourchey, against Bayly &

Pond, for one thousand two hundred and thirty-seven dollars, and interest, and the judgment was signed April 15, 1876. The debt due to Fourchey, on which the judgment was based, was never proved against Bayly & Pond in the bankruptcy proceedings.

On April 12, 1876, the U. S. district court, on the application of Bayly & Pond, issued an injunction restraining Fourchey from enforcing the collection of his judgment by execution. Bayly & Pond failed to pay Fourchey the first instalment of the composition, and also failed to pay Fourchey and other creditors the second instalment when the same fell due. On January 4, 1877, Bayly & Pond being still in default in the payment of their composition, Fourchey filed a motion for the dissolution of the injunction above mentioned. On this motion the district court made an order in these words: "Ordered, that unless the bankrupts forthwith carry out the composition, or within thirty days proceed with their bankrupt proceedings the injunction herein granted be dissolved." The petitioner thereupon filed this petition of review, in which he asked a reversal of said order and a dissolution of said injunction, because, as he claimed, 1. He is entitled to enforce his judgment for the full amount recovered, the said Bayly & Pond having never been adjudicated bankrupts, and having failed to carry into effect the said composition; and, because, 2. The right of the creditor to enforce his claim is an absolute right when the debtor does not seek to set aside the composition or offer an excuse for failure to execute the composition, and when the creditors do not seek to set aside the composition or to enforce it.

T. J. Semmes, for petitioner.
J. H. Kennard, contra.

WOODS, Circuit Judge. It is clear that Fourchey was in the first instance properly enjoined from proceeding to enforce the collection of his judgment out of the property of the bankrupts. Bayly & Pond filed their petition in bankruptcy March 2, 1876, in which they prayed for the benefit of the act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867. [14 Stat. 517.] The suit of Fourchey was not begun until March 13, and judgment was not rendered in his favor until April 10. The property of the bankrupts was by force of the bankrupt act protected from any interference by their judgment or execution issued thereon. See sections 5, 106, Rev. St.

The only question, therefore, for solution is: What is the effect of the composition proceedings, and the failure of the bankrupts to pay the composition, on the rights of the petitioner? Clearly as long as the bankrupts were paying the instalments according to the terms of their composition, the judgment creditor could not enforce the collection of his debt against the property of the bankrupt, for the act of congress providing for composition declares that the provisions of a composition accepted by a resolution adopted at a meeting of the creditors "shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed." [Act of June 22, 1874.] 18 Stat. 183. And Fourchey's name, address, and the amount of the debts due him from the bankrupts, were shown in the list above mentioned.

Has the failure of Bayly & Pond to perform the composition according to its terms clothed Fourchey with the right to disregard the bankruptcy proceedings and sue for his whole debt? It seems to me that such a result does not follow the failure of the bankrupts to pay their composition. The bankruptcy proceedings are not determined and closed by the order of the court approving the resolution of the creditors accepting the composition. The case is still pending. Further steps in the case may be necessary. The law says: "The provisions of any composition made in pursuance of this section may be enforced by the court on motion made in a summary manner by any person interested and on reasonable notice, and any disobedience of the order of the court made on such motion shall be deemed a contempt of court." "If it should at any time appear to the court on notice, satisfactory evidence and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept or confirm such composition, or may set the same aside, and in either case the debtor shall be proceeded with as a bankrupt, in conformity with the provisions of law, and proceedings may be had accordingly, and the time during which such composition shall have been in force shall not in such case be computed in calculating periods of time prescribed by said act. 18 Stat. 184. It is clear from these provisions of the statute that when a composition is set aside by the court the proceedings in bankruptcy may be prosecuted without beginning de novo. No new petition is required. The case is taken up just where it was when interrupted by the composition. The bankruptcy suit is therefore pending all the time, and by its force protects the property of the debtor from seizure by any creditor who is bound by the composition resolution. If a composition fails and the court orders the case in bankruptcy to proceed, the court has it in its power to see that those creditors who have not received their pro rata shares, if any, shall be made equal to those who have, in the distribution of the assets of the bankrupt estate. To hold that a failure to pay accord-

ing to the composition resolution authorizes the creditors who are not paid to seize the property of the bankrupt, would be to render vain and futile the bankruptcy.

The petitioner in review has attempted to sustain his views by the citation of cases under the English composition act. Edwards v. Coombe, L. R. 7 C. P. 519; Newell v. Van Praagh, L. R. 9 C. P. 96; In re Hatton, 7 Ch. App. 723. It is to be observed that these cases arose under section 126, 32 & 33 Vict., (see Blum. Bankr. p. 405,) which provides that "the creditors of a debtor unable to pay his debts may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor. If it appears to the court in satisfactory evidence that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice, or undue delay to the creditors or to the debtor, the court may adjudge the debtor a bankrupt, and proceedings may be had accordingly." The difference between the English act and ours is evident at a glance. Under the English act the composition may take place without any proceedings in bankruptcy, and if the composition fails, the court may, but is not required to, adjudge the debtor a bankrupt. Under the act of congress there can be no composition unless a petition under the bankrupt act is first filed; and if the proceedings in bankruptcy are arrested by a composition, and the composition fails, the law declares that the bankruptcy shall proceed. I therefore think that the authorities cited are not pertinent to the American statute. These remarks also apply to the cases relied on by petitioner, cited from Massachusetts Reports. National Mount Wollaston Bank v. Porter, 122 Mass. 308; Pierce v. Gilkey, 124 Mass. 300. On the other hand, in a well-considered case, the court of appeals of Maryland has decided, basing its decision on the peculiar form of our statute, that where a resolution of composition provides that the instalments shall be secured by the notes of the debtor, a creditor who has proved his debt cannot sue for his original debt in a state court, although the debtor has made default in payment of one of the instalments. Deford v. Hewlett, 49 Md. 51. The remedy for failure to comply with the terms of the composition, it seems to me, is clearly pointed out by our statute. It does not permit the creditor to sue for and recover his original debt, but provides for an application to the court for the enforcement of the composition, or, in case the composition cannot be enforced, that the proceedings in bankruptcy shall be resumed.

It results from these views that Fourchey was properly enjoined by the district court, and that the court was right in refusing to dissolve the injunction. Petition of review dismissed at petitioner's costs.

Case No. 1,145.

BAYLY et al. v. LONDON & L. INS. CO.

[4 Ins. Law J. 503.]

Circuit Court, D. Louisiana. 1875.

INSURANCE—CONDITIONS OF POLICY—ACTION—INSTRUCTIONS—EVIDENCE.

[1. Though one of the conditions of a policy on a stock of goods prohibits the storing or vending of saltpetre, on the premises, it is no breach of the condition to keep on hand a small quantity of saltpetre for the sole purpose of curing meat kept in stock.]

[2. In an action on such a policy the defendant pleaded the breach of this condition by the insured, and the court charged the jury that there could be no recovery if they found that the condition was broken by the storing and selling of saltpetre "in any considerable quantity." *Held*, that the use of the term "considerable" was not objectionable, where the meaning conveyed by the instruction, as a whole, was that there must have been a substantial violation of the condition.]

[3. Furthermore there can be no ground of objection to the use of the term "considerable quantity," where there is evidence that there was on the premises a keg of saltpetre, for that is enough to make the term applicable.]

[4. Where an additional defense, in such action, is that the premises were set on fire by the assured for the purpose of defrauding the insurer, and the court correctly charges as to the measure of proof required to sustain this defense, there is no error in failing to go further, and charge that, this being a civil action, the arson charged need not be proved beyond a reasonable doubt, as it would have to be in criminal proceedings.]

[5. The court cannot grant a new trial, where the evidence is conflicting, merely because the conclusions drawn by the jury from the evidence are different from those at which the court might have arrived.]

[6. Where the jury have assessed the damages at a certain sum in a case properly submitted to them, it is not competent for the court to inquire how they reached the result, if it is warranted by the evidence, or to make their reasons grounds of objection for the purpose of a new trial.]

[At law. Action by G. M. Bayly and Pond against the London & Lancashire Insurance Company. On motion for new trial. Motion denied.]

R. Hunt, T. J. Semmes, R. L. Gibson, J. & E. Austin, for motion.

J. H. Kennard and T. L. Bayne, contra.

WOODS, Circuit Judge. This action was a suit on a policy of insurance to recover for loss declared sustained by plaintiffs on their stock of groceries, by fire, on the 29th of May, 1874. The amount claimed in the petition was $9,195.35, and the jury returned a verdict for $8,714.87.

1. The first ground upon which the motion is based is as follows: That under the express provisions of the policy the plaintiffs were prohibited from keeping in their store, and selling, saltpetre, in any quantities whatever, and the evidence established clearly and beyond doubt that plaintiffs did keep in their store, and sell, saltpetre, in direct violation of their contract. I do not know

that it is denied that the plaintiffs, under the terms of their policy, might keep in their store small quantities of saltpetre, not for sale, but for the purpose of use in preserving from taint meats and other articles which formed a part of their stock. The policy forbids the storing or vending of any of the articles specified as hazardous, of which saltpetre was one. Keeping saltpetre for the purpose just indicated would not be a storing, within the meaning of the policy. Dobson v. Sotheby, 22 E. C. L. 481; O'Niel v. Buffalo Fire Ins. Co., 3 Comst. [3 N. Y.] 127. The plaintiffs do not deny that a part of a keg of saltpetre, which was used for the purpose above stated, was upon their premises at the time of the fire. But does the proof establish clearly and beyond doubt that the plaintiffs kept saltpetre for sale?

The proof upon this point is confined to the evidence of two witnesses, Van Benthuysen and Pond, the latter being one of the plaintiffs. Van Benthuysen testifies that, as to the charge that the plaintiffs kept saltpetre in store upon their premises, there was nothing in it. Pond, in an ex parte statement under oath, taken by an agent of the North British & Mercantile Insurance Company, in answer to the question put to him by the agent, "Did you keep in store and for sale coal oil, saltpetre, powder, matches, and other goods of like character?" answered: "We kept saltpetre in small quantities; no powder; matches in small lots, and coal oil in cases." When on the stand as a witness in the case, Pond testified that they had in their store part of a keg of saltpetre, for use in preserving meats, but not for sale. This was all the evidence upon this point. It cannot be denied that there was evidence on both sides the question, whether saltpetre was kept in store for sale on the premises. When this is the case it is the province of the jury to decide upon the weight and credibility of the evidence, and the court, even should it disagree with the jury on these points, would not set aside the verdict of the jury for that reason. To do so would be to invade the premises of the jury. Ashley v. Ashley, 2 Strange, 1142; Swain v. Hall, 3 Wils. 45; Lewis v. Peake, 7 Taunt. 153; Hartwright v. Badham, 11 Price, 383; Carstairs v. Stein, 4 Maule & S. 192; Woodward v. Paine, 15 Johns. 493. The jury are the exclusive judges of the weight of evidence. Ewing v. Burnet, 11 Pet. [36 U. S.] 41; U. S. v. Laub, 12 Pet. [37 U. S.] 1; Richardson v. Boston, 19 How. [60 U. S.] 263; Hyde v. Stone, 20 How. [61 U. S.] 170. As the question was first submitted to the jury, and they have passed upon it, and there was evidence to sustain their finding, the issue is not open for the consideration of the court. I therefore am of the opinion that the first ground for the motion is not well taken.

2. But it is insisted by defendants that there was an error in the charge of the court, to their prejudice upon defense set up, that the plaintiffs stored and sold saltpetre on the premises, contrary to the terms of the policy.

The charge of the court upon this point was as follows: "It is claimed by defendants that the plaintiffs kept and sold upon the premises, where the insured goods were stored, saltpetre, and that this by the very terms of the policy avoided the contract of insurance. On this point the policy provides as follows: 'And it is decreed and declared to be the true intent and meaning of the parties hereto, that in case the above mentioned property, or premises, or any part thereof, shall at any time after the making and during the continuance of this insurance be appropriated, applied or used to or for the purpose of storing or vending therein any of the articles, goods or merchandise in the conditions aforesaid denominated hazardous, extra hazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for or hereafter agreed to by this company in writing, and added to or indorsed upon this policy, then and from thenceforth so long as the same shall be appropriated, applied or used, these presents shall cease, and be of no force or effect.' By a reference to condition 3, indorsed upon the policy, the article of saltpetre is found to be classed as extra hazardous. Upon this branch of the case I instruct you that insurance companies are not compelled by their employment to take risks except upon their own terms. They have the right to impose such conditions, not contrary to good morals, or public policy, as they may choose, and these conditions are binding upon the parties assenting to them. When it (an insurance company) says it will not insure premises containing gunpowder or saltpetre, and inserts a condition in its policy that if gunpowder or saltpetre is stored or sold on the premises, the policy shall be void, that provision is binding on the assured; and if he stores and sells upon the premises these articles, that fact avoids the policy. And in case of loss by fire, it makes no difference that the loss was not occasioned by the prohibited articles. The assured is bound by the terms of the contract, and the insurer has a right to stand upon the provisions of his contract. So if you find, from an inspection of the policy, that it was to be void and of no effect if saltpetre was stored and sold on the premises, and saltpetre was stored and sold on the premises in any considerable quantities without the assent of the assured, these facts avoid the policy, and there can be no recovery."

The criticism made by the defendants on this charge is confined to the use of the word "considerable," in the last clause. But taking the entire charge upon this subject into consideration, it seems to me there is no error in it, and the word objected to could not mislead the jury. The meaning intended to be conveyed, and it seems to me

actually conveyed, is that there must be a substantial violation of the terms of the policy. To say that the storing of saltpetre in any quantity, however minute, would avoid the policy, would not be true. The storing or selling of half a pound of saltpetre would not avoid the policy; and it would not be a fair construction of the policy to so hold. The word "considerable," was therefore used as a qualifying word. The proposition submitted to the jury was that the storing or selling of saltpetre on the premises would avoid the policy; but there must be such a quantity as in the fair construction of the policy and intent of the parties would fall within its prohibition and amount to a substantial violation of the conditions of the policy. But a charge cannot be fairly considered or construed disconnected from the evidence to which it applies.

I have already referred to the evidence in this branch of the case, but must do so again. Van Benthuysen testified that no saltpetre was stored on the premises. Pond testified on the stand that part of a keg was kept on the premises for use in preserving meats. This, as we have already seen, was not a "storing," within the meaning of the policy. Now, if this had been the only evidence in the case upon this point, the defendants would have had no ground of complaint, for this charge would have been abstract, there being no testimony to show a storing or selling, to which the charge could apply. The plaintiffs might have complained, but the defendants could not. The only other evidence on this point in the case was the affidavit of Pond, already referred to, taken by the insurance agent and offered as an admission of one of the plaintiffs. Here are the questions and answers: "Q.—Did you keep in store and for sale coal oil, saltpetre, powder, matches, and other goods of like character? A.—We kept saltpetre in small quantities; no powder; matches in small lots, and coal oil in cans. Q.—Give an estimate of the quantities of these goods on hand at any one time. A.—We had at the time of the fire only five cases of matches, one keg of saltpetre and five or ten cases of coal oil."

Now, what is the effect of this evidence? Unquestionably, that matches, saltpetre and coal oil were kept on hand and for sale in substantial and considerable quantities. The plaintiffs are shown to be wholesale dealers, and that at the time of the fire they had a keg of saltpetre on hand for sale. Can any man say that it was not a considerable quantity? Now, what was the charge of the court as applied to this evidence? It was that if the plaintiffs stored or sold saltpetre in any considerable quantities, they violated the condition of their policy, and could not recover. What is there here of which defendants could complain? Where was the error of this charge, as applied to this evidence, and what was there in it to mislead the jury? In my judgment, there is no good ground of complaint against this part of the charge, either considered as an abstract proposition or as applied to the facts of the case.

3. It is stated as a ground for a new trial that one of the defenses being that the premises where the insured goods were stored was set fire to by the plaintiffs for the purpose of defrauding the defendants, the court did not charge the jury that, this being a civil action, the rule of evidence in criminal cases did not apply, and that it was not necessary to sustain the defence to establish beyond a reasonable doubt the fact that plaintiffs had fired their own premises.

What the court did say to the jury was as follows: "The defendant alleges that the fire in the premises, by which the plaintiffs allege their goods and stock in trade were lost and damaged, was caused willfully and maliciously by the plaintiffs, or others with their knowledge or connivance, and with intention of defrauding the defendant. It needs no judge to tell you that if these facts are established there ought not to be and cannot be any recovery on their policy. The burden of proof is on defendant to establish this branch of defense. The presumption of law is against the commission by plaintiffs of so great a crime, and to make out this defense the proof offered by defendants must be clear and satisfactory to your minds. You must be convinced from the evidence either that plaintiffs set fire to the premises, or that it was done by their procurement or connivance. Even if the evidence should convince you that the fire was set by the employees of the plaintiffs, that fact would not make good this branch of the defense, unless you were also clearly convinced that the fire was set by the direction, connivance or consent of the plaintiffs. The purpose of fire insurance is to indemnify the insured against incendiary as well as accidental fires, when the insured is in no way or manner chargeable with the fire. If you shall find that this defense is established by the proof, that will bring your deliberations to a close, and your duty will be to return a verdict for the defendants. But, if you should be of opinion that this defense is not proven, it will then be your duty to consider other matters of defense relied on." No objection is made to this charge as given, but it is said that the jury should have been told that it was not necessary to establish the firing of the building by the plaintiffs with the same strength and clearness of proof as required in criminal cases. In my opinion, it is usually sufficient to state to the jury what rules of evidence do apply, without stating also the rules which do not apply. I do not think it possible that the jury could have misunderstood the charge on this branch of the case, and I have not the slightest reason to believe they were misled. A labored and ingenious argument was submitted to the court in or-

der to induce it to grant the motion for a new trial, to show that Bayly & Pond did in fact fire their own premises. It would be sufficient to say, in answer to the argument referred to, that substantially the same argument was made to the jury, and failed to convince them of the truth of the charge made. Even were I convinced that the proof sustained the charge, it would not be my province to set aside the verdict of the jury because I disagreed with them. But as the argument was pressed with great vigor upon the attention of the court, it is not improper for me to say that it failed to convince me, as it had already failed to convince the jury.

The fire was first discovered about 9 o'clock p. m., of the 29th of May, 1874. The theory of the defendants is that it was set by two employees of the plaintiffs. This theory is not sustained by one word of direct evidence; the defendants depend on circumstances, only, to establish it. These circumstances were, as the evidence shows, that it was the custom of the plaintiffs to close their stores for the day at about 6 p. m., and to warn the employees upon the premises that they were about to close by the ringing of a bell or gong. On the afternoon of the day upon which the fire occurred these employees, as they claimed, did not hear the bell ring, when their business called them to the third story, and were locked up in the stores. When they discovered the fact, which was not till later than half past 6, they descended to the ground floor, and finding themselves locked in they returned to the second story, got out upon the roof of the gallery, which extended over the pavement, and slid down one of the iron columns to the street. When the fire on the premises was discovered, about 9 o'clock that evening, the testimony tends to show that it was burning in three different places. The defendants claim that these employees, before they left the building, had laid and fired the match that about two hours subsequently fired the building. This theory strikes me as highly improbable. Both these men were examined as witnesses, and they appeared to be of ordinary intelligence. It certainly seems plain that no one, unless insane, having fired a building, after it was closed for the day for the purpose of fraud, would have left it in broad daylight, with the sun an hour high, and left it too in the most conspicuous manner, and upon the most frequented thoroughfare in this city. If the claim of the defendants is true, these men had, by the laws of Louisiana, been guilty of a capital offense, and they take pains to advertise the fact by leaving the scene of their crime in a manner calculated to excite the attention and surprise of all the passers-by upon the most crowded street of the city. Men who commit the crime of arson do not proceed in that way when they can just as easily protect themselves by secrecy and darkness.

In my judgment there is not only an utter failure of direct proof to implicate these men, but there are the most cogent probabilities against the truth of the charge laid at their doors. But suppose it were established that the two employees of the plaintiffs fired the building. That is not sufficient; for there must be proof that they acted by the procurement or connivance of the plaintiffs. Upon this point there is not one word of proof. An attempt was made, by proving the business embarrassments of the plaintiffs, to show a motive for burning their own premises and thereby securing the insurance money. But in my judgment the decided weight of the evidence was that plaintiffs were not embarrassed; and the proof is uncontradicted that if their insurance money had been promptly paid, nevertheless their loss by the fire, over and above their insurance, would have been a very large amount—Pond himself placing it at $100,000. The fact which defendants essayed to prove, that the buildings were fired purposely, by showing that the fire, when discovered, was burning in three places, does not prove or tend to prove that plaintiffs caused the fire to be set. There are incendiary fires which are not set by the owners of the premises. Buildings are often fired by incendiaries from motives of revenge, from hope of plunder, or for the wanton purpose of simply causing a great fire and making a great excitement.

It were easy for any one so evilly disposed, with false keys or by other means, to gain access to the premises and set them on fire. Whoever did it waited till after dark, and left the building in as secret and unsuspicious a manner as possible. My deliberate conviction is, therefore, that this branch of the defense had nothing to support it, and I entirely agree with the jury in the conclusion they must have reached upon it.

4. It is assigned as other grounds for a new trial that the plaintiffs, by false and fraudulent statements, tried to exaggerate their loss, and that the proof of the amount of loss was uncertain and unsatisfactory. The questions of the fraudulent practices and of the actual amount of their loss were fairly submitted to the jury. There was evidence to sustain the verdict of the jury, and their finding is conclusive.

5. It is insisted that the jury must have arrived at the amount of their verdict by allowing the plaintiffs' claim for profits resulting from illegally carrying on the business of rectifiers. In answer to this it may be said that the jury report a given sum as the amount of the loss. We do not know how they arrived at that result, and we cannot ascertain, nor is it competent for us to inquire. One juryman has herein used one method of calculation, and another another. We have no right to enter into their deliberations, and make their reasons or their methods a ground of objection, if they have reached a substantially just result. But it seems to me that, even if the plaintiffs had

made large profits by an illegal traffic, it could not be said that they insured for illegal profits. They lost no "profits" by the fire, and they make no claim for "profits." The question of profits only came into the case as a factor in the problem to be solved, namely: How many goods were left in the store at the date of the fire, and what, therefore, was the actual loss, not of profit, but of property?

Lastly, it is said that by the process carried on in the premises of plaintiffs of reducing liquors by the mixing of water and the making of cocktails, etc., the risk was increased, and therefore there should have been no recovery. The proof upon this point was not so clear as to satisfy my mind that, as a question of law, the risk was increased. The high-proof spirits were passed into tubs and diluted with water. There was no fire or light in that part of the building, and smoking was prohibited anywhere in the premises. I am not able to say, as a question of law, that risks were by these precautions increased, and I was not asked to say so to the jury. I do not think a new trial should be granted for this last reason assigned.

I believe I have noticed all the matters stated in writing or orally upon the argument as reasons why a new trial should be granted, and am satisfied that none of them are well taken. The case was laboriously and ably tried by counsel for the parties. The jury was one of exceptional intelligence and experience in affairs, and in my judgment their verdict rendered substantial justice between the parties. The motion for a new trial must be overruled.

Case No. 1,146.

Case of BAYNE.

[Cited in U. S. v. Anderson, Case No. 14,452. Nowhere reported; opinion not now accessible.]

BAYNE, (MAY v.) See Case No. 9,331.

Case No. 1,147.

BAYSAND v. LOVERING et al.

[1 Cranch, C. C. 206.][1]

Circuit Court, District of Columbia. Dec. Term, 1804.

EXECUTOR DE SON TORT—LIABILITY.

An executor, de son tort, is liable for the value of the goods taken and used.

At law. Assumpsit on bill of exchange, [against Lovering and wife as executrix de son tort of Andrew White.] Pleas never executrix, non assumpsit, and limitations.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Morsell, for plaintiff.

Mason, for defendant.

THE COURT instructed the jury that if they should be of opinion that the defendant took the goods of the deceased and used them as her own, and not for safe keeping, she is chargeable as executrix in her own wrong to the amount of the goods so used.

Case No. 1,148.

The BAY STATE.

[Abb. Adm. 235;[1] 6 N. Y. Leg. Obs. 198.]

District Court, S. D. New York. April Term, 1848.[2]

COLLISION—EXTRAORDINARY PRECAUTIONS IN HARBOR—SAILING VESSEL IN FOG—SIGNALS—CUSTOM OF LONG ISLAND SOUND.

1. A steam vessel running into harbor, or through the common thoroughfare of other vessels, is bound to take extra precaution against collision with sailing vessels; and in the night, or in case of a fog, must move with great circumspection, or even lay-to or anchor, according to the danger of encountering other vessels.

[Cited in The Rocket, Case No. 11,975.]

2. A sailing vessel at anchor or lying-to in a dark night or in a dense fog, is also bound to take such precautions as may be in her power, to give warning of her position to other vessels, whether steamers or vessels under canvas, which may be nearing her.

3. Under the usages of navigation upon Long Island sound, the blowing a horn, the ringing a bell, or the beating upon an empty barrel or upon an anchor, is a reasonable precaution which a sailing vessel lying-to in a fog is bound, as towards a steamer which may come in collision with her, to take, in warning off such steamer. (Since reversed.)

[Cited in Jones v. The Hanover, Case No. 7,466. Disapproved in The Rockaway, 19 Fed. 452.]

[See note at end of case.]

4. The rule of equal contribution should be applied in cases of damage caused by a collision for which both colliding vessels are mutually in fault.

[Cited in The Atlas, Case No. 633; The Comet, Id. 3,050; Vanderbilt v. Reynolds, Id. 16,839.]

In admiralty. This was a libel in rem, by Goldsmith Wells and others, owners of the schooner Oriana, against the steamboat Bay State, to recover damages for a collision between those vessels. [Decree for libelant. This was afterwards reversed by the circuit court in The Bay State, Case No. 1,150. The decree of the circuit court was affirmed by the supreme court in McCready v. Goldsmith, 18 How. (59 U. S.) 89.]

Francis B. Cutting, for libellants.

Daniel Lord, for claimants.

BETTS, District Judge. The facts directly pertinent to the merits of this case are these:

[1] [Reported by Abbott Brothers.]

[2] [Reversed in Case No. 1,150, and that decree affirmed in 18 How. (59 U. S.) 89.]

—The schooner Oriana, laden with coal, on a trip to New Bedford, was, at six o'clock, on the morning of August 13, 1847, at a point distant about six miles to the southeast of Watch Hill light, and about thirty-five miles from Newport. She had her sails up and was under way, but there was nearly an entire calm, and the vessel was making little or no progress through the water. There was a dense fog at the time, so thick that vessels could not be seen a distance beyond one hundred to two hundred feet off.

The steamboat Bay State had lain-to on account of the fog at Mount Hope, and left Newport between three and four o'clock, a. m., that morning. She was running at the rate of sixteen miles the hour, and came within one hundred to one hundred and fifty feet of the schooner before discovering her.

So soon as the steamer was discerned from the schooner, the crew of the latter cried out with all their force, and the cry was indistinctly heard on the steamer. The steamer was then pointing to about midships the schooner. Her engine was stopped as quickly as possible, her helm thrown aport, and all the sheer given her that the space permitted. She struck the schooner on her larboard quarter, twelve or fourteen feet from her stern; the schooner sank in a few minutes, and with her cargo was a total loss. The vessels were in effect on the open sea, being east of Block Island, and in the lower part of Narragansett bay, with nothing intervening on the east and south between them and the ocean.

It is the practice of this steamboat to run in the open parts of her passage, through fogs, at her full speed, determining her position by her course and time. On this occasion, the master and two pilots were in the wheelhouse, keeping a look-out, and a man was stationed at the large bell of the boat to ring it from time to time in warning to other vessels. The bell had been rung immediately before the collision. It was proved that the beating of her wheels, on the approach of the steamer, could be heard on the water, in a calm, fourteen or fifteen miles, and in ordinary weather from six to seven miles. The large bell is heard usually from one to four miles.

The schooner had anchored the night previous about four miles from Watch hill, on account of the fog, and lay there until 5 a. m. of this day. She was got under way with a light breeze, and ran by compass E. by N. about 20 minutes; and the breeze then having died away, she was hove to, heading S. S. E., the water being free from swell, and smooth. She lay about 20 minutes, when the steamer was seen approaching her from the eastward, about one hundred feet off. During the night, while at anchor, persons were kept on her deck, beating with sticks on empty hogsheads, at short intervals, to give warning to other vessels. The testimony shows that noises from pounding on empty casks and anchors on board vessels are heard in the night time, or in a fog, on board steamers under way, a sufficient distance off to enable them to keep clear of vessels giving the signal. In this case, it was proved that those on board the schooner heard the steamer approaching fifteen minutes before the collision.

It has been repeatedly decided that vessels propelled by steam, and running into a harbor, or through a common thoroughfare of other vessels, will be held chargeable with the consequences of collisions, when kept at high speed during the night, or in weather so thick that objects in their way cannot be discerned at a distance sufficient to afford time to escape them. Bullock v. The Lamar, [Case No. 2,129;] The Perth, 3 Hagg. Adm. 414; The Rose, 2 W. Rob. Adm. 1; The Neptune, [Case No. 10,120.]

No blame is, however, to be implied against steamers who use their full power out on the high seas, and when there is no indication of other vessels in their track, and when no circumstances are known to them importing the necessity of extraordinary caution.

The place of the disaster in question partook of both characters. It was strictly on the open sea, on the ocean, as distinguished from the navigation of the Sound; but it was only a few miles from land, and in the range of vessels seeking ports in Rhode Island or Massachusetts from the Sound, or coming into the Sound from those places, or going out to, or coming in from the sea.

The master of the steamboat is chargeable with knowledge of these facts, and he would have been bound to take proper precautions against meeting or overtaking sailing vessels in that vicinity, if the wind had been sufficient to enable them to run with their sails. Then the darkness and obscurity from fog would impose on him the necessity of moving with great circumspection, and so as to be enabled to stop or change the direction of his boat in the shortest time, or he might be required to lay her to, or anchor her, according to the danger or probability of encountering other vessels in motion. In such case, he could not discharge himself of all obligation to further care and watchfulness, by merely rendering the steamboat motionless. He would be bound to exercise every reasonable and appropriate means at his command to prevent other vessels running upon his, to warn them of his position by ringing his bell, blowing off steam, or giving other notice that would be equally advantageous to them. The same principles must apply to the conduct of all vessels.

A sailing vessel at anchor, or lying-to in a dark night in a harbor, or where other vessels may be expected to pass, must show a light, or collisions with her will be imputed to that neglect. When the darkness is occasioned by mist or fog, and a light will not aid to designate her position, there would seem to devolve upon her the duty of using cor-

respondent means, for instance, as was done by the schooner the night before the collision, to give notice by noises sufficient to reach other vessels nearing her.

If, then, the schooner, at the time of the collision, is to be regarded as on the ocean, and excused from giving warning to other vessels in that position, the steamer would be equally freed from her obligation to keep at a low speed, and would be entitled to run as on the high seas, and a collision between the two vessels, under such circumstances, would be a common misfortune and an accident, without blame to either party.

But, in my judgment, this is a case of clear fault in both parties. The schooner lying-to in a calm, and having heard the steamboat approaching her for fifteen minutes, and knowing she was not discoverable from her by sight, was bound to give warning by such noises as might probably reach the steamer. She was not driven to devise something to that end in sudden alarm and confusion. She had passed the night in the use of the very precaution adapted to the occasion, and it was only necessary to repeat it on this emergency. Upon the evidence of the pilots and mates of the steamboat, that like noises were frequently heard by them in fogs, and the steamer was thus enabled to govern its course safely, it is fair to presume this accident might have been thus wholly prevented.

It was manifestly hazardous to run the steamboat in that state of the weather, when the darkness prevented her seeing any object more than a hundred yards ahead, and at a speed so great that with every exertion of her powerful engine she could not be stopped on the water in less than four or five minutes' time, during which her momentum must probably force her ahead a quarter or one third of a mile.

The doctrine commonly accepted and applied in this court is, that the libellant cannot recover for a collision, if it appear to have been caused in any manner by his own misconduct or fault, although he shows the other vessel to have been in fault also, (The Emily, [Cases Nos. 4,453, 4,452;] Abb. Shipp. 303, note 1,) and that the rusticum judicium recognized in many high authorities, which apportions the loss equally between both parties, (3 Kent, Comm. 231; Abb. Shipp. 305,) applies only to cases where it is undiscoverable upon the proofs where the blame actually lies. This is, however, the first case which has occurred in this court, where the question was distinctly propounded, whether in case of collision and loss of property by the mutual fault of both parties, the rule of contribution should be applied.

I confess myself better satisfied with the familiar doctrine of the common law, that in cases where both parties are to blame, no recovery of damages can be had by either. Kent v. Elstob, 3 East, 18; Vanderplank v. Miller, Moody & M. 169. The English admiralty has, however, distinctly laid down the opposite rule. The Woodrop-Sims, 2 Dod. 83. And that case has been constantly adhered to since. Abb. Shipp. 230; Story, Bailm. § 608a, note.

Judge Story regards it the settled law of modern maritime states, and he traces it to a high antiquity in the continental codes. Story, Bailm. §§ 608, 610. And it has been recognized in several American decisions of respectable character and weight. Reeves v. The Constitution, [Case No. 11,659;] Rogers v. The Rival, [Id. 11,867;] The Scioto, [Id. 12,508.] The case of Strout v. Foster, 1 How. [42 U. S.] 92, admits, by implication, the existence and validity of the rule, although that point was not embraced within the decision; and in the case of Waring v. Clarke, 5 How. [46 U. S.] 503, Mr. Justice Woodbury adverts to the rule of contribution between vessels, both of which were culpable, as one of the settled modes of exercising admiralty jurisdiction in cases of collision. The question, what is the proper rule of damages in such cases, is one deserving the solemn adjudication of our highest tribunal; but until it may be finally settled there, I shall adopt the rule of apportionment indicated in the authorities cited, and shall, accordingly, decree that a valuation of the schooner and cargo be made, and that the libellants recover one half that value. No costs are to be taxed by either party against the other.

The ordinary order would be, that the loss of both parties from the collision be valued, and that the equal moiety be borne by each; but the decree may be more simple and direct in this case, as there is no proof that the steamer received any injury. Decree accordingly.

NOTE, [from original report.] The case was appealed to the circuit court,—The Bay State, [Case No. 1,150,]—where it was held, as in the district court, that the steamer was shown to be in fault in her manner of navigating. But it was further held, that the proofs in the cause did not warrant the court to say, that as matter of fact, there was a usage of blowing horns, &c., on board of sailing vessels becalmed in a fog, under which the schooner was bound to take such precautions in warning off the steamer. The decree was, therefore, reversed, as to the point that the schooner was herself in part to blame; and a decree ordered for the libellants for the full amount of their damages. This reversal of the decision reported in our text, has been by some of the profession understood to proceed upon the ground, that as between a sailing vessel or steamer approaching in a fog, the whole duty of precaution to avoid collision rests upon the steamer, and the sailing vessel is free from obligation to employ any means or methods of giving notice of her proximity. We suggest, however, that the decision in the circuit court, fairly construed, goes no further than to hold that, as matter of fact, the evidence in the case showed that none of the precautions suggested as having been within the power of the sailing vessel — blowing horns, beating empty barrels, &c.—would have been of any practical avail in notifying the steamer of the danger; and so, that the sailing vessel was not to be held guilty of negligence in failing to employ means of notice, which, if employed, would in all probability have done no good. The general principle that a sailing

vessel, aware of the approach of a steamer in darkness or fog, and having at command adequate means of giving notice of her proximity, is bound to use those means, does not seem to us to be impugned by the decision in the circuit court. She is not, however, it would seem, guilty of negligence in failing to use means, which it appears would be insufficient if used. The decree of the circuit court was affirmed by the supreme court, in December, 1855, upon the grounds assigned in the circuit court. The case in the supreme court is reported under the title of McCready v. Goldsmith, 18 How. [59 U. S.] 89. [See note at end of Case No. 1,150.]

Case No. 1,149.

The BAY STATE.

[3 Blatchf. 48.][1]

Circuit Court, S. D. New York. Sept. Term, 1853.

COLLISION—VIOLATION OF HARBOR REGULATIONS—LIABILITY.

Where a steamboat was navigating the East river, opposite New York, not in the middle of the river, but near the piers built out from the shore next to the city, in violation of the state law of April 12th, 1848, entitled, "An act in relation to the navigation of the East river by steamboats," (Sess. Laws, 1848, c. 321,) and a collision ensued between her and another steamboat, which was in the proper track, and did every thing practicable to avoid the collision: *Held*, that the latter vessel was not liable for the damage caused to the former by the collision.

[Cited in The E. C. Scranton, Case No. 4,273. Approved in Lonan v. The C. H. Northram, Id. 8,473. Cited in The Amos C. Barstow, 50 Fed. 623.]

Appeal from the district court of the United States for the southern district of New York.

In admiralty. This was a libel in rem, filed in the district court, by the Norwich and New London Steamboat Company, owners of the steamboat Worcester, against the steamboat Bay State, to recover damages for a collision. In the district court, there was a decree for the libellants. The claimants appealed to this court. The facts are sufficiently stated in the opinion of the court.

John Leveridge, for libellants.

Daniel Lord, for claimant.

NELSON, Circuit Justice. The law of this state, passed April 12th, 1848, entitled, "An act in relation to the navigation of the East river by steamboats," requires steamboats navigating the East river to keep the middle of the river. This law is peremptory. The masters of vessels are bound to obey it, and have no discretion, except in cases of necessity. It is a mistake, on the part of those navigating vessels in this harbor, to suppose that they may indulge the exercise of their own judgment and discretion in regard to the proper mode of navigation. If they disregard the statute, they do so at their peril. In such cases, they are not only guilty of a crime, according to the statute, but they must take the hazard of the consequences to their vessel, when so out of the proper track and on an illegal course. The Worcester was here clearly in fault. She was navigating the river, not in the middle, but near the piers built out from the shore next to the city. She was navigating, therefore, in violation of the law, and, as a consequence of this improper navigation, she encountered water craft, which led to the collision. She met a sloop near the docks, and a towboat coming out of a slip, and, to avoid these, she was obliged to slow and sheer towards the Bay State, which was on a line with her, or nearly so, out in the middle of the river. The Bay State was in her true track. There is a little margin in the testimony of the witnesses, but they have to estimate the distance by the eye, and they place her substantially in the middle of the river. Vessels must keep as near the middle of the river as can be ascertained by the exercise of sound judgment and observation on the part of the master at the time. This is the only means of determining at the moment. The Worcester, being on a course in violation of the law, and, as one of the consequences, meeting the sloop and the towboat, and being obliged to slow and back and sheer, and the Bay State being nearly on a line parallel with her, upon the outer circle, in the middle of the river, there was, as a matter of course, immediate danger of collision. All that the latter was bound to do was to exert her power and skill faithfully to rescue the Worcester from the impending peril into which she had thus wrongfully brought herself. This she did. She slowed and ported her helm as soon as she saw the sheer of the Worcester. I consider the testimony of the officers on board of a vessel to be the better evidence of the measures taken, or the manoeuvres made at the time, on board of their own vessel. It is idle to say that she could have stopped. This she could not do short of three times her length. All she could do was to slow and port her helm, and, in doing that, she did all that was practicable, in the emergency, to rescue the Worcester from the peril. This law as to the navigation of steamboats will be strictly enforced; and it is high time that the masters of vessels should learn that they must obey it or take the consequences. The fundamental difficulty in the libellants' case is, that the Worcester was out of the track prescribed by law. She was obliged to sheer, to avoid the sloop and the towboat that she met, and this led to the collision. The Bay State was bound only to do all she could, in the midst of the peril, to avoid it; and, having done that, she is free from blame. The decree of the court below must, therefore, be reversed, and the libel be dismissed with costs.

[NOTE. The libellants took an appeal to the supreme court but failed to prosecute it, and it was therefore dismissed. Norwich & New London Steamboat Co. v. The Bay State, 15 Lawy. Ed. U. S. Sup. Ct. R. 42.]

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

Case No. 1,150.

The BAY STATE.

[11 N. Y. Leg. Ob. 297.]

Circuit Court, S. D. New York.[1]

COLLISION—SPEED IN A FOG—SIGNALS BY SAILING VESSEL — MUTUAL FAULT — APPORTIONMENT OF DAMAGES.

1. *Held*—That whether the speed of a steamer be excessive and culpable, depends upon the circumstances of the case. That the speed of sixteen or seventeen knots during a dense fog, and upon a frequented track, was grossly improper.

[See note at end of case.]

2. *Held*—That a vessel becalmed under canvass, in the track of a steamer, under such circumstances, was not culpable for omitting to use fog horns, or other measures, which the evidence showed would have been of no avail.

[See note at end of case.]

3. The rule of apportionment, where fault exists on both sides, is considered by the supreme court to be the admiralty rule to be adopted by the courts of the United States.

[Appeal from the district court of the United States for the southern district of New York.]

[In admiralty. Libel by Goldsmith, Wells, and others, owners of the schooner Oriana, against the steamboat Bay State, to recover damages for collision. The district court rendered a decree for libellants, and apportioned the damages between the two vessels. The Bay State, Case No. 1,148. The case is now heard on appeal from that decree. Reversed. The decree of this court was afterward affirmed by the supreme court in McCready v. Goldsmith, 18 How. (59 U. S.) 89.]

F. B. Cutting, for the Oriana.

D. Lord, Jr., for the Bay State.

NELSON, Circuit Justice. This case should have been decided at a much earlier day, but, after hearing the very able arguments of the counsel for the respective parties, I felt that it involved some principles of considerable practical importance, and deserved, therefore, the most careful and deliberate consideration. I admit, also, that I felt more doubt and embarrassment on the argument as to the side upon which the merits of the case lay, and hence desired to look more critically into the facts, than I now do after a more thorough examination. The difficulty my mind labored under, during the argument, was not so much in reconciling and settling the facts of the case, as in determining the force and effect to be given to them; for I have rarely met with a case of this class, where the material facts upon which it must ultimately turn, were less contradictory.

It is agreed, as respects the weather, that the fog was so dense that a vessel could not have been seen further than from one to two hundred feet; that the schooner lay helpless in the waters of the Sound, some four or five miles from Connecticut shore, off Watch Hill light; that the Bay State was coming down the Sound at the rate of sixteen or seventeen miles an hour when the collision occurred; and that the place where it happened, or rather the waters in which it happened, are frequented by vessels engaged in the coasting trade of the eastern states, to and with the city of New York and other ports upon the North river, embracing, also, as we see from this case, the coal trade with the state of Pennsylvania, the whole a trade through the Sound of no inconsiderable magnitude and importance. These are facts indisputable. Now I agree that it is not for the court to lay down any fixed and inflexible rule in respect to the rate of speed of steam vessels navigating these waters. That must depend upon circumstances as they appear, and are presented for its consideration in each particular case. These may warrant a rate deemed prudent navigation at one time, that might be wholly injustifiable at another. But I think I may say that, in a case circumstanced as the present is, a fog so dense that the most vigilant and experienced look-out would be unable to discover a vessel at a distance of more than 30 or 60 yards, navigating at the time in waters frequented with sailing vessels, engaged in the commerce of the country, as in the present instance, a rate of sixteen or seventeen miles an hour is altogether inadmissible as prudent or reasonably safe navigation. The pilot says it would take from four to five minutes to stop the Bay State at this rate of speed. At a reduced rate, of course, it would require a proportionally less period of time. This, in addition to the better opportunity for each vessel to make the proper manoeuvres to avoid the collision, affords strong ground for impressing upon those navigating these vessels the necessity of slackening their speed in thick weather, and in a track where other water craft are usually to be found. A passenger on board the Bay State, who witnessed the collision, seems to have been struck with the impropriety of her rate of speed at the time, and asked why they ran so fast in a fog, and was answered that they had to do so in order to keep their reckoning in going from place to place; and we learn from the pilot, and some others of the officers, that they never make any difference in the rate of speed in consequence of a fog—that they go slow when making land or light, or in narrow passages, or to heave the lead—as if the only precautions they were bound to serve in the navigation were in regard to the safety of their own vessel. I will only repeat the remark made in the case of The New Jersey and which was taken from the case of The Rose, 2 W. Rob. Adm. 1, in the English admiralty: "That it may be a matter of convenience that steam vessels should proceed with great rapidity; but the law will not

[1] [Reversing Case No. 1,148. Affirmed in 18 How. (59 U. S.) 89.]

justify them in proceeding with such rapidity, if the property and lives of other parties are thereby endangered." Newton v. Stebbins, 10 How. [51 U. S.] 606. I am satisfied, therefore, that this vessel was grossly in fault from the rate of speed upon her, under the circumstances, at the time the collision occurred.

The next question is, whether or not the schooner was in fault. This depends upon another—namely, whether she omitted any precautionary measures which she was bound to observe under the circumstances—such as blowing a horn or beating empty casks; by which means notice might be given to vessels approaching her position. The proofs show that an outcry was made by the master and hands, immediately on hearing the paddling of the wheels of the steamboat and before she was seen through the fog.

The usage proved as to blowing horns on vessels in a fog is limited to occasions when there is sufficient wind for them to make head; as, in the case of a dead calm, the precaution would be unnecessary, as no danger of a collision could occur. This is doubtless true in respect to sailing vessels, but the reason for the omission would not apply upon waters navigated by steam vessels; but, in respect to these—especially in the instance of vessels of the size of the Bay State—I am not satisfied that this precautionary step could be of any avail, as the noise of the machinery and motion of the boat in the water would prevent the sound reaching them. I think this is the fair inference from proofs in the case, and accords with experience and observation. The witnesses on the part of the Bay State agree that the noise of the motion of the boat in the water could be heard at a much greater distance than their own fog bell, and some of them consider the bell on these occasions useless, for this reason; and one of them states expressly that he did not recollect ever hearing a horn on a steamboat while she was under way, but had after she stopped. A horn, it is said by some of the witnesses, cannot be heard over a mile and a half, at farthest; and if so, it certainly could not be heard anything like that distance, if at all, on board a steamboat in motion. The Bay State was moving at a rate, as we have said, of more than a mile in four minutes; and we are quite well satisfied that under these circumstances, if a horn could have been heard at all, it could not, in time, upon any reasonable calculation, to have materially influenced the result. The point was pressed in the case of The Europa, that the Charles Bartlett should have blown a fog horn or rung her bell at short intervals, and that she was therefore at fault for this neglect. But the omission was disregarded by Dr. Lushington and the trinity masters, and apparently, so far as we can learn from the report of the case, on the ground that these precautions would have been useless, from the noise of the Europa while under way. 2 Eng. Law & Eq. (Boston Ed.) 557. I must therefore reverse the decree of the court below, and direct a decree in favor of the libellants, and that the case be referred to the clerk to take proof of their damages and loss by reason of the collision.

NOTE, [from original report.] After delivering the above opinion, counsel suggested whether the rule of apportionment adopted by the court below was coincided with, and to be enforced in cases of fault on both sides. Judge Nelson observed that it had been before the supreme court, and by them the English rule was regarded as the one to be recognized by the admiralty courts of the United States. The rule of apportionment would seem to have been recognized as early as 1843,—Strout v. Foster, 1 How. [42 U. S.] 92,—and to be applied whenever the proper case was presented,—Stainback v. Rae, 14 How. [55 U. S.] 538; The Bay State, [Case No. 1,148;] The Jamaica, [Id. 7,173.]

[NOTE. This decree was affirmed by the supreme court in McCready v. Goldsmith, 18 How. (59 U. S.) 89. Mr. Justice Nelson, in delivering the opinion, adopted the language of the circuit court in the principal case, as to the negligence of the steamer in running at so high a rate of speed. In respect to the failure of the schooner to make her position known by signals, the learned justice said: "A good many witnesses have been examined as to the usage of vessels navigating the Sound, in respect to the blowing of horns, beating of empty barrels, and the like, in thick and foggy weather; but, on looking carefully into the testimony, it will be found that no such general or established usage has been proved. * * * Without much more evidence of the usage, and of its utility in preventing collisions, than is shown in this case, we cannot say that the omission to comply with it is of itself chargeable as a fault against the schooner. * * * Besides, we are not satisfied, upon the evidence, that the precautionary measure of blowing horns, or ringing a fog bell, would have been of any avail under the circumstances of this case. * * * The steamer, as we have seen, was moving at a rate of more than a mile in four minutes; and taking into view the size of the Bay State, with her powerful engines, together with this rate of speed, it is quite apparent, that, if a horn could have been heard at all, it could not, upon any reasonable conclusion, in time to have materially influenced the result."]

Case No. 1,151.

BAZIL v. KENNEDY.

[1 Cranch, C. C. 199.][1]

Circuit Court, District of Columbia. Nov. Term, 1804.

SLAVERY—DEVISE—SALE FOR TERM—COMMENCEMENT OF TERM—FREEDOM.

Upon a devise that a slave should be sold for eight years, after which he should be free, the term of eight years shall begin to run from the time of the death of the testator or within a reasonable time thereafter.

This was an action to try the right of the plaintiff to his freedom under the will of Mrs. Turner, which was in these words: "I will that my slaves be sold by my executors, for

[1] [Reported by Hon. William Cranch, Chief Judge.]

the following terms: Bazil for eight years," (and others for other terms,) "and the money arising from the same I desire shall be applied in the following manner, to wit," (&c., giving sundry specific legacies, and the residue to her husband, Charles Turner, she having, by her marriage settlement, reserved the power to devise her estate.) "I will that after the above slaves respectively arrive at the completion of the above terms, they shall be free and their posterity after them at the age of thirty years."

C. Lee, for plaintiff, cited Dade v. Alexander, 1 Wash. (Va.) 30; Mayo's Lessee v. Carrington, Id. 45; New Rev. Code, 191, § 36. The testatrix died in 1796. Her husband suppressed the will. Bazil was sold as the property of the husband, by the marshal, to the defendant Kennedy, on the 27th of January, 1802. The will was found and proved June, 1804. This action was brought on the 22d of August, 1804. The defendant purchased without notice. This was a vested legacy. Roden v. Smith, Amb. 588; 2 P. Wms. 478.

Mr. Swann, for the defendant, contended that the term of eight years could not begin to run until the sale; and that the time of sale was left to the discretion of the executor.

But THE COURT decided that it was the intention of the testatrix that the plaintiff should be free after eight years' service after her death; and that the term began to run from the time of her death, unless some cause should be shown for extending it for a further reasonable time; and that as more than eight years had elapsed between the death of the testatrix and the commencement of this action, the plaintiff is entitled to his freedom.

BAZIN, (MARSHALL v.) See Case No. 9,125.

BAZIN v. RICHARDSON. See Case No. 1,152.

Case No. 1,152.

BAZIN v. STEAMSHIP CO.

[3 Wall. Jr. 229;[1] 5 Am. Law Reg. 459; 20 Law Rep. 129; 14 Leg. Int. 156; 37 Hunt, Mer. Mag. 449.]

Circuit Court, E. D. Pennsylvania. April Term, 1857.

CARRIERS — BILL OF LADING — LOSS OF GOODS — BURDEN OF PROOF — SHIPPING — CUSTOM—SEAWORTHINESS—DAMAGES.

1. The practice of all the lines of steamships between Liverpool and America, for three years—the lines being two in number—to ship goods in a certain way, is not such a legal custom as will at all affect the terms of a contract in which any other way is specified, though such other way was always set forth in all contracts of the company, it having been the way as set forth in a printed form, and in practice constantly departed from. Nor, though conceded to be a practice well known to persons in Liverpool, would it be regarded in law as probably known elsewhere, e. g., at Havre, nor, however, acted on by persons at Liverpool regarded as having been the implied basis of a contract, made at Havre by persons not from Liverpool, about a shipment to America, though from Liverpool.

[2. A carrier, shipping goods by a different vessel and at an earlier date than that specified in the bill of lading, is liable for loss or damage occasioned by shipwreck, notwithstanding the exception of "accidents of the seas," etc., in such bill of lading.]

[Cited in Marx v. National S. S. Co., 22 Fed. 682; The Bordentown, 40 Fed. 689.]

[3. The loss of goods committed to a carrier, and in possession of his servants, puts the burden of proof on him to show how the loss occurred, and that it was not by their fault, but in consequence of some of the unavoidable accidents excepted in the bill of lading.]

4. The fact that a vessel runs in a fog, and in calm weather, upon a well-known cape, is strong proof of her unseaworthiness, and not rebutted by the admitted fact that she was perfectly new, well built, well rigged and well manned, and in charge of a captain of reputed skill and experience. The conclusion remains that her compass had not been sufficiently tested, or that she was not well commanded, in fact, and for either of these wants she would be unseaworthy.

[Cited in Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 424, 10 Sup. Ct. 938; The City of Para, 44 Fed. 690.]

5. On a claim of damages for goods lost by a common carrier, the rule is that the carrier shall pay their net value at the place of delivery, with interest from the day when they should have arrived. Anticipated business profits are not allowed.

In admiralty. This was an appeal from a decree in the admiralty [of the district court of the United States for the eastern district of Pennsylvania,] in which a party claimed compensation from ship-owners for his goods lost at sea, while on their vessel. The case was thus:

[Xavier] Bazin, the libellant, was a retailer of French perfumery, in Philadelphia. Being in Paris in 1854, he purchased a large stock of goods for his business in America, which was shipped from Havre to Philadelphia. The respondents [the Liverpool & Philadelphia Steamship Company] were the owners of a line of several steamships sailing between the ports of Liverpool and Philadelphia. For greater regularity and convenience of passengers and traders, the vessels sailed at regular intervals, from these ports; certain vessels being usually named for certain days, when it was convenient so to do; but there not having been, apparently, any contract with the public that special vessels should sail on special days. The steamship company had their agents stationed at Havre, authorized to receive goods meant to be sent from France to the United States, and to issue bills of lading. On the 28th of August, 1854, their agent at Havre gave the libellant a bill of lading, containing the following clause, viz.: "Received in and

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

upon the steamship called the Shamrock, now lying in the port of Havre, and bound for Liverpool, eighteen cases of merchandise; to be transhipped at Liverpool on board the Liverpool and Philadelphia steamship City of Manchester, or other steamship appointed to sail for Philadelphia, on Wednesday, the 6th day of September, and failing shipment by her, then by the first steamship sailing after that date, for Philadelphia; and are to be delivered in like good order and condition, at the aforesaid port of Philadelphia." The bill of lading was quite formal in several other specifications, as to the mode of landing the goods, &c., and contained exceptions against loss by "the act of God, the queen's enemies, pirates, restraints of princes and rulers, fire at sea or on shore, accidents from machinery, boilers, steam, or any other accidents of the seas, rivers and steam navigation, of whatever nature or kind soever." The respondents also owned, as one of their line, another steamship called the City of Philadelphia, which was appointed to sail on the 30th of August, 1854, for the port of Philadelphia. The libellant's eighteen cases by the Shamrock, from Havre, arrived at Liverpool in time to put them on board of the City of Philadelphia, a week before the time that was provided for in the bill of lading, for a different vessel. The respondents accordingly shipped sixteen of them by the City of Philadelphia; the other two were afterwards shipped by the City of Manchester, on the 6th of September, 1854. The City of Philadelphia sailed on her first voyage, bound to Philadelphia, on the 30th of August, 1854, and on the 6th September struck the point of Cape Race, and was wrecked. Two of the cases on her were entirely lost, and the others much damaged; while the two cases not put on board her, arrived in the City of Manchester in due season, and in order.

The evidence as to the seaworthiness of the ship, and as to the cause of the disaster, was that of the captain, and as follows: "She was a new ship. I saw her in course of construction. She was built of iron, of the very best description; the character of the workmen stood very high on the Clyde; the naval constructors and workmen were of high character. She was, in every respect, a seaworthy vessel, at the time she started on her voyage. No expense was spared in fitting her up properly. She was well rigged and well manned; she continued seaworthy. She struck the point of Cape Race—up to that time she continued perfectly seaworthy. If she had not struck, at the average rate of our passage, we would have been in Philadelphia in five days more. The steamer was wrecked. We backed off the point of Cape Race, and run her on shore to save the lives of the passengers, and to keep her from sinking. There was no tempest; she struck in a dense fog—and the sinking of the vessel, and the damage done, resulted from her striking the cape." No other account was given of the cause of the loss; and it was commonly supposed that the iron vessel had caused the needle to deflect; but this was not in proof. The vessel was between thirty and forty miles out of her proper course when she struck.

There was no proof, except as it was given by the bill of lading, that Bazin knew anything about the respective vessels, or that he had preferred one vessel rather than another. His libel, however, alleged that some time previous to the day of shipment, he had by letter directed his agent in France to send his goods by the City of Manchester, to sail from the port of Liverpool on the 6th day of September, 1854, knowing her to be a safe and reliable steamship, and under skilful management; and that, when in France, he had personally given the same orders, and made all his arrangements accordingly. The answer of the steamship company, stated that "the substantial and exclusive object of the contract, as understood between the parties, and as appears upon the face of the bill of lading, and as understood by the usages of trade, was to transport the eighteen cases of merchandise named therein, to Philadelphia, in the United States, in the shortest time, and in the earliest steamer, after the merchandise arrived from Havre." "The particular steamship," they answered, "which was to sail on the 6th of September, being named in the said bill of lading, was so named, inasmuch as the parties to the contract had reason to believe, from the usual facts which were incident to forwarding goods from Havre to Liverpool, that the first steamer to sail after the arrival of the merchandise would be the City of Manchester." They alleged, "that had the City of Manchester, which was advertised to sail on the 6th of September, been for any cause unable to proceed upon her voyage, they would, either by some other vessel to sail on that day, or by the first vessel sailing after that day, have shipped the said cases direct to Philadelphia. But that the cases arriving from Havre in time for shipment by the City of Philadelphia, which sailed on the 30th of August; the respondents, in the diligent and faithful discharge of duty, desiring that the libellant should receive his goods in the shortest possible time, and in compliance with the customary mode of the particular business of the respondents, and settled usage of trade in this respect, shipped sixteen of said cases, safely and in good order, upon the City of Philadelphia, rather than permit the same to lose an entire week by remaining on deposit in Liverpool, for the sailing of the vessel appointed for the 6th of September."

A witness was examined by the respondents, in order to confirm this view, and to prove a custom varying the obligation to comply with the terms of the bill of lading, and to show, that in forwarding the goods

more expeditiously than they would have done by complying with those terms, they had acted in a usual and legal way, and one always desired by shippers. His testimony was thus: "According to the best of my knowledge and belief, there does exist at Liverpool, a general usage, custom and practice, amongst forwarding companies, as respects the time, order and manner of the shipment of goods sent to them, to be carried to the United States of America. Such general usage, custom and practice is, that the goods so sent for shipment, should be shipped to their place of destination with all dispatch, and, if possible, by the first vessel of the company then next sailing, in order to get the goods into the foreign market with every expedition, for the benefit and advantage of the shippers or consignees; I believe the British and North American Royal Mail Steam Packet Company, commonly called the Cunard Company, recognize and adopt this custom and usage, and I am not aware of there being any other British steam shipping company, having steamers for business purposes, between Liverpool and the United States of America. I am not aware of any other general rule, order, practice, usage or custom, other than what I have deposed to, which has existed ever since I have been in the employment of the company, about three years; it is not a secret practice, usage or custom, but, so far as I know, it is generally known to the shippers by the said steamship company's vessels. I first became aware of the fact that such custom existed at the time when I took charge of that department in the office of the company, which enabled me to have a knowledge of such custom by my intercourse with parties conducting business. I cannot state when this custom first arose, although I believe it has been of long standing, nor can I state, except as I have already done, amongst whom it prevails, nor whether it is subject to any, or what exceptions. I believe, and I have no doubt it is the fact, that shippers do frequently designate particular ships or vessels to carry their goods, but I say that I do not know, and I do not believe, that there is amongst shippers a preference sometimes for particular ships of the same line, or the masters commanding the same, and I have not known instances in which shippers have delayed sending goods by a particular ship when there was full opportunity to do so, in order that they might go or be shipped by some other vessel sailing at a subsequent time, which they, for any reasons, preferred, except in such instances where several ships belonging to different parties are destined for the same port, to sail about the same time, and in those instances, I believe, a preference is given to a ship of the first class, in preference to a ship of a minor class, although the ship of the first class should be advertised to sail some days after the ship of the minor class; but in the case of this company, all their vessels are of the first class, and are all commanded by masters of reputed skill and experience, and no preference is made by shippers as to whether their goods are to be shipped by the one vessel or by the other, and in all instances, as far as I know and believe, the shippers expect and rely upon their goods being shipped by the first vessel, regardless of her name or of the name of her master."

Upon this case, the district court decreed pro forma, in favor of the libellant, Bazin, for the original cost of the goods, adding expenses and cost of transportation, with seventy-five per cent., that being proved to be a fair sum or rate for "anticipated business profits."

David Webster and H. M. Phillips for the libellant, now made the following points:

1. That the bill of lading formed an absolute contract to ship libellant's goods by the City of Manchester, sailing on the 6th of September, 1854; and that any shipment of them by the respondents prior to that time, was at their own risk, and in violation of the contract.

2. That no usage prevailing at Liverpool could vary an express contract, more especially one made at Havre, where no knowledge of such usage was shown to exist.

3. That assuming that the respondents had the right to ship by the City of Philadelphia, they were nevertheless liable, since they had failed to show that she was lost through any of the perils excepted in the bill of lading.

4. That the measure of the libellant's damages was the market value of goods here, at the time they should have been delivered, in estimating which there was to be added to the original cost, not only duties and charges, but an allowance for the advance in value which they acquired in the market, the moment they were in condition to be sold, whether called profits, or by any other name.

On the part of the respondents, James Murray Rush contended:

1. That the receipt for the goods given in Havre, was not a maritime contract, but only an engagement preliminary to a maritime contract, and therefore not within the admiralty jurisdiction of the district court.

2. That the respondents were not bound to detain the goods in Liverpool to await the sailing of the City of Manchester, but under the law, as well as from usage, it was their right, as well as duty, to send them forward by the City of Philadelphia.

3. That anticipated profits could not be recovered, but only market value, or the amount it would take to replace the goods.

GRIER, Circuit Justice. The objection of the respondent's counsel, that the contract is not a maritime contract, cannot be supported. The case presents a bill of lading by which defendants bind themselves to carry goods received at Havre, and deliver

them in Philadelphia. It is a contract for a maritime service, and it would be difficult to say what is a maritime contract if it be not one. If it had been merely an agreement by respondents with libellant, that if he would send goods by their line, they would receive and forward them for a certain consideration, and the breach of the agreement was in refusing to receive or transport the libellant's goods at all, or for the consideration stipulated, then this first objection of the respondents would apply. But when the respondents have received the goods on board their vessel, and given a bill of lading to transport them across the ocean, it can hardly be called a preliminary agreement to a maritime contract, and not the contract itself.

The case then presents these two questions on the merits:

1st. Are respondents liable?

2d. If so, what is the rule of damages, and how is their amount to be ascertained?

The reason given by the answer why the City of Manchester was named in the contract, may possibly have been the true one, or that assigned by the libel, to wit, that the libellant "directed his agent in France to send his goods by the City of Manchester," which was advertised to sail on the 6th of September, because he knew her to be a safe and reliable vessel, and under skilful management. But we need not search for any reason, "Stet pro ratione voluntas." The libellant may, in fact, have had no better reason than that he believed the City of Manchester to be a lucky vessel, or he may very justly have preferred a tried boat and crew to a new iron steamer, whose officer or whose compass had not been tested by a trip across the ocean. Reason or no reason, he had a right to have his contract fulfilled according to its stipulations, and the result has shown that if such had been the case, his goods would have arrived safely. If the goods had been sent by the Manchester, the risks accepted in the bill of lading would have been borne by the libellant. For them he was his own insurer, and the carrier of those not accepted. If the carrier changes the vessel and the time of dispatching the goods, he has substituted different risks from those stipulated by the parties, and should be held as insurer against, all loss from whatsoever cause. The loss to libellant is a result of defendant's breach of contract.

But, assuming that the libellant had no good reason for desiring his goods to be sent by a particular vessel, and that the insertion of the name of the City of Manchester was merely pro forma, to fill up the usual blanks in a printed bill of lading, is there any evidence whatever that the goods were not injured in consequence of any accident accepted in the bill of lading?

The respondents aver that the ship was seaworthy in every way; the libellant denies the fact in his replication. The testimony of the captain shows his steamboat to have been new, made of iron, tight and stanch, well rigged and manned. The only account given of the loss of the vessel, was as follows: "She struck the point of Cape Race; up to that time she continued perfectly seaworthy. If she had not struck, at the average of our rate, we should have been in Philadelphia in five days. The steamer was wrecked. We backed off the point of Cape Race and run her on shore to save the lives of the passengers, and to keep her from sinking. There was no tempest. She struck in a dense fog; the sinking of the vessel and the damage done, resulted from her striking the cape."

Here, then, we have no other reason given by the captain, nor any testimony whatever, as to how or why this great mistake of running against a cape occurred. The answer and the witness both seem to assume that running against a cape or a continent is one of the usual accidents and unavoidable dangers of the sea. That cannot be termed an "accident of the sea" within the exceptions of the bill of lading, which proper foresight and skill in the commanding officer might have avoided. If the compass on the new iron vessel was not sufficiently protected to traverse correctly, the vessel was as little seaworthy as if she had no compass—and this should have been carefully ascertained before she started on her voyage. If there was no fault in the compass, then it is very evident that the officer who is thirty or forty miles wrong in his calculation, and driving through a thick fog with a full head of steam, and first discovers his true position by running on an island, a cape, or a continent, has neither the skill nor the prudence to be entrusted with such a command—and for want of such an officer the vessel is not seaworthy.

The loss of the goods committed to a carrier, and in possession of his servants, puts the burthen of proof on him, to show how it took place, and that it was not by their fault, but in consequence of some of the unavoidable accidents excepted in the bill of lading.

The respondents have not alleged or proved any one fact tending to relieve them from responsibility. That a steamboat has been either ignorantly, carelessly or recklessly dashed against a cape in a thick fog, cannot be received as a plea to discharge the carrier. Yet for anything that appears such is the case before us. If there were any circumstances tending to lead to a contrary conclusion, they are not in evidence in the case.

II. The rule of damages in these cases is, that the carrier shall pay for goods not delivered, their net value at the port of delivery. He is not liable for any speculation or possible profits which the owner might have anticipated in his peculiar business. Thus, suppose the carrier liable for non-delivery of a hundred barrels of flour at Philadelphia on a given day, and on that

day flour is worth five dollars a barrel, the amount of the owner's damage is clearly just $500, because he could have bought a hundred barrels of flour and supplied his loss for $500. The owner cannot be allowed to show that he was a baker and could in a few weeks have cleared ten dollars a barrel by manufacturing his flour into bread. The sum of money which represented the net value of the lost articles, with interest till paid, is all that can be recovered from the carrier when goods have been lost in the course of transportation. And as the owner would have paid freight as a deduction from the net value of his flour, so when the carrier pays its value, he will be entitled to have his freight deducted, if it has not been paid.

In all cases when the article to be delivered has a definite market value, the application of the rule is without any difficulty.

The libellant keeps a variety store in Philadelphia. The eighteen cases contained a selection of ten thousand articles of perfumery, &c., &c., to be found only in such shops. They are retailed generally at one hundred per cent. profit on the original cost in Paris. But few if any of these numerous trifles have any known wholesale or market value in Philadelphia, nor could libellant have supplied himself with the lost goods most probably in the Philadelphia market at any reasonable price. How, then, are we to arrive at a rule of damages to ascertain the amount of loss to libellant for the non-delivery of his articles? Certainly not as contended by his counsel, by taking the original cost, adding expenses and charges of transportation, and seventy-five per cent. "for loss of anticipated profits."

If these articles, like most other goods and wares, had a known value in market here, for which they could be purchased, the original cost and charges of transportation would have nothing to do with the calculation. But as such is not the case in the present instance, we must inquire what was the original cost and what the charges of transportation, &c., in order to arrive at their value here; or more properly, what would it cost to get other goods of precisely the same value in place of those lost. Now, we may assume (as nothing is pretended to the contrary) that a bill for the very same sort of articles which Bazin has purchased could be filled in Paris for the same sum of money. In less than sixty days, every article not delivered here by the carrier, could be put in Bazin's shop, for the same price which he has paid for them. But he will have lost only the interest of his money for sixty days longer. How much profit he might have made by retailing them, or what the amount of "anticipated business profits," being matters not capable of certain ascertainment, cannot make a part of the consideration. Legal interest is all that the law knows as the damage for detention of money. As the goods lost, therefore, have no market value here, and could not be purchased in our market, their value must be ascertained by adding costs and charges, and sixty days' interest on this sum. From this amount deduct freight, which is unpaid, and add interest on the balance till judgment.

If counsel can agree upon the amount of damages calculated on these principles, the decree will be entered for such amount; if not, the case will be referred to a master to report.

BEACH. (CITY BANK OF COLUMBUS v.)
See Cases Nos. 2,736 and 2,737.

Case No. 1,152a.

BEACH v. The NATIVE.

[Betts' Scr. Bk. 559.]

District Court, S. D. New York. July 7, 1857.[1]

MARITIME LIENS—SUPPLIES — PROOF TO SUSTAIN.

[Mere proof that a set of sails was furnished a vessel by the written order of her master, with directions to charge them to the vessel and her owners, is not sufficient to establish a lien for supplies; for an implied hypothecation of the vessel cannot arise from a credit to the master, given under circumstances that would not support a bottomry, and a bottomry hypothecation by the master upon the facts in proof would be void. Pratt v. Reed, 19 How. (60 U. S.) 359, followed.]

[See The Native, Case No. 10,054.]

[In admiralty. Libel by Henry C. Beach against the schooner Native (George Cornelius, owner) for supplies. Dismissed.

[Subsequently an appeal was taken to the circuit court, and a decree of reversal by default entered in favor of libellant. This was afterwards waived, and, upon the merits, a decree was entered in favor of libellant. The Native, Case No. 10,054.]

Dean & Donohue, for libellant.

Larned & Bell and Pratt, for claimants.

Before BETTS, District Judge.

This was a libel for supplies. The schooner was owned in New Jersey, and was supplied in this port with a set of sails, by the written order of her master, with directions to charge them to the vessel and her owners.

HELD BY THE COURT.—That it is not an open question to speculate upon, in regard to the general authority of the maritime law, when the text of an express decision of the United States supreme court stands in the way. Pratt v. Reed, 19 How. [60 U. S.] 359. The court say an implied hypothecation of the vessel cannot arise under a credit to the master, [under circumstances] less stringent than are required to support a bottomry. That there is no footing for argument in this case, but that a bottomry hypothecation by the master, entered into upon the facts in proof, would have been void. Libel dismissed, with costs.

[1] [Reversed in Case No. 10,054.]

BEACH, (PLATT v.) See Case No. 11,215.

Case No. 1,153.

BEACH v. TUCKER.

[3 App. Com'r Pat. 263½.]

Circuit Court, District of Columbia. Jan. 20, 1860.

PATENTS FOR INVENTIONS — INTERFERENCE — APPEAL—EVIDENCE.

[1. When an interference is declared between an application for a patent and an existing patent, the patentee is as much entitled to appeal to the circuit court of the District of Columbia, when the question of priority of invention is determined against him, as the applicant for the patent would be had the priority of the existing patent been sustained.]

[2. Upon an application for a patent dated December 1, 1858, an interference was declared with a patent issued December 2, 1856. To sustain the applicant's claim to priority of invention, there was offered his own testimony, and that of another interested witness, that the invention was made in 1844 or 1845, and that drawings were made in 1856. It was also shown that he filed a caveat in 1848, which he renewed in 1857. On the other hand, it was shown that the patentee had been in the enjoyment of the rights conferred by his patent under such circumstances that the applicant was chargeable with notice of it. *Held*, on appeal to the circuit court of the District of Columbia, that the evidence was not sufficient to show priority on the part of the applicant, and the existing patent should be sustained.]

Appeal from the commissioner of patents, refusing to grant letters patent to Moses S. Beach for his invention of a new and useful improvement in printing presses, and awarding priority of invention to Stephen D. Tucker, for which said invention a patent was issued to him in 1856, and which said patent he was in the enjoyment of for a period of nearly two years. [The commissioner's decision was set aside.]

MORSELL, Circuit Judge. Beach says: "It has for many years been a leading object, particularly among the publishers of newspapers of extended circulation and power-press manufacturers, to contrive a method for printing on both sides of the sheet at a single operation, which at the same time should not retard or in any wise interrupt the high rate of speed already attained in printing, nor complicate the machinery of the press. My invention accomplishes this much desired end, almost without expense, and accomplishes it so completely and simply that it seems to leave nothing more to be desired in the field it occupies. It is peculiarly applicable moreover to book printing because of the perfect 'register' which it must afford, and opens to that kind of work the most rapid presses, all of which have been heretofore excluded on account of the necessary delay for printing. Printing sheets on the second side without the intervention of hand labor leads naturally to feeding them to the press by machinery in the first instance, by cutting them off when wanted from an endless roll of paper or otherwise, and it also leads (as the sheets are not thus liable to misprinting) to the application of contrivances which will fold them ready for the book-binder, the mail-man and the carrier before they leave the press. I do not, however, claim the printing of sheets on both sides at one operation. But what I do claim as my invention, and desire to secure by letters patent, is seizing the back or tail end of the sheet, and thus returning to the types for a second impression in the manner as substantially set forth." Tucker, in describing his claim, says: "I claim seizing the back end of the sheet of paper by finger or other equivalents, and transferring it after its first side is printed from one side of the groove to the other, substantially as described, so as to again pass it around the impression cylinder to print the second side, substantially as above described."

The commissioner adopts for his decision the report of the examiner, dated May 5, 1859, who says:

"In the matter of interference between the applications of Richard M. Hoe, Stephen D. Tucker, and the patent of Moses S. Beach for improvements in feeding paper to printing press, I have the honor to report:

"This is an interference of two applications with a patent granted to Moses S. Beach on the second of December, 1856. Had Hoe alone applied, I should scarcely have considered it an interference with Beach's patent, the devices being different, but performing the same operation. Tucker's devices are identical in substance with Beach's, and being an avowed improvement on Hoe's, and applied for on the same day, the interference was evident. Beach does not prove his invention to be prior to the summer of 1856, (see testimony of John E. Powers, 3d interrogatory; James H. P. Dawson, 3d interrogatory; and Thomas L. Scoville's answer to the 4th interrogatory, &c.) Hoe proposed his devices in 1848, (see Stephen D. Tucker's testimony, 4th interrogatory,) and completed drawing in 1858. Tucker, the third party, proves, by testimony of Richard M. Hoe, his invention to have been in the winter of 1844–5. Drawings were made in November, 1856, (Exht. B, 4 interrogatory, &c.) James Blair's testimony is corroboratory of Hoe's, and the argument of Beach's counsel seems to admit the fact of prior invention on the part of Tucker. The plea of abandonment of their invention by Hoe and Tucker cannot be entertained. A caveat filed in the secret archives of this office in 1848, and renewed in 1857, which has been received as testimony, is followed by the applications for patents on the first of December, 1858. Just one day within the limit of statute, a neglected or abandoned caveat is not an abandoned invention. It is not made public, like a withdrawn application, and cannot, in consequence, be considered public property. I respectfully suggest that pat-

ents be allowed to Richard M. Hoe and Stephen D. Tucker for their respective inventions."

"May 6, 1859. The foregoing report is confirmed; priority of invention is adjudged Messrs. Richard M. Hoe and Stephen D. Tucker, to whom patents for their respective inventions are hereby ordered to issue," &c. Signed by the acting commissioner.

There are various reasons of appeal filed which appear fully and particularly to cover all the objections suggested in the arguments before me against the decision of the commissioners. To these reasons the commissioner has made a very general reply, which is to be regretted. All he says in his note addressed to me is: "Herewith are sent all the papers and models connected with the matter of appeal by Moses S. Beach, regarding which a notice was sent to the parties on the 8th instant. The nature of the decision from which Moses S. Beach appeals is sufficiently explained in the examiner's report, approved on the 6th of May last, and the office rests the defence on the accompanying documents, a list of which is enclosed." This was the state of the case when presented with all the documents and evidence by the commissioner, on the day and place appointed by me for the hearing of said appeal. The respective parties by their counsel also filed their arguments in writing, and submitted the case.

In the argument of the appellee's counsel, the objection to the jurisdiction of the judge to hear this appeal is raised upon the ground that the statute gives no right of appeal to a patentee in a case like the present. I have considered the arguments pro and con, with the authorities relied on by each party, and must confess that I am not free from doubts on which side the question should be decided. Under the influence of the new light thrown on the subject by the various new decisions referred to in the argument on the part of the appellant, and that no legal right may be denied to the appellant, and for the sake of future uniformity of decision, I think I ought to overrule the objection.

The next question to be decided is who was the prior inventor in the matter now in controversy. On the first of November, 1856, Moses S. Beach, the appellant, in compliance with the requisites of the statute, made oath that he verily believed himself to be the original and first inventor of the said invention, the subject of the issue in this case. Letters patent were issued to him, under the authority of which he has ever since exercised the rights thereby conferred, publicly and openly, and known or which might have been known to the appellee. This, according to the settled rule of law, must be considered prima facie evidence of the truth of the facts sworn to, and to throw the burden on the side of the appellee, by strong and satisfactory proof to overcome. The witnesses and proof offered are two in number, and the caveat filed in the secret archives of the office in 1848, and renewed in 1857 by Hoe, (one of the witnesses,) and Tucker, (the appellee,) admitted in evidence in this case. As to the witness Hoe, it is objected in the argument, that he was an interested witness, and on that ground the credit of his testimony impeached, as before stated. The commissioner says: "Hoe proposed his devices in 1848, (see Tucker's testimony,) and completed drawings in 1858." It appears that Hoe's case, therefore, was supported by the testimony of Tucker, the appellee in this case; and Hoe seems to be relied on as the principal witness to support by his testimony of Tucker's claim in this case, in which patents are directed to issue respectively to them.

These circumstances, with some others, tend to show a community of interests in the subject matter of the two interferences unfavorably to affect the credit of the witness Hoe, and so the commissioner seems to think when he looks to the testimony of Blair to corroborate him. This testimony is also objectionable on the ground of uncertainty, and because the original scraps and drawings from them which he says he made were destroyed. Why were they not preserved and produced at the examination? As they were in writing, they were the best evidence, and not being produced, or the non production of them otherwise legally accounted for, the legal presumption is that if produced they would show the facts to be unfavorably otherwise. If, however, Tucker's invention, as stated in the testimony of Hoe & Blair, should be considered as proved, Beach shows an entire dissimilarity between the two methods three respectable mechanics, skilled and experienced in the nature and operation of such machines, (see testimony.) But suppose the testimony free from the afore-going objections, and sufficient to prove what is claimed for it, what are the principles of patent law applicable to it? The commissioner says Tucker proves his invention to have been in the winter of 1854–5. Drawings were made in November, 1856; his application for a patent December the 1st, 1858. Beach's patent dated December 2, 1856.

Has the appellee been guilty of such laches as to have incurred a statutory forfeiture? The commissioner says: "The plea of abandonment of their inventions by Hoe & Tucker cannot be entertained. A caveat filed in the secret archives of this office in 1848, and renewed in 1857, which has been received as testimony, is followed by the application for patents, on the first of December, 1858, just one day within the limit of the statute."

The commissioner does not say what statute he means. I suppose it to be the seventh section, c. 88, Act March 3, 1839. I have in several instances of appeal endeavored to give what I thought was the true construction of the provision of the statute to mean that the inventor might use, and vend to others to be used, the specific machine, &c., with-

out liability therefor to the inventor, or any other person interested in the invention, and no patent shall be held invalid, &c., provided, &c. Now, this shows that the privilege granted is applicable only to the inventor or those claiming under him, &c., that this construction is the true one, I refer to the case of Pierson v. Eagle Screw Co., [Case No. 11,156.] Is there one particle of proof in the whole case or is it pretended that the appellee has ever, by purchase or sale or license or otherwise, authorized Beach to use or exercise the invention claimed by him Tucker? On the contrary, is not the claim set up by Beach as an independent inventor, without the knowledge even that Tucker claimed to be the inventor? How, then, can the provision have the least application to this case? If not, then here is a person sleeping on his rights for nearly two years after a patent granted to an independent inventor, who had been publicly and openly using it under circumstances stated in the proof, showing that Tucker must have known it, or that he might have known it, without offering any sufficient reason for the delay, and without on his part objecting, and from which it must be presumed he allowed or acquiesced in it, this then, in my opinion, was a statutory bar to his claim, and notwithstanding the caveat filed some time after the patent issued. Such being my opinion, there is error in the decision of the commissioner, and the same is annulled and set aside, and the appellant considered the first and original inventor.

Case No. 1,154.

BEACH v. WOODHULL.

[Pet. C. C. 2.][1]

Circuit Court, D. New Jersey. April Term, 1803.

TREASON—CONFISCATION—CONSTITUTIONAL LAW—RETROSPECTIVE LAWS.

1. The act of the legislature of New Jersey of 1778, relative to the sale of the estates of persons attainted of treason, did not authorize a sale of forfeited estates free from incumbrances, and a lien on lands sold under that law continued, notwithstanding a sale.

2. The law of 1783 is a positive bar to the claims of a mortgagee on an estate sold under its authority. This law is retrospective and unjust, but it is not repugnant to the constitution, and the court will not declare it a nullity.

[See Miller v. U. S., 11 Wall. (78 U. S.) 268; Tyler v. Defrees, Id. 331.]

In equity. The bill stated that Stephenson made a mortgage of certain lands to [Richards] the testatrix of the plaintiff in March, 1773, which was duly recorded according to law, the mortgage having been made for securing a debt due to the testatrix. In 1777 the mortgagor died, leaving his heir at law, who under the laws of New Jersey was attainted of treason, for joining the enemy; and the commissioners of forfeited estates sold the mortgaged premises to the defendant. The bill prayed the foreclosure of the mortgage.

The defendant pleaded, that Stephenson, as a further security, did at the time of executing the mortgage, give his bond for the payment of the debt, in which bond he bound his heirs. That upon the death of the mortgagor, the estate descended upon his heir at law; an inquest was taken in 1779 finding the heir at law to have joined the enemy, which not being traversed, judgment was entered forfeiting all his estate according to the laws of the state. The commissioners sold the same, declaring that the same was sold free of all incumbrances, and it was purchased by the defendant. That the money paid by the defendant was more than sufficient to pay the plaintiff's debt; and that due notice according to law was given, calling upon all persons having claims against this estate to bring them in; but none was made by the plaintiff.

Mr. Stockton, for the defendant, referred to the act of this state of December, 1778, (Wilson's Ed.) p. 67, which forfeits all estates of those who have joined the enemy, upon an inquest found and final judgment entered. By the 16th section, the court of common pleas or two judges may receive demands, within one year against the former owners, which are to be tried in a particular way, and if admitted, to be paid at the treasury. By the act of December, 1783, (Wilson's Ed.) p. 384, any person having demands by mortgage or otherwise against forfeited estates, are to exhibit the same before two judges of the court of common pleas, who are to state and ascertain. the same. This demand is within the 16th section of the act of 1778. The words "just and equitable demand" mean mortgage debts; the word demand would of itself be sufficient. Co. Litt. 291, 508; 1 Ld. Raym. 115. If it should be argued, that the word "may" was not compulsory, the following cases may be cited: 2 Salk. 609; 1 Vern. 152; 2 Doug. 526; 2 Vern. 116, 117. It may be said that this was not a debt from the heir, but the following cases show, that when the heir is bound it is his debt at common law. 2 Atk. 205, 609; Vern. The debt descends upon the heir although he is not chargeable without assets. By the 10th section of the law it is declared, that the purchaser shall hold the estate, as the offender held it—now, substantially, the estate, after forfeiture, belongs to the mortgagee, and the mortgage is only a security, 2 Burrows, 978; 2 Doug. 610; 7 Term R. 418. A mortgagee has only a chattel interest. But whatever construction may be given to the law of 1778, that of 1783 is conclusive. The four first sections only apply, to demands which had been adjusted. The 6th section bars the foreclosure of all mortgages, unless the demand has been produced and adjusted. 1 Ves. Jr. 285.

On the other side it was contended, that

[1] [Reported by Richard Peters, Jr., Esq.]

by the express provisions of the 5th section of the law of 1778, the state acquired no better estate than the offender had, and this was an estate incumbered with the debt. The state therefore, could pass no better estate to the purchaser. The word "may," when directed to courts or officers is imperative, though otherwise when applied to individuals. What proves that it could not be intended to compel mortgage creditors to abandon their liens, and apply to the treasury is, that if the sum were insufficient to pay all the debts, the creditors were to be paid pro rata, which would have been iniquitous as to mortgage creditors. The fact stated, of the commissioners selling free of incumbrances, is immaterial, as it is not stated that the law authorised them to sell in that way, nor is there any such authority in the law. The act of 1783 is retrospective and unjust, and is therefore void. But, if it is not so, the lien of the mortgage is not destroyed, but in cases where the commissioners sold free from incumbrances. But as the law had not given them a power so to sell, the case never occurred, or could legally occur, where this law could operate. The 6th section only refers to demands which could have been made. Those only could be made, which were against the person, but this was against the land. As to the idea of the heir being bound without assets, the cases below were cited. 3 Bac. Abr. 465; 2 P. Wms. 664. A law which vests all a man's estate in trustees, does not without express words discharge his person. Andrews, 40. An attainted person is still liable to his debt. Cro. Eliz. 516. An equity of redemption is not legal assets, (2 Atk. 290, 294;) and the heir may plead rien per descent, (2 Vern. 61; Amb. 308.) It has been frequently decided in our courts, that when the sale was not made free of all incumbrance, the mortgagee was not barred. When the sale was made free of incumbrance the point has not been decided. But the case of Walter v. Perine, [Case No. 17,121,] in this court, before Judge Chase, was precisely like the present, and was determined in favour of the mortgagee.

[Before WASHINGTON, Circuit Justice, and MORRIS, District Judge.]

WASHINGTON, Circuit Justice. It must be admitted, that the act of 1778, did not authorise a sale free of incumbrance, and that the lien, notwithstanding the sale, still continued under that law. But the mortgagee had an election to abandon his lien, and secure his money from the treasury of the state, if he pleased.

When we come to the act of 1783, it is plain that the four first sections, relate entirely to claims against the treasury only, and not to the right of the creditor against the estate. The legislature knowing that de jure, the commissioners could not sell free from incumbrances, knew also that de facto, they had done so in many instances, and therefore they say, to those having liens on forfeited estates, if you wish to readjust your demand, once given in, so as to have recourse against the treasury, you must first prove that the sale was free from incumbrance; under an idea perhaps that this having been publicly done, and acquiesced in by the creditor, who, by putting in his claims had consented to look to the state for payment, had abandoned his lien on the land. But the clause of the law has no effect, in my opinion, as to the construction of the fifth and sixth sections; that clause relating exclusively to claims against the treasury, and these to claims against the estate.

Upon the existence of the lien and the liability of the land, the law is positive, plain and unambiguous; no room is left for construction. It is a positive bar to the demand, whether the sale was made free of incumbrance or otherwise. But even if it be a bar only where the sale was free from incumbrance, this is exactly that case. To admit the course of reasoning of the plaintiff's counsel, that it meant cases where sales free from incumbrance were authorised to be made by law, would be to annul the law by construction, for it is admitted, that no previous law had authorised such sales. If a creditor had applied to the treasury he certainly would have been paid, on proving that the sale had been de facto made free from incumbrance, though such a sale had not been authorised, and it would have been no answer to say, that no such sale could legally have been made. How then can such an answer be made in this case, if the fourth clause is to control the construction of the fifth and sixth sections? The law is clearly retrospective and unjust in its operation, but it is not for this court to correct it, or to declare it a nullity. It is not repugnant to the constitution.

I am sorry to differ from the court which decided the case of Walter v. Perine, [Case No. 17,121,] but I must give such an opinion as I think right, not feeling myself bound by any decision given at a circuit court.

MORRIS, District Judge, considered the case of Walter v. Perine as precisely like the present, and that the decision in that case was right.

The court being divided, a case was stated for the supreme court, but no removal to that court took place.

BEACHAM, (TURNER v.) See Case No. 14,252.

Case No. 1,155.

In re BEADLE.

[5 Sawy. 351.] [1]

District Court, D. California. Jan. 4, 1879.

BANKRUPTCY—FRAUDULENT ASSIGNMENT—JUDGMENT LIENS OF CREDITORS.

[1. An assignment in trust, by an insolvent, with power to sell within two years for the benefit of creditors who will accept 60 per cent. of their claims, with a reservation in favor of the grantor of all property remaining after such settlement, is void at common law and under the bankruptcy act, as having been made with intent to hinder, delay, and defraud creditors.]

2. Where an insolvent made an assignment to trustees, with intent to hinder and delay his creditors, which assignment was by this court subsequently adjudged void, and the trustees conveyed the property to the assignee in bankruptcy: *Held*, that the latter took the property subject to the liens of creditors who had recovered and docketed judgments subsequently to the fraudulent conveyance and before the commencement of the bankruptcy proceedings.

[Cited in Re Estes, 3 Fed. 138.]

In bankruptcy.

Sawyer & Bell, for Wright & Co.

E. B. & J. W. Mastic, for assignee.

HOFFMAN, District Judge. It appears from the register's report, and the admissions of counsel, that on the thirteenth day of October, 1874, [Donald] Beadle, being then insolvent as an individual, and as a member of the insolvent firm of A. Chalfant & Co., executed to certain parties a conveyance of his real estate in trust for those of his creditors who should consent to accept sixty per cent. of the amounts due them, in full of their demands, and on the further trust to reconvey to the grantor all the moneys and property remaining in their hands after the payment of the creditors as aforesaid. The trustees were allowed to sell at any time within two years, and on such terms and conditions as they should deem most to the advantage of the parties interested—the property in San Francisco to be sold last.

Beadle was adjudicated a bankrupt on the petition of his creditors on the nineteenth day of February, 1877. Before the filing of this petition, several creditors who had not assented to the deed of trust had sued the bankrupt, and obtained judgments which were duly docketed. A suit was subsequently brought by the assignee in bankruptcy against the trustees to set aside the deed of trust. The trustees interposed no defense; and in pursuance of the decree of this court, they conveyed to the assignee all their right, title and interest in the property deeded to them. This property was subsequently sold by the assignee free of all liens, under a stipulation that the liens, if any, held by the judgment-creditors should attach to the proceeds. The latter now pray that their judgments may be satisfied out of the fund in the order of their dates. The cause has been very elaborately argued on in the briefs, but the questions presented are few and simple.

1. Was the deed of trust by the bankrupt a conveyance made with intent to hinder, dely and defraud creditors? Of this, there can be no doubt. It would not be easy to imagine a conveyance which would contain more of those features which the courts have always held to be indicia of fraud.

It was made by a person hopelessly insolvent. It embraced all his property. It was not for the equal benefit of all his creditors, but those of them who would consent to accept sixty per cent. of their demands in full satisfaction. It attempted to place the property beyond the reach of the creditors for two years, at the discretion of the trustees. And finally, it contained a reservation in favor of the grantor of whatever might remain after the payment of the sixty per cent. to those creditors who might agree to discharge the grantors.

No citation of authorities is necessary to show that this conveyance is in law conclusively deemed to have been made with intent to hinder, delay and defraud creditors, and is, therefore, void at common law, under the statute of Elizabeth, the civil code of this state, and United States bankruptcy act.

2. Could the judgment-creditors, by docketing their judgments against the grantor, acquire a lien on the land without previously bringing their bill in equity to set aside the fraudulent conveyance? This question must be determined by the law of this state; and it appears to have been settled ever since the case of Hager v. Shindler, 29 Cal. 47, that a conveyance of this description may be treated by the judgment-creditor as absolutely void ab initio, and as if non-existent. In that case it was held that the purchaser of land at a sheriff's sale may maintain a bill to set aside and annul as a cloud upon the title a deed of the land given before the judgment by the judgment-debtor without consideration and to defraud his creditors. This decision has been followed or approved in numerous subsequent cases, and it now stands as the established law of the state. 29 Cal. 190; 28 Cal. 649; 32 Cal. 263. Mr. Justice Sawyer in this last case observes: "As to the creditor the fraudulent conveyance was void. Notwithstanding this conveyance, therefore, so far as the rights of the creditor are concerned, the title never passed to the grantee until the sale under execution and the making of the sheriff's deed under which the plaintiff claims; until that time, as to the creditor, the title must be regarded as remaining in the debtor; and his grantee, who participated in the fraud, must be regarded as being in possession with the debtor's assent and not adversely to the creditor, his right being subject to being divested by a sale under execution against his grantor in favor of the creditor defrauded." It follows from this view of the law, as enunciated by the supreme court, that the judg-

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

ment-creditors by docketing their judgments acquired a lien upon the property fraudulently conveyed, "the title to it being regarded as to them as remaining in the debtor." The register was of opinion that upon the setting aside of the fraudulent conveyance by this court, the title passed to the assignee, precisely as it existed in the debtor at the date of the fraudulent conveyance. This would no doubt be the case if the conveyance had been valid under the state law (as in the case of an assignment under the state insolvent law for the equal benefit of all the creditors), and only voidable by the assignee in bankruptcy in case bankruptcy occurred within the prescribed period. But the conveyance in question was absolutely void under the state law, as we have seen. The title as against his creditors remained in the grantor. The creditors could seize and sell the property under execution, and the purchaser could bring his bill to set aside the fraudulent conveyance as a cloud upon his legal title. If such were their rights the property passed to the assignee, subject to the liens which had already attached to it under the state law, and those liens must be respected and enforced in this court.

It is urged that the statutory period to which liens of this nature are limited has elapsed, and that the liens are therefore gone. But it had not elapsed at the time of the commencement of the proceedings. The liens were then valid and subsisting; and both the terms of the act and the uniform course of the decisions under it show that the assignee takes the property of the bankrupt as of the date of the commencement of the proceedings, and subject to all then existing liens upon it. The rights of all parties are fixed, and must be determined as of that time. New liens cannot be acquired, nor can existing liens be lost by the running of the statute of limitations, or the expiration of any statutory period fixed for their enforcement.

The judgment-creditors are, therefore, in my opinion, entitled to be paid in preference to the general creditors, out of the proceeds of the property on which they acquired liens, and in the order of the dates on which their judgments were docketed.

BEADLE, (ARMSTRONG v.) See Case No. 541.

Case No. 1,156.

In re BEAL.

[1 Lowell, 323;[1] 2 N. B. R. 587, (Quarto, 178;) 2 Amer. Law T. Rep. Bankr. 95; 1 Chi. Leg. News, 326.]

District Court, D. Massachusetts. May, 1869.

BANKRUPTCY—CONCEALED ASSETS—TITLE IN ANOTHER—JOINT ESTATE—SEPARATE ASSIGNEES.

1. If a bankrupt has property in his possession, and has the use of it as his own, and wilfully omits it from his schedules and keeps it from his assignee, it is no answer to a charge of concealment thereof that the property belonged of right to his assignees under an earlier assignment in insolvency, under the laws of the state of his residence.

[Cited in Shimer v. Huber, Case No. 12,787; Re Moses, 1 Fed. 847.]

2. If a bankrupt has the actual possession of joint estate and joint books of account, he must disclose them to his separate assignees, and if he wilfully fails to do so, is not entitled to a discharge.

[Cited in Re Leland, Case No. 8,228.]

[In bankruptcy. Heard on objections to the discharge of the bankrupt. Discharge refused.]

It appeared that in 1866 the bankrupt carried on business in Boston, in partnership with one Ricker; and in the autumn of that year he bought for the firm a large quantity of goods on credit, and disposed of them in various ways, which his creditors thought to be fraudulent, under the insolvent laws of Massachusetts; and upon their petition the firm was adjudged insolvent. Their books were never found by the assignees, and the goods were never accounted for, and no discharge was ever granted them. Ricker was then and since a resident of New York, and the business here was conducted chiefly by [J. H.] Beal. The judge said that although the law of this state, in most respects, so far as such acts as then alleged against the firm of Beal & Ricker were concerned, was substantially similar to the bankrupt law, yet none of those acts could be set up in bar of his discharge here, because they were all done before the bankrupt law was passed.

J. D. Ball, for the creditors. If we trace goods and books of account into the bankrupt's possession in 1866, and show that he did not in fact hand them over to his assignees in insolvency, or otherwise account for them, the presumption is that he still has them, and as he has made no return of any such property or books in his schedules, nor delivered them to his assignees in bankruptcy, he must now account for them, or be deemed guilty of concealment, and fail to obtain his certificate of discharge.

[BY THE COURT: This view was adopted for the purposes of the hearing, and all legal evidence that either party offered on these matters was heard subject to the ultimate decision of the questions of law as well as of fact upon full argument, which has now been had.][2]

E. Avery, for the bankrupt, contended that whatever estate he possessed or was entitled to, and whether concealed or not, passed to his firm's assignees in insolvency, and that they had full power to inquire into all his dealings, and to set aside fraudulent conveyances, and must be conclusively presumed to have done their duty, or whether they did or not, that nothing was left for

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

[2] [From 2 N. B. R. 587, (Quarto, 178.)]

the assignees in bankruptcy, and therefore nothing can have been wilfully concealed from them.

[BY THE COURT: I cannot yield my assent to this argument.][3]

LOWELL, District Judge. The question is one of fact, whether this bankrupt had, at the time of his bankruptcy, any estate or effects, or any books relating thereto, which he has concealed. If he had such de facto, though by a defeasible title, he must set them out in his schedules, and give them to his assignees. It is not for him to rely on the title of a third person, which he has not himself respected. The presumption is that he surrendered all his property in 1866; but that is a presumption of fact, and if he did not, it is not important whether his motives were good or bad, whether his acts were done with the consent or against the will, and in fraud of the rights, of his then assignees. The possession of assets in the use and enjoyment of the bankrupt makes a sufficient title for his assignees in bankruptcy until the earlier assignees shall dispute it. A like argument applies to the books of account, though with somewhat greater force, because they are not so much assets as means of evidence, and might well be left in the bankrupt's possession after they had been inspected and made use of by the former assignees.

Again, it is said that the books and the property, if any there were, belonged to the firm of Beal & Ricker, and the firm is not in bankruptcy. But if this bankrupt had in his possession any of the joint estate, it would pass to his assignee, who would hold as tenant in common with the solvent partner. Whether the latter could take possession and control of it, subject to account, would depend on circumstances. Speaking generally, he could not; and, in any event, it must be disclosed in the bankrupt's schedules.

Finally, it was argued that these assignees, who happen to be the very same persons who were the assignees in insolvency, knew all that they now know long before the bankruptcy, and therefore there has been no concealment from them. As I state this argument, I fear that I must have misunderstood it; if not, it is easily answered. A concealment of property and books from a person entitled to their possession is not the less a concealment of them because he knows they are concealed, if he does not know where they are concealed. The facts in the case show a studied and protracted evasion on the part of the bankrupt of all information on the subject of his property and books. He seems to be very hostile in his feelings toward the assignees, and this may possibly account for his mode of meeting the necessary and proper inquiries which were made of him in his examination before the register; but the natural inference is that he was seeking to conceal the truth. He undertook, towards the close of the hearing, to account for his trade property by the payment of large debts by way of preference; but the explanation seemed to come very late. I do not feel by any means sure that he has any estate, but upon the evidence I can hardly say that he has not. There is every reason to suppose that he has the books of account of Beal & Ricker, unless he has destroyed them; and on the ground that he has concealed them from his assignees I refuse his discharge.

Discharge refused.

[3] [From 2 N. B. R. 587, (Quarto, 178.)]

BEAL, (WALKER v.) See Case No. 17,065.

Case No. 1,157.

BEALE v. BURCHELL.

[5 Cranch, C. C. 310.][1]

Circuit Court, District of Columbia. May Term, 1837.

TAXATION—COLLECTION BY DISTRESS AND SALE.

1. The corporation of Alexandria has a right to collect taxes by distress and sale; and to raise taxes for purposes and works out of the town.

2. The court will not instruct the jury that the plaintiff has a right to recover, unless all the facts necessary to entitle the plaintiff to recover, are stated in the prayer.

THE COURT (MORSELL, Circuit Judge, contra) refused to give the following instruction to the jury, which was moved by R. J. Brent, for the plaintiff, [Thomas K. Beale:]

1. That if the jury should be of opinion from the evidence, that the defendant [Edward] Burchell forcibly opened and entered the outer door of the plaintiff's house to serve the process under which he alleges to have been acting, such entry was illegal, notwithstanding he may have authority, and the plaintiff is entitled to recover a verdict in his favor.

THE COURT (nem con.) also refused to give the following instructions, which were also moved by the plaintiff's counsel:

2. That the defendant had no authority to enter and distrain, and if he did, he is a trespasser. That the corporation has no right to distrain at all, nor to raise taxes for purposes out of the town.

3. That if the jury should be satisfied by the evidence that all, or any part of the taxes for which the defendant distrained, were assessed by the corporation for a work of internal improvement beyond the town of Alexandria, then, as to those taxes, so

[1] [Reported by Hon. William Cranch, Chief Judge.]

assessed, the distress was irregular, and the corporation had no authority so to distrain.

4. That if the jury believe that the defendant procured the partial opening of the outer door by craft, and immediately entered with violence, injuring the wife of the plaintiff, who was holding the door, then the plaintiff is entitled to recover.

In support of his first prayer, Mr. Brent cited 2 Saund. Pl. & Ev. 691; 2 Petersd. Abr. tit. "Arrest," p. 326; Lee v. Gansel, 1 Cowp. 1. In support of his second prayer, he cited Loughborough v. Blake, 5 Wheat. [18 U. S.] 317, 4 Pet. Cond. R. 665; 2 Kent, Comm. 275, 339; 3 Wheeler, Abr. 457; Ellis v. Marshall, 2 Mass. 269; Rex v. Larwood, Comb. 316; 2 Wheeler, Abr. 470.

Verdict for the defendant.

BEALE, (CROCKER v.) See Case No. 3,396.

BEALE, (EMMERSON v.) See Case No. 4,469.

BEALE, (LINDENBERGER v.) See Case No. 8,359.

BEALE, (MEADE v.) See Case No. 9,371.

BEALE, (NUGENT v.) See Case No. 10,376.

BEALE, (PENNOCK v.) See Case No. 10,940.

Case No. 1,158.

BEALE v. PETTIT et al.

[1 Wash. C. C. 241.][1]

Circuit Court, D. Pennsylvania. April Term, 1805.

MARINE INSURANCE—ABANDONMENT — INSURABLE INTEREST—OPEN POLICY—EVIDENCE.

1. Action on a policy of insurance. A certificate given by a supercargo, upon his return from the voyage injured, and who, at the time it is offered, is dead, is inadmissible to prove the plaintiff's interest in the return cargo. Evidence cannot be given to prove what the supercargo had declared on this subject.

2. In an open policy, the plaintiff must prove his interest, and the value of his property, or he cannot recover. The bill of lading of the outward cargo, is no proof of the interest of the plaintiff in the homeward cargo.

3. Quere, whether, when, at the time of an offer to abandon, the property was restored, the assured can recover for a total loss?

At law. Action [by Beale against Pettit & Bayard] on a policy of insurance, on goods from Norfolk to Aux Cayes, and on the return cargo. The outward cargo was carried safely. The vessel took in a return cargo; was captured and carried into Jamaica; and libelled. The vessel, and most of the cargo, was restored, on stipulation to answer the appeal; and the vessel arrived, with the cargo, in safety, at Norfolk. As soon as the plaintiff had notice of the capture, he gave notice to abandon; but at that time the cargo had been restored, and was on its return home; but this not known to the plaintiff. The bill of lading, invoice, or an account of sales of the return cargo, were not produced; nor did it appear that any had ever existed. The supercargo, after his return, gave a certificate, on oath, that he had sold the outward cargo, belonging to the plaintiff, and invested the whole in a return cargo. But the court refused to let this certificate be read, or hear evidence of what the supercargo, (now dead,) had declared in his life time, on this subject. The notice to abandon was given on the 6th of May, and the captain's protest, to prove the loss, was sent to the underwriters the 4th of November, at which time the vessel had arrived at Norfolk.

Ingersoll, for the defendants, objected to the recovery; 1st, because, at the time the abandonment was made, no proof of loss or property was made; 2d, because, at that time, the vessel was in fact in safety; 3d, no proof of property and value.

WASHINGTON, Circuit Justice, charged the jury. This policy is made in the name of one Leamy, for and on account of all persons concerned in the cargo. The plaintiff states himself to have been owner of a part of the return cargo; and if so, it is clear that he has a right to sue. But proof of his interest, and, (the policy being open,) of the value of it, must be made out to your satisfaction. It is of the very essence of this action, that he prove his interest. The protest of the captain is inapplicable to this point. The bill of lading, for the outward cargo, is no proof that the plaintiff was interested in the return cargo. The evidence most relied upon is, a paper delivered by the defendants to the plaintiff, in which they state, that no proof of property had been laid before them, but the declaration, on oath, of the supercargo; for which reason they refuse to pay. Now this paper does not make that declaration evidence, which we have declared is not evidence; particularly as the defendants state it as the ground of their refusal. Should the jury not be satisfied with the proof of property, they will find for the defendants. If otherwise, they will find, subject to the opinion of the court, in a case to be stated, so as to enable us to decide more deliberately, the question,[2] whether, under

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

[2] This question is more difficult than I at first supposed it. Marsh. Ins. p. 484, says, that if the assured at the time he receives advice of the loss, or before he has abandoned, receives advice also that the property is recovered, he cannot abandon; because he can only abandon while it is a total loss, and he knows it to be so; not after he knows of the recovery. The rule, he says, is, that if the thing insured be recovered before any loss is paid, the insured

the circumstances of this case, the plaintiff could abandon, and go for a total loss. The plaintiff agreed to be called, as soon as the jury returned to the bar, and suffered a nonsuit.

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may claim for a total or partial loss, according to the final event; that is, according to the state of the case at the time he makes his claim. In the case of Hamilton v. Mendes, 2 Burrows, 1198, Lord Mansfield says, "the question is, whether the plaintiff, who at the time of his action brought, at the time of his offer to abandon, and at the time of his being first apprized of the accident, had only sustained a partial loss, ought to recover as for a total one?" It is repugnant to recover as for a total loss, when the final event has proved it only an average loss. "The assured cannot elect before advice of the loss; and if that advice shows the peril to be over, he cannot elect at all; for he cannot abandon, when the thing is safe." The present is the first attempt that has been made to charge the insurer as for a total loss, upon an interest policy, after the thing was recovered. "If the thing in truth be safe, no artificial reasoning can set it up for a total loss." "In case the ship be taken, the insured may abandon; provided the capture, or the total loss occasioned thereby, continue to the time of abandoning and bringing the action." He again lays down the principle in the following words: "That the plaintiff can only recover an indemnity, according to the nature of his case, at the time of the action brought, or at most, at the time of his offer to abandon." I give no opinion how it would be in case the ship and goods were restored in safety, between the offer to abandon, and the action brought, or between the commencement of the action and the verdict." Here the event had fixed the loss to be an average only, before the action brought, before the offer to abandon, and before the plaintiff had notice of any accident.

Parker, Ins. 145, says, that it may be collected from Roccus, that in order to entitle the plaintiff to recover for a total loss; it must continue total at the time the offer is made to abandon, at the time the action is brought, or at the time of the payment of the money.

From what is said above, it is clear, that if at the time of the offer to abandon, the assured had notice of the recovery, he cannot abandon. But the question is, if at that time the property was in fact recovered, and in safety, and this unknown to the assured, can he abandon, if afterwards the fact appears? In the case of Goss v. Withers, 2 Burrows, 683, and Hamilton v. Mendes, [supra,] the assured knew of the recovery before his offer to abandon. But the judge, throughout, in laying down principles, speaks of the fact of recovery, before action brought, or offer to abandon. From which I should conclude, that if before the action brought, or offer to abandon, it should appear, that the property was in safety, the assured can only recover as for a partial loss. But suppose at the time of the offer to abandon, she was still detained, by virtue of the capture, but liberated before action brought? This is the question which Lord Mansfield says he does not mean to decide. But I think it clearly proves, that the question depends upon the fact, not upon the assured having or not having notice of it. Indeed, I cannot see why that circumstance should make any difference in the principle, which certainly is intended to prevent a loss, partial in its nature, from being converted into a total one. In Marshall v. Delaware Ins. Co., decided in this court, [Case No. 9,127,] at a subsequent session, and affirmed in the supreme court, (4 Cranch, [8 U. S.] 202,) it was decided, that the right to abandon depends on the state of the fact, at the time of the offer, and not the state of the information received.

Case No. 1,159.

BEALE v. RAILWAY CO.

[1 Dill. 569.][1]

Circuit Court, D. Iowa, 1871.

GROSS NEGLIGENCE—EXEMPLARY DAMAGES.

Exemplary damages may be awarded against a railway company for an accident which happens in consequence of the gross negligence or drunkenness of their servants.

[Cited in Malloy v. Bennett, 15 Fed. 374.]

At law. This was an action for damages caused by a collision, and was tried before LOVE, District Judge. The negligence of the defendant's servants was admitted on the trial. The plaintiff suffered a severe and permanent injury. The jury found a verdict for $5,000 against the company, which moved for a new trial on the following grounds:

1. That the court erred in instructing the jury that a corporation might be rendered liable in punitive damages for the gross negligence of its servants.

2. That the court erred in instructing the jury that a single case of intoxication by a railroad engineer, when on duty, in the absence of countervailing proof, raises a presumption that he is a man of intemperate habits, and the superintending officer of the company is presumed to have knowledge of the character of its employes.

Nourse & Kauffman, for plaintiff.

Withrow & Wright, for defendant.

LOVE, District Judge, in overruling the motion for a new trial, held:

That on the grounds of public policy and for the better security of the rights of the public, punitive damages can, and in certain cases ought to, be awarded against railroad corporations. Punitive damages, it is true, are in the nature of punishment; and it is equally true that in ordinary cases it is contrary to our ideas of justice that the defendant should receive more than compensation for the injuries he sustained, but in cases like the one at bar, although the excess above the amount of real damages goes to the plaintiff, still, it is well settled that it is one of the means of securing more care and attention on the part of corporations having great rights and privileges, that in cases of injury arising from the gross misconduct or negligence of their employes, they are liable to punitive damages. It is a right and interest that the public have in every prosecution of this kind, that these companies shall be taught, so to speak, that they are held to exercise not only ordinary care, but extraordinary care in the transportation of passengers, and on these grounds, courts are inclined to uphold the reasonable verdicts of juries where punitive damages are awarded.

The counsel for the defendant have suggested to the court that railroad companies should not be held liable for punitive dam-

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[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

ages for the gross negligence of one of their employes, unless notice of the character of the employe is brought to the knowledge of the company. But the complete answer to this is that a railroad company acts only through its agents—the directors, the superintendent, and all the employes are the agents through whom alone the company acts, and unless the company are held liable for the acts of these parties, the public have neither a remedy nor security. The public have a direct interest in having these companies employ capable, honest, and reliable men, and it is the duty of the companies to see that their employes are of a proper character, or courts and juries will hold them to a strict accountability for misconduct. A railroad company employs a drunken engineer; the life and personal security of the travelling public is placed in his hands; the public can know nothing of his character, and if an accident occurs, occasioned by his negligence, inattention, or misconduct, and loss of life or limb results, the company should be held responsible for the accident thus occurring; not only in compensatory damages, but punitive damages for the want of the exercise of care in the character of the employes selected. And experience has long since demonstrated that merely compensatory damages is not sufficient to compel these companies to that care and attention that the personal safety and security of the travelling public demand.

Under the peculiar circumstances of this case the court is unable to separate the proof of the actual damages from the inference of punitive damages. The conduct of the agent of the company is so intimately connected with the proof of the circumstances connected with, and the character of the injury received, that one cannot be excluded without the other. So that the evidence, although in its nature tending to show a reason for punitive damages, would be still admissible as showing the actual damages. But under the rulings of this case heretofore stated by the court, it would, for other reasons, be admissible.

Judgment on the verdict.

BEALE, (UNITED STATES v.) See Case No. 14,549.

Case No. 1,160.

BEALE v. VOSS.

[1 Cranch, C. C. 179.] [1]

Circuit Court, District of Columbia. July Term, 1804.

PRACTICE—VERDICT BELOW TWENTY DOLLARS—NON PROS.

If the verdict be reduced below twenty dollars by account in bar, there must be judgment of non pros.

[Cited in Hellrigle v. Dulany, Case No. 6,343.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

At law. Assumpsit for work and labor; an account in bar given in evidence; verdict for 45 cents; motion for non pros. See Laws Md. 1785, c. 46, § 7; Laws Md. Nov. 1785, c. 87, § 2; Laws Md. Nov. 17, 1791, c. 68, § 9.

Mr. Mason, for the defendant, and Mr. Key, for the plaintiff, admitted, that by the law in Maryland there should be a non pros.

Non pros. entered at December term, 1804.

KILTY, Chief Judge, absent.

Case No. 1,161.

BEALL v. BECK.

[3 Cranch, C. C. 666.] [1]

Circuit Court, District of Columbia. Dec. Term, 1829.

LANDLORD AND TENANT — DISTRESS — BOARDING-HOUSE—PROPERTY OF LODGER—SLAVES.

1. The slave of a stranger, hired to, and in the service and employ of a lodger in a boarding-house, with the consent of his owner, and found upon the premises, is not liable to be distrained for rent due by the boarding-house keeper, being exempted by the broad principle of public convenience.

2. The distinction between an inn and a boarding-house is, that into the former all travellers have a right to enter and demand accommodation; but the keeper of a boarding-house has a right to select his guests.

3. A slave, hired as a servant to a lodger in a boarding-house, is not exempted from distress for rent, on the ground of his being in the actual use and personal service of his master, unless he is so at the time of the seizing of him by way of distress. It must be such an actual use, that the taking of the slave would be, or tend directly to a breach of the peace, even if taken from the tenant himself. The case is strengthened by the fact that the landlord rented the house to be occupied as a boarding-house.

At law. Replevin [by Walter B. Beall] for the plaintiff's slave William, hired to Mr. Easton, who was a boarder at Mrs. Rich's boarding-house, for whose rent, due to Mr. Archer, the slave was, by his order, distrained. The defendant made cognizance as bailiff of William Archer, for $90 rent arrear due by Mrs. Rich.

The plaintiff pleaded: 1st. That the slave was not, at the time when, &c., in the said dwelling-house of Mrs. Rich, as the servant, and in the employment of the said Ann E. Rich, but accidentally, and while in the service of one William C. Easton, to whom the said slave was hired by the said plaintiff; upon which issue was joined. 2d. The same plea with this addition, that there were, at the time when, &c., goods and chattels of the said Ann E. Rich in the said dwelling-house, &c., in which, &c., more than sufficient to satisfy the said rent-arrear, and then and there liable to distress for the said rent. To this plea there was a replication, demurrer, and joinder. 3d. That the said Ann E. Rich, during her occupation and enjoyment

[1] [Reported by Hon. William Cranch, Chief Judge.]

of the said dwelling-house, &c., in which, &c., by virtue of the demise in the said cognizance mentioned, used and followed the trade and business of a common public boarding-house keeper for travellers and strangers, and used the said premises in her said trade and business for entertaining, victualling, and lodging strangers and travellers, and that the said slave was in the employment and service of one William C. Easton, then in the said dwelling-house as a guest and lodger of the said Ann E. Rich, at the time when, &c., and this the said plaintiff is ready to verify, &c. To this plea there was a general demurrer and joinder. 4th. The fourth plea was the same as the third, only charging the locus in quo to be a common inn, instead of a public boarding-house. Upon this plea, issue was joined. 5th. That the slave being, at the time when, &c., hired by the plaintiff to one William C. Easton, was, at the said time, in the said dwelling-house and place in which, &c., in attendance upon the said Easton as his servant and waiting-man; and at the time when, &c., was actually engaged in performing for the said Easton, the duties and services of such servant and waiting-man, and in his, the said Easton's, actual use and personal service, and this the plaintiff is ready to verify. Upon this plea, issue was joined. 6th. That the slave was not the property of the said Ann E. Rich, but of the plaintiff; and that there were goods and chattels of the said Ann, in the place in which, &c., sufficient to satisfy the said rent; and that the said William Archer, knowing that the said slave was the property of the said plaintiff, fraudulently and maliciously ordered and caused his bailiff, the said defendant, to distrain the said slave for his said rent; and this the plaintiff is ready to verify, &c. To this plea also issue was joined.

Upon the issues of fact a verdict was taken, subject to the opinion of the court upon the demurrers, and upon the facts in evidence; upon which, if the opinion of the court be in favor of the defendants, judgment to be rendered in his favor for $65, the rent in arrear, &c.

The facts stated were as follows: "That William Archer rented the premises to Mrs. Rich, to be occupied as a boarding-house, and that she publicly advertised to keep a boarding-house, for the entertainment of all persons, travellers and others, for one or more days, at the will of the guests. That William C. Easton was a lodger and boarder in the said house, and hired, of the plaintiff, the slave in question for his own exclusive service as a domestic servant, and took him into his service, and kept him in the said house, as his exclusive servant, without being under the control of Mrs. Rich, although, by permission of Mr. Easton, he occasionally rendered her services when not engaged in his master's business. That Mr. Easton paid for his hire, and clothed him. That when the bailiff came to levy the distress, he was informed by Mrs. Rich that the slave was not her property, but was the property of the plaintiff, and was the hired servant of Mr. Easton, and exclusively in his employment, and that there were goods enough, the property of Mrs. Rich, on the premises, to satisfy the rent."

Mr. Wallach, for the defendant.

All personal property on the premises, with a few exceptions, is liable for rent. It is immaterial whether there were sufficient goods of the tenant on the premises or not. The only excepted cases are upon the principle of trade and commerce. A coach at public livery, and goods of an inmate at a public inn, are not exempt. Francis v. Wyatt, 3 Burrows, 1498. The reason why a horse at an inn is not liable to distress for rent, is, that the innkeeper is bound to receive him and has a lien upon him for his food. Robinson v. Walter, 3 Bulst. 269; 8 Petersd. Abr. 424; Francis v. Wyatt, 3 Burrows, 1498; Gorton v. Falkner, 4 Term R. 568; 7 Serg. & L. 356; Ham. N. P. 375.

Mr. C. C. Lee, and Mr. Jones, for the plaintiff.

Originally, non-payment of rent or services, was a forfeiture. Afterwards the profits only could be seized, not any thing necessary to enable the tenant to perform the service or pay the rent, such as beasts of the plough, &c. Bradb. Dis. 211. Next came the principle of benefit to trade, such as meal at the mill, a horse at the market, or at pasture. 9 Vin. Abr. 144. Goods on a wharf, or in a warehouse on storage. Thompson v. Mashiter, 1 Bing. 283. Cheese in a cart stopping at a private house. Gisbourn v. Hurst [1 Salk. 250]. A loom in actual use, or if there be other sufficient distress. Simpson v. Hartopp, Willes, 514. Goods at auction. Himely v. Wyatt, 1 Bay, 102. A slave accidentally on the premises. Bull v. Horlbeck, Id. 301. A hair-dresser's apprentice. Phaelon v. McBride, Id. 170. But all these exemptions rest on the broad basis of public inconvenience. Gilman v. Elton, 3 Brod. & B. 75, 6 Moore, 243; 8 Petersd. Abr. 423, 425; and Van Ness v. Pacard, 2 Pet. [27 U. S.] 137. The case of the goods of lodgers in a public boarding-house comes within the same principle; for the trade of keeping a boarding-house, so necessary for the accommodation of the public, especially at the seat of the government, would be broken up if the goods of the lodgers should be liable to distress for rent.

CRANCH, Chief Judge, delivered the opinion of the court, (THRUSTON, Circuit Judge, dissenting.)

1. Upon the first issue, the jury has found "that the slave was not, at the time when, &c., in the said dwelling-house, as the servant and in the employment of Mrs. Rich,

but accidentally, and while in the service of one William C. Easton, to whom the said slave was hired by the plaintiff." This finding, however, is subject to the opinion of the court upon the facts in evidence, which are agreed to be as before stated; and the question for the court upon this issue is, whether the verdict is justified by the evidence. We think it is not; because it does not appear that the slave was accidentally upon the premises, at the time of the distress, but was there as the servant of Mr. Easton, who was then a boarder and lodger in the house, and kept the slave there as his exclusive servant. This plea was probably drawn with a view to the case of Bull v. Horlbeck, 1 Bay, 301, where the jury found a verdict for the plaintiff, the owner of the slave, against the opinion of a majority of the court, who instructed the jury, that the slave of a stranger found accidentally on the premises, is liable to distress for rent; and the reporter adds, that the verdict has been acquiesced in, and the case often relied upon since. In that case, a distinction was taken between cattle and slaves; because the master cannot confine his slaves, as he can his cattle; and it was also said that the common law never contemplated this kind of property. The principle upon which that case was decided by the jury was, the public convenience. The word "accidentally" in that case means without the license of the master; which was not the case with Mr. Easton's servant. He was not, therefore, in the house accidentally within the meaning of the case of Bull v. Horlbeck.

2. The second plea of the plaintiff is like the first, with this addition; that there were, at the time of the distress, goods and chattels of the tenant, in the house, more than sufficient to satisfy the rent in arrear, and then and there liable to distress for the same. To this plea the defendant replied; concluding with this traverse, namely: "Without this, that the said slave was not at the time when, &c., in the said dwelling-house, as the servant of the said Ann E. Rich, but accidentally, and while in the service of one William C. Easton, to whom the said slave was hired by the said plaintiff; and that there were, at the time when, &c., goods and chattels of the said Ann E. Rich, in the said dwelling-house, &c., more than sufficient to satisfy the said rent-arrear, and then and there liable to distress for the said rent, &c." To this replication there was a general demurrer and joinder. Upon this demurrer the court is confined to the facts stated in the pleadings. In considering the validity of the defendant's replication, the court cannot take the inducement to the traverse as true, because the defendant, by tendering an issue upon the allegations of the plaintiff's plea has prevented the plaintiff denying the matter of inducement to the defendant's traverse. The traverse is to a material part of the plaintiff's plea, and is well taken; there is, therefore, no fault in the defendant's replication; nor is there any suggested in the cognizance. We think, therefore, that the judgment upon this demurrer ought to be for the defendant.

3. The third plea, in substance, is that Mrs. Rich, during her occupation under the demise, used and followed the trade and business of a common public boarding-house keeper, for entertaining, victualling, and lodging travellers and strangers, and used the said premises in her said trade and business; and that the slave was on the premises, in the service and employ of one of her lodgers and guests, then in the house. To this plea there is a general demurrer and joinder. The question arising upon this demurrer is, whether a slave of a stranger, hired to and in the service and employ of a lodger in a boarding-house, with the consent of his owner, and found upon the premises, is exempt from distress for rent, there being no other property upon the premises liable to distress. All the exceptions to the general rule of liability are founded upon the public inconvenience which would attend its application in particular cases. The general rule itself was adopted to counteract the fraud of tenants, and to prevent that litigation which would arise if the question of title to the property was to be tried in every case of distress. One broad rule, therefore, was laid down, that every thing found upon the premises should be liable for the rent; and as every person was bound to know the rule, it would be his own fault if he permitted his goods to be in such a situation as to be liable to seizure. But there were cases of necessity and accident which would, sometimes, place a man's goods in that situation against his will. These ought to be provided for. Such is the necessity of sending corn to a mill to be ground. In this case the corn would not be voluntarily nor negligently subjected to the power of the landlord. The owner of the corn and his family must not starve for want of meal. The corn, therefore, is excepted from the general rule. The corn could not be carried without a bag, &c., nor conveniently without a horse. The bag and the horse, therefore, are equally protected under the plea of necessity. The case of a common inn is also a case of necessity. The weary traveller must have repose. He is obliged to place his goods upon the premises of some landlord. Other cases, although not of such apparent necessity, are excepted on the ground of public utility and convenience. Thus cloth sent to the tailor's to be made up into garments—a horse sent to the farrier's to be shod—a carriage at a coachmaker's to be repaired—goods at a market, or on the way, and the carriage and horses which convey them;—these, although bordering on the plea of necessity, are yet, more properly, arranged under the principle of public convenience. It is a great conven-

ience to the public that these trades should exist, and that goods should be brought to market; but the privilege of the landlord would prevent people from employing these tradesmen, and from bringing goods to market. So far, therefore, that privilege is restrained by law. The instances cited in the books are only examples of the general principle of public convenience. Wherever the privilege of the landlord would destroy a lawful trade or occupation which is useful to the public, it is restrained by law. The same principle protects the tools of the mechanic and the books of the scholar, the averia carucae, and the implements of husbandry, so long as other distress may be had. It extends also to the protection of trade and commerce. Thus goods in the hands of a factor or broker, or vendue-master, to be sold, or in a warehouse upon storage, or upon a wharf on wharfage, are exempt from the distress of the landlord. It is said that the principle is confined to the benefit of trade and commerce; but trade and commerce are only instances of the application of the general principle of public convenience, which is the broad ground of all the exceptions. The keeping of a boarding-house is not only a benefit to trade and commerce in the more general acceptation of those terms, but is, of itself, a trade. One of the legal definitions of trade is, "a way of living." It is an honest and a lawful occupation, and is useful to the public, especially in a city like this, where there must of necessity be many temporary residents. If the trunks and clothes of the lodgers should be liable to distress for rent in common boarding-houses, it may be said in the language of Lord Mansfield, in Francis v. Wyatt, 1 W. Bl. 485, in regard to livery-stables, "they will all be deserted and undone; for no prudent man will make himself liable to such a hazard." So the privilege of the landlord, if not restrained in this respect, would destroy this lawful trade of keeping a common boarding-house—this way of living—which would be a great inconvenience to the public; for then all temporary residents would be obliged to depend on private hospitality, or to lodge at a common inn, where the innkeeper is bound to receive all sorts of guests. But the case of Francis v. Wyatt, 3 Burrows, 1499, is relied upon to show that goods of a lodger in a common lodging-house are liable to distress for rent. That was an action of replevin, for a chariot standing at livery in a coach-house belonging to a common livery-stable, distrained for rent due by the keeper of the stable. The case was twice argued by counsel of very high standing; and Mr. Blackstone, who argued on the side of the landlord, thought that he fortified his argument, by saying that the case did "not differ at all from that of goods put into a common lodging-house, and there distrained by the landlord for rent in arrear." That cause does not appear to have been actually decided; but the opinion of the court was intimated so strongly against the plaintiff that he declined a third argument, which the court would have granted him. In the report of the case, however, in 1 W. Bl. 485, it is said that judgment was rendered for the defendant, upon the ground of its being a "part of the profits of the premises;" following the idea suggested by Mr. Blackstone in his argument, that the owner of the chariot was to be considered as an under-tenant to the stable-keeper. However, the counsel for the plaintiff seem to have had the better of the argument upon principle; and the ground which they took has been supported by subsequent judges, as in the case of wharfage, (Thompson v. Mashiter, 1 Bing. 283,) and in the case of factorage, (Gilman v. Elton, 3 Brod. & B. 75.)

The opinion of the court in Francis v. Wyatt seems to have been founded rather upon the technicalities than upon the principles of the law. Lord Mansfield, in that case, said, "that whatever may be the law of the case, it is worth the defendant's while to consider the consequences of such a distress, which will ruin his estate. For if it should be determined that carriages and horses, standing at livery, are liable to be distrained by the lessor for rent, the livery-stables will be deserted and undone; for no prudent man will make himself liable to such a hazard; therefore let the case stand over for further argument, and let the defendant, in the mean time, seriously consider how far, in prudence, he ought to press the question." 1 W. Bl. 485. He could hardly have used stronger language to show that the case was within the general principle of public convenience; and if that case had happened after the case of Gilman v. Elton, [supra,] it would probably have been decided upon the same principles which governed the latter. He admits that the privilege of the landlord, if enforced, would ruin the trade; and it is upon that very ground that the exception rests in favor of trade and commerce. A man must have with him, wherever he goes, some articles of indispensable necessity, such as clothes, &c., things of daily use for his personal comfort and convenience; if he is not to be protected in the enjoyment of these, at a boarding-house, he must abandon it; and the trade, or occupation, as a means of living, will be destroyed. If these are protected, the trunk which contains them must share in the same protection. How far will this principle lead us? It would be difficult to draw the line around articles of necessity only; for what would be considered as necessary to one man might be considered superfluous to another. The line is not well defined between articles of necessity and articles of comfort. The principle which governs these cases seems to require that the line should extend to such articles of personal convenience and comfort, the property of the lodger, as are in his or-

dinary use. The principle of public convenience goes to the absolute exemption of all articles within its reach. Thus, the cloth at the tailor's, the horse at the farrier's, the corn at the mill, the goods at the factor's, or in the warehouse, or upon the wharf, are all absolutely protected, whether there be or be not sufficient goods of the tenant on the premises liable to distress. The plea states that the slave was in the service and employ of the lodger, at the time he was taken. In such case, we think the slave was protected by the general principle of public convenience, and that the case may even be brought within that branch of the general principle which relates to trade and commerce.

The case of Himely v. Wyatt, 1 Bay, 102, was decided by a superior court of South Carolina forty years ago. It was replevin for goods sent to a vendue warehouse for sale, and distrained by the landlord for rent. The court decided that they were protected under the principle of public utility and convenience; and Mr. Justice Waties, who delivered the opinion, said: "The reason why a stranger's goods are subject to distress is, because infinite frauds would be otherwise practiced upon a landlord; and his summary remedy, in this case, might at any time be defeated by a collusion between his tenant and a stranger. All goods, therefore, found on the premises, belonging to strangers or tenants, are generally distrainable. They are presumed to be the property of the tenant, because in his possession. There is no instance in which possession is regarded so much, as the evidence of property, as in this, to preserve the right of the landlord from fraud and imposition. This appears to be the sole object of the law, and therefore admits of exceptions when this mischief does not occur. For when the possession of the goods by the tenant holds out no fallacious security to the landlord, but they are known to belong to a stranger, in that case they are privileged from distress; as in the case of a horse at an inn, or in a smith's shop to be shod, cloth at a tailor's, and sacks of corn in a market or mill, &c., these are privileged and protected for the benefit of trade; but, in my mind, it is as good a reason that the property (notwithstanding the immediate possession is in the tenant,) is known to the landlord not to belong to the tenant, but to his customers. No presumption of property can arise from the possession, and therefore the landlord is not deprived of any security he may have trusted to in them for the payment of the rent. With respect to the present case, all the different reasons for an exemption apply with great force. The defendants, when they leased their house to a vendue-master, could never have had in contemplation any remedy they might have against the goods of various persons which might be lodged with him for sale. They must have known that these were not his property, and must have relied on other resources for the recovery of their rent. Considering then the well-known use of vendue stores as the depositories of the goods of strangers only, and which are placed there, as it were, by the authority of law; and considering also the public convenience and utility of them, there appear to me the strongest grounds for extending to them the protection of the law."

So also in the case of Phaelon v. McBride, in the year 1791, 1 Bay, 170, which was replevin for the plaintiff's slave, bound apprentice to a hair-dresser, and distrained for rent due by the hair-dresser to his landlord. "The court was unanimously of opinion that the negro boy was not liable to be distrained, upon the principle, that goods in the way of trade are exempted." And they said, that "the case of Himely v. Wyatt was adjudged upon wise and legal principles;" "and that it would be hard and unreasonable, under those circumstances, to make the property of a third person liable for the default of a tenant."

So also in the case before mentioned, of Bull v. Horlbeck, 1 Bay, 301, although a majority of the court (against the opinion of Judge Bay) decided that a slave of a stranger, accidentally found on the premises, was liable to a distress for rent, yet the jury found a verdict against the opinion of the majority, which verdict was acquiesced in, and has often been relied upon since.

So also in the case of Gilman v. Elton, 3 Brod. & B. 75, in which the court of common pleas, in England, decided in the year 1821, that the goods of the principal, in the hands of the factor, cannot be distrained for the factor's rent. Dallas, C. J., said—"The general right of landlords to distrain is clearly protected in point of law; and I agree that, whatever is found on the premises is, prima facie, taken as belonging to the tenant. The rule grows out of the relation of landlord and tenant, and out of the nature of the thing itself; for all such rules are of simple origin. But rules which are of simple origin, if very general, become in time, and from change of circumstances, inconvenient, and thence subject to exceptions. Exceptions to this general right of distress arose at a very early period, and have ever since been recognized by the courts." And after citing the words of Mr. Justice Ashurst, in Gorton v. Falkner, 4 Term R. 568, in which he states the foundation of the landlord's right to distrain the property of a stranger on the premises to be, "that the landlord is supposed to give credit to a visible stock on the premises;" and that it is founded, also, on public convenience and the prevention of fraud; and that "the exceptions out of the general rule are all of them tending to the benefit of trade and commerce, and general advantage;" he says—"The rule was evidently founded not on natural, but artificial arrangements. It was a rule to prevent a particular species of inconvenience, which would other-

wise have arisen. But as it was found that this rule, when universally enforced, created another kind of inconvenience, extensive in its nature, exceptions were necessarily introduced. In like manner, therefore, and on the same principle of public convenience, a rule has been adopted in favor of trade and commerce; and, as the landlord is protected under the general right of distraining, so goods of a certain description, and in certain situations, are protected in favor of trade and commerce." Again, he said—"The public convenience runs through all the cases of exception. And, on general principle and analogy, this question comes within the scope of those decisions." Mr. Justice Park, in the same case, said—"The instances mentioned under the exception as to trade, by Lord Coke, are not put as limiting or comprehending the whole exception, but merely by way of illustration. The principle of the exception is admirably put by Lord Holt, in 1 Salk. 250; and his language shows that the exception was not established for the benefit of the individual, but of trade in general. The case in Cro. Eliz. 549, Read v. Burley, is strong to show that it is the trade which is favored, not the individual." Mr. Justice Burrough, in the same case, said—"This case is to be decided on principle; and on the principle of all the decisions. From the earliest times, these exceptions to the general right of the landlord to distrain, have existed; the question, therefore, is, whether this case falls within the principle of the exception in favor of trade." In none of the cases has that principle been put as if in favor of any particular trade, but for the advantage of trade in general. And Mr. Justice Richardson said—"The advancement of trade equally requires that goods should be placed in the hands of a factor for sale, as that they should be placed in the hands of a carrier for carriage." "The instances enumerated by Lord Coke, under the exception in favor of trade, are only put by way of example, and the present case falls clearly within the principle of the exception."

So in the case of Thompson v. Mashiter, 1 Bing. 283, where the goods of the principal, which had been put by the factor into the warehouse of Ramsay, a wharfinger, were, upon the same general principle, held to be exempted from distress for rent due for the wharf and warehouse. Dallas, C. J., said, "that the case is the same as if the owner had sent them immediately to Ramsay's, where, on the broad principle of public convenience, I think they were not liable to distress." Mr. Justice Park said—"The cases were all considered in Gilman v. Elton; and the general principle laid down in that case is applicable to the present. The principle there laid down was, that certain exemptions of goods from distresses were permitted, not on account of the character of the individual in whose hands the goods were deposited, but for the benefit of trade. On that general ground we now decide; and not on the ground that Ramsay was the servant, or stood in the place of the factor. The instances put by Lord Coke are merely illustrative, but they apply in principle, though none of them, perhaps, in terms." "Therefore, keeping to the broad and general principle of convenience, and benefit to trade and commerce, I think these goods ought not to have been distrained."

These cases show that the principle is broad enough to cover a slave, the personal servant of a lodger, at a common boarding house; and that the principle, if it applies at all, goes to the total exemption of the property thus situated, whether there be other sufficient distress or not. We are, therefore, of opinion that the demurrer to the third plea of the plaintiff ought to be overruled.

4. The fourth plea of the plaintiff was the same as the third, except charging the locus in quo to be a common inn. Upon this plea issue was joined, and found for the plaintiff, but subject to the opinion of the court, whether the facts justified the verdict. It is not clearly stated in the books what are the essential requisites of a common inn, commune hospitium, or what distinguishes it from a common boarding-house. It appears, however, by the Registrum Brevium, 105, (see Fitzh. Nat. Brev. 104, B, and Co. Ent. 347,) that common inns must be kept "ad hospitandos homines, per partes, ubi hujusmodi hospitia existunt, transeuntes;" that is, for the entertainment of travellers passing through those parts of the country where the inns are. Calye's Case, 8 Coke, 32. And "it is no way material that he should have any sign before his door or not, if he make it his common business to entertain passengers." 1 Hawk. P. C. c. 78, § 2, p. 452; Rex v. Collins, Palmer, 373. And, in section 4, c. 78, Hawkins says—"Also it seems to be settled, at this day, that any person may lawfully set up a new inn, unless it be inconvenient to the public in some of the respects taken notice of in the first section, and that he has no need of any license from the king for this purpose; for the keeping of an inn is no franchise, but a lawful trade, open to every subject. But if an inn degenerate into an ale-house, by suffering disorderly tippling, it shall be deemed as such." It is true that, by the act of Maryland, 1790, c. 24, ordinary keepers are required to take out an annual license; but the eighth section, by imposing a fine on any person "who shall presume to keep ordinary without a license," shows that an ordinary may exist without a license. The intent of the party, manifested by his acts, must decide whether the house is kept as a common inn, into which all travellers have a right to enter and demand accommodation; or a boarding-house, in which the keeper has a right to select his guests. The statement of facts shows that Mr. Archer rented the premises to Mrs. Rich, to be occupied as a boarding-house; and she publicly

advertised to keep a boarding-house. It is, indeed, stated to be for the entertainment of all persons, travellers and others, for one or more days, at the will of the guests; but still she advertised it as a boarding-house, not as an inn, probably intending to reserve to herself a right to select her guests. We think, therefore, that the verdict of the jury upon this issue is not supported by the evidence.

5. The question arising upon the verdict found in favor of the plaintiff upon the fifth plea, is, whether the verdict is supported by the state of the facts. The matter found by the verdict, upon this issue, is, that at the time the slave was taken he was "in attendance upon the said W. C. Easton, as his servant and waiting-man, actually engaged in performing for him the duties and services of such servant and waiting-man, and in the said Easton's actual use and personal service." We think this verdict is not supported by the evidence; for it does not appear, by the statement of facts, that the slave, at the time of caption, was in the actual use of Mr. Easton. It is only stated that, "when the bailiff came to levy the distress, he was informed by Mrs. Rich that the slave was not her property, but was the property of the plaintiff, and was the hired servant of Mr. Easton, and exclusively in his employment." We do not think that it can be, from that, inferred that the slave was in the actual use of Mr. Easton at the time he was taken, within the meaning of the rule of law, that goods in the actual use of any person cannot be distrained. It is a rule which applies to the goods of the tenant himself, as well as to those of a stranger; and implies such an actual use, that the taking thereof would be, or tend directly to, a breach of the peace.

6. The verdict, on the issue joined on the sixth plea, finds that the slave was the property of the plaintiff; that there were goods of the tenant on the premises sufficient to satisfy the rent; and that the landlord, knowing the same, fraudulently and maliciously caused the defendant to distrain the slave. The question arising upon the verdict on this issue is, whether it is supported by the facts stated. We think it is not; for fraud and malice, which are the gist of this plea, are not to be presumed, but ought to be clearly proved. The only circumstance stated in this plea, from which fraud or malice could possibly be inferred, was the knowledge of the landlord that the slave was the property of the plaintiff, and that there were goods enough of Mrs. Rich's to satisfy the rent. But there might be other motives to induce him to distrain the slave; and that charity which the law itself demands, in respect to an allegation of fraud, requires us to presume the motive to be good until the contrary appears.

We have, so far, considered the case as it appears upon the pleadings, compared with the statement of the facts. But there is no one of the pleas which brings into view the whole merits of the case. The verdict for the plaintiff has been rendered, "subject to the opinion of the court upon the demurrer, and upon the facts in evidence; upon which, if the opinion of the court be in favor of the defendant, judgment is to be rendered in his favor for $65, the rent in arrear."

The facts in evidence were substantially as follows: That the landlord rented the premises to Mrs. Rich, to be occupied as a boarding-house, and that she publicly advertised to keep a boarding-house for the entertainment of all persons, travellers and others, for one or more days, at the will of the guests. That, at the time when, &c., W. C. Easton was a boarder and lodger in her house, and hired of the plaintiff, the slave in question, for his own exclusive service, as a domestic servant; and took him into his service, and kept him in the said house, as his exclusive servant; and that while the said slave was so in the said house, as the exclusive servant of Mr. Easton, and in his exclusive employment, he was, by the order of the landlord, distrained for rent due by Mrs. Rich to the landlord. That at the time of making the distress, the defendant was informed by Mrs. Rich that the slave was the property of the plaintiff, and was the hired servant of Mr. Easton, one of her boarders, and exclusively in his employment. The fact is also stated, that there were goods enough the property of Mrs. Rich, upon the premises, to satisfy the rent.

The question then is, whether, if these facts had been formally pleaded, the plaintiff would be entitled to recover in this action. It is evident that all the reasons which we have before urged, in support of the opinion expressed upon the demurrer to the third plea, are of equal weight upon the merits of the case as here stated; and in addition thereto are the important facts that there were other goods upon the premises, the property of the tenant, sufficient to satisfy the rent; and that the bailiff was informed, at the time of the distress, that the slave was not the property of the tenant, but of the plaintiff, and in the exclusive service of Mr. Easton, a boarder and lodger in the house. These additional facts, we think, removed all doubt, with respect to the plaintiff's case, even if the court should have erred in its opinion upon the demurrer to the plaintiff's third plea. The circumstance that the landlord rented the house to be occupied as a boarding-house is very important. It is prima facie evidence of his assent that the lodgers should place upon the premises such articles as were necessary for their comfort and convenience, and that he knew they were not the property of his tenant. They held out to him no deceitful evidence of security for his rent; and he could not, with a good conscience, have relied upon them as a fund out of which the rent was to be paid. Even if there had not been sufficient property of the tenant on the premises to satisfy the

rent, it would have been unconscionable, if not fraudulent in him, to have distrained this slave, after having been informed that he was the property of the plaintiff, and was the personal servant in the exclusive employment of one of the lodgers and boarders in the house; and to do it with that knowledge when there was sufficient property of the tenant liable to his distress, was evidence from which the jury might have inferred malice, and perhaps fraud. It would be like the case of Fowkes v. Joyce, 2 Vern. 129, where a grazier, driving sheep to London, was encouraged by the tenant, to put his sheep into the close for one night, which he did, with the consent of the landlord, who distrained them for rent due by the tenant. This distress was adjudged valid at law, but the grazier was relieved in equity upon the ground of fraud; and the reporter says the court looked upon it as a fraud and contrivance in the landlord, to subject the sheep to his distress. Saunders, in his note on page 290, [3 Saund.,] speaking of that case, says, "And it should seem that, at this day, a court of law would be of opinion that cattle belonging to a drover, being put in a ground, with the consent of the occupier, to graze only one night, in their way to a fair or market, were not liable to the distress of the landlord for rent."

Upon the whole, therefore, we are of opinion that judgment should be entered up for the plaintiff upon the defendant's demurrer to the plaintiff's third plea; and that the verdict, not being supported by the facts in evidence, upon any one of the issues, must be set aside, with leave to the plaintiff to put in a plea embracing all the facts in evidence, showing the whole merits of the case, unless the plaintiff should choose to rely upon the judgment in his favor upon the demurrer; in which case he will be permitted to withdraw the pleas upon which the issues of fact have been joined, and take judgment upon the demurrer.

THRUSTON, Circuit Judge, dissented.

BEALL, (COOK v.) See Case No. 3,153.

Case No. 1,162.

BEALL v. DICK et al.

[4 Cranch, C. C. 18.][1]

Circuit Court, District of Columbia. May Term, 1830.

EVIDENCE—OFFICIAL COPY OF MORTGAGE—EQUITY.

An official copy of a mortgage of real estate is sufficient evidence, in equity, in Washington county, D. C., of the existence of the original mortgage, and of the debt due thereon.

In equity. Bill to foreclose a mortgage of real estate in Georgetown, D. C., made by John Peter to T. B. Beall, the plaintiffs' testator. John Peter afterwards sold the land to Elizabeth Peter, who devised it to the defendants, Margaret Dick and others. The plaintiffs averred that the debt was still due and that the mortgage was a subsisting mortgage, and exhibited an office-copy. The debt and mortgage were admitted by the defendant, John Peter, the mortgagor, but not by the defendants, Margaret Dick and others, the devisees of Mrs. Peter, who called for proof of the execution of the mortgage and that the debt and mortgage were still subsisting and unsatisfied. The mortgage was made on the 4th and recorded on the 9th of August, 1809. The deed from John Peter to Elizabeth Peter was dated the 16th of April, 1810.

Mr. Jones, for the defendants, Dick et al., denied that the office-copy is evidence of the mortgage. There is a difference between mortgages and ordinary deeds of conveyance. A mortgage may be discharged by indorsement on the original deed; by acknowledgment of satisfaction, or tearing off the seal; or by destroying the instrument. Enrolment, in this country, is considered as implied notice in law, but not conclusive in equity. If the original is lost it should have been so averred in the bill, and that it was a subsisting security, and a subsisting debt; these defendants might then have denied the facts. They have had no notice that the plaintiffs meant to rely upon this copy. It is the common practice to exhibit copies in all cases, whether the originals are in the possession of the plaintiffs, or not; and the originals are produced at the hearing, and, if denied, may be proved ore tenus.

Mr. Marbury and Mr. Coxe, contra.

When a copy of a deed of lands from the record is produced, it is not necessary to produce the original deed, unless the original be particularly called for by previous notice, and then only when the execution of the original is put in issue. The copy is evidence of the existence of the original; and it is presumed to exist in full force until the contrary is shown. It is not necessary for the plaintiffs to aver that it is not cancelled; or not destroyed, or lost. But it is not a fact to be put in issue to the jury. It is a fact to be ascertained by the court, even at law; and a fortiori in equity as a ground for admitting secondary evidence. An exemplification of the record of the deed is as good evidence as the deed itself.

THE COURT (MORSELL, Circuit Judge, not sitting in this cause) was of opinion that the exemplification of the record of the mortgage was sufficient evidence of the existence of the mortgage and of the debt; and also permitted the affidavit of one of the plaintiffs to be read, as to the loss of the original deed. CRANCH, Chief Judge, however,

[1] [Reported by Hon. William Cranch, Chief Judge.]

very much doubting as to the propriety of admitting the affidavit, as the court was of opinion that it was not incumbent upon the plaintiffs to produce, or to show the loss of, the original mortgage. See Laws Md. 1785, c. 9, § 7, "or a full copy of the same from the record."

BEALL, (HALLER v.) See Case No. 5,957.

Case No. 1,163.

BEALL v. HARRELL et al.

[The case reported under this title in 7 N. B. R. 400 is the same as Jarrell v. Harrell, Case No. 7,222.]

Case No. 1,164.

BEALL v. NEWTON.

[1 Cranch, C. C. 404.][1]

Circuit Court, District of Columbia. June Term, 1807.

PLEADING — COVENANT — TRIAL — ARGUMENT OF COUNSEL — THE RIGHT TO BEGIN AND REPLY.

1. In covenant upon an issue on the plea of general performance, the plaintiff is not bound to produce the original covenant.

2. The party who holds the affirmative of the issue has the right to open and close the argument to the jury.

At law. This was an action upon a covenant in a mortgage for payment of money; plea general performance, general replication and issue.

Mr. F. S. Key, for the defendant, contended that the original covenant ought to be produced.

THE COURT (FITZHUGH, Circuit Judge, absent) said he could not demand the production of the original. He had admitted the execution of the deed and its contents. He had either had oyer or he had not. If he pleaded without oyer, he equally admitted the statement of it in the declaration to be true; if had oyer he has spread it on the record.

Mr. Key then contended, that there being a power of sale in the mortgage, the jury had a right to presume and ought to presume, that the land existed, that the title was good, that Beall had sold it, and received full satisfaction of the debt.

But THE COURT said that there was no such presumption, and that it was incumbent upon Mr. Newton to prove that Beall had sold the land, and that it had produced the money.

The defendant's witness had stated that he had heard that the land sold for one hundred and ten dollars. The plaintiff's counsel, Mr. Morsell, did not object to such testimony; and in arguing to the jury, stated it to be evidence. Mr. Key contended that it was not evidence; and so THE COURT decided.

Mr. Key claimed a right to open the argument to the jury.

DUCKETT, Circuit Judge, said that in his practice the plaintiff uniformly opened and closed.

CRANCH, Chief Judge, said that the practice of this court always had been that the party who held the affirmative, and on whom the burden of proof lay, had the right to open and close the argument to the jury; but if there were more issues than one, and the plaintiff held the affirmative in any one of the issues, the plaintiff had the right. 3 Bl. Comm. 366.

DUCKETT, Circuit Judge, acquiesced in consequence of CRANCH, Chief Judge, stating the practice to be so.

[1] [Reported by Hon. William Cranch, Chief Judge.]

BEALL, (O'NEALE v.) See Case No. 10,513.

BEALL, (TRAVERSE v.) See Case No. 14,153.

Case No. 1,165.

In re BEALS et al.

[9 Ben. 223;[1] 17 N. B. R. 107.]

District Court, S. D. New York. Oct. Term, 1877.

BANKRUPTCY — PARTNERSHIP — RESIDENCE.

A petition in involuntary bankruptcy against three persons as co-partners alleged, as the only ground of jurisdiction, that they had all of them resided in this district for a period of six months next preceding the filing of the petition. On an application by the three bankrupts, afterwards, for discharges, a creditor showed, on a proper specification, that one of the three bankrupts had not resided in this district for a period of six months next preceding the filing of the petition: *Held*, that the court did not acquire jurisdiction over all the copartners and could not grant a discharge to any of them.

[In bankruptcy. In the matter of Oliver B. Beals, Irving Holland, and Martha A. Smith.]

S. W. Fullerton, for bankrupts.

B. Low, for creditors.

BLATCHFORD, District Judge. The petition in this case, one in involuntary bankruptcy, alleged as the ground of jurisdiction, that the debtors, all three of them, had resided in this district for a period of six months next preceding the filing of the petition. No other ground of jurisdiction was alleged, nor can any other be now urged, on the petition, to sustain it. The allegation of residence or carrying on of business, in the petition, is the allegation of a jurisdictional fact, and the petition must contain an allegation showing jurisdiction in that respect. But it is open to creditors, on an application for a discharge, to show, under a proper specification of objection, that the ground of jurisdiction al-

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

leged in the petition for adjudication did not exist. The bankrupt has an opportunity to meet and contest the specification. In the present case, it is clear that the allegation of residence, in the petition, is not true, and that one of the bankrupts had not resided in this district for a period of six months next preceding the filing of the petition, although the other two had. This defeats the jurisdiction of the court as respects all the debtors and the entire case, inasmuch as the proceeding is one against the debtors as copartners and their firm assets, and the petitioning creditors were creditors of the firm, and a discharge is sought by all the debtors from the debts of the firm. In such a case the court must acquire jurisdiction over all the copartners, in order to have jurisdiction over any of them. I regard the eighth specification as raising this question. The discharges are refused.

BEALS, (SUYDAM v.) See Case No. 13,653.

Case No. 1,166.

In re BEAN.

[14 N. B. R. 182; 2 Wkly. Notes Cas. 432.]

District Court, E. D. Pennsylvania. July 21, 1875.

BANKRUPTCY—CLAIM BY BANKRUPT'S WIFE—COMPETENCY OF BANKRUPT AS WITNESS—PENNSYLVANIA STATUTE.

[1. Under Rev. St. § 858, state laws in force prior to December 1, 1873, are rules of decision in federal courts as to the competency of witnesses.]

[2. Under Act Pa. April 15, 1869, (P. L. 30,) and Rev. St. § 858, a bankrupt may testify to support a claim by his wife against the estate. Bechtel's Case, Case No. 1,204, distinguished.]

[In bankruptcy. In the matter of Levi Bean. This was an application by the bankrupt's wife to prove a promissory note given to her by the bankrupt in consideration of a loan made by her. The register, under the ruling in Bechtel's Case, Case No. 1,204, decided that both husband and wife were incompetent witnesses. The case is now heard on exceptions to the register's report. Exceptions sustained.]

Lewis B. Thompson, for applicant, cited Act Pa. April 15, 1869, § 1, (P. L. 30.)

Erdman, for assignee, cited Const. Pa. art. 11, § 8; Bechtel's Case, Case No. 1,204; Tioga Co. v. South Creek Tp., 75 Pa. St. 433; Bronson v. Bronson, 8 Phila. 261.

CADWALADER, District Judge. The testimony of the bankrupt was excluded by the register, on the supposed authority of my decision in Bechtel's Case, [Case No. 1,204.] At the time of that decision (16th December, 1871), the act of the legislature of Pennsylvania, of 15th April, 1869, was not considered in force in this court. The act of congress of 16th July, 1862, [12 Stat. 588, c. 189,] making the laws of the state the rule of decision as to the competency of witnesses, did not apply to a law of the state subsequently enacted. But the Revised Statutes, (section 858,) re-enact the law of 1862, so as to include all state laws on the subject, prior to 1st December, 1873. The state law of 15th April, 1869, [P. L. 30,] therefore, furnishes the rule of decision in the present case.

The case will be recommitted, in order that the bankrupt's testimony in support of the wife's claim may be taken. Whether the claim can be sustained upon his unsupported testimony is a question which it would be premature to consider, and which, indeed, may never arise. It will, however, perhaps be important to consider hereafter what proof, if any, of the time when the alleged note was signed can be adduced, and what proof, if any, that his cash in hand was increased at the time or times in question. The general views expressed by the register seem to be correct; and he will decide provisionally as to their applicability to the case.

NOTE, [from original report.] Register Chase subsequently examined the bankrupt, and in his second report disallowed the wife's claim, for the reason therein given (upon the evidence he found facts against the claim), which report was confirmed by the court, and the claim of the wife was disallowed.

BEAN, (ALKAN v.) See Case No. 202.

Case No. 1,167.

BEAN v. AMSINCK et al.

[10 Blatchf. 361;[1] 12 Am. Law Reg. (N. S.) 379; 8 N. B. R. 228.]

Circuit Court, S. D. New York. Jan. Term, 1873.[2]

BANKRUPTCY — PARTNERSHIP — COMPOSITION — FRAUDULENT PREFERENCE — SUIT BY ASSIGNEE OF PARTNER.

1. Where several creditors enter into a composition arrangement with their debtor, by deed, it is a constructive fraud on the other creditors signing the deed, for one creditor who signs to enter into a secret arrangement with the debtor, for an advantage over the other creditors, in respect to his debt.

[Cited in Bean v. Brookmire, Case No. 1,170; Re Jewett, Id. 7,306; Fairbanks v. Amoskeag Nat. Bank, 38 Fed. 634.]

2. Securing 50 per cent., in cash, at once, instead of 70 per cent. on time, is such an advantage, when obtained secretly, where the taking of the cash payment so embarrasses the debtor as to make it impossible for him to meet his payments to the other creditors, as they mature.

[Cited in Fairbanks v. Amoskeag Nat. Bank, 38 Fed. 634.]

3. Where such a fraud has been committed, and the debtor afterwards is adjudged a bankrupt, his assignee in bankruptcy may recover

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

[2] [Reversed in 22 Wall. (89 U. S.) 395.]

from the creditor receiving such cash payment, the amount so paid.

4. In this case, it was held, that the fact, that the composition deed was, by its terms, not to be binding on any creditor unless all the creditors signed it, and all did not sign it, and the further fact, that the agent who signed it for the favored creditor was authorized to sign it only after all the other creditors had signed it, did not, on the facts of this case, exempt such favored creditor from his liability to repay the money to the assignee in bankruptcy.

[5. A partner in an insolvent firm executed a composition deed with the firm creditors, referring to them as "his creditors," and, in pursuance thereof, signed compromise notes in the firm name. The creditors regarded the firm as dissolved, and the assets as having been placed in his hands for settlement. He then made payments from the firm's funds in fraud of the rights of such creditors, and was afterwards himself declared a bankrupt. *Held*, that his assignee in bankruptcy can, in the interest of the firm creditors, recover the sums so paid in fraud of their rights.]

[See note at end of case.]

[In equity. Bill by William C. Bean, assignee in bankruptcy of Charles S. Kintzing, against Louis E. Amsinck & Co., for an accounting, and for the recovery of money alleged to have been paid in fraud of the rights of other creditors of Charles S. Kintzing & Co., of which firm Kintzing was a member until a short time before the commencement of the proceedings in which he was adjudged a bankrupt. Decree for plaintiff.

[Subsequently, on defendants' appeal to the supreme court, this decree was reversed, and the case remanded to this court, with directions to dismiss the bill of complaint. Amsinck v. Bean, 22 Wall. (89 U. S.) 395.]

Edward B. Merrill, for plaintiff.

Augustus F. Smith, for defendants.

BLATCHFORD, District Judge. On the 15th of February, 1869, the firm of Charles S. Kintzing & Co., of St. Louis, Missouri, composed of Charles S. Kintzing and Malcolm S. Lindsley, was indebted to the defendants, who then composed, and still compose, the firm of L. E. Amsinck & Co., of New York, in the sum of $32,551 65. Kintzing & Co. were also very largely indebted to many other persons, and, having stopped payment, a meeting of their creditors was held at St. Louis, about that date, at which a statement of their financial affairs was presented, showing their condition on the 8th of February, 1869, in which their liabilities were placed at $179,299 54 and their assets at $204,602 80. In the latter amount there were only $77,344 26 of accounts considered good, merchandise and cash, while the rest of the assets consisted of $51,704 50 of suspended debts, $10,167 35 of doubtful claims, and $65,386 69, "due from Montana branch." The business of Kintzing & Co. was the wholesale grocery business. For the purpose of making a compromise with their creditors, an agreement in these words was prepared and presented for signature to such creditors: "Articles of agreement made and entered into this 15th day of February, A. D. 1869, between Charles S. Kintzing & Co., of the city of St. Louis, and his creditors, witnesseth, that we, the undersigned creditors of said Charles S. Kintzing & Co., for and in consideration of one dollar to each of us paid by said firm, and for divers other good and valuable considerations, agree to accept, in full payment and satisfaction, seventy (70) cents on the dollar, for the entire indebtedness of said firm to us respectively, as shown by the amounts set opposite our signatures hereto, to be divided up into three equal payments, at six (6), twelve (12) and eighteen (18) months respectively from the date hereof, without interest, and is evidenced by three (3) negotiable notes of Charles S. Kintzing & Co., of even date herewith, and, on the payment of which, said firm is to be released from all liability on account of said indebtedness; and be it further known, that we have entered into this compromise with said firm of Charles S. Kintzing & Co., after hearing and seeing a statement of Messrs. Kintzing & Co.'s books, assets and effects, and find that it is the best, in our judgment, that can be done for the interest of all concerned; and, further, that we have full confidence in the integrity of Charles S. Kintzing, and his ability to settle up the business better than any one we could appoint; but it is further expressly agreed and understood, that this composition is not to be binding on any one, unless agreed to and signed by all of the creditors of said firm. In witness whereof, we have hereto set our respective names, and desire the co-operation of all the creditors with us in this compromise." This composition agreement was ultimately signed by sixty-three of the creditors, including the defendants, the aggregate of whose debts, as set opposite their signatures, amounted to $153,558 21. The debt due to the defendants was more than double that due to any other one creditor. For the purpose of procuring the signature of the defendants to the agreement, Kintzing went to New York and had an interview with one of the defendants, and desired their assent to the compromise, to which the reply was, that, if he could obtain the assent of the other creditors, the defendants would not stand in the way, if Kintzing would afterwards pay them fifty cents on the dollar, on the amount of the indebtedness, in the manner stated in the letter of March 8th, 1869, hereafter referred to. An agreement to that effect being verbally made between Kintzing and the defendants, the latter, under date of New York, March 8th, 1869, wrote, and signed, and sent to the firm of F. A. Reuss & Co., of St. Louis, a letter, in the following words, addressed to that firm, at St. Louis, which they delivered to Kintzing, in New York, and which he carried to St. Louis: "We hereby authorize you to sign, as our attorneys, the agreement entered into by Chas. S. Kintzing & Co. with their

creditors, accepting their extension notes for 6, 12, and 18 mos., for seventy per cent. of their indebtedness, under the following conditions: (1.) That all other creditors must have signed before us; (2.) That Chas. S. Kintzing & Co. discount their extension notes, upon your signing said agreement, paying for them $5,808 27 in cash, on or before the 15th inst., $5,233 78 in their new note due 1–4 April, $5,233 78 in their new note due 1–4 May—$16,275 83, say, sixteen thousand two hundred and seventy-five 83/100 dollars in all; (3.) That, upon your lawyer's advice, Chas. S. Kintzing & Co. have a legal right to enter into the above arrangement with us. Referring you, for further particulars, to our letter by mail, we remain," &c. F. A. Reuss & Co. received from the defendants, otherwise than through the letter so given to Kintzing, instructions the same in substance as those contained in that letter. After sixty-two of the creditors, representing debts put down at $121,006 56, had signed the agreement, F. A. Reuss & Co., on the 15th of March, 1869, signed it thus: "L. E. Amsinck & Co., by F. A. Reuss & Co., their Att'y, 32,551 65," that signature being the last one which appears appended to the agreement. Whether, at the time Reuss & Co. so signed, Kintzing gave to them, for the defendants, three notes, according to the terms of the agreement, payable in 6, 12, and 18 months, dated February 15th, 1869, for seventy per cent. of the $32,551 65, does not, perhaps, clearly appear; but, when Reuss & Co. so signed, Kintzing gave to them, for the defendants, $5,808 27 in cash, and two notes, each dated St. Louis, March 2d, 1869, each for $5,233 78, one payable thirty days after date, and the other payable sixty days after date, each signed Chas. S. Kintzing & Co., and each payable to the order of the defendants' firm, one to become due April 1–4, the other May 1–4. On the 16th of March, Reuss & Co. wrote a letter to the defendants, reporting thus: "Have signed in your name the list of K. creditors. Mr. K. came up last night, and brought us cash and notes as per agreement. Our lawyer satisfied himself so much that all K.'s cred. have signed the 70c. The 2 notes you find enclosed, you may return us the same properly endorsed, and, in case K. don't come up, we promise you to be after him again." The letter also accounted with the defendants for the $5,808 27 cash. The two notes were received by the defendants, and endorsed by them, each payable to F. A. Reuss & Co., or order, and returned by the defendants to F. A. Reuss & Co. Reuss & Co. received payment of the notes in full from Kintzing, and remitted the amount to the defendants, $2,500 being paid on the 3d of April, 1869; $2,733 78 on the 10th of April, 1869; $3,000 on the 4th of May, 1869; and $2,233 78 on the 11th of May, 1869. Thirty-three creditors, with debts to the amount of $2,313 53, did not sign the compromise agreement.

From and after time when the firm of Charles S. Kintzing & Co. so suspended payment, it seems to have been regarded by the partners in it, Kintzing and Lindsley, as dissolved. The assets, with the tacit assent of Lindsley, passed into the exclusive possession of Kintzing, for administration for the benefit of the creditors of the firm, as contemplated by the terms of the compromise agreement. Lindsley was largely in debt to the firm. Kintzing took the stock of merchandise, and, making new purchases on his own account, went on in business, in St. Louis, in his own name, from about the 1st of March, 1869, selling the old stock and the new stock, and mingling the funds arising from the goods and assets of Charles S. Kintzing & Co. with those arising from his new individual business, although he kept a separate set of books for each business. The moneys paid to the defendants were paid out of such mingled funds.

After so settling with the defendants, on the 15th of March, Kintzing proceeded to send to the other creditors who had signed the compromise agreement, six, twelve and eighteen months' notes, made by Charles S. Kintzing & Co., for the 70 per cent. The first of the six months' notes matured on the 18th of August. None of them were paid at that date. The amount of them maturing on that day was $24,768 39. The amount of the compromise notes outstanding on the 18th of August, to mature after that date, was $45,795 26. Kintzing continued to carry on business until the 18th of August, and, on the 21st of August, made a voluntary assignment of all his property, in trust for his creditors, to one Pritchard, under the laws of Missouri. Comparatively small sums were realized from the assets of Kintzing & Co., before mentioned. Of the $65,386 69 due from Montana branch, $200 in cash was received and $17,000 in notes. Of the $22,265 64, accounts considered good, Kintzing collected about $6,000. The stock of merchandise depreciated to some extent. Between February 15th and August 1st, Kintzing paid to creditors of the firm, other than the defendants, $5,836 02. From the 15th of February to the 18th of August, the total cash receipts by Kintzing were about $75,000, and the cash payments were $103,000. The amount of merchandise purchased by Kintzing after the 15th of February was about $32,000. The total amount of sales of merchandise by Kintzing from the 15th of February to the 18th of August, was $62,189 59. Of this amount he received about $54,000 in cash prior to the 18th of August. Kintzing did not, when the creditors signed the agreement, or when the compromise notes were delivered to such creditors, inform any of them of the arrangement made with the defendants, nor does it appear that any creditors knew of it, other than the defendants. There was turned over to Pritchard, under the assignment to him, a quantity of merchandise and notes and accounts, and a small sum in cash. He sold

the merchandise, and collected some of the notes and accounts, and afterwards turned over to the plaintiff $11,199 in cash and the uncollected notes and accounts, amounting to $42,771 58, of which the plaintiff has been able to collect only $453 25.

On the 17th of September, 1869, creditors holding some of the six months' compromise notes, signed Charles S. Kintzing & Co., and dated February 15th, 1869, presented a petition thereon, to the district court of the United States for the eastern district of Missouri, alleging that they "are creditors of Charles S. Kintzing, a member of the late firm of Charles S. Kintzing & Co.," the indebtedness being the said notes, which are averred, in the petition, to have been given to the petitioners by Kintzing, and alleging various acts of bankruptcy to have been committed by Kintzing, and, among others, a preferential payment to the defendants of the sums so paid, and praying that "the said Charles S. Kintzing, doing business as aforesaid, under the style and firm of Charles S. Kintzing & Co.," be declared bankrupt, and his estate be distributed according to law. Kintzing was adjudicated a bankrupt on such petition, and an assignment, under the act, of "all the estate, real and personal, of the said Charles S. Kintzing, bankrupt aforesaid, including all the property of whatever kind of which he was possessed, or in which he was interested, or entitled to have, on the 17th day of September, A. D., 1869," was executed to the plaintiff, in due form, on the 4th of January, 1870.

The bill alleges, that the arrangement between Kintzing and the defendants was a fraudulent agreement, on the part of the defendants, with the intent of deceiving and cheating the other creditors of Kintzing, and with a view to obtain a fraudulent advantage over them; that the payments were made by Kintzing to Reuss & Co., as the agents of the defendants, in pursuance of the said fraudulent agreement, and in violation of the compromise agreement; that the defendants concealed the fraudulent agreement, and the payments, from the other creditors of Kintzing and of the firm of Charles S. Kintzing & Co.; and that said creditors were deceived, to their damage. The prayer of the bill is, that all the payments so made by Kintzing to the defendants may be decreed to have been made in fraud of the other creditors of Kintzing and of Charles S. Kintzing & Co.; that the defendants may be decreed to account for, and pay over, to the plaintiff the sums of money so paid to them by Kintzing, and to render a full account of all moneys paid to them by Kintzing, or by Charles S. Kintzing & Co., since February 15th, 1869; and that all the property and effects, both of Kintzing and of the said firm of Charles S. Kintzing & Co., may be decreed to have vested in the plaintiff, as such assignee in bankruptcy.

The answer denies that an agreement was made which was fraudulent, or made with an intent, on the part of the defendants, to deceive or cheat the other creditors of Kintzing, or with a view, on their part, to obtain a fraudulent preference over the said other creditors. It admits, that, subsequently to the 15th of February, 1869, Reuss & Co., by the authority of the defendants, signed, in the firm name of the defendants, the compromise agreement. It denies that any money paid to the defendants vested in the plaintiff. It avers, that the defendants received the payments, believing, after the compromise agreement was signed, that Charles S. Kintzing & Co. were solvent, and able to pay all their then debts; that the other creditors also so believed; that, in consideration of the payments, they discharged Charles S. Kintzing & Co. from all liability, which, under the compromise agreement, amounted to $22,786 15; that the transaction can, in no respect, be questioned by the plaintiff, in consequence of its being contrary to public policy, in respect to its infringement of the terms of the compromise agreement; that, at the time of the filing of the petition in bankruptcy, Lindsley was a partner of Kintzing, under the firm name of Charles S. Kintzing & Co., and the debts claimed by the creditors by whom said petition was filed, were contracted by said firm, so composed, the members of which were, both of them, liable, as such partners, to said creditors, on said debts, at the time the petition was filed, and afterwards; that Lindsley was not made a party to the bankruptcy proceedings, or adjudged bankrupt, although he was alive, and resided in the United States; that, therefore, the court in Missouri never acquired jurisdiction of the proceedings, so as to adjudge Kintzing to be bankrupt; and that the plaintiff, by his appointment as assignee, never acquired any title to any of the estate of said firm of Charles S. Kintzing & Co., or to the claim or cause of action set forth in the bill.

The principle upon which the plaintiff seeks a recovery, in this case, is well settled. Such a transaction as that in which the defendants engaged was a constructive fraud on the other creditors. Those who entered into the composition agreed, by its terms, to accept the seventy per cent. in full payment and satisfaction of their claims, relying on the statement which had been exhibited to them, of the books, assets, and effects of their debtors, and, in substance, constituting Kintzing their trustee, to take such assets and effects, and settle up the business, by applying such assets and effects to the payment of the compromise notes. Such an arrangement was necessarily based on the good faith of all the creditors entering into the composition, in their dealings with the debtors, and with each other; and there could be no good faith, either towards the debtors, or towards the other creditors, when one creditor obtained, by a secret arrange-

ment with the debtors, [under circumstances] [3] which amounted to coercion and duress upon the debtors, the advantage of an early, certain cash payment of one-half of his debt, which resulted in making the debtors unable to pay to the other creditors any part of the seventy per cent. for which they bargained. They supposed the favored creditors were acting in good faith, in agreeing to the same terms they agreed to; whereas, it turns out that such favored creditors have been bribed to hold themselves out as agreeing to such terms. Secret agreements of that kind are held void, both by courts of law and courts of equity, and are not enforced, even against the assenting debtor, or his sureties, or his friends. Public policy, and the interests of unsuspecting and deceived creditors, forbid the enforcement of such secret agreements; and it makes no difference whether threats or oppression were used to induce the debtor to consent to the secret agreement, or whether he was merely a volunteer, offering his services, and aiding in the intended deception. 1 Story, Eq. Jur. §§ 378, 379, and cases there cited; Clarke v. White, 12 Pet. [37 U. S.] 178, 199; May, Fraud. Conv. 86, and cases there cited; Russell v. Rogers, 10 Wend. 473, 479; Wiggin v. Bush, 12 Johns. 306, 309; Bean v. Brookmire, [Case No. 1,169;] Dauglish v. Tennent, L. R. 2 Q. B. 49, 54. Not only are such secret agreements not entorced, but money paid under them is allowed to be recovered back by the debtor, as having been obtained in violation of the principles of public policy, and affirmative relief is given to the debtor against such agreements, even where they are not forbidden by an express statute. Smith v. Bromley, Doug. 696, note; Jackman v. Mitchell, 13 Ves. 581; Wood v. Barker, L. R. 1 Eq. 139. Nor is it material, whether the secret agreement gives to the favored creditor a larger sum, or an additional security or advantage. Eastabrook v. Scott, 3 Ves. 456; Constantein v. Blache, 1 Cox, Ch. 287. The case of Cullingworth v. Loyd, 2 Beav. 385, shows, that, although there is no general meeting of creditors, nor any agreement entered into by the creditors generally, yet, if a proposition is made to the creditors at large to pay them all a composition on certain terms, no creditor can ostensibly accept such composition, and sign the deed which expresses his acceptance of the terms, and, at the same time, stipulate for, or secure to himself, a peculiar and separate advantage, which is not expressed upon the deed. In Leicester v. Rose, 4 East, 372, 383, it is said, that the fraud, in such a case, may consist in putting the favored creditor in a better situation than the other creditors; that it is not necessary he should stipulate to receive more money than the others; but the fraud may consist in receiving that which is meant to procure him more money, namely, a better security for the same sum; and that it is a fraud on the creditors at large, for a person to hold out that he will come in under the general agreement, by signing the deed when presented to him separately, and then to stipulate for a further partial benefit to himself.

The leading cases on the subject are reviewed in Breck v. Cole, 4 Sandf. 79, and the conclusion is thus stated: "It is the clear and inevitable result of the decisions, that, where a composition is made with creditors, every security given to a particular creditor, not provided for in the terms of the deed, and not disclosed, is void, as a fraud upon the creditors from whom it is concealed, and, where it is taken from the debtor himself, as a condition of his discharge, is void upon the ground of duress, as well as of fraud." It is also said, in that case, that it makes no difference, that the secret agreement does not have, and cannot have, the effect of depriving the other creditors of any portion of the amount they had agreed to receive; that it is sufficient if a fact is concealed which it was material for them to know, and the knowledge of which might have prevented them from assenting to the composition; and that, upon a composition deed, all the parties are supposed to stand in the same situation, and, if there is any one who refuses to do so, he must announce it at the time, it being impossible to say, that those who signed the deed in the confidence that, under it, the rights of all would be equal, would have signed it at all, if it had been known to them that a better security was to be given to any one creditor than that which, by the terms of the deed, all had consented to take. These views are approved by Judge Woodruff, in Carroll v. Shields, 4 E. D. Smith, 466. The case of Pinneo v. Higgins, 12 Abb. Pr. 334, is very much like the present one. There, the favored creditor held out to the debtor that he would unite in the composition, if the other creditors did. When all the other creditors had signed, he sought to obtain better terms, and then agreed to sign if those terms were complied with, and finally did sign because they were complied with. In that case, it was urged, that no creditor was induced to sign because the favored creditor had signed. But the court held, that it was of no consequence whether the name of the favored creditor was the first, that was signed to the composition agreement, or the last; that he, by signing, entered into an agreement with the other creditors, as well as with the debtor; and that the separate agreement was equally void, whether made after all the other creditors had signed, or whether before, or after, the creditor who made it had signed.

It is contended, for the defendants, that the present case does not fall within the principles thus settled, because it was expressly provided, in the composition agreement, that

[3] [From 8 N. B. R. 228.]

it was not to be binding on any one, unless agreed to and signed by all the creditors, and it was not signed by all the creditors; and because the defendants bargained for fifty per cent. only of their claim, and threw away twenty per cent. of it; and because Reuss & Co. were authorized to sign only after all the other creditors had signed, and there were creditors who did not sign at all, and such condition was not waived either by Reuss & C., or by the defendants. The ground taken is, that, as the composition agreement never had any binding force as against the defendants, the payment to them of fifty per cent. of their debt did not violate any rights of the other creditors under the compromise. The difficulty with this view is, that it overlooks the true relations of the defendants to the other creditors. The defendants and Reuss & Co. supposed, as is evident from the letter of the 16th of March, 1869, from the latter to the former, that all the other creditors had signed. They, therefore, acted on that view, in taking the fifty per cent., and pretending to assent to the compromise terms, and concealing from the other creditors the special arrangement. So, too, the other creditors, inasmuch as the deed, by its terms, provided that all the creditors must sign before the composition should be binding, had the right to suppose, in receiving their composition notes, that all the creditors had signed, and that all were to receive like notes, and nothing further. They acted on that view, in taking their notes. Hence, not only must the agreement, for the purposes of this case, be regarded as having been signed by all the creditors, but each creditor has a right to stand as if the defendants had signed before him.

Nor does it make any difference that there may not, in fact, have been any manual tradition of the compromise notes to Reuss & Co., or to the defendants. The letter of the 8th of March, 1869, from the defendants to Reuss & Co., states, expressly, that the fifty per cent. is to be received as a "discount" of the compromise notes, and that those notes are to be discounted on the signing of the agreement by Reuss & Co. Therefore, the signing, the receipt of the compromise notes, and their "discount," were to be simultaneous acts; and the defendants, having accepted the "discount," and retained it, under that arrangement, are estopped from saying that the compromise notes were not received by them, or that Reuss & Co. had no authority to sign the agreement, or that it was not binding because all the creditors did not sign it. The defendants did not treat separately in respect of their debt, but as a part of the general creditors, all of whom were, as they knew, to be invited to accede to the same terms.

Nor is there any force in the fact that the defendants obtained only fifty per cent. of their claim instead of seventy per cent. By obtaining the fifty per cent. they substantially exhausted a large part of the resources of the debtors. They intended to make it sure that they should obtain the whole of their fifty per cent. before any of the compromise notes which the other creditors were to receive should fall due, and they further intended to make it sure, by signing last, that no creditor should be left free to proceed against the debtors on his original claim, so as to prevent the payment of the whole of the fifty per cent. It is to be assumed that other creditors would have preferred such an arrangement as the defendants made. At all events, it is to be assumed that others who signed would not have signed, had they known of the private arrangement with the defendants, which was to strip the debtors of a large part of their means of paying the six months' compromise notes. The amount of such notes, actually given, was $24,768 39. The amount of the defendants' first compromise note, at seventy per cent., would have been $7,595 38. Before half of the six months had elapsed, the defendants had exacted from the debtors $16,275 83. The position of the creditors who have been defrauded by the private agreement would have been no different from what it is, if all the creditors had signed the compromise agreement; or if, all signing it, the defendants had not signed last; or if, only a part signing it, including the defendants, the defendants had not signed last. Such position, too, is the same it would have been, if, all the creditors signing the compromise agreement, the defendants had signed it first; or, only a part signing it, including the defendants, the defendants had signed it first.

The suggestion, that, if the compromise at seventy cents had been carried out, Kintzing & Co. were solvent, has no force, except to show, that the defendants, by rendering it, through their fraud, impossible that the compromise should be carried out, made Kintzing & Co. insolvent.

It being clear, therefore, that the transaction was a fraud on the creditors, the right of the plaintiff to recover back the money, for such creditors, is equally clear. Whether the money could or could not be recovered back by the debtor, the 14th section of the bankruptcy act especially vests in the assignee all property conveyed by the bankrupt in fraud of his creditors, and authorizes him to sue for and recover the same. This applies to conveyances fraudulent at common law, and to transfers of property such as that in the present case. Knowlton v. Moseley, 105 Mass. 136; Bean v. Brookmire, [Case No. 1,169.]

It is contended, that the bankruptcy proceedings were against Kintzing alone, and not against Lindsley also, and not against the firm; that the plaintiff is the assignee only of Kintzing individually, and not of the assets of the firm; that the copartnership was never dissolved; that the plaintiff does not represent the interest of Lindsley in the

claim sought to be recovered in this suit; and that Lindsley has an interest in it, which did not pass to the plaintiff. It is apparent, from the evidence, that the firm was regarded as dissolved by all parties concerned, by Kintzing, by Lindsley, and by the creditors, including the defendants, and that the assets and effects of the firm were regarded as being put into Kintzing's hands, in trust, to settle up the business, as the appointee of the creditors, and pay the compromise notes. Kintzing passed into the hands of the state assignee all that was left of such assets, as being part of the estate of Kintzing. From the state assignee they passed to the plaintiff, as the assignee of Kintzing, as part of the estate of Kintzing.

But, there is another view of the matter. The composition deed does not appear to have been assented to in any manner by Lindsley. He is not named in it, nor was he, so far as appears, a party to it, potentially. The deed is made between "Charles S. Kintzing & Co." and his creditors. There does not seem to have been any authority, so far as Lindsley was concerned, to sign the firm name to the compromise notes, so as to bind him by them. The compromise notes, therefore, signed by Kintzing with the firm name, were the individual notes of Kintzing. Having given them, he was to have the assets to administer, with which to pay them. This was the view of the creditors and of the bankruptcy court. The petition states, that the petitioners are creditors of Kintzing, a member of the late firm, and that his debts to them are two of these six months' compromise notes, signed in the name of Charles S. Kintzing & Co., but given by Kintzing, and that he committed all of the alleged acts of bankruptcy, one among them being the preferential payment by him to the defendants, as creditors of his, of the moneys before mentioned; and the prayer of the petition is, that Kintzing, so doing business as Charles S. Kintzing & Co., may be declared bankrupt. The defendants, as before shown, having really accepted the compromise notes, and received the fifty per cent. as a discount of those notes, and those notes, as well as all the other compromise notes, being really only the individual notes of Kintzing, and it appearing that the moneys paid to the defendants were paid by Kintzing out of the general funds of Kintzing, it follows, that, although those funds may have been, in part, the proceeds of the assets of the former firm, and although it may appear, on a calculation, that Kintzing was a debtor to such former firm, in respect of the assets he received and converted into money, to an amount sufficient to cover the payments to the defendants, yet the claim sought to be recovered in this suit is a claim belonging to the estate of Kintzing and recoverable by the plaintiff, as his assignee. How the plaintiff shall distribute the amount of the recovery, under the direction of the bankruptcy court, as between persons who were creditors of the former firm, (including those who received and those who did not receive compromise notes,) and persons who, though creditors of Kintzing, were never creditors of the former firm, is a question not involved in this suit.

There must be a decree for the plaintiff, for the several amounts of money paid to the defendants, with interest, and costs.

[NOTE. On defendants' appeal to the supreme court, this decree was reversed, upon the ground that the assignee of the senior partner had no such title as would enable him to call third parties to account for partnership property. In speaking for the court, Mr. Justice Clifford said:

["Money paid under such circumstances, if it can be recovered back at all, must be claimed by the partnership in whose behalf it was paid, or by an assignee duly appointed to administer the joint estate, as it is quite clear that neither an individual partner nor his assignee can call the party to whom such a payment has been made to an account for such a payment, any more than he could for any other debt due to the copartnership. If liable in fact, a voluntary payment to the appellee would not discharge the obligation, as the liability, if it exists, is to another party; nor would a judgment in this case, even if satisfied, be a bar to a subsequent suit in the name of the partnership or their duly appointed assignees.

["Two principal suggestions are made in support of the theory set up by the appellants: (1) That all the parties concerned in the attempt to effect a compromise between the debtors and their creditors proceeded as if the copartnership had previously been dissolved, and as if the assets and effects of the debtor firm had been placed in the hands of the senior partner in trust to settle up the affairs of the debtors with their creditors, and to pay the compromise notes. (2) That the other partner never assented to the compromise agreement, nor was he, in fact, a party to the final arrangement, and that the copartnership name was signed to the compromise agreement and to the notes without his authority.

["Issuable matters are certainly involved in those propositions, but, suppose they are fully proved, they are not sufficient to show that the other partner ever conveyed his interest in the assets and effects of the copartnership to the bankrupt partner, or that he ceased to be a joint owner of the same when the estate of the bankrupt partner was assigned and conveyed to the complainant below, as his assignee. Harrison v. Sterry, 5 Cranch, (9 U. S.) 302. Nothing is exhibited in the record to warrant the conclusion that the copartnership was ever in fact dissolved before the decree in bankruptcy against the senior partner, and, as the compromise notes were given in the name of the copartnership, the other partner remained liable for their payment."

[The case was remanded to the circuit court, with directions to dismiss the bill of complaint. Amsinck v. Bean, 22 Wall. (89 U. S.) 395.

[For other cases involving this bankruptcy, see Bean v. Brookmire, Cases Nos. 1,168–1,170; Bean v. Laflin, Case No. 1,172; Brookmire v. Bean, Id. 1,942; Kinsing's Assignee v. Bartholew, Id. 7,831; In re Kintzing, Id. 7,833.]

Case No. 1,168.

BEAN v. BROOKMIRE et al.

[1 Dill. 25;[1] 4 N. B. R. 196, (Quarto, 57;) 10 Am. Law Reg. (N. S.) 181; 4 West. Jur. 392.]

Circuit Court, D. Missouri. 1870.

BANKRUPT ACT—LIMITATION—THIRTY-FIFTH SECTION CONSTRUED.

1. The two clauses of the 35th section of the bankrupt act [of March 2, 1867, (14 Stat. 534,)] apply to transfers to two different classes of persons dealing with the bankrupt. The first clause applies to a creditor or a person having a claim against the bankrupt, or who is under a liability for him and who receives the money or property by way of preference; and the second clause applies to the purchase of property of the bankrupt by any person who has no claim against him and is under no liability for him.

[Cited in Ex parte Mendell, Case No. 9,418; Darby v. Boatman's Sav. Inst., Id. 3,571; Re Dow, Id. 4,036; Hall v. Hayner, Id. 5,933; Harvey v. Crane, Id. 6,178; Collins v. Gray, Id. 3,013; Coggeshall v. Potter, Id. 2,955; Gibson v. Warden, 14 Wall. (81 U. S.) 249; Bean v. Amsinck, Case No. 1,167; Bean v. Brookmire, Id. 1,170; Anibal v. Heacock, 2 Fed. 171; Matthews v. Westphal, 48 Fed. 665.]

2. The four and six months limitations in the 35th section of the bankrupt act considered; and it is held that where the transaction by the insolvent is with a creditor, the four months limitation applies, but where the transaction is with a general purchaser the six months limitation governs.

[Cited in Bean v. Brookmire, Case No. 1,169; Ex parte Mendell, Id. 9,418; Darby v. Boatman's Sav. Inst., Id. 3,571; Re Dow, Id. 4,036; Hall v. Hayner, Id. 5,933; Harvey v. Crane, Id. 6,178; Collins v. Gray, Id. 3,013; Coggeshall v. Potter, Id. 2,955; Gibson v. Warden, 14 Wall. (81 U. S.) 249; Bean v. Amsinck, Case No. 1,167; Bean v. Brookmire, Id. 1,170; Re Bousfield & Poole Manuf'g Co., Id. 1,703; Re Foster, Id. 4,964; Anibal v. Heacock, 2 Fed. 171; Matthews v. Westphal, 48 Fed. 665.]

3. Accordingly, where in an action by the assignee under the 35th section of the act the declaration alleged a payment by the bankrupt to the defendants, in liquidation of an existing debt and to have been made to them as creditors of the bankrupt, with intent to give a preference; and alleging that this was done within six months, but not within four months of the filing of the petition under which the bankruptcy was established, it was held to be demurrable.

[Cited in Bean v. Brookmire, Case No. 1,169; Harvey v. Crane, Id. 6,178; Collins v. Gray, Id. 3,013.]

4. All illegal or fraudulent transactions which are so by the common law, by the statute law, or by rules of law, other than the special limitations in the 35th section of the bankrupt act are governed by the limitation of two years upon the assignee in bringing the suit. (Arguendo per Miller, Circuit Justice.)

5. Purpose and policy of the bankrupt act stated by Miller, Circuit Justice.

[Cited in Darby v. Boatman's Sav. Inst., Case No. 3,571; Re Scott, Id. 12,518.]

[Error to the district court of the United States for the eastern district of Missouri.]

At law. This was an action, by [William C. Bean] the assignee in bankruptcy of Charles S. Kintzing, brought under the 35th section of the bankrupt act to recover of the defendants [Brookmire and others] the value of certain property alleged to have been conveyed by the bankrupt to them, in fraud of the bankrupt law.

The district court (TREAT, District Judge,) sustained demurrers to the declaration, [unreported,] and the cause came into the circuit court on a writ of error. [Affirmed.] The facts sufficiently appear in the opinion of the court.

Edmund T. Allen, for plaintiff.

George M. Stewart, for defendants.

Before MILLER, Circuit Justice, and KREKEL, District Judge.

MILLER, Circuit Justice. This case comes before us on a writ of error to the district court for the eastern district.

The plaintiff in error brings his suit to recover as assignee of the bankrupt the sum of $1,436.00 paid to the defendants within six months, but not within four months of the filing of the petition under which the bankruptcy was established. The declaration contains two counts intended to cover the two clauses of the thirty-fifth section of the bankrupt law, in one of which the transaction is described as a payment in liquidation of an existing debt, and in the other it is alleged to have been made to defendants as creditors of the bankrupt with intent to give a preference. In both counts, the insolvency of the bankrupt at time of the transaction is alleged, and also the knowledge or notice of that fact on the part of defendants, and that it was within six months of the filing of the petition in bankruptcy.

Demurrers were filed to both counts by defendants which were sustained by the district court, and this ruling is the error assigned here. The determination of the question here presented necessarily involves a construction of the section of the bankrupt act just referred to, or rather the first two clauses of it, which are in the following words: "And be it further enacted, that if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefitted thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefitted; and if any person being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud."

And I commence the examination into the true meaning of the section in its application to the question before me, by affirming what I am told was held in this same court at the last term, namely: that the two clauses differ mainly in their application to two different classes of recipients of the bankrupt's property or means. That is to say, that the first clause is limited to a creditor or person having a claim against the bankrupt, or who is under any liability for him, and who receives the money or property by way of preference; and the second clause applies to the purchase of property of the bankrupt by any person who has no claim against him and is under no liability for him. That the first clause is confined to persons of that character, cannot well be doubted, since the acts therein mentioned are acts done with persons of that character, and must be done with a view to giving such a person a preference over others of the same class. That the second clause has reference to another class of persons and is governed by other rules, seems to be strongly sustained by these considerations:

1. The sale or other transfer of property mentioned in it need not be in preference of a creditor or person liable for the bankrupt, to make it void.

2. It need not be made to a person of that character.

3. In the first clause the transfer may still be valid though within all the other conditions of the clause, if made more than four months before the filing of a petition in bankruptcy, while the transfer described in the second clause requires that it shall have been made more than six months before the filing of the petition, to have the same effect.

These are sufficient reasons to justify our conviction that the two clauses apply to transfers to two different classes of persons dealing with the bankrupt.

It is objected to this view that in the second clause payment is one of the acts described, as well as in the first, and that the word necessarily implies a transaction between debtor and creditor.

The force of this objection is fully met by the language of that part of the section which makes void the acts against which it is directed, and which, while declaring that such "sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof," omits to make any such provision as to payment, while in the invalidating language of the first clause, that is the first word used.

The word "payment" may have been used in the second clause inadvertently, or in a loose sense to include some consideration advanced by the insolvent in some one of the transactions otherwise forbidden; but, however it came to be used, it is quite certain that it is intentionally omitted where the transactions are mentioned which are declared to be void.

The payment described in both counts of this declaration is not one covered by the second clause of the section. It is a payment of money to a creditor on account of an existing debt, and is a preference within the meaning of the law. It is clearly one of the transactions described in and forbidden by the first clause, and therefore not included within the second. We need, therefore, inquire no further concerning its relation to the latter.

In regard to the first clause, both counts would be good under that, if they contained the averment, that the transaction described took place within four months before the filing of the petition in bankruptcy. But this allegation cannot truthfully be made, and the principal question in this case is whether that is necessary to make the count good.

The language of the section is, that if any person being insolvent, or in contemplation of insolvency, within four months of the filing of the petition by or against him, with a view to give the creditor a preference by any of the acts therein mentioned, the act shall be void, and the assignee may recover the property from the person receiving it, if such person had reasonable cause to believe the party insolvent. It is very certain that the act described is not made void by this clause, or by any clause in this section, unless it was done within four months of the filing of a petition by or against the bankrupt, and it is as strong an instance as can well grow out of a negative pregnant, that no such act is void for any of the causes there mentioned that was done within the four months.

In opposition to this view of the subject, it is earnestly contended that one of the clauses of the thirty-ninth section of the act de-

scribes pretty nearly in the same language the acts mentioned in the thirty-fifth section, and concludes that section with the declaration that if the person doing such acts shall be declared bankrupt, the assignee may recover the property transferred contrary to the provisions of the statute, making no restrictions as to time; and that the two sections can only be reconciled in this regard, by holding that the special provisions of section thirty-five are to be taken as a rule of evidence, not imperative, but prima facie, that the transaction was fraudulent, if within the period therein mentioned.

Having thus stated the opposite opinions of this thirty-fifth section, maintained by counsel, I do not know that I can do better than to state my own views of the policy which governed congress in its adoption.

The acts mentioned in the section are not such as were forbidden by the common law, or generally by the statutes of the states. Nor are they acts which, in their essential nature, are immoral or dishonest. For a man who is insolvent, or approaching insolvency, to pay a just debt, is not morally wrong, nor was it forbidden by any law in this country previous to the bankrupt act. And though a preference of creditors by transfer or assignment of property by an insolvent, may sometimes be unjust to the other creditors, it was not forbidden by the common law, and is not forbidden by many of the states.

It is very certain that such a preference may consist with the highest obligations of morality, and under circumstances which any one can imagine it may be the dictate of the purest justice in reference to all concerned. The careful and diligent framers of the bankrupt act were fully aware of all that has just been said.

But they were about to frame a system of laws, one main feature of which was to provide for the distribution of the property of an insolvent debtor among his creditors, and they adopted wisely, as the general and pervading rule of distribution, equality among creditors. But they found that this general principle could not without hardship be made of universal application. When a creditor had obtained by fair means a lien on any property of the bankrupt, that lien ought to be respected. If he had so obtained payment of the whole or a part of his debt, the payment ought to stand. These exceptions to the general rule of distribution were however liable to be abused, and might be used to defeat the purposes of the bankrupt law. The bankrupt, knowing that he must soon be helpless, would desire to pay or secure favorite creditors. They knowing his inability to pay, and his liability to be called into a bankrupt court, would naturally desire to secure themselves at the expense of other creditors.

In this dilemma, congress said we cannot prescribe any rule by which a preference would be held to be morally right or wrong; and it would be fatal to the administration of the law of distribution to permit such a question to be raised. We will therefore adopt a conventional rule to determine the validity of these preferences.

In all cases where an insolvent pays or secures a creditor to the exclusion of others, and that creditor is aware that he is so when he receives it, he shall run the risk of the debtor's continuance in business for four months. If the law which requires equal distribution, is not called into action for four months, the transaction, if otherwise honest, shall stand; but if by the debtor himself, or any of his creditors, that law is invoked within four months, the transaction shall not stand, but the money or property received by the party shall become a part of the common fund for distribution.

Congress in this view seems also to have thought that in case of a creditor who had already parted with his money or property to the insolvent party, and whose reasons for such further dealing with him were more pressing, that he might be saved from an impending loss, the time which should secure the transaction from the effect of the bankrupt law should be less by two months, than in the case of one who, having no such incentive to action, became a volunteer purchaser of an insolvent's property, with knowledge of his insolvency.

It is in a similar spirit that the provision in section twenty-three, which forbids a person accepting such a preference, from sharing in the assets of the bankrupt, uses the qualifying phrase, "until he shall first have surrendered to the assignee all that he had received under such preference."

I do not see any necessary contradiction between section thirty-nine and this view of section thirty-five. The former is a very long one, and recites all the acts which subject a person to involuntary bankruptcy, and that is the main purpose of the section. Among the acts which constitute a man a bankrupt, are those of giving preference to creditors in contemplation of bankruptcy. And it is in conclusion of that section declared in general terms, that if the debtor shall subsequently be declared a bankrupt, his assignee may recover the money or other property which was the subject of the act of bankruptcy. But this general declaration of the right of the assignee to recover is not inconsistent with the limitation of the right in another section, to cases occurring within six and four months of the commencement of the bankrupt proceedings. The general declaration of a state statute, that a person shall recover land by an action of ejectment, is not inconsistent with the provision in the statute of limitations that such actions must be brought within ten years after they have accrued. Nor is it inconsistent with the still more comprehensive right of suit conferred on the assignee by the fourteenth section of the act.

The thirty-fifth section and the thirty-ninth section, having for the first time set up a rule by which certain payments and transfers of property shall be declared void (a rule at variance with the common law, and with the statutes of the states), very properly limits and defines the circumstances within which this new rule shall operate. These are, among others, that the recipient of the bankrupt's money or property must have had reasonable cause to believe he was insolvent, and that the transaction must have been recent when the bankrupt law was applied to the case,—with a creditor within four months and with the general purchaser within six months.

As to all illegal or fraudulent transactions which are so by common law, by statute law, or by any other recognized rule of law, other than these special provisions of the bankrupt law, that act has imposed the limitation of two years on the assignee in bringing his suit, and by that they are governed. But the case made by the plaintiff does not come within any such law known to us. Therefore, his declaration is bad, and the demurrer was properly sustained by the district court, whose judgment is affirmed.

Affirmed.

NOTE, [from original report.] Bankrupt Act —Construction of 35th Section, as to Limitations and Preferences. Affirmed, Gibson v. Warden, 14 Wall. [81 U. S.] 249. Followed, Maurer v. Frantz, [8 Phila. 505;] In re Dow, [Case No. 4,036;] Collins v. Gray, [Id. 3,013;] Anibal v. Heacock, 2 Fed. 171, 173; Coggeshall v. Potter, [Case No. 2,955;] Matthews v. Westphal, [48 Fed. 664;] Bean v. Brookmire, [Case No. 1,169.] Cited in Re Scott, [Id. 12,518;] Darby's Trustee v. Boatman's Sav. Inst., [Id. 3,571;] Bean v. Brookmire, [Id. 1,170;] Harvey v. Crane, [Id. 6,178;] Jordan v. Downey, 40 Md. 413. Doubted, Ex parte Mendell, (In re Butler,) [Case No. 9,418.]

[For other cases involving this bankruptcy, see Bean v. Amsinck, Case No. 1,167; Bean v. Brookmire, Cases Nos. 1,169 and 1,170; Bean v. Laflin, Case No. 1,172; Brookmire v. Bean, Id. 1,942; Kinsing's Assignee v. Bartholew, Id. 7,831; In re Kintzing, Id. 7,833.]

Case No. 1,169.

BEAN v. BROOKMIRE et al.

[1 Dill. 151;[1] 3 Chi. Leg. News, 378; 1 Leg. Op. 178; 5 West. Jur. 505.]

Circuit Court, D. Missouri. April Term, 1871.

BANKRUPTCY—RIGHTS WHICH PASS TO ASSIGNEE—JURISDICTION IN EQUITY, ETC.

1. The assignee in bankruptcy may recover money fraudulently paid by the bankrupt to the defendants in order to obtain their signature to a composition agreement.

[Cited in Bean v. Brookmire, Case No. 1,067.]

2. Equity will entertain such a bill by the assignee, although he might have maintained an action at law.

[Cited in Bean v. Brookmire, Case No. 1,170. Cited generally in Brookmire v. Bean, Id. 1,942.]

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

In equity. After the decision of this court in the cause reported above, [Case No. 1,168,] the assignee [William C. Bean] brought the present bill, in the district court for the eastern district of Missouri, to recover money alleged to have been fraudulently paid by the bankrupt to the defendants, [Brookmire and others.] The district court sustained the demurrer to the bill on the ground that no recovery could be had in equity, and that the remedy was exclusively at law, [unreported.] The assignee appeals. [Reversed. A decree was afterwards rendered for the assignee, and affirmed by this court. Bean v. Brookmire, Case No. 1,170.]

The necessary facts appear in the opinion of the court.

Edmund T. Allen, for assignee.

Stewart & Slayback, for respondents.

Before DILLON, Circuit Judge, and KREKEL, District Judge.

KREKEL, District Judge. This is a bill by the assignee of the bankrupt to recover of defendants fourteen hundred and thirty-six dollars, alleged to have been fraudulently paid by Kintzing, the bankrupt, to Brookmire & Rankin, the defendants, in order to obtain their consent and signature to a composition deed entered into by the creditors of Kintzing & Co., prior to the adjudication in bankruptcy against the said Charles S. Kintzing.

The defendants filed their demurrer, and for cause assign that complainant has no interest in the subject-matter of the bill, and want of equity.

The court below sustained the demurrer, on the ground that full and complete remedy exists at law, and that the action does not lie in equity.

The bill alleges that Charles S. Kintzing and Malcolm A. Lindsley were merchants doing business under the name and style of Charles S. Kintzing & Co.; and becoming insolvent, on the 15th day of February, 1859, applied to their creditors, among them defendants Brookmire and Rankin, for a compromise, and on the same day entered into a composition agreement with them, agreeing on their part to pay seventy cents on the dollar, in six, twelve, and eighteen months; that one of the conditions of said compromise was that the same should not be binding unless signed by all the creditors; that afterwards, on the 27th day of February, 1869, the said partnership of Charles S. Kintzing & Co. was dissolved by the withdrawal of Lindsley, who at the time was largely indebted to the firm. The bill charges that the consent and signature of said Brookmire & Rankin were obtained by Charles S. Kintzing, the bankrupt, conniving with the said Brookmire & Rankin to deceive and defraud the creditors of said Kintzing & Co., who had bona fide entered into this compromise; and that said bankrupt fraudulently paid, and the said

Brookmire & Rankin, well knowing the deception and fraud to be practiced, and participating therein, received the sum of fourteen hundred and thirty-six dollars, now sought to be recovered.

In support of the first ground of demurrer, that the complainant has no interest in the subject-matter of the bill, it is argued that no provision of the bankrupt law, either directly or by implication, passes any title or interest in the subject-matter of this suit to the assignee, and the 14th and 35th sections of the act [of 1867, (14 Stat. 522, 534,)] are commented on by counsel. The former section, among other provisions has the following:—

"That the register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt; * * * and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in the assignee. * * * all rights in equity, choses in action. * * * And all his rights of action for property or estate, real or personal, shall in virtue of the adjudication in bankruptcy and the appointment of his assignee, be at once vested in such assignee."

The terms used in the foregoing extracts have a definite signification, and embrace all rights and estate a man may own or possess, without limitation or qualification, and seem to have been used on account of their well ascertained meaning, both in law and in common acceptation. The provisions cited, thus defined, are by the court deemed sufficient to vest in the assignee whatever of interest the bankrupt had in the premises.

It is next said that the bankrupt had no interest which could pass to his assignee; that the payment made to Brookmire & Rankin by the bankrupt was that of a just debt, which they had a right to receive. It is true that if such a payment had been made and received bona fide, and not attacked under the four months clause of the 35th section, no recovery could have been had, as was decided in this court by Justice Miller, in a case against these defendants at a former term. [Bean v. Brookmire, Case No. 1,168.] Can a payment made and accepted for the purpose, and with the intent to deceive and defraud unsuspecting creditors, as charged in the bill, be said to be made bona fide? Numerous authorities might be cited establishing that a compromise entered into under such circumstances avoids the composition deed, and that the creditors are not bound thereby; nor are authorities wanting to show that the law will not allow the enforcement of any obligations given to secure a preference. O'Shea v. Collier White Lead & Oil Co., 42 Mo. 397.

It is true the courts were slow in coming to the conclusion to interfere between the parties to the fraud, even when invoked to do so. They commenced, however, by permitting inquiry into usurious transactions, and upon close examination did not fail to see that the relations in which the lender and borrower stood to each other differed. The case of Darby v. Boatman's Sav. Inst., decided at this term, recognizes this distinction. [Case No. 3,571.]

The reasons on which this class of cases proceeds are of easy application in the cause now before the court. The bankrupt was seeking to compromise with his creditors, all of whom were to join, in order to bind them. Brookmire & Rankin refused unless they could obtain a preference, and having obtained it, pretended to come into the composition with other creditors on equal terms, when they had, in fact, by their preference, abstracted a share of the property to which the honest, confiding creditors, looked for the ultimate satisfaction of their claims. Under such circumstances the courts have finally held it to be the better policy to allow the debtor, though a participant in the fraud, to recover the amount paid. Atkinson v. Denby, 6 Hurl. & N. 778, 7 Hurl. & N. 934; Mare v. Sandford, 1 Giff. 295.

Such a recovery does not, however, interfere with the right of the creditors to seek satisfaction from those who have deceived and defrauded them.

A more serious question arises, and one about which the courts have differed, whether a recovery can be had in equity in a case such as is before us, the complainant having, as held by the court below, a complete remedy at law. Courts of chancery seem originally to have had exclusive jurisdiction of fraud, oppression, and deceit, but in time law courts also took cognizance thereof. While it may be admitted that the complainant might maintain an action at law, it does not therefore follow that this court, as a court of equity, is ousted of its jurisdiction. 1 Story, Eq. Jur. (10th Ed.) § 64i; Darby v. Boatman's Sav. Inst. supra, and authorities cited. The jurisdiction of law and equity in cases of fraud of this character is concurrent, at all events it exists in equity. The acts charged are oppressive and wrongful as against the debtor, and operate as a fraud upon the other creditors, and upon the bankrupt act.

The case being before us on the equity side of the court, and having, under the views entertained, power to grant the relief sought, we will reverse the order of the court below, and remand the case for further proceedings therein.

Reversed.

[NOTE. For other cases involving this bankruptcy, see Bean v. Amsinck, Case No. 1,167; Bean v. Brookmire, Id. 1,168; Id. 1,170; Bean v. Laflin, Id. 1,172; Brookmire v. Bean, Id. 1,942; Kinsing's Assignee v. Bartholew, Id. 7,831; In re Kintzing, Id. 7,833.]

Case No. 1,170.

BEAN v. BROOKMIRE et al.

[2 Dill. 108;[1] 7 N. B. R. 568; 5 Chi. Leg. News, 314; 2 Am. Law Rec. 222; 6 Am. Law T. Rep. 418; 7 West. Jur. 324.]

Circuit Court, E. D. Missouri, 1873.

BANKRUPTCY—COMPOSITION DEEDS—SECRET PREFERENCES—RECOVERY BACK OF MONEY PAID BY WAY OF ILLEGAL PREFERENCE.

1. Parties who sign composition deeds must do so in good faith.

[Cited in Brookmire v. Bean, Case No. 1,942; Fairbanks v. Amoskeag Nat. Bank, 38 Fed. 634.]

2. Secret preferences paid as inducements to obtain signatures of creditors to composition deeds, can be recovered by the debtor himself, or by injured creditors, or by an assignee in bankruptcy, who represents both debtor and creditor.

[Cited in Brookmire v. Bean, Case No. 1,942.]

3. Such recovery may be at law or in equity.

4. It is no defense to such an action that the composition deed was invalid, because not signed by all the creditors, pursuant to its terms, it appearing that the greater part of the creditors believed that the composition had been signed by all the creditors in good faith.

[Cited in Brookmire v. Bean, Case No. 1,942.]

In equity. This cause was before the court on a former appeal. Bean v. Brookmire, [Case No. 1,169.] After it was remanded, an answer and replication were filed, testimony was taken, the cause heard on its merits, and a decree entered in favor of the assignee [William C. Bean] for the sum of $1,436.02 and interest against the defendants Brookmire & Rankin. The bill was dismissed as to Laflin. To reverse the decree against them, Brookmire & Rankin now bring the cause here by appeal. [Affirmed.]

The plaintiff is the assignee in bankruptcy of Charles S. Kintzing, who was the successor of the firm of Charles S. Kintzing & Co., wholesale grocery merchants in St. Louis. Kintzing & Co. were largely indebted, and being unable to go on with their business, they called, on the 15th day of February, 1869, a meeting of their creditors. Many of their local and some of their non-resident creditors were represented at this meeting, but a large number of creditors was not present. An exhibit of their affairs was made showing liabilities to the amount of $179,299.54, and assets, nominally, to the amount of $204,602.80, which last sum included $51,704.50 of suspended debts, and $65,386.69 due from "the Montana branch."

Kintzing, acting for Kintzing & Co., proposed to pay their creditors seventy cents on the dollar in six, twelve, and eighteen months, and to give notes for the installments; and a composition agreement in the usual form was prepared accordingly, dated February 15, 1869.

This agreement, after providing that upon the payment of the notes given in settlement the firm should be released from all liability, contained the following: "We have entered into this compromise with the said firm of Charles S. Kintzing & Co., after hearing and seeing a statement of their books, assets, and effects, and find that it is the best, in our judgment, that can be done for the interest of all concerned. And further, that we have full confidence in the integrity of Charles S. Kintzing, and his ability to settle up the business better than any one we could appoint; but it is further expressly agreed and understood that this composition is not to be binding upon any one, unless agreed to and signed by all of the creditors of the said firm. In witness whereof, we have hereunto set our respective names, and desire the co-operation of all of the creditors with us in this compromise."

A question growing out of this agreement was before this court in Kintzing's Assignee v. Bartholew, [Case No. 7,831.] Creditors whose claims amounted to $153,558.21 ultimately signed the agreement; but creditors, over thirty in number, whose claims, mostly small, in the aggregate amounted to $2,313.53, never signed it. The last name appearing to the agreement was that of the firm of L. E. Amsinck & Co., of New York, creditors to the amount of $32,551.65. The circumstances under which they signed it appear in the case of Bean v. Amsinck, recently (January, 1873) decided in the United States circuit court for the southern district of New York. [Case No. 1,167.]

Kintzing & Co. were indebted to the defendants, Brookmire & Rankin, merchants residing also in St. Louis, upon a promissory note for $1,436.02, dated January 4, 1869, and payable thirty days from its date.

Brookmire & Rankin refused to attend the meeting of the creditors on the 15th day of February, and declined to join in the proposed compromise, but, on the contrary, had commenced suit on their note in the state court to recover the amount thereof from Kintzing & Co. This suit was pending at the time the negotiations for a compromise were going on. A committee of creditors waited on them to induce them to unite with the rest, but they refused, saying that they had no confidence in Kintzing, and that they thought they could collect the whole amount of their debt.

The next to the last name appearing to be signed to the composition agreement is that of the firm of Brookmire & Rankin, purporting to be creditors of Kintzing & Co. for $1,436.02. The defendants' names were affixed to the agreement by Sylvester H. Laflin, on the 17th day of March, 1869, under the circumstances stated in the opinion of the court.

On the same day (March 17), Kintzing enclosed compromise notes to various non-resident creditors representing that his articles of compromise had been completed. The compromise notes matured on the 18th day of August. Kintzing made a voluntary assignment, under the state law, and on the 17th

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

day of September, 1869, was proceeded against in bankruptcy, and such proceedings were had that the plaintiff was appointed his assignee.

The present suit is brought to recover of the defendants the $1,436.02 paid to them on the 17th day of March, with interest. The substantial nature of the bill is stated in [Bean v. Brookmire, Cases Nos. 1,168 and 1,169.] The answer admits the payment, but denies the imputed fraud and all liability to account for or return the money. As before stated, the court entered a decree for the assignee, and the defendants, Brookmire & Rankin, appeal. No appeal is taken from that part of the decree dismissing the bill as to Laflin.

Edmund T. Allen, for appellee.
G. M. Stewart, for appellants.

DILLON, Circuit Judge. Kintzing was embarrassed, and on the 15th day of February, 1869, called a meeting of his creditors at his place of business in St. Louis. The defendants refused to attend. The creditors present, after an exhibit of his affairs, agreed to the proposal to take seventy cents on the dollar in notes at six, twelve, and eighteen months, without interest, and a composition article to that effect was drawn up. This was to be signed by all his creditors, and contemplated placing all upon an equal footing. This appears upon its face.

By the middle of March following this agreement had been signed by the great bulk of the creditors in number and amount. Those who had not signed it were the defendants; also, Amsinck & Co., who were creditors for over $32,000; Bartholew, Lewis, & Co. (defendants' local bankers) [Bean v. Brookmire, Case No. 1,169,] and sundry small creditors, over thirty in number, and whose claims in the aggregate amounted to something over $2,000.

It was known generally to the creditors in St. Louis that the defendants had not acceded to the compromise proposed, and that they declined to do so. The defendants had, indeed, made known their refusal to a delegation of creditors who had waited upon them and urged their concurrence. Not only had they thus refused, but they had a suit upon their note pending against Kintzing & Co. in the local courts. Kintzing found that the claim of the defendants stood in the way of completing the desired arrangements, and that the defendants must in some way be satisfied, or their names procured to the composition agreement. He pursued this course: He procured from Bartholew, Lewis, & Co., or drew upon his account at the bank, the full amount of the defendants' note, placed the money thus obtained in a package and left it at the bank, with directions to deliver it to Sylvester H. Laflin. He then requested Laflin (a friend of his, and a distant relative of Brookmire's) to act for him in negotiating with the defendants. He directed Laflin to call upon Bartholew, Lewis, & Co. for a package of money, and then go to the defendants and do the best he could with them. On the 17th day of March, 1869, Laflin accordingly obtained from Bartholew, Lewis, & Co. the package of money Kintzing had provided for him; he went at once to the defendants' store; said he had called to pay or take up the Kintzing note; was informed it was at the court house, and then requested that it be sent for, which was done. The note being produced, he made an appeal to the defendants to throw off part of their demand, saying (according to the weight of testimony) that the money had been raised by himself and Kintzing's friends, or by the latter, to help him through, and he wanted the defendants to make it as easy as possible. There is no evidence that this statement is true in point of fact, and Laflin denies that he stated that he had contributed to raise the money. Upon the proofs we find that the money was Kintzing's, and that no part of it had been furnished by any one else. Defendants refused to make any substantial deduction, but at length threw off one month's interest and agreed to pay the costs of court. The money was handed by Laflin to the defendants and counted by their book-keeper, who made an entry at the time in the books of the defendants to the effect that the note had been "sold" to S. H. Laflin.

As to what occurred at this time there is among the witnesses on some points much forgetfulness and conflict. But certain it is that when the note was finally delivered to Laflin (which was at the time he paid the money) it contained this material indorsement made upon it at Laflin's request by Rankin, one of the defendants: "We authorize S. H. Laflin to sign for us. Brookmire & Rankin."

The court is obliged to find upon the evidence, and does find, that this referred to the composition agreement, and that it authorized Laflin to sign that for the defendants. With this indorsement upon the note it was delivered to Laflin, who, upon the same day, took it to Kintzing and signed the composition agreement, with the words, "Brookmire & Rankin, $1,436.02," without indicating on the paper that it was signed by him as their agent.

Just underneath the name of the defendants appears the name of the firm of Amsinck & Co., signed by F. A. Reuss & Co. as their attorneys, for the sum of $32,550.65. These two were the last signatures ever procured to the agreement. On the same day, March 17, Kintzing wrote various non-resident creditors to the effect that his compromise was "completed," and enclosed notes pursuant to the composition agreement. The creditors received these notes in settlement, and Kintzing continued in business without interruption or disturbance for the next six months. His failure to meet any of his com-

promise paper called attention to his affairs, and the result was an assignment, and, subsequently, proceedings in bankruptcy against him.

It is a fair deduction from the testimony, that the creditors generally, in good faith, supposed the compromise had been fully completed, and were not aware that a portion had never signed it, nor were they aware of the circumstances under which the defendants and a few others had received the full amount of their debts, or of any fact which made the composition invalid. During these six months Kintzing seems to have wasted or squandered the assets, and very greatly impaired his ability to pay his debts. None of the composition notes were ever paid.

Under the circumstances, the question is, Are the defendants liable to the assignee in respect to the money so paid to them by the bankrupt through the agency of Laflin?

And first, as to the form of the action. We decided on the former appeal—1 Dill. 151 [Bean v. Brookmire, Case No. 1,169]—that equity had jurisdiction, although it might be true that the assignee could have sued at law. Upon the authorities there can be no doubt of the correctness of this view, and the point need not further be discussed. Adams, Eq. 180; Mare v. Sandford, 1 Giff. 295; Jackman v. Mitchell, 13 Ves. 581; Cockshott v. Bennett, 2 Term R. 763; Constantein v. Blache, 1 Cox, Ch. 287.

Next, as to the merits of the cause. The defendants made the endorsement on the note: "We authorize S. H. Laflin to sign for us," and it was under authority thus given that he signed their name to the composition agreement. The evidence favors the view that the defendants at first objected to making this indorsement, and finally did it without much reflection, and upon Laflin's assurance that it would be all right and he would answer that the note should never come back or give them any further trouble. They did not seek Laflin or Kintzing, but were standing aloof from the proposed arrangement for a compromise and pursuing their own remedy against their debtor. True, the circumstances of the debtor were such that they could not obtain payment under a judgment against him which would not be liable to be defeated by the bankrupt act; still we have felt that their passive conduct in this matter hardly deserves the warm indignation which it has called forth from the assignee's counsel.

A creditor is not bound to accede to a compromise, nor is he legally censurable merely because he refuses to unite with others; nor is he morally censurable if his refusal proceeds from a want of confidence in the debtor. And this seems to have been the case of the defendants; and if they had received the money in payment of their note, not knowing it was Kintzing's, and believing it to be that of his friends, and had merely surrendered the note, perhaps they could have retained it, or, though knowing it was Kintzing's, they could not be made to refund it, if he was not thrown into bankruptcy within four months thereafter. Bean v. Brookmire, [Case No. 1,168.]

But the defendants, unfortunately for them, were induced to empower Laflin to sign for them the composition agreement, and he did so. And the proposition must be true that the act of Laflin, thus authorized, is the same in legal effect as if the defendants had themselves signed the agreement with their own hands. It must be taken, then, that the defendants did sign the composition agreement, and that they agreed to do so as part of the transaction in which they received, less a trifling deduction, the full amount of their debt.

The rules of law respecting the good faith to be observed by all who unite in a composition agreement are well known and well settled, and rest upon the soundest policy and upon the clearest principles of equity, commercial morality, and fair dealing. The temptation to obtain undue or secret advantages is so great, that the necessity for the severe rules which have been declared by the courts to repress it, is undeniable. All must be open and fair. If a creditor, appealed to by his debtor, makes it a condition of his uniting in a composition, that he shall have any advantage not enjoyed or made known to the others, the transaction cannot stand either at law or in equity. It is a fraud upon creditors, and they can avoid it. It is treated as oppression or duress towards the debtor, and he may defend against any promise to pay made under such circumstances; or, if he has actually paid, he may recover back the amount, as the law does not consider the parties as being in pari delicto, nor regard the payments thus made as voluntary, and allows such recovery on grounds of public policy. Breck v. Cole, 4 Sandf. 79; Pinneo v. Higgins, 12 Abb. Pr. 334; Atkinson v. Denby, 6 Hurl. & N. 778; on appeal, 7 Hurl. & N. 935; approving, Smith v. Bromley, 2 Doug. 696, note; Clay v. Ray, 17 C. B. 188; Leicester v. Rose, 4 East, 372; Jackman v. Mitchell, 13 Ves. 581; Knight v. Hunt, 5 Bing. 432; Bradshaw v. Bradshaw, 9 Mees. & W. 29; Wood v. Barker, L. R. 1 Eq. 139; Howden v. Haigh, 3 Perry & D. 661, 11 Adol. & E. 1033; Higgins v. Pitt, 4 Exch. 322; Wells v. Girling, 1 Brod. & B. 447, 4 Moore, 78; In re Hodgson, 4 De Gex & S. 354; Mallalieu v. Hodgson, 16 Adol. & E. (N. S.) 689; Cullingworth v. Loyd, 2 Beav. 385.

Aside from the question as to the effect of all not signing, presently to be noticed, it is incontestible that if the defendants, with one hundred cents on the dollar in their pockets, yet signed an agreement with the other creditors that they would take seventy cents on the dollar in the future, this would be a fraud which would give a right of action both to the debtor and to the creditors there-

by injured. And the assignee in bankruptcy represents both the rights of the bankrupt and of creditors who have been defrauded. Bankrupt Act, [1867; 14 Stat. 522,] § 14; Allen v. Massey, [Case No. 231,] affirmed in supreme court, [17 Wall. (84 U. S.) 351;] Bradshaw v. Klein, [Case No. 1,790;] Knowlton v. Moseley, 105 Mass. 139; Bean v. Amsinck, [Case No. 1,167.]

Now, with their debt substantially paid in full, the defendants signed, or authorized their names to be signed to, the composition agreement: and hence they are liable to the assignee unless there is some special ground of defense.

The defense relied on may be thus stated: By the terms of the composition agreement it is not to be binding upon any creditor unless it shall be signed by all; confessedly it was not signed by all, hence it never became a completed or effectual agreement, and therefore it was incapable, in the nature of things, of working any fraud upon the other creditors. And this position is sought to be strengthened by the argument that the defendants' conduct in signing the agreement in fact worked no fraud upon the creditors, because, at most, only one firm signed it afterwards, and there is no evidence that any of the creditors saw it or knew of it after the defendants' signature was placed upon it. We are compelled, however, to differ with counsel upon this point. It seems to us quite clear upon the proofs that the compromise would never have been regarded as completed without the defendants' signature. Other creditors knew they had refused to come in, knew they had a suit pending, and it is hardly probable that they would have accepted compromise notes and allowed Kintzing to proceed for six months, as if the composition agreement had been completed, if the transaction which led to the placing of the defendants' name to the paper had not taken place. Undoubtedly the local creditors were given to understand that the defendants had at length yielded, and come in with the rest, and the foreign creditors, as we have seen, were, on the same day that the defendants' name was placed upon the agreement, notified that it was completed, and they acted upon the truth of this statement, and received notes and gave time of payment in accordance with the terms of the composition article. We cannot agree, therefore, that the defendants' conduct has been innocuous; that it has, in fact, produced no injury. But still, the legal point above stated recurs; how can it be predicated of an instrument which by its own terms never became complete or binding, that it could operate to defraud or injure others? Plainly stated, the position of the defendants is this: The complaint is that we signed an agreement by which creditors have been defrauded; but how can an agreement which never became binding, operate to defraud or injure any one?

We have felt the force of this objection and own to some difficulty in satisfactorily answering it. Precisely the same point was made by Amsinck & Co. in the case of this plaintiff against them, and it was overruled by Judge Blatchford, on the ground that the defendants having acted under the agreement were estopped to deny its validity.

In this case we answer the objection as follows:—

1. The defendants' signature to the agreement having misled and injured other creditors, the defendants as against them are estopped to deny its validity.

2. The receipt of the debt in full, accompanied by an agreement to sign the composition article, was fraudulent, ab initio, and gives to the assignee, as representing creditors, the right to recover in respect thereto. See Alsager v. Spalding, 4 Bing. N. C. 407, and cases cited, supra.

3. The assignee represents as well any right of action the bankrupt would have had if bankruptcy had not supervened.

And as the defendants refused to take less than the full amount of their demand, and on receiving that actually did agree to sign the composition articles, or authorized them to be signed, it must be taken that the real contract between them and Kintzing, through his agent, was: "If you will pay us in full we will sign the compromise agreement," and if so, Kintzing would have had a clear right to recover back the amount paid, though the composition may have failed, and this right has devolved upon his assignee in bankruptcy. Atkinson v. Denby, supra, and other cases above cited.

The decree appealed from is therefore affirmed.

Affirmed.

NOTE, [from original report.] As to the presumption of law that all creditors who sign a composition deed are ignorant of any fact that would invalidate it, see Bean v. Amsinck, [Case No. 1,167;] Partridge v. Messer, (1859,) 14 Gray, 180; Ex parte Sadler, (1808,) 15 Ves. 59; Coleman v. Waller, (1829,) 3 Younge & J. 212; Pinneo v. Higgins, (1861,) 12 Abb. Pr. 343; Curran v. Munger, [Case No. 3,487.] As to the right the assignee to recover simply as representing the bankrupt: Wood v. Barker, L. R. 1 Eq. 139; Alsager v. Spalding, (1838,) 4 Bing N. C. 407; Smith v. Cuff, (1807,) 6 Maule & S. 160; Turner v. Hoole, Dowl. & R. N. P. 27, 16 E. C. L. 418; Cockshott v. Bennett, (1788,) 2 Term R. 763; Howden v. Haigh, 3 Perry & D. 661, (1840,) 11 Adol. & E. 1033; Higgins v. Pitt, (1849,) 4 Exch. 322; Breck v. Cole, 4 Sandf. 79; Carroll v. Shields, 4 E. D. Smith, 466. Notes or securities fraudulently obtained cannot be enforced. Wells v. Girling, (1819,) 1 Brod. & B. 447, 4 Moore, 78; Constantein v. Blache, (1786,) 1 Cox, Ch. 287; Jackman v. Mitchell, (1807,) 13 Ves. 581; Ex parte Oliver, In re Hodgson, 4 De Gex & S. 354; Mallalieu v. Hodgson, (1851,) 16 Adol. & E. (N. S.) 689. As to right of the debtor, if not bankrupt, to recover back money extorted from him in order to induce a creditor to sign a composition agreement: Atkinson v. Denby, 6 Hurl. & N. 778; on appeal, (1862,) 7 Hurl. & N. 935; Clay v. Ray, 17 C. B. (N. S.) 188; Smith v. Bromley, (1760,) 1 Doug. 697, note; Adams, Eq. 180; Mare v. Sandford, (1859,) 1

Giff. 295; Partridge v. Messer, (1859,) 14 Gray, 180; Doughty v. Savage, (1859,) 28 Conn. 146; Pinneo v. Higgins, (1861,) 12 Abb. Pr. 334; O'Shea v. Collier White Lead & Oil Co., 42 Mo. 397. As to forfeiture by creditor of entire demand if guilty of fraud, see In re Cross, (1848,) 4 De Gex & S. 364; Howden v. Haigh, 3 Perry & D. 661, (1840,) 11 Adol. & E. 1033; Mallalieu v. Hodgson, (1851,) 16 Adol. & E. 689; Doughty v. Savage, (1859,) 28 Conn. 146; Bankrupt Act, [14 Stat. 534,] § 35, last clause; Carter v. McLaren, (1871,) L. R. 2 H. L. Sc. 120.

[For other cases involving this bankruptcy, see Bean v. Amsinck, Case No. 1,167; Bean v. Brookmire, Id. 1,168, Id. 1,169; Bean v. Laflin, Id. 1,172; Brookmire v. Bean, Id. 1,942; Kinsing's Assignee v. Bartholew, Id. 7,831; In re Kintzing, Id. 7,833.]

BEAN, (BROOKMIRE v.) See Case No. 1,942.

Case No. 1,171.

BEAN et al. v. The GRACE BROWN.

[2 Hughes, 112.][1]

District Court, E. D. Virginia. May 10, 1841.

SALVAGE BY PILOTS—SHIP TEMPORARILY ABANDONED.

1. Regularly authorized and licensed pilots are entitled to compensation for salvage, where their services are extraordinary and beyond the strict line of their professional duty.

2. Where a master and crew voluntarily leave a ship while in peril of the sea, with the bona fide intention of returning to her, the ship is not derelict.

3. Where a ship, thus left by her crew, is found by pilots, after the weather has abated in violence, and is brought into port without danger or much difficulty, they are entitled to liberal compensation, say $2,400, when the ship and cargo are worth $38,000.

[Cited in The Ann L. Lockwood, 37 Fed. 237.]

[In admiralty. Libel by Bean and others against the ship Grace Brown, for salvage. Decree for libellants.]

The libellants are pilots, from Baltimore, duly authorized to act as such, and claim salvage, for themselves and their respective crews. They propound that while cruising off the capes of Virginia, on the lookout for vessels requiring their services, Captain Bean, on the 8th January, 1841, spied a ship on shore on Smith's Island flats, which proved to be the Grace Brown, of Baltimore. That finding himself unable to relieve her, he procured the assistance of the other libellants, and again boarded the ship at 1 o'clock on the morning of Saturday, the 9th of January; that there was no human being on board, and that the ship was abandoned and derelict; that she was in imminent peril, frequently striking the bottom, with a heavy sea surging over her, with eight or nine feet of water in her hold, and in danger of going to pieces. That by incessant labor and at the peril of their lives, and their three pilot-boats, they succeeded in rescuing her from her perilous situation, and brought her and her cargo in safety to the port of Norfolk, where they secured her at the wharf at 8 o'clock p. m. of the same day.

A claim is interposed by Henry Duff, master and part owner of the Grace Brown, in behalf of himself and the other owners of the ship. He alleges that his ship sailed from Liverpool on the 12th of November, 1840, bound to Baltimore, with an assorted cargo, and had uninterrupted voyage until the 7th January, when the ship struck, as he supposed, on the middle ground off Cape Henry, and sprung a leak; that he displayed the usual signal for a pilot without obtaining one; that after endeavoring to extricate her from the difficulties of her situation, at half-past 10 o'clock a. m. on the 7th of January, he hove out his anchor, by which he rode securely while he remained on board; that about half past 4 o'clock p. m. he left the ship with his officers and crew, in the long boat, to go ashore for assistance, with the intention of an immediate return to the ship with aid; that her danger arose from his ignorance of the localities, and mainly from the wind's blowing a strong gale from the S. E., or on shore. That the ship was not derelict, and when the services of the libellants were rendered, her situation was not imminently dangerous. That after using every effort, and all the dispatch which he could control, he returned on the morning of Saturday, the 9th, to the spot where he had left the ship at anchor, and found that she was not there. He became satisfied that he had seen her, on his way out, under sail to Norfolk; pursued, and at 11 o'clock p. m. found her at the wharf in possession of the libellants, who refused to deliver her up. That the libellants are pilots, and the ship at the time of the salvage service was within their pilotage-ground. The libellants claim the highest rate of salvage, on the ground stated, and the owners, admitting that although pilots, the libellants are entitled to compensation, contend that so small were their risk and service, that the lowest rate of remuneration should be adopted. The ship and cargo are appraised at $38,928.

MASON, District Judge.[2] The material facts in dispute between the parties are: 1. Whether the ship was abandoned by the officers and crew, and was in a state of derelict, when she was taken possession of by the libellants, or not? 2. Whether the situation of the ship and cargo was imminently perilous, at the time of the salvage, and in what degree?

The depositions of some of the libellants are taken and read as evidence in the cause. This is legal evidence; it forms an exception, from the necessity of the case, to the general rule, that a person interested in the re-

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

[2] Hon. John Y. Mason, afterwards secretary of the navy, attorney general, and minister to France.

sult of a cause is incompetent to testify. The testimony of salvors is admissible, "but only admissible as to facts occurring at the time of the salvage service, and in weighing that with the other evidence, its force will be greatly abated by opposing testimony from persons belonging to the crew of the saved ship," and a portion from other disinterested witnesses. The Boston, [Case No. 1,673.] Sensible of the embarrassment and difficulty of deciding on conflicting evidence and controverted facts without the aid of a jury, I have attentively considered the able and elaborate arguments of the counsel, and have carefully examined and weighed the testimony in the cause. By the owners, it is proved that the ship securely rode by three anchors, in four fathoms water, from 10 o'clock a. m. to half-past 4 o'clock p. m., when the master and crew left her on the 7th; that during that time the wind was blowing a gale on shore, and the sea running high, but had not moved her from her moorings; that the ship's draft was less than 17 feet, and I consider that the weight of evidence leaves no doubt that, though leaking, water in her hold was never more than 4½ feet aft and 5½ forward; that the captain and crew went ashore for assistance, and though leaving the ship under strong apprehensions for her safety, he declared and evinced his purpose to be an immediate return to her; that he used every effort to procure aid, and on Saturday morning, with what he deemed the necessary aid, and all that he could command, he did return to the place where he had left her anchored, without any knowledge that the libellants were in possession of her; that the captain was a part owner, an experienced master, and a respectable man. The libellants rely on the condition in which the ship was found, the delay of the captain in his return, a supposed want of promptness in procuring the necessary aid, on the fact that no one was left on board, on the articles taken in the boat, and other circumstances, as showing that no intention to return existed at the time of leaving the ship, and no hope of recovering her or her cargo. Without entering into an argument, which has been conducted with great ingenuity on both sides, I am satisfied by the proofs that however imminent Captain Duff may have regarded the danger of his ship at the time of leaving her, he had then a fixed intention to return to her, whatever might be her fate. In the case of Clarke v. The Dodge Healy, [Case No. 2,849,] Justice Washington held, that in judging of the master's intention at the time of leaving his ship, great weight is to be given to his subsequent acts. "If," says he, "the intention were to leave her to her fate, and to use no further exertions to save, the master could have no motive for remaining on shore for the purpose of watching her motions and of discovering her situation the next morning." In that case the master and crew had actually left his vessel under most imminent peril, and declared that he had abandoned her. Yet the learned judge held that his conduct showed that such was not his purpose, and dismissed the libel. In this case the captain left his ship, on reaching the shore declared his purpose to be an immediate return, applied for, and as soon as he could, procured, aid, and did return to where he left and where he expected to find her.

On the second point, more essential perhaps than the first in determining the rate of compensation to be made, it appears to me that the following facts are established: That the danger of the Grace Brown proceeded in the first instance from a want of that local knowledge which a pilot could have afforded, had the captain succeeded in getting one in time. That while the wind was S. E. her situation was more dangerous; that when the libellants commenced the work of salvage, the wind was N. N. W. and was favorable for getting her off; that she was got off by the rise of tide and the aid of her own sails; that she was prevented from going on shore by her anchors; that possessing the local knowledge belonging to their profession as pilots, the libellants incurred but little risk to their lives in the act of salvage; that as the weather was at that time, the pilot-boats were in no danger; and that in navigating the ship to Norfolk, the risk incurred was, under the circumstances existing, not considerable; that they commenced the act of salvage about one o'clock on Saturday morning, and arrived in safety at the wharf in Norfolk about eight o'clock in the evening of the same day. On these facts, the inquiry arises, Are the libellants entitled to salvage, and in what amount? Salvage is the compensation that is to be made to other persons by whose assistance a ship or its loading may be saved from impending peril or recovered from actual loss; and in fixing the rate of salvage the court has, usually, regard not only to the labor and peril incurred by the salvors, but also to the situation in which they may happen to stand with respect to the property saved; to the promptitude and alacrity manifested by them; to the value of the ship and cargo; and to the degree of danger from which they were rescued. And it is laid down as a principle which cannot be controverted, that where it is proved that no human force could have averted the danger, unless Providence kindly aided the exertions by which the object is attained, it does not deprive the salvors of merit, but may diminish the rate of compensation. It is for rescue from present impending perils, and not those which might possibly under subsequent contingencies befall the property, that compensation is made. The danger of the property saved, at the time of saving, its value, the extent of service, the danger incurred in rendering it, to the lives and property of the salvors, their character, and their local knowledge, by

which the dangers to those not possessing it may be avoided, are all elements in making the delicate and difficult computation of the remuneration to be awarded as salvage. That the libellants are entitled to compensation for their services in this case is not denied. It is clearly established by repeated decisions, and especially by that of the supreme court of the United States, in the case of Hobart v. Drogan, 10 Pet. [35 U. S.] 108, "that however a pilot while acting in the strict line of his duty may entitle himself to extraordinary pilotage compensation for extraordinary services, as contradistinguished from ordinary pilotage for ordinary services, he cannot, therefore, be entitled to salvage. But a pilot as such is not disabled in virtue of his office from becoming a salvor. On the contrary, whenever he performs salvage services, beyond the line of his appropriate duties, or under circumstances to which those duties do not justly attach, he stands in the same relation to the property as any other class, that is, with a title to compensation to the extent of the merit of his services, viewed in the light of a liberal public policy. Regarding pilots as a useful and meritorious class of men, eminently contributing by their skill, intrepidity, and local knowl edge to the success of navigation, the courts have not been disposed to impose on them duties beyond those appropriately belonging to their office, or to deprive them of the reward of dangers encountered in such extraordinary services. But as the peril incurred always enters largely into the estimate of remuneration to be made, their local knowledge will always be taken into consideration in estimating salvage services." On this principle, Sir William Scott decided the case of The Frow Margaretta, in 4 Rob. Adm. 84.[3] That was the case of a foreign vessel that had struck on a sandbank on the Essex coast, from which she was rescued by the master and crew of a fishing-smack. The court said that it would never be allowed that a claim of salvage should be ingrafted on the local ignorance of foreigners, who are, of course, not very likely to be well acquainted with the coast. The danger of the vessel arose from that ignorance; the salvors possessed the necessary local knowledge to extricate her without peril to themselves, and for their services fifty pounds were allowed them, and the service pronounced to be as low a degree of salvage merit as could be presented to the court. In the case of Hobart and Drogan, one-third of the appraised value of the brig and cargo was awarded as salvage. It is argued that there is a strong similitude between that and the case at bar. In many of the circumstances attending the adventure, in the means employed and in the character of the parties, there is. But, it seems to me, that in the circumstances which mainly regulate the salvage the resemblance is not strong. In that case the brig was in most imminent peril. In the hurricane which she encoun tered the masts and bowsprit were cut away, the water was making in her hold, her pumps were choked with coffee, and useless, and she was aground. The master and crew had abandoned her to save their lives. The salvors after unsuccessful attempts boarded her, with great danger to themselves. The wind was blowing in such a direction and with such violence that if the brig had not been taken possession of by the libellants she would have been drifted on the West Bank and become a complete wreck, so that the peril of the salvors and of the brig and cargo at the time of salvage was great and imminent. While the libellants are therefore entitled to compensation notwithstanding their character as pilots, no precise rule is afforded by that or any other case to fix the amount. What then is to be the compensation in this case?

II. The question of salvage, depending in all cases on the peculiar circumstances of each case, is subject to the legal discretion of the court. But in case of derelict, the merit is regarded as so great, the restoration of his abandoned property to the owner so entirely a clear gain, that the courts have established a very high rate of compensation with such uniformity, that, although the rule is admitted to be flexible, I should not be disposed under ordinary circumstances to depart from it. The general allowance has been of not less than one-third nor more than one-half of the entire value of the ship, cargo, and freight earned.

Was the Grace Brown derelict? I regard the law as well settled, that a mere abandonment of a ship on the high seas, with the bona fide intention of returning to her, when the impending peril shall have ceased, or the object of leaving her is attained, does not constitute the ship derelict. In the case of Rowe v. The Brig, [Case No. 12,093,] I do not understand Judge Story as contravening this doctrine. In the case of The John and Jane, 4 C. Rob. Adm. 216, Sir William Scott had intimated an opinion that if a vessel be captured and afterwards abandoned by the capturing enemy, it was not a case of derelict, because neither the owner nor those who were in possession as his agents had committed an act of dereliction. So that in this view there must be a voluntary abandonment by the master and crew. But "this opinion," says Judge Story, "has been silently retracted." If the abandonment shall be without the intention to return, it is derelict, whether voluntary or involuntary. In the case of The Aquila, 1 C. Rob. Adm. 37, Sir William Scott had held that a legal derelict is properly where there has been an abandonment at sea, without the hope of recovery. Judge Story adds that it might perhaps have

[3] There is error in this reference. The case cited is in 6 Rob. 92; but has no bearing upon the subject. [The case intended to be cited in the text is The Vrouw Margaretha, 4 C. Rob. Adm. 103.]

been more accurate to have said an abandonment without an intention to return. On various cases cited at the bar this rule has been acted on, and I regard it as settled. I have already said that in this case, on the proofs, the master of the Grace Brown at the time of leaving her with her officers and crew, intended to return to her, and, therefore, this is no case of legal derelict. The allegation of the libel to that effect is not sustained by the proof. The compensation to be made to the libellants then is for relief given to a distressed vessel at sea, and it is to be regulated by the principles already laid down. When the ship was anchored the wind was blowing on shore and the sea running high. While that state of things continued it does not appear to me that it would have been possible for the libellants to have relieved her. With their local knowledge on a favorable change of the wind they conducted her into deep water, with the high tide and the aid of her own sails. To them this was a duty involving comparatively no danger. Cole, one of the libellants, says that as the "weather then was," the vessels of the salvors were in no danger, and it is for the actual danger incurred that they are to be compensated. Neither the adverse gales which endangered the ship before they went to her, nor the southeastwardly wind which sprung up after the ship reached Norfolk, can enhance the pretensions of the salvors. Finding the ship at sea without any one on board, the libellants had just ground for believing her abandoned, and lawfully took possession of her. But I have not clearly seen the necessity of their doing so, nor am I satisfied that the ship would not have made this port in safety, under her own officers and men, if the salvors had not interfered, so that neither the peril of life or property to the libellants in the adventure, nor the benefit to the owners by their services, has been very great. It has, however, been urged on the court, and with great propriety, that the interests of commerce and an enlarged commercial policy require that a liberal compensation should be made for such services; I acknowledge the full force of these considerations. But it must be borne in mind, that while for extraordinary services beyond the strict line of duty, pilots may receive the extraordinary compensation of salvage, theirs is a profession of peril and adventure; that in the season of tempest and danger their services are most necessary to vessels seeking a harbor, without the local knowledge in their officers to conduct them in safety, and that no inducement should be offered to pilots to withhold their services in moments of peril, that when the ignorant mariner is placed in imminent distress they may rescue him from a situation which their timely aid would have averted, and then demand the extraordinary remuneration of salvors. They would cease to be the guardians of commerce, pursuing their useful but hazardous profession as pilots, and become its worst enemies, permitting its distresses and prospering on its misfortunes.

Upon the whole case the merit of the libellants is not of a very high grade; as their services though promptly rendered were not very arduous, nor attended with great danger to them; as the ship was not in great and imminent peril at the time they took possession of her, or while in their possession, and as the value of their services to the owners was not considerable, as the master and crew were returning to her, and might have saved her with no great risk or trouble if the libellants had not taken possession of her. But the libellants are entitled to a liberal compensation for their services, and for them, their risk and expenses, I award to them the sum of two thousand four hundred dollars, clear of legal costs. In the language of Judge Hopkinson in the case of The Elvira, [Case No. 4,423,] I know of no probable or plausible calculation on which I can suppose that these pilot-boats and those on board could have earned half this amount while engaged with the Grace Brown, and certainly they could not have earned it with less labor, risk, and expense. I make no order of distribution amongst the salvors, as neither the proof nor the libel enables me to do so, and I presume it can be arranged amongst them.

BEAN, (KISSINGER v.) See Case No. 7,853.

Case No. 1,172.

BEAN v. LAFLIN.

[5 N. B. R. (1873,) 333.]

District Court, E. D. Missouri.

BANKRUPTCY—PREFERENCES—INDORSERS—CONTINGENT LIABILITY.

[1. The bankruptcy act (section 35) provides that if a payment is made by an insolvent "with a view to give preference to any creditor or person — who is under any liability for him, — the person to be benefited thereby — having reasonable cause to believe such person to be insolvent, — such payment is in fraud of the provisions of this act and the same shall be void," etc. Certain persons indorsed a note for the accommodation of an insolvent, who received the whole of the proceeds of its discount; and at the maturity of the note the insolvent paid it, without the knowledge or procurement of the indorsers. *Held* that, as their contingent liability never became absolute by default in payment of the note, it was not such a liability as is contemplated by the terms of the section; and, as the payment was not thus for their benefit, they are not liable to an action by the assignee in bankruptcy, as in case of an unlawful preference.]

[Cited in Corbett v. Woodward, Case No. 3,223. Distinguished in Blair v. Allen, Id. 1,483; Sill v. Solberg, 6 Fed. 477.]

[2. Even if there had existed on the part of the indorsers such a liability as is contemplated by this section, where only one of the three indorsers had the knowledge of the maker's insolvency which was required to make them amenable to its provisions, he could not have

been forced to pay to the assignee in bankruptcy the whole face of the note.]

[Action by Bean, assignee in bankruptcy of one Kintzing, against Laflin, to recover money alleged to have been paid by the bankrupt for defendant's benefit in such wise as to constitute a preference. Heard on a motion for new trial. Motion granted.]

TREAT, District Judge. An incident pertaining to the misconduct of a juror, who, with full knowledge of the facts on the part of counsel, was discharged from the panel, has not escaped the consideration of the court. It is not presented by counsel as a ground for setting aside the verdict, inasmuch as the trial proceeded by consent; yet it indicates a condition of mind in the jury box at that time exacting more than usual scrutiny into the conduct of the cause. It may be that no other juror was affected in like manner, yet it is essential to the purity of jury trials that they should be beyond reasonable suspicion of being controlled by prejudice.

The various facts and circumstances connected with Kintzing's composition deed, whereby the same became void, it was seemingly necessary to prove in order to establish his insolvency at the date of the payment in question; and a knowledge of some one or more of those facts by the defendant seemed to be also necessary to bring home to him "reasonable cause to believe" Kintzing insolvent. It may be that the court suffered that class of inquiries to be pushed too far. It was clear from one fact established, viz.: that Brookmire and Rankin received full payment and then caused their names to be signed to the composition deed—that the deed was actually inoperative and void. Laflin knew the fact, although he may not have known its legal effect. It appeared also that all the other creditors did not assent thereto, for Hunt objected and threatened, and others state they had no knowledge thereof. The composition deed being actually void, Kintzing was insolvent. While Kintzing was proceeding under the deed as if valid, the defendant put his name, in connection with two others, on a note to be discounted for the accommodation of Kintzing. Instead of becoming joint endorsers, they became joint makers, and as between them and Kintzing were merely his sureties. If the notes were not paid at maturity, no protest and notice were necessary to fix their liability to the holder. Each of the three joint makers would then have been justly liable inter sese for one-third of the amount; and if any one of them paid the whole, he would have been entitled to contribution from the others. In that condition of affairs, Kintzing, for whose accommodation the note was made, paid the same at maturity to the holder, without consulting or referring in any way to the accommodation makers or sureties. The suit was originally by Kintzing's assignee to recover back from those makers jointly the whole amount so paid, on the ground that the payment was for their benefit and in fraud of the provisions of the bankrupt act, and that they had reasonable cause to know the insolvency of Kintzing and the fraud named. The suit now stands against Laflin alone.

Many difficulties arise as to the law of the case. It has been held by some judges that the payment before maturity by an insolvent maker of a note endorsed by a solvent person does not render the holder liable to refund, but does make the solvent endorser liable, because the payment was for "his benefit." To that ruling this court cannot assent. It is evident that the holder cannot be required to refund, for he could not refuse payment at maturity when tendered, and then protest and charge the endorser. The latter's liability is contingent, and until the note is dishonored and notice duly given, his legal liability is not fixed, and he cannot be legally called upon to pay. If, without any action whatever on his part, the insolvent maker pays the note at maturity, it is not easy to see how that payment is in a legal sense for his benefit, inasmuch as he never became legally liable to pay at all. To say that he might have become legally liable if certain contingencies had happened, which never did happen, does not alter the case. It suffices that he never was legally liable to pay, and that, through no procurement by him, his contingent never was converted into a present and absolute liability. One of the main objects of the bankrupt act, it is true, is to secure equality among creditors of an insolvent, and the law covers to some extent debts not due and existing liabilities; but it must be construed in the light of the general laws obtaining at the date of its enactment, and also of its own provisions with reference thereto. It does not contemplate that every endorser's contract shall be changed from what it was when made, merely because, by a subsequent event, viz.: the maker's insolvency, the latter cannot meet all of his obligations. That subsequent event does not of its own force convert a contingent into an absolute contract; does not dispense with non-payment, protest and notice. It is not to be held that the law merchant in that respect was designed to be thus wholly overturned. It is apparent on the other hand that if an insolvent who has outstanding obligations, secured by endorsements, can pay some and leave others unpaid, then some of the endorsers or sureties escape and others not, and thus a preference is wrought. Look at the question as we may, serious difficulties must arise; yet all that courts can do is to follow in the paths the law directs. The legal fact exists, that an endorser's contract is contingent. Until his liability is fixed according to the terms of his contract, payment cannot be exacted from him. An attempt to force him to pay what he is not

bound to pay, on the ground that without his knowledge or procurement the maker paid what he (the maker) contracted to pay, could well be met by the answer "in haec foedera non veni"—such was not my contract. This line of investigation might be pursued at great length; but enough is said to indicate the reasons which influence this court in its refusal to follow the decisions referred to. The bankrupt act is not to be construed as subversive of elementary principles pertaining to the law merchant or the universal law of contracts, except where its provisions plainly require such rulings. The thirty-fifth section enacts that if a payment is made by an insolvent "with a view to give preference to any creditor or person having a claim against him, or who is under any liability for him," "the person receiving such payment" or "to be benefited thereby," "having reasonable cause to believe such person is insolvent," and that "such payment is in fraud of the provisions of this act, the same shall be void," &c. Does that section contemplate that an endorser who never receives a dollar, and whose contingent never became an absolute liability, shall pay to the bankrupt's assignee the amount of the note paid by the bankrupt to the holder? This court cannot so hold. In one sense the endorser was benefited by the maker's payment, but not in the legal sense in which the act uses the phrase. When other sureties exist and the debt is paid by the obligor at maturity, does not the same rule apply? The sureties' obligation is contingent, and if the debt is paid, at or before maturity, without any action on their part, how can it be said that they are made absolutely or immediately liable? These remarks apply only to cases where sureties or endorsers take no action, or are innocent of all participation in any scheme by the principal debtor to contravene the law.

The case as now before the court presents still another difficulty. Where a payment made has to be refunded, no one is liable to refund unless he had "reasonable cause to believe," &c. Here were three sureties, each equally liable, contingently, and entitled to contribution, &c. One, it is contended, had reasonable cause to believe, but neither of the other two; and therefore he is bound to refund to the assignee the whole amount. His contract was, in a contingency which never happened, to pay to the creditor the amount with right of contribution from his co-sureties. If he is to be held to pay the whole, what becomes of his right of contribution? The theory is, that he has been benefited by the payment, and because he had "reasonable cause to believe," and the other sureties not, therefore they cease, practically, to be his co-sureties, and the contract, as to him, is converted into a new and distinct contract; he is made absolutely liable as sole surety on a contingent contract with co-sureties, notwithstanding the contingency never happened and he assumed no new obligation in the premises. It might well be that, knowing the maker's embarrassed condition, he was originally willing to sign the paper in connection with others and share with them the probable loss. If the maker did not pay, the three would have to contribute equally. How is he to be compelled to pay the whole, and the others to be discharged? It is said, because the maker paid the demand, and by the new rule each who had reasonable cause to believe, etc., is converted into a surety absolute, and the co-sureties innocent of such reasonable cause are alone discharged. The case must be an extraordinary one, dependent on some active participation by a surety or endorser in a debtor's fraud, to justify any such ruling. In this case the money obtained on the discount went to Kintzing and was used by him. He paid the note at maturity, without calling on his sureties. He continued in business for some time thereafter, on the hypothesis that his composition deed was valid, or would be permitted to stand. Finally it was ascertained that not only was the composition deed void, but that Kintzing could not comply with its terms. This suit is to obtain from the defendant, one of three sureties, the whole amount of a note discounted for Kintzing's benefit, and paid by him at maturity, without any interference by them to induce him so to act. The views presented by Mr. Justice Miller as to the debtor's interest, under this act, must arrest the attention of courts and possibly of congress. At any rate it does not conform to established rules of interpretation so to construe this act as to work a subversion of elementary and essential principles governing the laws of contracts, and hold parties to obligations they never assumed or contemplated; to make them also liable for acts done by others without any participation by them in the alleged wrong. Payments made after liability fixed presents a very different question. These comments are made in full view of the many difficulties to spring up from whichever rule of construction is adopted. As the rulings at the trial were not in accord with these views, a new trial will be granted.

[For other cases involving this bankruptcy, see Bean v. Amsinck, Case No. 1,167; Bean v. Brookmire, Cases Nos. 1,168–1,170; Brookmire v. Bean, Case No. 1,942; Kinsing's Assignee v. Bartholew, Id. 7,831; In re Kintzing, Id. 7,833.]

Case No. 1,173.

BEAN v. SMALLWOOD.

[2 Story, 408; 2 Robb, Pat. Cas. 133; Merw. Pat. Inv. 312.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1843.

PATENTS FOR INVENTIONS —COMBINATION—NOVELTY.

1. A machine is only patentable, when it is substantially new; but the application of an old machine to a new purpose is not patentable.

[Cited in Le Roy v. Tatham, 14 How. (55 U. S.) 177; Winans v. Denmead, 15 How. (56 U. S.) 347; Bray v. Hartshorn, Case No. 1,820; Sarven v. Hall, Id. 12,369; Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co., Id. 10,337; Alcott v. Young, Id. 149; Couse v. Johnson, Id. 3,288; Gottfried v. Crescent Brewing Co., 9 Fed. 766; Worswick Manuf'g Co. v. City of Kansas, 38 Fed. 248.]

2. In the present case the invention was *held* not to be patentable, because it was merely the application of an old apparatus to a new purpose.

[Cited in Teese v. Phelps, Case No. 13,819; Hebbard, Ex parte, Id. 6,313.]

[3. Cited in Smith v. Downing, Case No. 13,036, to the point that what is patentable is not an abstract principle, but the embodiment of the principle into a machine as described in the specification, and it is the invention, in conformity to that embodiment or representation of the working, that the acts of congress will protect.]

Case [by Samuel Bean against Thomas Smallwood] for infringement of a patent [No. 1,531, granted to S. Bean, and] dated 30th of March, 1840, for "a new and useful improvement in the rocking chair." The specification annexed to the patent stated as follows: "The principal feature of this invention and improvement consists in making the seat and stool of the chair in two parts, so that whilst the stool remains stationary, the seat is made to rock on the top of it; thus doing away with the long and cumbersome rockers on the common chair, which occupy a great deal of room, and are very destructive to carpets, and which also renders the back of this improved chair susceptible of being fixed in a reclining position at any angle to suit the wishes of the sitter, and at the same time rendered perfectly secure from being thrown off the stool."

Plea, the general issue, with a notification of special matters of defence. (1) That the invention was not new, but is described in certain books, naming them, and invented and used before by certain persons, naming them.

Mr. Sewall, for plaintiff.

B. R. Curtis, for defendant.

B. R. Curtis, for the defendant, at the trial, cited London Journal of Arts and Sciences, (of the conjoint series,) vol. 7. 1836, p. 161, describing an easy chair patented in 1833. The chair is in two parts, on curved surfaces; he also cited Phil. Pat. 102, 106. He also read the specification of Simmons's patent for "an improvement in rockers for chairs, cradles, or other things intended to be rocked," granted in 1819.

Sewall, for the plaintiff, admitted, that the first two parts in the claim in the plaintiff's specification of his invention were similar to those in Simmons's patent; but he insisted, that the third part in his claim in the specification was the plaintiff's invention, and under the patent act of 3d of March, 1837, [5 Stat. 194,] c. 45, § 9, he was entitled to maintain his present suit for an improvement thereof, as the patent was by the act good pro tanto. He added, that the third claim was new, and if not, it was an application to a new purpose.

Curtis, e contra, contended, that the section applied only to cases where the patent was broader than the invention, by mistake, accident, or inadvertence. He further insisted, that the plaintiff's patent was substantially, in all respects, like Simmons's patented invention, with unimportant differences of form. And he called a witness who established the facts; and his testimony was admitted by the plaintiff to be unimpeachable.

STORY, Circuit Justice. It seems to me, that, upon the evidence admitted by the parties, the plaintiff has no case. His patent is not (as the plaintiff admits) for a new combination of old materials, or for a new rocking-chair, framed in a manner unknown before. If it were, it seems admitted by the plaintiff, that, upon the evidence, it would not be maintainable. It would seem open to one of two objections; (1) That the defendant does not use precisely the same combination; but a modification thereof; that is to say, although he uses the two first specifications of the claim in the patent, he does not use the third; but an apparatus to accomplish the same purpose, of a somewhat different structure. Or, if the last apparatus be substantially like the plaintiff's, then that the same apparatus is not new, nor the combination in any part new. But he contends, and it seems to me that it may, perhaps, be deemed a fair interpretation of the words, in which the claim is summed up in the specification, that it is a claim for three distinct and several things, and that if either is new, pro tanto, he is entitled to maintain his suit under the 9th section of the patent act of 1837, c. 45. Now the summing up of his claim is as follows: "What I claim as my invention and desire to secure by letters patent consists, (1) In making the seat and stool of the chair in two parts, so that the seat shall rock on the top of the stool, instead of having the parts permanently united with rockers on the legs of the stool, as here-

[1] [Reported by William W. Story, Esq. Merw. Pat. Inv. 312, contains only a partial report.]

tofore. (2) And also the mode of connecting together the seat and stool by the vertical plates attached to the seat, passing through the stool, with shoulders projecting from the sides thereof, which catch against the under side of the stool when the seat is rocked to or fro. (3) And likewise the manner of reclining the back of the seat at any angle required, by the lock plates and notches in the hanging plates, which receive them as before described."

The first two specifications of claim are admitted to be the same as in Simmons's patent, and therefore are not new or patentable. The third and last specification of claim, upon the testimony of Mr. Eddy, which is admitted to be true, is equally unsupportable. He says, that the same apparatus, stated in this last claim, has been long in use, and applied, if not to chairs, at least in other machines, to purposes of a similar nature. If this be so, then the invention is not new, but at most is an old invention, or apparatus, or machinery, applied to a new purpose. Now, I take it to be clear, that a machine, or apparatus, or other mechanical contrivance, in order to give the party a claim to a patent therefor, must in itself be substantially new. If it is old, and well known, and applied only to a new purpose, that does not make it patentable. A coffee mill applied for the first time to grind oats, or corn, or mustard, would not give a title to a patent for the machine. A cotton gin applied without alteration to clean hemp, would not give a title to a patent for the gin as new. A loom to weave cotton yarn would not, if unaltered, become a patentable machine as a new invention by first applying it to weave woolen yarn. A steam engine, if ordinarily applied to turn a grist mill, would not entitle a party to a patent to it, if it were first applied by him to turn the main wheel of a cotton factory. In short, the machine must be new, not merely the purpose to which it is applied. A purpose is not patentable; but the machinery only, if new, by which it is to be accomplished. In other words, the thing itself which is patented must be new, and not the mere application of it to a new purpose or object. Under these circumstances, upon the admissions of the parties, it does not strike me that the action is maintainable.

The plaintiff submitted to a non-suit.

Case No. 1,174.

BEAN v. SMITH et al.

[2 Mason, 252.][1]

Circuit Court, D. Rhode Island. June Term, 1821.

FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—EQUITY—JURISDICTION OF FEDERAL COURTS—BONA FIDE PURCHASER — JUDGMENT FOUNDED ON NEGOTIABLE CHOSE IN ACTION.

1. The circuit court, notwithstanding the restrictive clause in the judiciary act of 1789, [1 Stat. 78,] c. 20, § 11, has jurisdiction in a suit in equity brought by a judgment creditor against his debtors and others, (they being citizens of different states,) to set aside conveyances made in fraud of creditors, although the ground of the judgment was a negotiable chose in action, on which, before judgment, a suit could not have been maintained in such court.

[Cited in Wood v. Dummer, Case No. 17,944; Dundas v. Bowler, Id. 4,140; Pratt v. Curtis, Id. 11,375.]

2. A bill in equity lies to set aside such fraudulent conveyances, for there is not in the proper sense of the terms, "a plain, adequate and complete remedy" at law, within the meaning of the 16th section of the judiciary act of 1789, [1 Stat. 82,] c. 20, which is merely affirmative of the general doctrines of courts of equity.

[Cited in Baker v. Biddle, Case No. 764; Tufts v. Tufts, Id. 14,233; Phillips v. Preston, 5 How. (46 U. S.) 290; Orendorf v. Budlong, 12 Fed. 25; Mann v. Appel, 31 Fed. 383.]

3. A bona fide purchaser without notice from a grantee, to whom property has been conveyed to defraud creditors, is entitled to hold the same against the creditors of the grantor.

[Cited in Wood v. Mann, Case No. 17,951; In re Estes, 3 Fed. 142.]

4. Where in Rhode Island a judgment debtor had conveyed his real estate to defraud his creditors, and had afterwards been committed to gaol, and been discharged from imprisonment on taking the poor debtor's oath under the laws of that state, which could only be obtained by a person having no property to support himself in gaol, or to pay prison charges, it was held, that a bill in equity lay to set aside the fraudulent conveyances, and to charge the real estate with the judgment debt, notwithstanding that by the laws of that state, while the debtor was alive and lived within the state, such real estate would not be directly liable to be taken in execution.

5. Where a conveyance has been made with the meditated intent to defraud creditors, it shall not be permitted to stand as security in the hands of the grantee for advances made on account of such conveyance to the grantor.

6. Notwithstanding a judgment, the court will, where the judgment creditor asks relief against such fraudulent conveyance, look into the original consideration, and give the creditor only, what on the whole appears due to him.

[Cited in Lawrence Manuf'g Co. v. Janesville Cotton Mills, 138 U. S. 557, 11 Sup. Ct. 402.]

In equity. This was a bill in equity brought by the plaintiff [Stephen] Bean, against Simon Smith, Ziba Smith, Ahab Smith, Simon Smith, Jr., Esther Stone, William Foster, and Elizabeth Foster, wherein he claimed to be paid, out of certain lands in the possession of the respondents, a debt due to him from Simon Smith, one of the said respondents. The facts which came out in the bill and answers, were as follows: On the 22d day of December, 1808, the plaintiff was the holder of bills of the late Farmers' Exchange Bank to a large amount; for the payment of these bills William Colwell, the cashier of the said bank, drew two bills of exchange upon one Andrew Dexter, Jr., in favour of the respondent Smith, one for the sum of $3,063, and the other $1,500. These bills were indorsed in blank by Smith, one of the respondents, and by one John Harris, and were

[1] [Reported by William P. Mason, Esq.]

received by the plaintiff in payment of the bank bills, which he held against the said bank as before mentioned. The said Smith and Harris were at the time directors and large stockholders in said bank. These bills of exchange were afterwards protested for non-acceptance and non-payment, and the endorsers Smith and Harris duly notified thereof. In March, 1809, two actions were commenced on these bills against Smith, and at the March term of the supreme court of the state of Rhode Island judgment was recovered in these suits against Smith for the sum of $5,052.37, debts and costs, and executions issued thereon, upon one of which he was committed to jail in May, 1810, and upon the other in September following. In the month of May, 1813, Smith took the poor prisoner's oath; gave his notes for the debt and costs, payable in two years, with interest, and was thereupon discharged from prison. The Farmers' Exchange Bank entirely failed in February, 1809, at which time Smith was indebted to the bank in the sum of $15,284. This debt to the bank he paid in their own bills in August, 1809, which were purchased for him for that purpose by one Seth Hunt for the sum of $2,273.80, for which last sum he gave his own notes indorsed by William Foster and Simon Smith, Jr., two of the respondents, who were afterwards sued on the same. After the commencement of the suits against Smith, and a few days before the sitting of the court, at which judgment was expected to have been obtained, the said Smith made conveyances of all his estate both real and personal, to his children. In September, 1809, he leased the Rounds and Wills farms, so called, to his sons-in-law William Foster and William Stone, (both of them made respondents,) for five years from 1st April, 1810, for the alleged consideration of $1,000. And on the same day he gave a deed of gift of the same farms to his two daughters Elizabeth and Esther, wives of the said Foster and Stone. No consideration was paid at the time, but they afterwards gave their notes to one Zephaniah Andrews for a part of a debt which the said Smith owed him, making themselves accountable to said Andrews in the sum of $483.48, each, or two-fifteenths of the debt due to said Andrews. On the 15th of September, 1809, Smith leased 54 acres of land in Smithfield, called the Waterman lot, to Ziba Smith, one of the respondents, for ten years, at the annual rent of $738, paid down. And on the same day he executed a deed of gift of the same lot to said Ziba in fee simple. He also conveyed to the said Ziba on the 18th of the same month of September 26 acres of woodland in Gloucester. On the 15th of the same month said Smith leased the Daniel Eddy farm, so called, to Darius Smith for five years from April 1, 1810, and three days after he conveyed it to the said Darius and Ahab Smith for the alleged consideration of $5,000, which they swear was paid to him. And the said Darius and Ahab afterwards conveyed the same to one Amasa Stone and one William Stone. On the 22d of November, 1809, the said Smith conveyed his homestead farm, the John Eddy farm, so called, to Ziba Smith and Simon Smith, Jr., for the alleged consideration of $8,000, which they averred, that they paid at the time by giving their notes for $4,000, each.

Whipple, for respondents.

The first question, to which the respondents call the attention of the court, is a question of jurisdiction. The plaintiff Bean is an assignee of John Harris, a citizen of the state of Rhode-Island, at least it does not appear that he is a citizen of another state, and the want of such an averment may be taken advantage of by motion. [Sere v. Pitot,] 6 Cranch, [10 U. S.] 332; 1 Mason, 250, [Bullard v. Bell, Case No. 2,121;] [Montalet v. Murray,] 4 Cranch, [8 U. S.] 47.

It may be said, that although this court could not sustain a suit for the collection of the debts, that still they may give redress for any injury, which the orator may have received in his character of creditor by the conveyances complained of; that their right to a remedy for this injury is not derived from John Harris, but that inasmuch as the injury is direct from the respondents to the orator, so must their remedy be directly against the respondents. It is admitted, that a new promise made by the promissor of a note directly to the indorsee will confer jurisdiction on this court, although the promissor and a first indorser are both citizens of this state. But it may well be doubted, whether an act in fraud of the rights of an assignee, confer the same jurisdiction as a new promise made directly to him. In the latter case, the new promise is the gist of the action, but not so with the fraudulent act. The court must first decide, that the orator is a bona fide creditor, before they can listen to any complaints of fraud. But if the court have no jurisdiction over the contract, which clothes him with the character of creditor, how can they decide that he is a creditor? How can the court give relief indirectly, when the statute forbids their doing it directly? How can the court give the orator a remedy for an injury to his rights as creditor, when the power to judge, whether the orator is a creditor or not, is not granted to the court? We contend, therefore, that as this court have not a jurisdiction strong enough to enforce the payment of the debt, said to be due from Simon Smith to the orator, that consequently they have no power over it. And if they have no power over the debt itself, they can give no relief for any act in fraud of that debt. If it is said, that the question of jurisdiction must be decided according to the state of facts at the commencement of the action, and that the orator at the time of preferring the present bill was a judgment creditor of Simon Smith, I will admit the conclusiveness of the argument so far as it relates to Simon Smith. I

will also admit, that the judgment is legal evidence against the respondents, who are not parties to them, for the purpose of proving the plaintiff to be a creditor of Simon Smith. But I do not admit, that the judgment of court obtained by the orator against Simon Smith six months after the obnoxious conveyances can at all affect the rights of those not parties to it. All the rights of the orator to prosecute the respondents accrued to him, when the conveyances of the real estates were made. And the question of jurisdiction must be settled according to the state of facts at that time. At that time the orator was assignee of John Harris, and it is submitted with some confidence, that if the orator could not maintain a suit in this court at the time the injury was committed, nothing which has been done since by Simon Smith and the orator, without the privity of the other respondents, will enable them to maintain a suit now.

We object, in the second place, to the jurisdiction of the court, because there is a plain, adequate, and complete remedy at law. In England, the courts of law and equity have concurrent jurisdiction in many cases. The case of fraud is emphatically one of the number. But the courts of the United States have not concurrent jurisdiction in any case, for the statute has confined the attention of courts of equity to cases, which cannot be heard in a court of law. The language of the statute is, where "plain, adequate, and complete remedy may be had at law." If, therefore, the orator has any remedy at law, this court cannot interfere, for the word "remedy" is as full of meaning when standing alone, as when accompanied with the words, "plain," "adequate" and "complete." It ceases to be a remedy the moment it ceases to be plain, adequate, and complete. The word "remedy" is technically confined to proceedings before judgment. Wherever a plaintiff can obtain judgment against another for any injury, he has a plain remedy. Whether he can obtain satisfaction of that judgment, depends on the ability of the defendant, and the local regulations of the state in which the judgment is obtained. 2 Bac. Abr. 685; Co. Litt. 289.

Has the orator, then, a remedy at law? In order to judge of this, we must take his case as it is stated. By the bill it appears, that Simon Smith has conspired with the other respondents to defraud the orator of his just debts. The conveyances are used as means only. Can there be any doubt, that at the common law a creditor can obtain judgment against those who conspire to defraud him of his just debts? Such actions are common in England and in this country. Not only are the conveyances void at law, but all parties to an actual fraud, whether in the sale of real or personal estate, are liable to an action on the case. A conveyance in fraudem legis merely, is subject to a different consideration. The circuit court of the United States, in deciding whether there is a plain remedy at law, is not to regard the statute laws of any particular state, nor suffer itself to be influenced by a regard to the practice prevailing in any of the courts of this, or any other state. If such considerations had weight, the jurisdiction of this court would not be fixed and established by a known and certain rule, but would change and fluctuate, in order to accommodate itself to the different rules prevailing in different states. This court, therefore, cannot regard the feeble jurisdiction of the courts in Rhode-Island, nor decide that the orator has not a remedy at law, because (except in certain cases) the laws of Rhode-Island do not allow the sale of real estate for the payment of debts. The language of the supreme court in [Russell v. Clark,] 7 Cranch, [11 U. S.] 89, is strong in affirmance of the doctrine here advanced. "It is true, (say the court) that if certain facts, essential to the merits of the claim, purely legally, be exclusively within the knowledge of the party against whom that claim is asserted, he may be required in a court of chancery to disclose those facts, and the court being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy. But this rule cannot be abused by being employed as a mere pretext for bringing causes proper for a court of law, into a court of equity. If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, the established rules limiting the jurisdiction of courts, require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law."

By a reference to the cases before the court it will be perceived, that the deeds of the Rounds and Wells farms to the daughters of Simon Smith are deeds of gift, and void as against creditors both at law and in equity. The fee of the Waterman lot and the wood lot to Ziba is by a deed of gift. Can it be said, that as respects these conveyances the orator has not a plain, adequate, and complete remedy at law? Can they expect the respondents to disclose any facts "exclusively within their knowledge?" So far from this, the deeds are void on their very faces, and this court would not allow the respondents to offer any evidence in support of them. If a consideration had really been paid, parol evidence to prove the fact would be inadmissible.

Where, then, is the necessity of resorting to a court of equity to obtain relief against conveyances, which are void of themselves? If a necessity does exist, it arises not from any general defect in the laws, but from the peculiar statute in force in Rhode-Island, which does not allow the lands of a debtor to be seized or sold for the payment of his debts, so long as the debtor himself may be found. This is conceived to be the whole difficulty under which the orator labors, and

this difficulty must be removed by the legislature of Rhode-Island, not by this court. It is very clear, that so far as respects the deeds of gift, the orator has derived no aid from the answers of the respondents, and that the "established rules limiting the jurisdiction of courts require, that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law." The same rule applies with equal force to the other conveyances. Whatever fraud the orator may imagine, none is proved by the answers of the respondents, and if the orator has evidence in his own possession to prove the fraud, that evidence will be heard with the same patience in a court of law as in a court of equity.

This last objection to the jurisdiction of this court, (whatever doubts may be entertained of the first) is made from a sincere conviction, that it applies unanswerably to this case. It is not made from any fears entertained by the respondents of the issue of a contest on the merits of the case. They do assert, and have always asserted, that the conveyances from Simon Smith to his sons and sons-in-law, were not made with any fraudulent intention, but bona fide and for a valuable consideration.

Snow and Searle, for the plaintiff, contended as to the jurisdiction of the court, that at the time the original debt was contracted and the bills of exchange drawn, both the indorsers of these bills were citizens of Rhode-Island, and that the indorsee then was and ever since had been a citizen and inhabitant of Massachusetts; that all, or nearly all, the facts involved in this suit, took place in the former state. And they argued, that no suit by the indorsers against the maker, or by the second indorser against the first, could be maintained in this court, whilst all the parties continued to be citizens and inhabitants of Rhode-Island. But that the indorsee might have maintained a suit against his immediate indorser, for as between them the indorsement created a new contract. And if the two indorsers had removed from Rhode-Island, and become citizens of different states previous to the suit, there was no doubt but that this court would have jurisdiction of any suit between either the indorsers, or the indorsee and indorsers, or drawer, and of a suit between the holder and an indorser, although the drawer and both indorsers were citizens of Rhode-Island at the time the bill was drawn, and at the time the right of action accrued, and although all the material facts arose in that state.

The present complainant has prosecuted in the state court his demand on the bill of exchange, against Simon Smith, and has recovered judgment, and there can be no doubt, but that he can pursue in this court any remedy either at law or equity, which he has against Simon Smith, to recover the amount of that judgment. At the time of committing the frauds charged in the bill, the complainant was the holder of the drafts, and the frauds (if any) were perpetrated to his immediate injury, and he could at all times maintain his suit in law or equity against the perpetrators of this fraud, who were all citizens of this state, except as to Simon Smith, who, as an indorser, could not in the first instance be sued in the circuit court. But Smith, being now liable in this court for that debt, or for any act he has done to defeat the payment of it, and all the other parties having been always liable in this court, I am at a loss to discover any legal objection to the jurisdiction. But we apprehend there can be no doubt, but that this complainant might, without having resorted to the state court on his bill of exchange, have filed his bill in equity in the first instance in this court against Simon Smith and all the present respondents. He could not, it is true, have sued Simon here as indorser of the bill, but he was still a creditor of Simon, and the bill would have been legal evidence of a debt on the trial of the bill in equity. The bill in equity charges a fraud, and a conspiracy, to defraud the complainant, and if the fact could have been made out on the trial, I apprehend, that the complainant would have been entitled to a decree, although his remedy at law against one of the conspirators, might have been prosecuted before the state court.

As to the present question, we can perceive no difference between an assignee creditor, and an original creditor, or one to whom a promise is directly made. If he be a real creditor at the time of the supposed fraud, his rights and his remedy are abundantly sufficient to hold the delinquent accountable. Indeed, it is not very material, whether the party litigating be a creditor, or not, at the time of the fraud. A subsequent creditor may set aside transfers to defraud prior creditors. And if the very debt, to defeat the payment of which, the fraudulent transfers were made, is demanded in the present suit, it can avail nothing to the fraudulent party, that the debt has since passed into other hands. As to the existence of the debt against Simon Smith, we believe no question can be made about it. It is now established by judgment of court, and that judgment proves it existed as a debt at the times when the alleged frauds were committed.

The second objection to the jurisdiction rests on as feeble grounds as the first. The supreme court of the United States in the case of Ammidon v. Smith, 1 Wheat. [14 U. S.] 447, which grew out of the same transactions as the present, directed that the plaintiff had no remedy at law upon the bond given for the liberty of the jail yard, nor did they intimate the existence of any other remedy at law. And when the chief justice remarks in that case, (pages 458, 460,) that there "was so much turpitude in the act confessed by the demurrer," and that the de-

fence was so flagitious, the court found a difficulty in considering it as a naked point of law, and that the jurisprudence of Rhode-Island must be defective indeed, if it furnished no remedy for such a mischief, I presume he had a pretty direct reference to the kind of remedy we are now pursuing. The original demand is certainly merged in the judgment, the judgment as to all proceedings at law, seems to be satisfied by the issuing of execution, the commitment of the body, and the execution of the bond for the liberty of the jail yard. The only legal remedy, then, seems to be confined to the bond, and the court have decided, that there is no remedy at law against the parties to that bond.

If any right of action exists against these respondents jointly, it must be, I presume, a special action on the case, charging the defendants with a conspiracy to defraud, and, with having defrauded the complainants. But admitting this right of action to exist, it is no objection to the present suit. There are many cases, in which courts of law and equity have concurrent jurisdiction in relation to frauds, trusts, and contracts, and in perhaps three-fourths of the cases decided in equity, the complainant had some remedy at law, as in cases between co-partners for the settlement of their accounts. In almost every case of a bill filed for specific performance of a contract, the complainant might sue at law, and recover damages. In bills filed to compel the execution of trusts. In almost all those cases the complainant might sue at law. In numerous cases where accounts are to be taken, a bill is sustained, as a more convenient mode of settling them than by a jury. But where the bill is filed to set aside fraudulent conveyances, it seems to be peculiarly the right and duty of a court of equity to sustain it, and for one plain reason amongst many others, because a remedy or special kind of relief is asked, which cannot be granted at law, viz. that the fraudulent grantee be adjudged to re-convey, or convey to others, as the court shall direct, and that the fraudulent deed shall never after be set up as giving any title. This cannot be done in a trial at common law, for although a jury may incidentally find a conveyance fraudulent, yet the deed remains a subsisting deed, and the title is still in the fraudulent grantee, and the deed and the title under it may be re-asserted as often as the question of fraud is raised at law, but a court of equity sets the fraudulent deed aside, or directs a sale, or a re-conveyance by the grantee, and puts definitely an end to all dispute on the subject. And although some of the deeds are voluntary, and void on the face of them as to creditors, yet this is no objection to equity jurisdiction, but it seems to be equally at least the right and the duty of the judge in chancery, to set aside the deeds, and dispose of the property according to law and equity. But if the deeds, or any of them, are fraudulent and void, the grantee is undoubtedly accountable in equity for the rents and profits, and accounts may be necessary to be taken. I am not at present informed of any remedy at law, which the grantor or a creditor has against the fraudulent grantee, for these rents and profits. The grantee is concluded by his deed, and a creditor, or a purchaser on a creditor's execution, could not recover rents and profits accruing previous to his title. And it seems peculiarly the province of equity to decide all such questions, to the end, that full, adequate, and complete justice may be done to all parties. But suppose a deed should be partially or constructively fraudulent, and should be a valid security to a certain extent, but not to one quarter the value of the estate conveyed. In such a case, a court of law can pursue no middle course, but must treat the deed as entirely void, or as sufficient to convey the whole estate, and in either case injustice might be done. Equity, however, can reform, or rather conform, the deed to the justice of the case, by letting it stand as a security for the first amount, and decree it void as to the residue. In all these cases, I presume there can be no question as to the jurisdiction of a court of equity, and yet in all, or nearly all, of them, perhaps the creditor or creditors may have some kind of remedy, (adequate or inadequate) at common law.

There is nothing in the 7 Cranch, [11 U. S.] which militates against the positions we have stated, or the jurisdiction of the court in this case. All that the court meant to decide, was, that when the bill contains charges purely legal, and the complainant depends upon the defendant's answer to furnish proof of his equity claim, and the defendant denies every thing in his answer, the bill must be dismissed. And for a very plain reason, viz. there is no equity charged in the bill, and none disclosed in the answer. But the court never meant to decide, nor even to intimate, that where sufficient equity is charged in the bill, it is to be dismissed for want of jurisdiction, because the defendant denies the charges in his answer, but the case goes on to a hearing, and if the complainant proves his equity charges, he has a decree notwithstanding the denial in the answer, and if he cannot produce such proof, the bill is dismissed not for want of jurisdiction, but for want of proof. If, therefore, in this case the complainant has charged no matter in his bill entitling him to relief, and if the defendants in their answers have disclosed none, we admit the bill must be dismissed; but if the charges embrace matter entitling the complainant to relief if true, the case is no doubt completely within the jurisdiction of the court, and the decree must depend upon the proof. As to the evidence of fraud it is contended, that all the circumstances in the case prove, that the conveyances were made by Smith for the purpose of defrauding

his creditors, and were not bona fide as they purported to be. He conveyed away all his estate both real and personal, and threw himself and wife, in their old age, upon the charity of the world. The conveyances were all made to his own children, and very nearly at the same time, and before witnesses who belonged to the family. These conveyances were made at the time suits were pending against Smith. There were no settlements, computations, or receipts, made or given at the time. These, and all the other features of the transaction, clearly demonstrated, that the conveyances were a mere cover to protect these lands from the creditors of Smith. If the court is satisfied, that the transactions were fraudulent, it can afford the plaintiff Bean, ample remedy, by setting aside the fraudulent deeds. 1 Johns. Ch. 478; 2 Johns. 297. It may order the property to be sold to pay the plaintiff. Sands v. Codwise, 4 Johns. 600; 3 Johns. Ch. 481, 507. If the land is sold to bona fide purchasers, the fraudulent grantee is liable for the value. 1 Mod. 260. Deeds fraudulent on the part of the grantor may be set aside, though bona fide as to the grantee. 2 Johns. Ch. 42; 14 Ves. Jr. 289. A bona fide purchaser from a fraudulent grantee, acquires no title by the conveyance, against the creditors of the fraudulent grantor. 3 Johns. Ch. 378; 1 Day, 527.

If the grantor was fraudulent the grantee must suffer the consequences, and is accountable for the rents and profits. Simon Smith, senior, in this case deposited his property in the hands of his children, so that he might be enabled to take the poor debtor's oath. Are they not, therefore, to be considered as trustees for the benefit of his creditors? The fee is in them not to their own use, but in trust for creditors. Equity will order the trust estate to be sold. In this case the court may order the estates conveyed to the children of Smith, to be sold to pay his debts, or may decree against them as trustees personally for the value of the estates and the rents and profits, or order the complainant's debts to be paid.

Whipple, in reply.

It is deemed unnecessary to answer most of the authorities cited. The principles are correct with some exceptions, but their applicability is denied. That a bona fide purchaser for a valuable consideration, should suffer for the fraudulent intentions of the grantor, is so repugnant to common sense, that it is extraordinary, that so great a man as Chancellor Kent, with all his attachment to authority, should, for a moment, have doubted about it. With his usual frankness, however, he corrects himself in 3 Johns. Ch. 378. The only question is, whether the deeds were taken by the grantees bona fide, and with a view to secure themselves, or to aid the grantor in delaying and defrauding creditors. This is a matter of evidence rather than law. That the grantor meant to prefer particular creditors cannot be doubted. That he paid, what he called his private debts, by transferring real estate at from ten to twenty per cent above its value, is fully proved. The residue he chose to give away rather than retain. That he had a right to prefer creditors whose debts originated in hard labor and money advanced, to those who speculated upon his misfortunes, and bought up Gloucester bills at from 60 to 70 per ct. discount, as they themselves prove, cannot be denied. Finch Prec. 105; 1 Fonbl. Eq. 277. The grantor in 1809, owed debts to the amount of $19,540. In payment of those debts he conveyed lands to the value of $13,500. The other conveyances were voluntary.

Can the court order a sale of the land conveyed by deeds of gift? It is difficult to tell, what a court of chancery can or cannot do. All the power which the chancery in England at present possesses has its origin in the decrees of the chancellor, not in the statutes of the realm or the usages of the people. And the boast of their learned writers, that common law is common usage, is just as true, as that the chancellor of England is bound by a fixed and stubborn rule. The power of the chancellor has been increasing from time to time, and every new chancellor establishes new rules in addition, and sometimes in opposition, to old ones, and at this day none but those, whose ardent attachment to the law blinds their better judgment, will contend, that the chancellors of England for the last century, have been bound by any rules but those of their own making. They have none of them as yet established the precedent of selling real estate for the payment of debts, unless by virtue of the contract of the parties. In this country it may be done by the chancellors of those states, the laws of which authorize such a proceeding. The laws of Rhode-Island are opposed to such a sale, and it is submitted with confidence, that the statute of the United States has not conferred the power on this court. General chancery powers are given in all cases, where a remedy may not be had at law. And it follows conclusively, that this court does not possess the power, unless the chancellor of England also does.

It is believed that no case can be found of a voluntary grantee's being made a trustee. It is a case of actual, not constructive fraud, that has called forth such strange decisions. It was formerly thought, that a man could not be made a trustee without his own consent. It has been often decided, that the court of chancery has no power to punish for a fraud, and yet they decide, that a grantee shall be made a trustee, and shall convey to creditors, and in default of complying with the decree, imprisonment follows. This would appear to be punishing a man for a fraud, although it is called punishment for contempt of court. This power in its operation would be very partial and unjust, as it would give to creditors in other states, con-

trol over the real estate of their debtors in Rhode-Island, which Rhode-Island creditors do not possess.

STORY, Circuit Justice. A preliminary objection has been taken to the jurisdiction of the court, upon two grounds, 1. That the plaintiff claims as assignee of a chose in action, on which, independent of such assignment, no suit could be sustained in this court. 2. That there is a complete and adequate remedy at law, and therefore no reason for the interposition of a court of equity.

The suit is between citizens of different states, and plainly within the general jurisdiction of the circuit court, unless it falls within the restrictive clause of the 11th section of the judiciary act of 1789, c. 20, which declares, that the circuit court shall "not have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." The bills in which the transactions disclosed in the present case originated, were drawn by a person resident in one state, upon a person resident in another state, and whether they be foreign or inland bills in the sense of the statute, is a question worthy of serious deliberation, upon which much contrariety of opinion has been entertained. As this question has not been argued at the bar, and is not indispensable to a correct decision of this case, I pass it over with the single remark, that I do not wish to be understood as acquiescing in the doctrine, that bills drawn in one state upon drawees living in another state, are to be deemed inland bills. I entertain great doubts as to the correctness of that doctrine, and am not alone in these doubts, and before I come to a decision, I should choose to hear the question fully discussed with all the learning and principles that belong to it.

The present suit is not brought upon any bills of exchange, but at most upon a judgment rendered in favour of the plaintiff against Simon Smith, one of the defendants, upon certain protested bills of exchange, indorsed by Simon Smith, in the state court of Rhode-Island. The chose in action has therefore passed in rem judicatem; and so far as Simon Smith is concerned, is absorbed and extinguished by the judgment. The claim of the plaintiff is not now in virtue of any assignment, but of a direct judgment in his favor; and if the suit were now at law upon the judgment itself, there cannot be a doubt of the jurisdiction of this court to sustain it. In deciding on its jurisdiction, the court can only look to the immediate groundwork of the suit, not to any remote or collateral considerations in which it had its origin. It is no objection to the jurisdiction, that at some anterior period the transaction assumed a shape not within the reach of that jurisdiction. It is sufficient, if it has now become so modified by the act of the parties, or by the principles of law, that jurisdiction now rightfully attaches.

Taking, then, the case in the most favourable view for the argument of the defendants' counsel, it is a suit upon a judgment between citizens of different states, and does not fall within the statute of prohibition. But in truth, the suit is not, strictly speaking, founded solely upon a judgment. The judgment is collateral. It forms an ingredient, and an essential ingredient, in the case; but it is not the whole of the case. The plaintiff seeks for relief against fraudulent conveyances of property, executed by the defendant Simon Smith, to the other co-defendants, for the alleged purpose of defeating the plaintiff of his just rights as a creditor under the judgment. It is these fraudulent conveyances which constitute the immediate ground-work of the suit, and so far as respects all the defendants, except Simon Smith, the sole ground-work of the suit. They were never liable, either upon the original bills or judgment, nor had the plaintiff any claim against them, in his mere character as assignee. If they are liable to him at all, it is because they are parties to a meditated fraud to his injury, or as trustees holding property for his use. His right to sue them, is not a right which once vested in another person, and has passed to him by assignment. It is a right, which originally sprung up after the assignment to him, and from new transactions. And the same observations apply with equal force to Simon Smith. It is not his liability to the plaintiff under the original assignment of the bills of exchange indorsed by Simon Smith, that is now in question, and is now sought to be enforced; but a new right collateral to that, growing out of a direct judgment between the parties, and an asserted fraud injurious to the plaintiff, which has been devised to avoid the satisfaction of that judgment. It is perfectly clear, that the statute never contemplated an exclusion of jurisdiction in cases where a mere negotiable instrument, or chose in action, was mixed up in the ingredients of the case; but where that chose in action constituted the sole cause of action, and the assignment constituted the whole ground of the plaintiff's right. I have no difficulty, therefore, in overruling this objection to the jurisdiction of the court, for the reasons already stated, although the other arguments of the plaintiff's counsel would, in case of any doubt, have been entitled to great consideration.

The other objection is not so much to the competency of the court, as in the nature of a demurrer to the bill for want of equity. Much stress has been laid upon that clause of the judiciary act of 1789, [1 Stat. 82,]

c. 20, § 16, which declares, "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." I take this clause to be merely affirmative of the general doctrine of courts of equity, and in no sense intended to narrow the jurisdiction of such courts. It has been repeatedly held by the supreme court, that the equity jurisdiction of the courts of the United States, does not depend upon what is exercised by courts of equity, or courts of law, in the several states; but depends upon what is a proper subject of equitable relief in courts of equity in England, the great reservoir from which we have extracted our principles of jurisprudence. Robinson v. Campbell, 3 Wheat. [16 U. S.] 212, 221; U. S. v. Howland, 4 Wheat. [17 U. S.] 108, 115. If, therefore, a bill of this sort, states a case properly within the cognizance of courts of equity, according to the general doctrines of their jurisprudence, I should have no difficulty in overruling this objection, although the state courts of Rhode-Island, might afford some sort of remedy at law to aid the plaintiff. There are many cases in which courts of law and equity exercise a concurrent jurisdiction, and the judiciary act never intended to disturb that jurisdiction. In such cases, it is supposed that the remedy at law is not adequate and complete for all the purposes for which the plaintiff may claim relief. Herbert v. Wren, 7 Cranch, [11 U. S.] 370, 376. There cannot be a doubt, that this bill states a case, which is entirely fit and proper, if it be proved, for the interference of a court of equity. Nothing is more common, than for courts of equity, upon bills filed for the purpose, to set aside conveyances made to defraud judgment creditors. It is a case peculiarly belonging to its jurisprudence, and adequate and complete relief cannot be obtained at law. Coop. Eq. Pl. 148; 1 Eq. Cas. Abr. 77, pl. 13; Smithier v. Lewis, 1 Vern. 398; Mountford v. Taylor, 6 Ves. 788; Bennet v. Musgrove, 2 Ves. Sr. 51; 3 Bac. Abr. "Fraud," D; Com. Dig. "Chancery," 3, M; Id. "Covin," B, 2.

But I go yet farther in the case now before the court, and affirm not only that the bill presents a case of equitable jurisdiction; but that under the peculiar laws of Rhode-Island, which do not, except in a few specified cases, make lands liable for debts, there is no remedy, at least no adequate remedy at law; and that if the plaintiff be entitled to any relief, he must seek it exclusively in a court of equity. The case is wholly unlike that to which the supreme court alluded in the language cited at the bar, from Russell v. Clark, 7 Cranch, [11 U. S.] 69, 89. The language there used, supposes that the bill states no case for equitable relief, but only asks for a discovery on which to found equitable relief; and if the answer discloses none, then as neither bill nor answer shews any title to such relief, the parties must be dismissed to their remedy at law. Here, the bill does state a case for equitable relief; and though the answers of some of the defendants deny the facts on which that relief is sought, that is a question, not of jurisdiction but of proof. As to some of the parties the bill is confessedly true, for they claim under voluntary deeds of gift, which the law deems fraudulent as to creditors. We may then dismiss any farther consideration of the preliminary questions of jurisdiction, and pass to the merits of the case as they stand disclosed in the pleadings and evidence.

Before, however, proceeding to this discussion, it may be as well to dispose of another point urged at the bar, and which is of vast practical consequence; I mean the doctrine, that a bona fide purchaser for a valuable consideration, without notice, cannot protect the estate in his own hands, against creditors, where he derives his title to the estate through a grantee to whom it was originally conveyed for the purpose of defrauding the creditors of the first grantor. This doctrine is certainly supported by high authority of a recent date, and the cases cited at the bar are fully in point. Until I had perused these cases, I am free to confess, that I was not aware that there was in this respect any difference between the operation of the statute of 13th of Elizabeth, (chapter 5,) which avoids conveyances made in fraud of creditors, and that of the 27th of Elizabeth, (chapter 4,) which avoids conveyances made in fraud of subsequent purchasers. An unbroken current of authorities establishes beyond question, that a bona fide purchaser for a valuable consideration, without notice, shall hold the estate, notwithstanding he claims through a grantee to whom it had been conveyed in fraud of purchasers. 1 Fonbl. Eq. bk. 1, c. 4, § 13, note f, p. 278; Rob. Fraud. Conv. p. 496, c. 4, § 10; Prodgers v. Langham, 1 Sid. 133; Newport's Case, Skin. 423, 3 Lev. 267; Doe v. Martyr, 1 Bos. & P. (N. S.) 332. But Mr. Chancellor Kent has held, in Roberts v. Anderson, 3 Johns. Ch. 371, that the same doctrine does not apply, where there has been a conveyance to defraud creditors. If this be so it is certainly a departure from the general doctrine of courts of equity, on the subject of bona fide purchasers without notice. So solicitous are courts of equity to preserve the rights of persons in this predicament, that Lord Chancellor Loughborough, in Jerrard v. Saunders, 2 Ves. Jr. 454, 458, (Coop. Eq. Pl. 281; and see Bassett v. Nosworthy, Finch, 102; 2 Fonbl. Eq. bk. 3, p. 307, c. 3, § 3,) emphatically declared, that against them the court would not take the least step imaginable. They are not only treated as favourites of courts of equity, but the common law in many instances, holds their titles good, although in the hands of the original grantees, the titles were infected with the taint of fraud, or other analogous infirmity. Com. Dig. "Covin," B; Prodgers v. Langham, 1

Sid. 133; Woodcock's Case, 33 Hen. 6, 14; Shep. Touch. 66; Hob. 166; Bingham's Case, 2 Coke, 91, 94; Gibbs v. Chase, 10 Mass. 125; Jackson v. Henry, 10 Johns. 185; Jackson v. Walsh, 14 Johns. 407; 1 Fonbl. Eq. p. 268, c. 4, § 11, note Y. If, therefore, the doctrine is to stand, it must stand either as an exception founded upon public policy; or upon the positive provisions of the statutes of 13th and 27th of Elizabeth. As to public policy, it remains to be demonstrated that it would be essentially promoted by the alleged exception; at least it does not strike one, that there is any general reasoning on this head, which would not apply with equal force to subsequent purchasers, as well as to creditors. There is the same injustice and mischief in allowing a subsequent purchaser without notice from the fraudulent grantor, to be defeated in his rights by a prior conveyance to a like purchaser from the fraudulent grantee, as in the analogous case affecting creditors. The ground cannot be, that in the former case the conveyance is voluntary, and takes effect between the parties and their representatives, for that is equally true as to conveyances in fraud of creditors. The real ground of the doctrine must be, that where the parties are equally innocent and equally meritorious in their titles, the law will give a preference to that title which has a priority in point of time, upon the maxim "qui prior est in tempore potior est in jure." A conveyance to defraud purchasers, or to defraud creditors, is not "utterly void," as has been sometimes supposed; it conveys the estate effectually as between the parties and their representatives; and the estate may be maintained against all persons but those whom it was intended to defraud. The grantor himself cannot convey the same title to any mere volunteer, nor can he avoid his own grant in his own favour; nor can a mere stranger contest the validity of the conveyance. Rob. Fraud. Conv. p. 498, c. 4, § 10; Dame Burg's Case, Moore, 602; Fonbl. Eq. bk. 1, p. 273, c. 4, § 12, note. The estate, therefore passes toties quoties by every subsequent conveyance, and it is good against all the world, except creditors and purchasers, in the possession of every successive grantee, even with notice of the fraud. Mr. Chancellor Kent says (Roberts v. Anderson, 3 Johns. Ch. 371, 378) that "if the fraudulent grantee be enabled to sell, the grantor cannot call those proceeds out of his hands." This is very true; but neither can he recall the land itself, or avoid his own grant. He adds, "and the grantee can either appropriate them to his own use, or to the secret trusts upon which the conveyance was made." And he thence deduces the conclusion, that "there is more danger of abuse, and that the object of the statute could be more easily defeated in the one case (i. e. of creditors) than in the other," (i. e. of purchasers). It may be asked of that eminent judge, whether the doctrine, here asserted, be correct? Is it true, that the grantee can appropriate the proceeds of a sale to his own use, or to the secret trusts of the fraudulent conveyance against a judgment creditor? Will not a court of equity decree, that the fraudulent grantee shall account to the judgment creditor for the amount of the proceeds of the sale, considering them as a mere substitution for the original fund? It appears to me, that such a course is within the established doctrine and practice of the court. Equity will permit a creditor of an estate to sue the debtor, where there is collusion between the latter and the executor. Benfield v. Solomons, 9 Ves. 77, 86; Alsager v. Rowley, 6 Ves. 748; Doran v. Simpson, 4 Ves. 651. A fortiori it will sustain a suit where the very fund appropriated by law for the payment of the debt, is withheld by a fraudulent grantee. See Hendricks v. Robinson, 2 Johns. Ch. 283; and see Rob. Fraud. Conv. p. 502, c. 4, § 10; Gore v. Brazier, 3 Mass. 541; 3 Poth. Pand. lib. 42, p. 195, tit. 8, art. 3, § 24. If, then, the reasoning of the learned judge on this point, proceeds upon principles which are inadmissible, the conclusion drawn from those principles, may well be doubted. No peculiar principle of public policy has been shewn to exist in respect to creditors, which entitles them to a preference over other bona fide purchasers. They stand in truth in the character of purchasers for a valuable consideration, and not above them. The analogies of the law do not support any peculiar distinction in their favour. The policy of the law generally, is to support bona fide purchasers for a valuable consideration in the titles acquired; and this policy is at least as ancient as Woodcock's Case, in 33 Hen. VI. 14, where a conveyance from a fraudulent grantee to such a purchaser, was permitted to defeat highly meritorious and legal claims. The great object of the law is to afford certainty and repose to titles honestly acquired. It is of no public utility to destroy titles so acquired, on account of the taint of a prior secret fraud, which was unsuspected and unknown, and which probably no diligence could detect. If the creditor of the original grantor be cheated by holding such titles valid, the innocent purchaser would be no less cheated by holding them void. And, therefore, the common law which leans to equity, is unwilling to visit upon innocent persons, the consequences of fraud. It enables them to hold estates acquired bona fide for a valuable consideration, purged of the anterior fraud that infected the title.

Then as to the statutes of 13th and 27th of Elizabeth. In their most material provisions, they have, in modern times, been held as merely affirmative of the common law, (Cadogan v. Kennett, Cowp. 432, 434; Sands v. Codwise, 4 Johns. 536, 596; Hamilton v. Russel, 1 Cranch, [5 U. S.] 316;) and one should cautiously put upon them any construction, which implies a departure from that law. In the only case, where such a

departure under the 27th of Elizabeth, has been tolerated, I mean in respect to the rights of a subsequent purchaser with notice, to set aside a voluntary conveyance, courts and jurists in modern times, have felt the difficulty of sustaining that doctrine upon any sound principles, where the voluntary conveyance is not a meditated fraud; and if the point were new, it would be, I had almost said, immoral to adopt it. It stands drily upon authority, and we bow to it neither with reverence nor affection. The statute of 13th of Elizabeth (chapter 5,) in the first section, declares, that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, &c. goods, &c. made with intent to delay, hinder, or defraud creditors and others, of their just actions, suits, debts, &c. "shall be from henceforth deemed and taken only as against that person or persons, his or their heirs, &c. executors, &c. whose actions, suits, debts, &c. by such guileful, covinous, or fraudulent devices and practices as aforesaid, are, or shall, or might be in any wise disturbed, hindered, delayed or defrauded, to be clearly and utterly void, frustrate, and of none effect." The sixth section of the same statute, contains a proviso, that "this act, or any thing therein contained, shall not extend to any estate or interest in lands, &c. goods, &c. had, made, conveyed, or assured, or thereafter to be had, made, conveyed, or assured, which estate or interest is, or shall be, upon good consideration, and bona fide lawfully conveyed or assured to any person or persons, or bodies politic or incorporate, not having, at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion, as is aforesaid." It is observable, that this proviso does not use the expression, feoffment, gift, or grant, &c. but estate and interest, and that there is not a syllable in it, which points to any estate or interest derived directly from the fraudulent grantor, any more than from the fraudulent grantee. The language in its just interpretation, applies equally well to an estate derived from either. And it would be somewhat strange, if it were intended merely to apply to an estate or interest derived from the grantor. In the first place, if such estate or interest was before the fraudulent conveyance, it is manifest, that it could not be affected by it, in any manner whatsoever. In the next place, if it were after such conveyance, then by excepting such cases from the operation of the act, it would leave such estate or interest, exactly where the act found it, to be judged of according to the rules of the common law. And if the common law would give effect to such second grant as against creditors, (as would probably now be held) then the creditors would be just as much defrauded, as they would be by a second grant of the grantee, being held valid. For if the second grant of the grantor could convey a good title directly, and purged of the fraud, the public mischief would be quite as great, as if he conveyed indirectly through the medium of his fraudulent grantee. If, on the other hand, as it seems to be thought, the old law stood, (see Halsey's Case, Lane, 105; Upton v. Basset, Cro. Eliz. 445,) the second grant from the grantor could not avoid the first grant, then there would be still less reason to suppose, that the proviso meant to save only an estate or interest derived from the grantor, which the law held utterly defective and inoperative. There seems, then, no reason founded on the intent of the statute, why the language should be held less comprehensive in its operation than the terms import.

Then, as to the statute of 27th Elizabeth, c. 4. The first section declares all and every conveyance, gifts, grants, &c. of lands, &c. made for the intent to defraud and deceive such person or persons, &c. as have purchased, or shall thereafter purchase, in fee simple, &c. the same lands, &c. "shall be deemed and taken only as against that person or persons, &c. his and their heirs, &c. and against all and every other person and persons, lawfully having or claiming by, from, or under them, or any of them, which shall have purchased or shall thereafter so purchase for money, or other good consideration, the same lands, &c. to be utterly void, frustrate, and of none effect." Then comes a proviso in the 4th section, "that this act or any thing therein contained, shall not extend, or be construed to impeach, defeat, make void, or frustrate, any conveyance, &c. assurance, grant, &c. estate, interest, &c. of any lands, &c. heretofore at any time had or made, or hereafter to be had or made, upon or for good consideration, and bona fide to any person or persons, &c." And another proviso in the sixth section extends the same protection to every "lawful mortgage made or to be made bona fide, and without fraud or covin upon good consideration." Now it is observable, that these enactments are substantially like those of the 13th of Elizabeth, as to their objects. In each, the fraudulent conveyance is declared "utterly void," as to the persons intended to be defrauded, and is limited to those persons. In each, there is an exception of estates acquired bona fide, and upon good consideration; and the only marked difference of language is, that the proviso of the 27th of Elizabeth, drops the expression of the 13th of Elizabeth, as to notice of the fraud by such purchaser. In the proviso of the 27th of Elizabeth, there is no qualification or limitation as to the person, from whom the conveyance or estate is acquired; and it has been always held to apply equally to estates derived from the fraudulent grantor and grantee. And this, not upon any necessary construction of the statute, but upon the principles of the common law. Prodgers v. Langham, 1 Sid. 133, is a leading authority on this head. There the court agreed, that though a deed

might be fraudulent in its creation, and voidable by the purchaser, yet it might be made good by matter ex post facto; as if one made a feoffment by covin, and the feoffee makes a feoffment for a valuable consideration, and then the first feoffor enters and makes a feoffment for a valuable consideration, the feoffee of the first feoffee shall hold the land, and not the feoffee of the first feoffor. The reason assigned by the court is, not that such is the construction of the language of the statute, forcing them to such a conclusion, but that such is the common law; for, say the court, though the estate of the first feoffee was in its creation, "covinous and so voidable; yet when he enfeoffs upon a valuable consideration, this shall be preferred before the last." Precisely the same reasoning applies to the case of creditors, under the 13th of Elizabeth. The estate is not utterly void as to all persons; but voidable, and voidable by creditors only; and a bona fide transfer by the grantee ought to convey the estate purged of the fraud.

I repeat it, that until I saw the case of Roberts v. Anderson, 3 Johns. Ch. 371, which professes, in no small degree, to be founded upon that of Preston v. Crofut, 1 Day, 527, note, the asserted distinction which we have been considering, between the operation of the statute of 13th Elizabeth, and that of 27th Elizabeth, was utterly unknown to me. I have searched with some diligence, to ascertain if that distinction has been recognized in any adjudged case, or in any elementary treatise in England. Hitherto my researches have been unsuccessful. In Wilson v. Wormal, Godb. 161, however, Lord Chief Justice Coke, than whom no man was probably better acquainted with the statute, or its true construction, lays down the doctrine that in terms denies the distinction. He says, that "if lessee for years assign over his term by fraud to defeat the execution (upon a judgment against him); and the assignee assigneth the same over unto another bona fide, that in the hands of the second assignee, it is not liable to execution." In Gore v. Brazier, 3 Mass. 523, 541, Chief Justice Parsons manifestly understood the law in the same way. He says, "a bona fide alienation for a valuable consideration by a devisee, has been compared by the counsel for the defendant to a case, where a fraudulent purchaser has afterwards bona fide, and for a valuable consideration conveyed, in which case the last purchaser shall hold the land purged of the fraud. But the two cases are not alike in principle, for the consideration money received by the devisee, cannot be personal assets in the hands of the executor." The like doctrine is directly asserted by the supreme court of Massachusetts, in a recent case, (Inhabitants of Worcester v. Eaton, 11 Mass. 368, 378; Trull v. Bigelow, 16 Mass. 406;) and I may be justified in asserting, that such has been in that state the received law of the land. The reasoning of the court in Jackson v. Henry, 10 Johns. 185, and Jackson v. Walsh, 14 Johns. 407, would have strongly led to the same conclusion, illustrated as the doctrine there is, in analogous cases. In the latter case, the doctrine is broadly laid down, that "it has been a long and well settled principle that a purchaser for a valuable consideration, without notice, has a good title, though he purchase of one, who had obtained the conveyance by fraud."

There is, too, the light of the civil law to guide our inquiries on this subject. The learned author of the treatise of equity has justly observed, that "by the civil law, whatever debtors do to defeat their creditors is void; and there is a great resemblance between the civil law in this matter, and the statute of 13th Elizabeth. But in each of them, there was this exception, that it should not extend to avoid any estate or interest made upon good consideration, and bona fide." 1 Fonbl. Eq. b. 1, p. 270, c. 4, § 12. And the learned author is well warranted in his assertion; and his reference to the civil law, where the very case now under discussion is put, shews, that he did not contemplate the existence of the present distinction. The case put in the Digest is, "Is qui a debitore, cujus bona possessa sunt, sciens rem emit, iterum alii bona fide ementi vendidit. Quae situm est an secundus emptor conveniri potest? Sed verior est Sabini sententia, bona fide emptorem non teneri; quia dolus ei duntaxat nocere debeat qui eum admissit. Quemadmodum diximus non teneri eum, si ab ipso debitore ignorans emerit. Is autem qui dolo malo emit, bona fide antem ementi vendidit, in solidum pretium rei quod accepit tenebitur." 3 Poth. Pand. lib. 42, tit. 8, p. 195, art. 3, § 25. I trust that the doctrine of this latter clause is equally the doctrine of courts of equity with that, which is so persuasively stated in the former. And the like doctrine is recognized by Voet in his commentaries. 2 Voet Com. lib. 42, p. 822, tit. 8, § 10.

The case has thus far been reasoned upon, as though it depended entirely on the statutes of Elizabeth; but in truth it turns upon the statute of frauds of Rhode-Island. If any doubt could rest upon the proposition, that both these statutes should receive the same construction, that doubt would vanish upon an examination of the Rhode-Island act; for that in the same enacting clause embraces both descriptions of persons, creditors and purchasers, and as to them avoids all fraudulent conveyances, and contains no proviso of any sort. St. R. I. 1798, p. 473, § 2. The case of a bona fide purchaser must, under this statute, stand purely upon the principles of the common law.

The great deference, which I feel for the chancellor of New-York, and the supreme court of Connecticut, has occasioned no small solicitude on my part respecting this subject. I have weighed the reasoning, which has directed their judgment with care; and, how-

ever reluctantly, I am constrained to declare, that it does not carry conviction to my judgment. I cannot persuade myself to desert the doctrine of Lord Coke, and the civil law, fortified as it is by the general analogies of the common law. If, therefore, it becomes material to the parties in this cause to establish the doctrine, that a bona fide purchase for a valuable consideration without notice, derived under a grant made to defraud creditors, is not a good title against creditors, I shall decide against the proposition, and leave the parties to their appeal to the supreme court.

There is another objection lying at the very foundation of this bill, which requires deliberate consideration. It is this. By the laws of Rhode-Island real estate is not subject to be taken in execution by a judgment creditor, except in a few cases specified in the statutes of that state. Where the debtor is alive and resides within the state, the laws do not authorize an attachment or levy upon his real estate, unless he conceals himself, so that neither his body nor personal estate can be come at to satisfy his debts. St. R. I. 1798, p. 202, § 5. The present case does not (as it is said) fall exactly within this description, and it is hence inferred, that however fraudulent may have been the conveyances sought to be set aside by the bill, the plaintiff is without remedy, since he had no lien on the real estate, and could not acquire any title to it by his judgment. If conveyances are acknowledgedly made in fraud of creditors, and in cases, circumstanced like the present, a judgment creditor can have no redress either at law or in equity, the jurisprudence of the country is most shamefully defective in the first principles of justice. Men must rely altogether upon the private honesty of their debtors for payment of their debts and not upon remedies by the law. A dishonest debtor may lock up a splendid fortune from the reach of his creditors, and by the facile contrivance of a conveyance to defraud his creditors secretly secure to himself or his family the whole profits of his corrupt conduct; and, if he can quiet his conscience, relieve himself afterwards from imprisonment under the plausible character of a poor prisoner. I am, however, of opinion, that the justice of the country does not deserve such a reproach. Here is a case, where the judgment creditor took the body of his debtor in execution, and had a right to retain him in imprisonment, unless he could discharge himself by taking the poor prisoner's oath, that he had no property to support himself in prison or to pay prison charges, and that he had not conveyed any part of his estate to any persons with intent to secure the same, or to defraud his creditors. The laws of Rhode-Island contemplate, that a false oath taken by the prisoner on such an occasion incurs the penalty of perjury. St. R. I. 1798, pp. 229, 231. If, then, the debtor cannot, while he possesses property, be relieved from imprisonment, but his body is security for the debt; and he makes a fraudulent conveyance of his property, (the natural fund for the payment of that debt) for the express purpose of cheating his creditors, and depriving them of every means of satisfaction, it cannot be possible, that the law will authorise the party or his coadjutors in such conduct to reap the fruits of their dishonesty. If the property be not directly subjected to the judgment, it is indirectly liable, since the debtor can never be entitled to a discharge, without yielding it up to his creditors. And if the debtor does procure a fraudulent discharge of his person by a fraudulent transfer of that property, the law will hold the latter a substitute for the former by his own consent. It is by no means universally true, that, because there is no lien directly created on land or other property by a debt or decree in favour of a creditor, therefore he can never be entitled to any relief in respect to them. Herne v. Meeres, 1 Vern. 465. He may acquire it by the conduct of the debtor himself. A sequestration upon a decree in chancery is only personal process, and does not affect the land immediately like an extent or a judgment. The contempt in not performing a decree is the foundation for a sequestration, for the decree acts only in personam, and not in rem. Bligh v. Darnley, 2 P. Wms. 620, 621. And yet a conveyance made in fraud of a decree or of a sequestration will be set aside in equity. Self v. Madox, 1 Vern. 460, and cases cited; Simmonds v. Kinnaird, 4 Ves. 735; Colston v. Gardner, 2 Ch. Cas. 43; 1 Har. Ch. Pr. p. 142, c. 26. If the debtor, with the intent to defeat a particular judgment creditor, lend his money, this, though a mere chose in action, and on which the judgment did not attach as a lien, may yet be followed in equity by the creditor. Smithier v. Lewis, 1 Vern. 398; and see 1 Eq. Cas. Abr. 132, pl. 15. I know, that there are cases, in which equity has refused to interfere to follow personal property into the hands of a fraudulent grantee, unless execution was first taken out, which should bind that property. But this is not universally true, any more than the rule requiring, as to lands, the suing of an elegit. Angell v. Draper, 1 Vern. 399, and Raithby's note 1; and 1 Vern. 463. In the case of collusion between an executor and a purchaser of leasehold assets, a creditor on a bond debt was permitted to reach the purchase money in the hands of the purchaser, and in default of payment the leasehold estate was decreed to be sold, and payment ordered out of the proceeds of the sale. Crane v. Drake, 2 Vern. 616, Raithby's note 1. See Hendricks v. Robinson, 2 Johns. Ch. 283. It is far from being necessary in all cases, that it should appear, that a creditor will sustain a loss unless a fraudulent conveyance be set aide. In Chamley v. Lord Dunsany, 2 Schoales & L. 690, 714, Lord Eldon in the house of lords declared, "it is

every day's practice for a creditor, a puisne creditor, to have a conveyance of his debtor's estate declared fraudulent; and although the purchaser says, that there is sufficient to pay the creditor, still the plaintiff is not delayed for an inquiry into that effect; and if the conveyance is proved fraudulent, or a trust, the court declares it so, though it is plain, that the grantor may be benefitted much more than the plaintiff." But where there is a real injury to the creditor, where he does sustain a loss by the fraudulent conveyance, it would be a narrow obedience to mere technical rules to deny him relief. He must have a right to come into chancery and have the fraudulent conveyance set aside; and if the court be bound to go thus far, there is no reason, why it should not stretch out its arms to give him complete redress.

The principle is not new, that a party, who obtains an estate in fraud of the rights of another, shall be held the trustee of him, whom he has defrauded. The doctrine has been applied even to those, who claim as innocent parties, where it is directly through the fraud without any intervening acts or considerations of their own; for it is against conscience, that one person should hold a benefit derived through the fraud of another. Huguenin v. Baseley, 14 Ves. 273, 290. And the fraudulent procurement of the omission of an act has been visited upon the party with the same effects, as if the act had been done. Id., and cases there cited; Mestaer v. Gillespie, 11 Ves. 621, 638. It is familiar, that a person procuring a perfect legal title of property with notice of a prior title derived under the same party, and not yet perfected, shall be held a trustee of the prior purchaser, and compelled to surrender his own title. That is the common case of a second purchaser having knowledge of a prior unrecorded deed. The doctrine is carried yet further, so that a party enabling another to commit a fraud is made answerable for the consequences, either personally or in his estate, as the case requires. Evans v. Bicknell, 6 Ves. 174.

It appears to me that a court of equity may justly consider the grantees in this case, supposing the charges in the bill to be true, as holding the property conveyed to them in trust for the benefit of the judgment creditors, who have been defrauded by the conveyances. If the precedent were to be made for the first time, I should have no difficulty in holding this doctrine upon the eternal principles of justice and morality. The debtor, who conveys his property for the purpose of defrauding his creditors, and upon the ground, that he has no property, procures a discharge of his person, (that pledge, which the law had given them for their debt,) ought to be estopped from denying, that the property so conveyed stands bound for his debts, and that the person, in whose hands it is deposited, holds it in trust for this purpose. If the justice of the case could not be reached by this course, I should have as little difficulty in holding, that a fraudulent purchaser should be held to account to the creditors for the full value of the property without any allowance for any of the purchase money paid by him, upon the ground that such payment being fraudulent is void as to the creditors; and that the case would be the same, as if the whole purchase money still remained in his hands unpaid. In this latter case, there could be no doubt of the fitness of a remedy in equity in Rhode-Island; for certainly personal estate (and such would be the purchase money) is completely bound by a judgment and execution. By the civil law fraud may also create obligations, where there is no direct agreement. For if debtors pass away their goods or estates to defraud creditors, it is declared by that law, that he that receives them shall be forced to return them to the creditors. Woods, Ins. Civ. Law, bk. 3, p. 248, c. 6, § 8. If such doctrines be new here, they are not elsewhere; and they are so consonant with reason, with equity, and with conscience, that little effort can be necessary to persuade us to adopt them.

We have now discussed the principal questions of law applicable to this case, and may well return to a consideration of the facts. And the material question here is, whether the conveyances by Simon Smith to the other respondents are, as charged in the bill, fraudulent. It appears, that the plaintiff was on the 22d of December, 1808, the holder of certain bills of the Farmers' Exchange Bank, of which Simon Smith was a director; that he received in payment of those bills two drafts drawn on one Andrew Dexter by the cashier of the bank, in favour of Smith, and indorsed by Smith, and also by the president of the bank in blank, one for $3,063, and another for $1,500. These drafts being dishonored, the plaintiff afterwards on the 15th of March, 1809, brought two actions on the same drafts against Simon Smith in the state court of Rhode-Island, and at the March term, 1810, of the supreme court of that state recovered judgment in the same actions to the amount of $5,095, 34-100 damages, and $57.03 costs. Executions duly issued on these judgments, on which Simon Smith was committed to gaol in May, 1810, and afterwards on the 10th of May, 1813, he was discharged from gaol on taking the poor prisoner's oath according to the laws of Rhode-Island. That oath, as has been already stated, supposes the party to be utterly without property sufficient to support himself in prison, or to pay prison charges; and he is expressly required to swear, that he has not, directly or indirectly, sold, conveyed, or disposed of, or entrusted any person with any of his estate, real or personal, to defraud his creditors or to receive any profit for himself.

During the pendency of the plaintiff's suits, and before judgment, Simon Smith being then in possession of a very valuable real estate, by his own confession worth $12,000

or $14,000, conveyed the whole of his real and personal estate, including his household furniture, to his children, thus stripping himself at once of all his property and means of support. The material facts are as follows: On the 15th of September, 1809, Simon Smith, for the asserted consideration of $1,000, leased to his two sons-in-law, William Foster, (one of the respondents) and William Steere, (a respondent by the bill, but who died pending the suit, and it has not been revived against his representatives) for five years from the first day of April, 1810, two farms, one called the Wells farm of about 218 acres, and another called the Rounds farm of about 120 acres. On the same day he conveyed the reversion of the same farms in fee to his daughters Esther the wife of the said William Steere, and Elizabeth the wife of the said William Foster, for the asserted consideration of love, good will, and parental affection. The deeds are admitted to have been executed at the same time; and the respondents allege, that the consideration money of $1,000, was first secured and afterwards actually paid by them to one Zephaniah Andrews, to whom Simon Smith was indebted, and credited to his account. The testimony of the plaintiff's witnesses establishes, that these farms were at the time worth from $6,000, to $7,000. On the same 15th day of September, 1809, Simon Smith executed a lease for 10 years, of a lot of land called the Waterman lot, containing about 54 acres, to his son Ziba Smith, (one of the respondents) for the asserted consideration of $738, and on the same day conveyed the reversion of the same lot in fee simple to his said son for the asserted consideration of love, good will, and affection. Three days afterwards Simon Smith conveyed to the same son a lot of woodland, containing about 26 acres, for the like consideration of love, good will, and parental affection. The respondent Ziba Smith alleges, that upon these conveyances he paid about $1,800, and as part of this sum he gave his note, which he afterwards paid, to Zephaniah Andrews, for $1,500, on account of his father's debt. The plaintiff's witnesses establish the value of the Waterman lot to be about $1,350. The value of the wood lot does not appear; but was probably worth quite $800 or $1,000. On the same 15th of September, 1809, Simon Smith executed a lease to his son Darius, for five years from the ensuing April, of a farm called the Daniel Eddy farm, containing about 130 acres, for the asserted consideration of $500. Three days afterwards Simon Smith conveyed the reversion of the same farm for the asserted consideration of $500, to his sons Darius Smith and Ahab Smith, and "to the eldest male heir of each of them, and their eldest male heirs, and so to descend in that line in equal moieties." Darius died in March, 1816, insolvent, and on the 7th of February of the same year, Ahab and Darius (Thomas, the oldest son of Darius, joining in the deed) conveyed the same property to their nephews Amasa Steere and William Steere, Jrs., (the sons of William Steere, the respondent) for the asserted consideration of $2,000, and a lease was granted by them back to Ahab, of the premises, for and during his Ahab's life. The lease was executed on the same day, and purports to have been given in consideration of their uncle Ahab's having the same day executed a deed of gift to them of his estate in the same land, and for the further consideration of one dollar. It may not be unimportant to observe, that the execution of these deeds is witnessed by Simon Smith and William Steere, and that there is an express reference in the first deed to the title of the grantors, as derived under Simon Smith's deed of the 15th of September, 1809. The respondent Ahab alleges that his father was indebted to him, in the sum of $3,040,99, (a specific return of the items of which, under date of 1815 and 1816, is annexed to the answer) of which about one half is for services, and the other half is made up of items of a miscellaneous character, of which one item of $875, is sufficiently remarkable, it being the estimated rent of the Daniel Eddy farm, from the time of the original purchase by the father, to the time of the conveyance. This is claimed on the ground, that the father bought the farm originally for his sons in payment of their services; and the amount constitutes the payment made by Ahab to his father, for his moiety. The Messrs. Steere in their answer allege, that the $2,000 mentioned in the deed to them, was paid to Darius partly by the payment, with the assistance of their father, of debts due by Darius to his creditors, to the amount of $1,060, and partly by payment of a mortgage of Darius to a Mr. Barton, in January, 1816, for $300, and for the residue of $640, they gave their note to Darius, which since his death has been paid to his creditors. As the plaintiff seeks only to subject to his claim the moiety of Ahab, so far as his life estate extends, it is not necessary to consider how that of Darius is sustained. It is clear, that as the young Messrs. Steere claim through a voluntary gift of Ahab, by the very terms of their deed, they cannot be permitted to set up, as they now pretend, a different pecuniary consideration, (Bridgman v. Green, 2 Ves. Sr. 627; Clarkson v. Hanway, 2 P. Wms. 203; Watt v. Grove, 2 Schoales & L. 492, 501; Hildreth v. Sands, 2 Johns. Ch. 35, 42;) and they must be deemed as mere volunteers standing in the same predicament as if the estate were now in Ahab. But as they are not parties to this bill, and that of Dexter v. Smith, [Case No. 3,866,] and others, applies to them, I shall reserve all farther remarks for that case.

It is deserving of observation, too, in this connexion, that Simon Smith by a deed purporting to be dated on the 7th of March, 1807,

but not acknowledged until 7th of March, 1808, in consideration of love, good will, and parental affection, conveyed to the same Darius Smith, "and to his eldest male born heir born unto him, and to his eldest male heir, and so to descend down to the eldest male heir, &c." a farm called the Lewis and Tinkham farm, containing about 93 acres. And yet the consideration set up to support the other deed in favour of Darius, is founded in a great measure upon services, which were unrequited by his father. On the 22d of November, 1809, Simon Smith, for the asserted consideration of $8,000, conveyed to his sons Ziba Smith and Simon Smith, Jr., (the respondent) in fee, his homestead farm, containing about 300 acres. Afterwards on the 30th of May, 1812, Ziba Smith conveyed his moiety of the farm excepting 31 acres, to Simon Smith, Jr., for the asserted consideration of $4,000, and thus Simon became possessed of the whole farm, with the above exception; and Simon Smith, Jr., on the same day conveyed his moiety of the 31 acres to Ziba Smith, for the asserted consideration of $784. Simon Smith, Jr., further admits, that he received at the same time all the personal estate that there was of his father's, consisting principally of household furniture worth about $200, and paid for the same. He does not, however, upon his original answer state the manner in which he paid, either for the personal or real estate so conveyed to him; and exceptions having been taken to it on this account, by his supplemental answer, he asserts, that on the first of October, 1809, he paid Zephaniah Andrews, on his father's account, $1,250; that on the 1st of August, 1809, he became bound to one Seth Hunt, for his father, (as it should seem) for the sum of $2,273,80 which he afterwards in July, 1810, paid. He paid to other creditors about $909,33; and he held notes against his father amounting to $595,72. Some of these notes were given to him in 1805, some in 1806, one in 1808, and one in 1809. He further states, that in 1805 or 1806, he assisted his father in building a vessel called the "Perseverance," and for this and other previous services, his father agreed to allow him one moiety of the price for which she should be sold; and that she was sold, as he believes, for about $6,000. That he took one moiety of the farm above mentioned in payment of the debts due to him; and that he and his brother Ziba gave their father their several notes for $4,000 each, for the purchase money, and that what was due him beyond the price of his moiety of the purchase money, was to be paid by Ziba's note. That Ziba afterwards being embarrassed, and unable to pay the note, he took the conveyance of the moiety of Ziba in 1812, in payment of the debt due to himself from his father; and about this time, (1812) he took up his own note given to his father, and made a settlement with him, and in that settlement $3,000 was allowed him on account of the sale of the Perseverance. He adds, that he has paid other sums for his father, but cannot recollect particulars, and is positive in this manner, that he paid $8,000 for the homestead farm; and that in 1810 and 1811, he was obliged to sell some of his own lands to the amount of $2,000, or $2,100, to pay debts contracted on his father's account. The answer of Ziba only states the purchase of his father, and his conveyance to his brother, for the reasons stated by him, and that thus his note given to his father was discharged. He says nothing as to the 31 acres retained by him, not even mentioning the fact of the retainer.

It is material to state, that previous to this fraud, on the 15th day of May, 1807, Simon Smith for the asserted consideration of $1,000, "and other good considerations him thereunto moving," executed a lease to his son Simon Smith, Jr., and "to his eldest male heir, and to the eldest male heir of him, and so to descend, &c." for a term of 1000 years, a farm called the Absalona Hill farm, containing about 335 acres. On the same day he conveyed to his said son in fee, another tract of land containing about 40 acres, for the asserted consideration of $2,000; and also by a third deed on the same day he conveyed to him another tract of land in fee of 25 acres, for the asserted consideration of $1,000. These three deeds being all executed at the same time between the same parties, must be considered as one transaction; and they convey about 400 acres of land for $4,000, worth, as one of the witnesses declares, from $12,000 to $15,000. It is apparent, therefore, that paternal love and affection must have constituted a material inducement to the conveyance. In respect to his son Ziba, too, there is no reason to suspect the father's want of liberality, for on the 12th of April, 1800, in consideration of $1,500, and "more especially for the good settlement, well being, and advancement of Ziba in this world," the father executed to him and his heirs male, a lease of three farms, containing about 380 acres, for the term of 1000 years. It may deserve a passing observation, that if, as the respondents now contend, the father was a man who had long been heavily oppressed with debts, and reputed much richer than he really was, and in truth having but little property beyond his debts, it seems somewhat extraordinary, that he should have been so very liberal to his children; and it would require more faith than I profess to have, to believe, that these prior conveyances did not meditate an evasion of the rights of creditors. No man has a right to be generous at the expense of his honest creditors.

We have now passed in review all the conveyances which were made during the pendency of the plaintiff's suit, with a few explanations of the character which is attempted by the respondents to be impressed on them. To these deeds with a single excep-

tion, some one of his children were witnesses, and among these witnesses were Darius Smith, Simon Smith, Jr., William Foster, William Steere, and Elizabeth Foster. The money considerations apparent on the face of these deeds, exceeds $15,000; and if the testimony of witnesses is to be believed, the property was at least worth $22,000. Connecting this with the conveyances previously made, the children were possessed of property derived from their father, worth at least $35,000. Some additional facts ought not to be omitted. Notwithstanding the great diligence exercised in this case, to obtain testimony in support of these conveyances, it does not appear, that Simon Smith at the time was indebted in any considerable amount, excluding the debts set up by his children, but to Zephaniah Andrews, to whom he was indebted not exceeding $4,500, and a debt due to the Farmers' Exchange Bank, of $15,284. The debt due to Andrews appears to have been discharged ultimately by the children of Simon Smith at various times between December, 1810, and May, 1813. Notes were given in small sums, payable in one, two, three, and four years, some of which were signed by the children only; and some were indorsed or signed by the father; and on all, excepting two or three notes of about $1,000, no payments were ever made except after suit and judgment at law against the parties. The debt due to the Farmers' Exchange Bank was paid between May and August, 1809, by bills of that bank, (which had failed in the preceding February) bought at a very great discount, and as seems admitted by the respondents' counsel, for a sum not exceeding $3,000; and from the other evidence in the case, probably for a sum considerably less. The greater part, if not the whole, was purchased for Simon Smith by a Mr. Hunt, who received for the bills two notes, one for $1,500, and one for $773.80, signed by Smith, and indorsed by his sons William Foster, and Simon Smith, Jr. These notes were afterwards sued by the holders, and judgment recovered against the indorsers in the summer of 1810. So that it is apparent, that neither of these debts were in fact discharged by the children at the time of the conveyances above stated; and that the father was not entirely exonerated from them; but as to a considerable part still remained liable as a party to the notes.

Upon the first blush of these transactions, it seems almost impossible not to pronounce the conveyances executed in September and November, 1809, as fraudulent; and made with the meditated design to injure and defeat creditors. The badges of fraud cluster about them in every direction. They were made pending suits brought for large sums of money due to creditors, after the failure of the bank, whose credit Simon Smith had lent his own personal security to support. They were all made to the children of Simon Smith, who appear to have been privies to all the conveyances. The consideration of several of the deeds is avowedly an inadequate consideration as against creditors, founded on mere love and affection; and the property disposed of in this manner is of great value. The conveyances embrace the whole property, personal and real of the father; thus reducing him to absolute beggary, and including even his household furniture. No money was paid at the time, all rested in confidence, and the utmost that the children ever became bound to pay to creditors, or ever did pay, was short of $7,000, though the property then conveyed to them, was in their own view worth more than double that amount; and beyond all question, upon the evidence, more than three times that amount. The remaining consideration for this property, was either love or affection or debts due, unliquidated debts due for services, from a father who had previously conveyed to the parties large and valuable farms, either confessedly or implicitly from parental affection, or for a very inadequate consideration. It is utterly impossible for a court of justice to sustain such conveyances as bona fide, unless it surrenders all judgment and discretion. The transactions can be viewed in no other light than that, which the father avowed to one of the witnesses who wrote several of the conveyances, as having no other objects but to give his estate to his children. The inference deducible from the facts, that this was the father's whole property, that the conveyances are professedly in part voluntary, and that he was then indebted beyond the amount of his whole estate would alone be conclusive of the fraud. And if fraud applied to any of these transactions, it infected the whole. In a legal point of view, the mala fides which justly applies to one, infects by its contamination the whole. I have no doubt, that they must be declared fraudulent upon this broad and general examination of the case; and if there were any doubt here, a more thorough and minute sifting of the facts accompanying each conveyance, and the answers made in their support, would irresistibly lead to the same conclusion. I forbear, however, to dwell on these facts, as I cannot escape from that which stands so prominent on the face of the transactions. I have omitted to take any notice of the exception to the competency of Thomas Smith and Amasa Steere as witnesses, not because I am against that exception; but because it is not necessary to decide it. See Roberts v. Anderson, 3 Johns. Ch. 371, 375.

Taking this, then, to be the state of the case, for the reasons that have been already suggested, there do not appear to me to be any persons standing before the court as bona fide purchasers for a valuable consideration without notice, and consequently none entitled to protection as such. The next question that arises is, whether the con-

veyances are to stand as securities for the sums which have been really advanced or paid by them for their father since the execution of these instruments. I agree to the doctrine laid down by Mr. Chancellor Kent, in Boyd v. Dunlap, 1 Johns. Ch. 478, and Sands v. Codwise, 4 Johns. 536, 549, that a deed fraudulent in fact is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; but it is otherwise with a deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent. At law, where a conveyance is found to be fraudulent, against a creditor, he comes in and avoids all without re-payment of any consideration. But it is said, equity can deal differently with it, and decree back principal and interest; and, therefore, in equity a lesser matter will in such a case set a conveyance aside. Herne v. Meeres, 1 Vern. 465, 2 Brown, Ch. 177, note to Heathcote v. Paignon; Attorney General v. Vigor, 8 Ves. 256, 283. Cases are not unfrequent in equity, where the court, upon setting aside a conveyance, has left some benefit to the grantee. But that is done only where there are circumstances, which do not immediately affect the party, against whom the decree is sought, with an original and meditated fraud; or if he holds a derivative title, where that title was attained without knowledge of the fraud. Such was the case of How v. Weldon, 2 Ves. Sr. 517, (see, also, Proof v. Hines, Cas. t. Talb. 111; Grove v. Watt, 2 Schoales & L. 492,) where an assignment of prize money having been obtained for an inadequate consideration, it was set aside even in the hands of a second assignee, but admitted, however, to stand security for the original purchase money. In Bennet v. Musgrove; 2 Ves. Sr. 51, Lord Hardwicke decreed a conveyance of land, which was made in fraud of creditors, void so far as respected a creditor, who had taken the same in execution on an elegit. And he is reported to have said, that "whether the party could recover (at law) or not, he is entitled to come into this court; the distinction in this court being, where a subsequent purchaser for valuable consideration would recover the estate and set aside, or get the better of a precedent voluntary conveyance, if that conveyance was fairly made without actual fraud, the court will say, take your remedy at law; but wherever the conveyance is attended with actual fraud, though they might go to law by ejectment and recover the possession, they may come in to this court to set aside that conveyance; which is a distinction between actual and presumed fraud, from its being merely a conveyance." I do not cite this case to shew, that the grantee was permitted here to retain a benefit; for Lord Hardwicke, (whose decision seems very imperfectly reported) did not intend such benefit, but he considered the conveyance void for meditated fraud, though he seems to have thought there might be some difficulty in establishing that at law. He set aside the conveyance, so far as respected the creditor, as void against him; and he having an elegit executed on the land, this was all that the case required; for it will not be pretended, that the conveyance was void as to third persons. What I cite it for is to show the distinction between actual and constructive fraud. The former makes the conveyance "utterly void," as to creditors and others, whom it intends to injure, and therefore it cannot be permitted to stand as to them as a security for advances. But if no such actual fraud was originally in contemplation, but the law adjudges the conveyance fraudulent on motives of public policy, as in cases of voluntary or other conveyances, which are void against creditors and purchasers, there, if any advances have been made, or any other equities arise, they may be enforced by the court in favor of the grantee. In the present case it appears to me, that the court is bound by the strict rule. The conveyances were in their very concoction fraudulent. They were, therefore, in the language of the statute "utterly void" as against creditors; and cannot be permitted to stand as a security for any advances subsequently made, or any pretended debts then due. All the reasons of public policy, so forcibly urged in Sands v. Codwise, 4 Johns. 598, against such an allowance, command the court to be rigid in denying to those, who are guilty of bad faith, any such indulgence. Let them reap the due reward of their own misconduct.

I have hesitated as to the nature of the decree, which ought to be made in this case, whether under all the circumstances to hold the respondents according to their respective interests liable to account to the plaintiff for the full value of the estates conveyed with interest, as a fund for the payment of his debt, leaving them in possession of their estates; or to decree the conveyances void, and the plaintiff's debt a charge upon the land, and the rents and profits, which have accrued since the conveyances, giving them an election to pay the debt really due him, and in default, to order the land to be sold, and an account to be taken of the rents and profits, and out of these funds to give the plaintiff a priority of payment. I have concluded to adopt the latter course, not meaning to imply any doubt of the propriety of the former.

The only further point, on which I have paused, has been as to the extent of the plaintiff's demand. It originated in Farmers' Exchange bills, which at the time of the giving the drafts, on which the plaintiff's judgment is founded, were at a great discount. At law I am aware, that the plaintiff might be entitled to the full amount of his judgment, notwithstanding any purchase of this sort. But I think a court of equity has a right to moderate his claim; and if he asks equity to compel him to do equity. All that

in conscience he ought to claim under all the circumstances against Simon Smith is the value of the bills of the bank at the time he received them or bought them, with interest from that time to the present. I shall, therefore, direct an inquiry to be had before a master for this purpose, on which examination the plaintiff is to be examined in respect to this point on oath. A reference also must be made to the master to ascertain the rents and profits, making all proper deductions; and all further orders are reserved until the report is made.

MEM., [from original report.] Since this opinion was delivered, the doctrine in Roberts v. Anderson, 3 Johns. Ch. 371, has been overruled in the court of errors. [See Anderson v. Roberts, 18 Johns. 515.] See, also, Astor v. Wells, 4 Wheat. [17 U. S.] 487.

DECREE. This cause came on to be heard on the bill, answer, pleadings, and evidence in the case, (the due execution of all the deeds in the case being admitted by the parties) and was argued by counsel, on consideration whereof,

It is ordered, adjudged, and decreed, as follows, to wit: That the conveyances made by the said Simon Smith mentioned in the bill and answers in this cause, bearing date the fifteenth day of September, in the year of our Lord one thousand eight hundred and nine, to the said Esther Steere and Elizabeth Foster, and William Steere and the said William Foster, for two certain farms lying in Gloucester and Foster in the county of Providence, within said district of Rhode-Island, containing three hundred and thirty-five acres of land, one called the Wells farm, and the other called the Rounds farm; and also the conveyances, in the said bill and answers mentioned, made by the said Simon Smith to the said Ziba Smith, bearing date the fifteenth day of September, in the year of our Lord one thousand eight hundred and nine, for a farm or lot of land, situate in Smithfield, in said district, and known by the name of the Waterman lot, containing fifty-four acres; and also the conveyances, in the said bill and answers mentioned, made by the said Simon Smith to Darius Smith, and to Darius Smith and the said Ahab Smith, bearing date the fifteenth and eighteenth days of September, in the year of our Lord one thousand eight hundred and nine, for the farm on which the said Darius then lived, situate in Gloucester aforesaid, called the Daniel Eddy farm, lying on both sides of the turnpike road; and also the deed, in the said bill and answers mentioned, made by the said Simon Smith to the said Ziba Smith, bearing date the eighteenth day of September, in the year of our Lord one thousand eight hundred and nine, for a lot of land situate in said Gloucester, containing twenty-six acres; and also the deed, in the said bill and answer mentioned, made by the said Simon Smith to the said Ziba Smith and Simon Smith, Jr. bearing date the twenty-second day of November, in the year of our Lord one thousand eight hundred and nine, for the farm whereon the said Simon Smith then lived, situate in said Gloucester, it being all the land he purchased of John Eddy, Elijah Cooke, and Abel Potter, and is about three hundred acres, were made by the said Simon Smith with the intent to defraud his creditors, and particularly the plaintiff, and are, therefore, as to the plaintiff, utterly void.

But inasmuch as it appears to the court, that the real estate so as aforesaid conveyed to the said Darius Smith, and to the said Darius and Ahab Smith, has, with the exception of a life estate therein still held by the said Ahab, been conveyed to persons, who are not parties to the present bill, and the plaintiff seeks no relief against them, it is further ordered, adjudged, and decreed, that the said life estate of said Ahab only be subject to the debt of the plaintiff in this suit, in manner as hereinafter stated, without prejudice to the rights of persons not parties to this bill.

And it is further ordered, adjudged, and decreed, that the said conveyances before mentioned, having originated in a meditated fraud upon the creditors of the said Simon Smith, cannot be permitted to stand as a security for any debts then due to the grantees, or for any subsequent advances by them made in furtherance of the original intention of the parties thereto.

And it is further declared, and decreed, that the plaintiff has a right to be paid the principal debt due to him, with interest up to the time of this decree, and that the same ought to be, and is decreed to be, a charge on the same lands, and on the rents and profits (making all proper allowances) which have accrued to the respective respondents, or might have accrued to them without wilful default, since the estates contained in the same conveyances have come to their hands, possession, and use; and it is declared, and decreed, that the said lands, rents, and profits, are specifically holden for, and charged with, the payment of the plaintiff's said debt.

And it is further declared, and decreed, that the respondents be permitted to pay in the proportion of the value of the estates respectively conveyed to them, to be ascertained by a master, the amount due to the plaintiff for principal and interest, with costs, if they shall elect so to do, within sixty days from the date of this decree, and in that event the plaintiff is to assign to them, by conveyances to be approved by a master, all his right and title to the judgments stated in his bill, and to the debts due, and his right and title under this decree; and the respondents shall be admitted to hold the same accordingly as a charge on the same lands; but if the respondents shall not pay the said debt and costs, within the period aforesaid, then the same master is to ascertain the rents and profits of the said estates as aforesaid, which are to be paid by the respondents respectively towards

the discharge of the plaintiff's debt, and if this fund shall not be sufficient, or shall not be productive, then it is further declared, and decreed, that the master shall sell the lands so conveyed to the respondents by the conveyances aforesaid, or a sufficiency thereof, to pay the plaintiff's debt, interest and cost, at public auction to the highest bidder, in manner as shall hereafter be decreed by the court, and make due and legal conveyances thereof to the purchaser or purchasers thereof, and the respondents Simon Smith, Ziba Smith, Ahab Smith, Simon Smith, Jr., Esther Steere, William Foster, and Elizabeth Foster, shall respectively join in such conveyance or conveyances, releasing their right, title, and interest therein, and thereto, and covenanting against their own acts, in such manner as the master shall approve, and the proceeds of such sale shall be brought into this court to discharge the plaintiff's debt, and costs of suit.

And it is further declared, and decreed, that it be further referred to the same master to ascertain by an examination of the plaintiff on oath and otherwise, what was the value at which the plaintiff received the Farmers' Exchange bills for which the drafts, on which his judgments were founded, were given, at the time when he received or bought the same, and that the plaintiff is to be allowed that sum, the damages on said drafts at the rate allowed by law on the bills of the like nature, and his costs of suit, in the state courts of Rhode-Island, as his principal debt, and the interest is to be computed thereon as aforesaid; and the same master is to make his report as soon as may be, and in the mean time all further proceedings and orders are reserved for the consideration of the court.

BEAN, (UNITED STATES v.) See Case No. 14,550.

Case No. 1,175.

BEANE et al. v. The MAYURKA.

[2 Curt. 72.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1854.

COLLISION—NEGLIGENCE IN ANCHORING—ADMIRALTY JURISDICTION—GENERAL AVERAGE.

1. The allegation of negligently anchoring so near to another vessel, as to come in collision in a storm, repelled.

2. There is no maritime lien created by a general average loss, and consequently the admiralty has not jurisdiction in rem.

[Cited in Oologaardt v. The Anna, Case No. 10,545; The Kate Tremaine, Id. 7,622; The John C. Sweeney, 55 Fed. 544.]

3. Where two vessels at anchor come in collision without fault, and it was necessary, to prevent the destruction of both, for one to slip the cable and go ashore, this gave no claim against the other for a salvage service.

[Approved in The John Perkins, Case No. 7,360.]

[4. The admiralty jurisdiction extends to actions ex contractu, quasi ex contractu, ex delicto, and quasi ex delicto.]

[Cited in Banta v. McNeil, Case No. 966.]

[Appeal from the district court of the United States for the district of Massachusetts.

[In admiralty. Libel by Amaziah Beane and others against the schooner Mayurka for collision. The district court rendered a decree for libellants. (Unreported.) The cause is now heard on appeal. Reversed.]

CURTIS, Circuit Justice. This is an appeal from a decree of the district court in a cause of collision. The libel states that the schooner Sarah and Adeline being at anchor inside the breakwater at the mouth of the Delaware bay, on the night of the third of January, 1853, the Mayurka dragged her anchors, drifted foul of the Sarah and Adeline, and after the two vessels had been some time in collision, and while they were both in imminent danger of sinking at their anchors if not extricated, the Sarah and Adeline slipped her cable and drifted to leeward a short distance, let go her small and kedge anchors, held on by them for some hours, and then was driven on shore and wrecked.

The libel is framed in three aspects. First. It alleges that the collision occurred through the negligence of the people of the Mayurka in not having out, proper ground tackle, and not keeping a suitable anchor watch. Second. If there was no such negligence, and the vessels came in collision by inevitable accident, it insists that the cable and anchor of the Sarah and Adeline were voluntarily slipped, for the safety of both vessels, and upon the urgent request of the master of the Mayurka, as the only means of preventing the destruction of both, and that the stranding which followed was a direct and necessary consequence of the voluntary sacrifice of the cable and anchor, and therefore the entire loss should be borne pro rata by both vessels and cargoes as a general average loss. Third. That if this be not so, the libellants should be treated as salvors of the Mayurka.

Upon the first of these questions, the evidence derived from the officers and crews of the two vessels, and of another vessel called the Harbinger, which was anchored near, is even more than usually conflicting. I have carefully examined it, with the endeavor not to reconcile it, for that is plainly impossible, but to arrive at some leading facts, in a manner satisfactory to my own mind. To some extent I have been able to do so; and without detailing the evidence I will state what those conclusions are.

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

First. I find that the Mayurka came into the harbor before dark and came to anchor, with her best bower; that she does not appear to have drifted before twelve o'clock that night; that just before twelve o'clock, her second anchor was dropped, and about twenty-five fathoms of chain was payed out.

Second. That the Sarah and Adeline came to anchor with her best bower, after dark, on the lee quarter of the Mayurka, and by reason of the scope of her chain, when she swung to her anchor, was somewhat astern of the Mayurka. But I am not satisfied, that any one on board either vessel saw the other vessel, when the Sarah and Adeline came to anchor, nor do I find it possible to determine, with any approach towards precision, how near together they were, when the Sarah and Adeline was first anchored.

Third. I do not attribute this failure to see each other, to the want of a light on board either vessel, for I am satisfied there was no neglect in this particular; nor do I find any want of due care in the selection of a berth, by the Sarah and Adeline. The testimony is direct and strong to prove, that the master had the helm, and the mate and all hands were on the look-out forward, to discern a proper place for anchorage. That they believed they had selected such a place is probable in itself, and, as already stated, there is not sufficient evidence to satisfy me, that in point of fact, the Sarah and Adeline was anchored in dangerous proximity to the Mayurka.

Fourth. I find that after twelve o'clock at night, the ground tackle of the Mayurka was sufficient, and was properly attended to, and that a suitable anchor watch was kept on board. Through what causes the two vessels came together, is the difficult question. The collision occurred in a dark night, a snow-storm, and a violent gale of wind. The Sarah and Adeline was found to be just astern of the Mayurka, heading, in nearly the same direction, and almost immediately struck the boat of the Mayurka with her bowsprit, then came with her bows on the quarter of the Mayurka, her bowsprit sliding along until it was caught between the mainmast and rigging, and in this position the two vessels lay until the chain of the Sarah and Adeline was slipped, and she drifted to leeward. On the one side it is asserted, that the Mayurka drifted on to the Sarah and Adeline; on the other, that the Sarah and Adeline, swinging at one anchor, was forced by a strong current, when the squalls lulled, in the direction of the Mayurka, and thus came in collision. There are very material facts sworn to in the case, which tend, and if they stood alone, would be sufficient to support either hypothesis. I will advert briefly to some of them. The mate of the Mayurka swears he observed the chains carefully after the small anchor was let go; that its chain at no time bore an equal strain with the chain of the best bower. There is much evidence to prove that the relative positions of the Mayurka and Harbinger were not materially changed during the night, and that the latter vessel had both anchors down, and sufficient chain out, and that her master, who seems to have been anxiously vigilant during the night, was not aware that his vessel drifted. The Sarah and Adeline, a vessel of nearly the same size, model, and burden of cargo as the Mayurka, had but one anchor down, and about the same scope of chain out as the Mayurka's best bower had, after twelve o'clock, and is not alleged, and does not appear to have drifted. On the other hand, it is difficult to believe that these two vessels were anchored so near each other, that the Sarah and Adeline could, in that gale, have come up into the wind far enough to reach the Mayurka; and it is very difficult to reconcile the fact, that as soon as her cable was slipped, she immediately went astern, with any other hypothesis than that she was then held by her anchor. I attach some weight, also, to the testimony of the mate of the Sarah and Adeline, concerning the manner in which the two vessels came together. It was also urged that the Mayurka did not drift after the collision. But more scope was given to her chains after the collision. How soon after, does not satisfactorily appear. If immediately after, it would have a tendency to prove, that her people thought she had been drifting and needed more scope to hold her. Some of them say, it was a considerable time after the collision, that more chain was let out. Length of time is a fact, extremely difficult to be judged of with accuracy, on such occasions, and I have not been able to allow much force to this circumstance. On the whole, I think the evidence so far preponderates in favor of the hypothesis that the Mayurka did drift, that I consider the Sarah and Adeline relieved from the blame which would be attributable to her, if it had sufficiently appeared that the disaster was caused by her anchoring so near the Mayurka, that she was carried by the tide in collision with her. The result to which I have come upon the best consideration I have been able to give to the evidence, relieves both vessels of blame, and attributes the disaster to a vis major merely. Of course the libellant cannot recover, treating this as a simple cause of collision, and in this respect the decree of the district court must be affirmed.

It remains to consider the other claims;—and first, that for a general average contribution. This is a novel question of much interest. Whether such a claim can ever exist save as between those who have voluntarily embarked their several property in a common adventure, is worthy of great consideration. But I do not feel at liberty to express any opinion upon it, because I consider there is not jurisdiction in the admiralty to try and determine it. In Stainback v. Rae, 14 How. [55 U. S.] 532, it was settled, that where a loss happens from a collision which is the re-

sult of inevitable accident, without negligence or fault of either party, each should bear his own loss. Viewed, therefore, simply as a case of collision, and damage proceeding therefrom, the libellants have no valid claim. The question is, whether in a proceeding in rem, the admiralty may examine, whether a voluntary sacrifice was made, to diminish the damage which would otherwise have been suffered, from a collision without fault, and may pronounce in favor of a lien, upon the vessel benefited by the sacrifice. I say, pronounce in favor of a lien upon that vessel, because it is clear, if there is not a maritime lien on the vessel proceeded against, for the amount due on contribution, there can be no decree against that vessel. I consider a proceeding in rem in the admiralty, to be a proceeding to give effect to a maritime lien arising either ex contractu or quasi ex contractu, or ex delicto, or quasi ex delicto, and that such a lien must always exist, to form the basis of such a proceeding. This is very clearly, and I think accurately stated by Lord Chief Justice Jarvis, in the case of Harmer v. Bell, 22 Eng. Law & Eq. 72, decided by the privy council in 1852. "A maritime lien is the foundation of all the proceedings in rem, a process to make perfect a right inchoate, from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be found to be equally true, that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, to be carried into effect by legal process." See, also, The America, [Case No. 288,] and cases there cited. If, then, this rests upon the existence of a maritime lien on the vessel proceeded against, we must find such a lien here, or the process is misapplied. That no lien, or privilege to secure any thing, arose from the collision, is clear. There was no claim, whatever, growing out of the collision. The vessels being in collision without fault, and being relieved from it by a voluntary sacrifice of their property, it is maintained by the libellants that they have a claim for contribution. Suppose this admitted, does the maritime law create a lien on the claimant's vessel, to the extent of its contributory share. This is settled in the negative by the case of Cutler v. Rae, 7 How. [48 U. S.] 729. It was there held, that the maritime law does not confer a lien, to secure contribution in general average; that the only lien which existed, was a common law lien, dependent on possession, and lost when the possession was terminated. In this case, there never was any possession by the libellants of the vessel of the claimants, and it necessarily follows from this decision, that no lien of any kind ever existed. At all events, it seems to me, that without departing from this decision, I cannot say the libellants have a maritime lien on the vessel proceeded against, for the contribution due, for the relief of that vessel from collision; and, consequently, I must pronounce against the libel on this ground.

As to the claim for salvage, I am of opinion it cannot be maintained. These vessels were subject to a common peril, which threatened the immediate destruction of both. It is testified by all the libellants' witnesses, that if not relieved from it, they must both have sunk at their anchors. Finding this to be so, and that he could not otherwise release his own vessel, the master of the Sarah and Adeline slipped his cable. It was his imperative duty to do so, to save his own vessel and cargo, and the lives on board. To constitute a salvage service, there must be a voluntary interposition to save another's property, by one under no legal obligation to render the service. But this master was under a perfect legal obligation to do all he did, wholly independent of the safety or danger of the other vessel. In the case of The Branston, 2 Hagg. Adm. 3, where a passenger had successfully exerted himself to save the ship and cargo, and the lives of those on board, Lord Stowell denied his claim for salvage, upon the ground, that where there is a common peril, it is the duty of all, to contribute to the general safety. There are other cases, in which passengers as well as others standing in different relations to the ship, have been allowed salvage, but only when they have assumed responsibilities and rendered services, which could not be required of them in the performance of any duty. I do not consider that what this master did, under a clear legal obligation to his owners and to his crew, to save his own vessel, is in the nature of a salvage service, because it also benefited others. It may be that the property of others benefited, should bear some portion of the loss voluntarily incurred, but this rests upon the law of general average, if anywhere, and not upon a claim for salvage compensation; and to treat this as a salvage service, would so confound these distinct subjects, as to produce great confusion and mischief. As the claim for a general average contribution was allowed in the district court, the decree must be reversed and the libel dismissed, as to that claim, for want of jurisdiction, but without costs.

Case No. 1,176.

BEANE v. ORR et al.

[2 Ban. & A. 176;[1] 9 O. G. 255.]

Circuit Court, D. Massachusetts. Oct. Term, 1875.

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

Where, upon a motion for a preliminary injunction, the affidavits of the contesting parties were contradictory and left in doubt whether

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

the defendant had a license from the complainant, the motion was denied.

[In equity. Bill by Eben J. Beane against Thomas M. Orr and others to restrain infringement of a patent. Heard on motion for a preliminary injunction. Denied.]

Geo. L. Roberts, for complainant.

R. M. Morse, Jr., and C. W. Sumner, for defendants.

LOWELL, District Judge. The issues of facts upon which the motion for a preliminary injunction were argued are difficult, and I do not find that the plaintiff is so clearly right that the use of the machine should be prohibited before the hearing. There is no question of the validity of the patent, or of its infringement, but whether a license was granted to the defendants, and, if granted, whether the plaintiff was induced to give it by fraud.

It seems that the defendants had a license which required them to pay a fee or royalty of $100 each year in advance, and in default of such payment the license might be revoked. That on the 15th October, 1874, the parties came to a settlement and agreed to give and take a single sum of $818 in full satisfaction for past and future fees to the end of the life of the patent. The plaintiff took the defendants' note for that sum payable in four months, and soon afterward the defendants filed a petition in bankruptcy and made a composition with their creditors. The plaintiff has refused to receive his dividend, and insists that by the oral bargain the terms of the original license were only suspended for four months, and that upon the failure of the defendants to pay the note in full at maturity his right of revocation has revived. He gave notice accordingly, and brought this bill.

The defendants deny the plaintiff's version of the bargain, and produce his receipt for the note, expressed to be "in payment for machines." Putting this receipt into the scale of contradictory evidence, I must hold the case not to be made out. If the practice were to examine and cross-examine witnesses on these occasions, instead of filing affidavits, no doubt a more conclusive judgment might be arrived at. Then the question is whether the note was given fraudulently. The law of Massachusetts is, that if goods are bought with a distinct purpose not to pay for them, the purchase is fraudulent. The close proximity of the bankruptcy has a suspicious look, but here again the evidence is one affidavit against another, and the defendants' counsel did not fail to observe that the plaintiff's two statements are not quite consistent with each other. If it was a mere conditional grant, to take effect when the note was paid, then it is not probable that any misstatements would be made concerning the standing, etc., of the defendants, since they would be utterly immaterial. I do not mean to say that the stories are irreconcilable. No doubt the plaintiff might inquire into these things with a view to obtain a discount of the note, but it is much less probable that any great reliance would be given or expected to the mere solvency of the parties if the grant were conditional, and, on the other hand, its being conditional would seem to show some doubts of the solidity of the security. Motion denied.

Case No. 1,177.

In re BEAR et al.[1]

District Court, S. D. New York. Dec. 23, 1879.

BANKRUPTCY—ASSIGNMENT FOR BENEFIT OF CREDITORS — FAILURE TO FILE PROPER INVENTORY—EXECUTION CREDITOR—VALIDITY OF LEVY.

[1. A paper signed and verified by one of three partners, and purporting to be a schedule of all the creditors of the firm, and an inventory of all the estate of the copartners, both joint and several, but which fails to show the assets or liabilities of the signing partner, or the assets of one of the nonsigning partners, and which contains no statement that such liabilities or assets do not exist, and which does not purport to be made with the knowledge or consent of such nonsigning partners, nor to state the occupation, residence, or place of business of the members of the firm, or any of them, nor the residence of their assignee, does not comply with Laws N. Y. 1877, c. 466, as amended by Laws 1878, c. 318, relating to assignments for the benefit of creditors, and requiring the assignors to file an inventory or schedule containing the name, occupation, place of residence, and place of business of the debtor, the name and place of residence of the assignee, a true and full account of all the creditors, their residence, amount and consideration of their debts, etc., and a true and full inventory of the debtor's estate, together with an affidavit by the debtor that the same is just and true.]

[2. The statute further provides that, if the inventory prescribed shall not be made and filed within 30 days, the assignment shall be void. *Held*, that the failure to file a proper inventory rendered the assignment void as to execution creditors who had levied upon the property of the firm in the possession of the general assignee subsequent to the 30 days within which the statute required the inventory to be filed, and prior to the filing of a petition in bankruptcy by the assignors.]

[Cited in Hunker v. Bing, 9 Fed. 280.]

[3. The assignment being operative until the time within which the inventory might have been filed by the assignors had expired, there was no interest in the debtor, to give effect to a levy made within that period. In re Croughwell, Case No. 3,440, followed.]

[4. The assignment was void as to the firm property, as well as to the individual estate of the nonsigning members of the firm.]

[5. An adjudication in bankruptcy relates back to the filing of the original petition, and not to the time of an ancillary petition filed to correct an irregularity, and a levy after the filing of the original petition gives no lien.]

[In bankruptcy. In the matter of Isaac Bear, Philip Bear, and Samuel Bear, bankrupts.

[For subsequent proceedings on behalf of creditors of the bankrupts, see 5 Fed. 53; 7

[1] [Not previously reported.]

Fed. 583; 8 Fed. 428, 429. For accounting of the general assignee, see Hunker v. Bing, 9 Fed. 277.]

George Bell, for creditor.
F. W. Hinrichs, for assignee.

CHOATE, District Judge. The question in this case is whether an execution creditor has acquired a lien on the goods of the bankrupts, the proceeds of which have been paid into court subject to such lien, if it exists. The bankrupts, Isaac Bear, Philip Bear, and Samuel Bear, carried on business in New York city as copartners. On the 2d of January, 1878, the bankrupts made a general assignment of their joint and individual estates for the benefit of their creditors. This assignment is not objected to by the execution creditor, either in form or in substance, as being invalid under the laws of New York, except by reason of the alleged failure to comply with the statute in the matter of filing an inventory. See the statute, (Laws N. Y. 1877, c. 466, since amended by Laws N. Y. 1878, c. 318.) The statute requires the debtor making the assignment within twenty days thereafter to file an inventory or schedule containing the name, occupation, place of residence, and place of business of the debtor, the name and place of residence of the assignee, a true and full account of all the creditors, their residence, amount and consideration of their debts. etc., and a true and full inventory of the debtor's estate, and an affidavit made by the debtor that the same is in all respects just and true. In case the debtor shall omit to file such schedule or inventory within twenty days, the assignee may within thirty days after the date of the assignment make and file such inventory and schedule, so far as he can. The statute then provided that "in case an inventory shall not be made and filed within thirty days by the debtor or the assignee the assignment shall be void." On the 15th of January, 1879, a document purporting to be an inventory was filed. It was signed and verified by one of the assignees only, Samuel Bear. It purports to be and is sworn in the affidavit to be a schedule of all the creditors of the firm, as required by the statute, and an inventory of all the estate of the copartners, both joint and several. It contains a schedule of individual liabilities of Isaac Bear and of Philip Bear, and of assets of Isaac Bear. It contains no schedule of liabilities of Samuel Bear, nor of assets of Samuel or Philip Bear, nor does it contain any statement that such liabilities or assets do not exist, except so far as that may be inferred as to the assets from the affidavit of Samuel Bear above referred to. Between the 15th of January and the 9th of March, 1878, the creditor, having recovered judgment, levied his executions on the stock of goods formerly in the possession of the debtors, but which had been delivered to, and were at the time of such levies in the possession of, the assignee, and he now claims that these levies gave him a lien thereon, not affected by the subsequent bankruptcy. The petition in bankruptcy was filed March 11, 1878. The assignment has been set aside at the suit of the assignee in bankruptcy as being fraudulent under the bankrupt law; and, under the rule declared in the case of In re Beisenthal, the intervening levies give no liens as against the assignee in bankruptcy, unless the assignment was void by the law of New York as against the execution creditor. In re Beisenthal, [Cases Nos. 1,235 and 1,236.] It is claimed that the assignment is made void by the statute for the following defects in the inventory or schedule; that it was not signed or verified by Isaac Bear or Philip Bear, nor did it purport to be made with their knowledge or consent; that it did not state the occupation, place of residence, or place of business of the assignors, or any of them; that it did not state the residence of the assignee, nor contain a schedule of the individual creditors or estate of Samuel Bear, nor an inventory of the individual estate of Philip Bear; that, while stating the individual estate of Isaac Bear, it was not signed or verified by him. The 25th section of the statute provides that the court, where this assignment is recorded, "may exercise the powers of a court of equity in reference to the trust and any matters involved therein."

The question is whether the filing of an inventory defective in the particulars stated made the assignment void at the expiration of thirty days from its date. That it was not, in case it then became void, made void ab initio, by relation back, was held in the case of In re Croughwell, [Case No. 3,440.] There is no evidence of fraud, unless it is to be inferred from these defects in the inventory, and the care with which the inventory was in other respects prepared seems to show an intention to comply with the statute. It is urged that the general equity powers given to the court by the 25th section of the act are sufficiently large to allow all necessary amendments of the inventory, if it does not in all respects conform to the statute. I am unable to see, however, how the court, in the exercise of such a power, can dispense with or obviate the want of an inventory, where the statute expressly declares that if no inventory is filed the assignment shall be void. This would be to make of no effect this positive provision of law. The question, therefore, is whether there was an inventory filed, within the meaning of the statute. The inventory filed cannot be considered as a schedule of the debts of Samuel Bear. It does not purport to be so. In view of what it contains and what it omits, the fact that it is not sworn to by Philip Bear and Isaac Bear is fatal to the inventory as an inventory of those debtors' individual estates. It seems to me impossible to hold it

is in substantial respects such an inventory as those assignors were required to file. It clearly was the intention of the statute that the debtor should verify the inventory. Among the separately enumerated things to be contained in it is the affidavit of the debtor to its truth. In no sense as to the individual estate of Philip and Isaac Bear can their copartner Samuel Bear be deemed to have had any authority whatever to verify the inventory for them, and I see no escape from the conclusion that as to their individual estates the assignment became void at the end of the thirty days because the debtors did not file such an inventory as the law requires, nor, upon their omission to do so, did the assignee file, as he might have done, an inventory such as he was able to make out for them. I think, upon the authorities, that the substantial requirements of the statute in such a case must be complied with, or the assignment will be held to be necessarily fraudulent as against creditors. The requirements of the statute are for the security of creditors against secret and fraudulent assignments. Juliand v. Rathbone, 39 N. Y. 369. The fair construction of the statute is that, if the assignee does not within twenty days file an inventory substantially such as is described, the assignee may have 60 days' further time to make and file the same as well as he can, otherwise the assignment fails. If this assignment is void as to the individual estates of Isaac and Philip Bear, can it be sustained as to the firm property? It seems not. Firm creditors have an interest under the assignment in the possible surplus of the individual estates, and it is impossible to uphold the instrument in part and avoid it in part, the rule being that where a statute in terms declares a deed or instrument void on account of some illegal or fraudulent provision contained therein, or some vicious element or fault in it, then it is void in toto, because the legislature has seen fit to make it so. O'Neil v. Salmon, 25 How. Pr. 255, and cases cited. The levies made, therefore, between the expiration of the thirty days and the filing of the original petition in bankruptcy, gave the execution creditor valid liens on the property.

It is also claimed that the adjudication in bankruptcy does not relate back to the filing of the original petition in bankruptcy, but only to the time of filing the ancillary petition, because it is said that one of the original petitioning creditors did not sign the petition, the name of the creditor in the petition being "A. Fleischmann & Co.," and the signature being "A. Fleischmann." There is nothing in the point. A. Fleischmann & Co., with the other petitioning creditors, appeared by their attorney. They were the parties petitioning, and, even if A. Fleischmann & Co. had not signed at all, it would be, at most, a mere irregularity in practice, not affecting the jurisdiction. The statute does not in terms require the petitioners all to sign in order to give the court jurisdiction to entertain the petition. Therefore, the levy after the filing of the petition gave no lien. As to the first levy, which was within the twenty days on the authority of Croughwell's Case, ut supra, the assignment was then operative, and there was no interest in the debtor to give effect to the levy.

Case No. 1,178.

In re BEAR et al.

[1 Cent. Law J. 607; 11 N. B. R. (1875,) 46.]

District Court, S. D. Mississippi.

BANKRUPTCY—INSURANCE POLICY—RIGHTS OF WIFE AND ASSIGNEE.

[1. Where the husband insures his life for the benefit of his wife, the legal title to the policy is in her; so that, upon his becoming bankrupt, it is not necessary that he should surrender such policy, or list it in his schedule of assets.]

[2. Payments of premiums thereon by the husband after he becomes insolvent, however, constitute a fraud on his creditors, whether made with fraudulent intent or not, to the extent that the assignee in bankruptcy is entitled to recover from the wife out of the proceeds of the policy, when it shall have been paid, the amount so advanced by the husband, with interest.]

[3. This claim on the part of the assignee, when its amount is ascertained, may be sold by him, and will pass to the purchaser a contingent right in the proceeds of the policy.]

[In bankruptcy. In the matter of the bankruptcy of Bear and Steinberg.]

Harris & George, for creditors.
Wharton & Johnstons, for bankrupts.

HILL, District Judge. This case is now submitted upon the exception of the creditors to the schedules of the bankrupts, upon the ground that they do not contain, and the bankrupts have not surrendered therein, a life policy taken out by each for the benefit of his wife. The question, upon examination, I find one of no little difficulty, and have postponed its decision for the purpose of obtaining all the light on the question attainable. But as it may be important to the parties in interest to have it settled without further postponement, I proceed to its examination. It is admitted that the policies are upon the lives of the husbands for the benefit of their wives; this being so, the question is, to whom do they belong? I am inclined to the opinion that the legal title is in the wife, and not the husband. The value of the policy depends upon the payment of the premiums as they fall due. This may be done by the wife out of her own means, or may be advanced by a friend other than her husband; if advanced by the husband it is but an advancement, settlement, or provision made by him for her benefit out of his estate, which, if solvent at the time the advance was made, he could do without any violation of the rights of creditors—provided

it was reasonable in amount when considered in connection with his estate and liabilities—and certainly would be valid as to subsequent creditors; indeed, a suitable provision for one's household is not only not condemned, but sanctioned by law, both human and divine. I am of opinion that the title to a life-policy of the kind mentioned, both legal and equitable, is in the wife, and cannot be controlled or assigned by the husband. It is otherwise when taken out by him for his own benefit, or for the benefit of his estate, as in the case of Catchings v. Manlove, 10 George, [39 Miss.] 655, cited by creditors' counsel; hence the necessity of the assignment to his wife and children in that case, which, being made when the husband was insolvent, was properly declared void as against his creditors, but was valid as against other parties. Whilst I am satisfied the policies in the case now submitted belong to the wives of the bankrupts, and are not subject to be surrendered by the bankrupts, yet any payments which they may have made out of either their individual or partnership effects, after they became insolvent, were a fraud whether so intended or not, so far as to entitle the assignee to recover from the wife the amount advanced, with interest, out of the policy when it shall have been paid, and this claim when ascertained may be sold by the assignee, and will pass the contingent right to the purchaser. The Case of Erben, [Case No. 1,315,] referred to by counsel, was a claim upon the part of the bankrupt, for whatever interest he had in the policy to be set off as exempt under the statute of Pennsylvania, which was allowed, which, if it was property in the sense of the statute, was properly set off, and did not raise the question as between the creditors and right of the wife, and is not authority upon the question now presented. The other cases referred to by the distinguished and able counsel of the creditors, will be found when closely examined, I am of opinion, not in conflict with the conclusion above stated. The register will take proof as to the amount paid by the bankrupts, if any, after they became insolvent, and out of that fund paid, which claim, when ascertained, will be sold for cash by the assignee, as provided for the sale of other debts or choses in action.

Case No. 1,179.

BEAR v. LUSE.

[6 Sawy. 148; 12 Chi. Leg. News, 130.][1]

Circuit Court, D. Oregon. Dec. 10, 1879.

PUBLIC LANDS — TOWN SITE — SUIT TO AFFECT A PATENT—QUESTIONS OF FACT—DECISIONS OF THE LAND DEPARTMENT—QUESTIONS OF LAW.

1. The occupation of a tract of land as a town site for the purposes of business or trade, which is afterwards abandoned, does not impress upon the locality the character or quality of a town site, so that the same can not be taken up and held under the donation act as unoccupied public land.

2. Equity does not have jurisdiction to affect a patent except upon the ground of an antecedent equity in the plaintiff which was disregarded in the issuing thereof, and therefore a party who claims to have settled upon a tract of public land subsequent to the settlement and entry thereof by another who has received the patent for the same, upon the ground that the settlement and entry of the patentee were illegal and void, can not maintain a suit to set aside such patent or charge the patentee as his trustee of the premises.

3. Questions of fact decided in the land department are not subject to review by the courts, except for fraud or mistake other than an error of judgment; and where there is a contest in such department between one who claims to be a settler upon a portion of the public land, to cancel the entry of a prior settler upon the same land, the decision therein precludes further inquiry by the parties into any question of fact which might properly have been made in such contest, the same as if it had been actually so made and considered.

4. Whether a settler under the donation act upon unsurveyed lands could commute his residence thereon, under section 1 of the acts of February 14, 1853, and July 17, 1854, by the payment of one dollar and twenty-five cents an acre therefor, is a question of law, and therefore the decision of the land department thereon may be reviewed by this court upon the suit of a party having an equity in the premises prior to such entry, but not otherwise, except in a suit by the United States to cancel the patent issued upon such entry.

[In equity. Bill by John Bear against H. H. Luse to enjoin certain proceedings at law on the part of Luse to recover possession of certain lots in Marshfield. Bill dismissed.

[Bills were also filed against the same defendant, for the same purpose, by W. F. Deubmer, George Wolf, Frederick Timmerman, William G. Webster, A. Lobree, C. B. Golden, and William Temple. By stipulation the case of Bear against Luse was argued and submitted upon the understanding that the final determination therein should be followed in the other cases. These bills were also dismissed.]

Walter W. Thayer and William G. Webster, for plaintiff.

John Burnett and R. R. Strahan, for defendant.

Before FIELD, Circuit Justice, and DEADY, District Judge.

DEADY, District Judge. In the spring of 1877, H. H. Luse commenced actions at law in the circuit court for the county of Coos against a number of persons to recover the possession of certain lots in the town of Marshfield, in said county, the same being parts of lots 3 and 4 of section 26, in township 25 south, of range 13 west of the Wallamet meridian. Each of the defendants in these actions filed a complaint in equity in the nature of a cross bill, under section 377 of the Oregon Civil Code, against Luse, to stay the proceedings therein, and praying

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 12 Chi. Leg. News, 130, contains only a partial report.]

that he be enjoined from "asserting any right or title to the premises" or "interfering with the plaintiffs in occupying and holding" the same. Under said section 377, the effect of this was to stay the proceedings in the actions at law until the final disposition of the suit in equity. On account of the disability of the judge, the cases were removed by stipulation to the circuit court for the county of Marion. In November, 1878, they were removed by Luse to this court, upon the grounds that he was a citizen of California, and that the controversy therein arises under the donation and town-site acts of the United States, and were entered here on January 6, 1879. By stipulation, the evidence taken in this case was to be considered as taken in the others; and on August 21 it was argued and submitted, upon the understanding that the final determination therein should be followed in the other cases.

The material facts in the case are as follows: On March 24, 1877, the land office at Roseburg issued a patent certificate, No. 1,961, in favor of Wilkins Warwick, for a donation of one hundred and sixty acres, under the donation act of September 27, 1850, (9 Stat. 497,) upon a residence thereon from August 4, 1854, to March 10, 1856, and the payment on September 16, 1856, of one dollar and twenty-five cents per acre, under the acts of February 14, 1853, (10 Stat. 158,) and of July 17, 1854, (10 Stat. 306,) amendatory of said donation act, in lieu of the remainder of the four years' residence thereby required, the same being lots 3 and 4 of section 26, the north one-half of the south-east one-quarter of section 27, all in township 25 south, of range 13 west of the Wallamet meridian; upon which certificate a patent for said premises was on May 6, 1876, issued to said Warwick, and the defendant, Luse, on and before the commencement of said actions at law, had, by means of sufficient conveyances, acquired all the interest of said Warwick in the premises. In 1869, proceedings were instituted in the local land office in the interest of the inhabitants of Marshfield, and with a view of entering the same for their benefit as a town site, to cancel and set aside Warwick's notification and entry upon the charge of "abandonment." The ground of this charge was, that the commutation entry of September 16, 1856, was void, the land being then unsurveyed, and therefore the failure to reside thereon, thenceforth, amounted to an abandonment. That office and the commissioner of the general land office decided the question against Warwick, holding that section 1 of the acts of February 14, 1853, and of July 17, 1854, providing for the payment of one dollar and twenty-five cents per acre in lieu of the last three years' residence upon the donation required by the act of September 27, 1850, did not apply to unsurveyed lands.

Upon an appeal to the secretary of the interior, that officer on May 29, 1874, reversed such decision, saying: "The language [of said section 1] is somewhat ambiguous, but it is undoubtedly susceptible of a construction to include unsurveyed land, and such a construction seems to be in strict conformity with the spirit of the act and the objects intended to be accomplished by its passage. The construction adopted is extremely technical, and I think contrary to the policy of the act, which was a benevolent statute, and as such had received, in all adjudicated cases arising under it, an exceptionally liberal interpretation. Stark v. Starr, 6 Wall. [73 U. S.] 402; Silver v. Ladd, 7 Wall. [74 U. S.] 219." The secretary also held that the entry of Warwick being, prima facie, regular and valid, the contestants, who had neither alleged nor claimed any prior interest in the land, could not maintain a proceeding to set it aside.

The present suit is sought to be maintained not only upon the ground passed upon in the land department, namely, the abandonment by Warwick of his residence upon the premises before he had complied with the requirements of the law, but also upon the ground that the premises included in the patent to Warwick are a part of the town site of Marshfield, which "was settled upon for the purposes of business and trade, and not agriculture, long prior to the date of the pretended settlement or occupation by Warwick," and that, relying upon this fact, the plaintiff settled upon the lot in controversy, expecting "that title thereto would be duly obtained in accordance" with the laws of the United States.

Briefly, it appears from the evidence that in March, 1854, Mr. J. C. Tolman, now surveyor-general of this state, went upon the ground with his family, and marked out a claim of three hundred and twenty acres, to which he gave the name of Marshfield, and built a double log house thereon, with the intention of acquiring the same as a donation under the act of September 27, 1850, and building a town thereon. About August 1, Tolman removed to Jackson county, where he settled upon three hundred and twenty acres of the public land and acquired the title to the same under the donation act, and never returned to Coos county. When he left he made an arrangement with one A. J. Davis to hold the claim thereafter together, Davis procuring Warwick to hold the north end of the claim for him, and one A. J. Gaskill the south end for Tolman. Just prior to leaving, Tolman gave Captains Crosby and Williams, who were in the bay with a vessel, two lots, on the marsh near the water, on condition that they would build a store and warehouse thereon, and occupy the same as a place of business. During the summer they caused a small frame house to be erected there, but never occupied it or returned to the place. On August 4, 1854, Warwick went into the log house built by Tolman, and resided there for over a year,

claiming to be a settler under the donation act, during which time, on March 10, 1856, he filed a notification under the donation act for one hundred and sixty acres, including such dwelling house, and on September 16, 1856, per said Davis, made proof of such residence and cultivation, and entered the same at one dollar and twenty-five cents per acre, under the donation act and section 1 of the acts of February 14, 1853, and July 17, 1854. In the fall of 1856 Warwick and Davis, left the country, and have not yet returned to it, and at the same time, James T. Jordan, by the permission of Davis, occupied the house built by Crosby and Williams as a store. Davis gave Jordan instructions to look after the claim and pay the taxes on it, which he did for about five years, when Luse assumed an oversight of the place as the agent of Davis and within a year thereafter as the owner of the same. On June 10, 1855, Tolman sold his supposed interest in the Marshfield claim to J. S. Hatch, who soon after took George C. Furber into the speculation as a partner. In the fall of 1856, Socrates Schofield, under the direction of said Hatch, Furber, and Davis, laid off a village upon the claim taken up by Tolman, the smaller portion of which was upon the tract patented to Warwick, and made plats thereof, which was the first attempt to lay off a town upon the premises. The first house built upon the Marshfield claim after the two built in 1854, was built in 1857, and occupied as a dwelling-house by a man named Hamilton. The next house was a saloon, built in 1866, and now occupied by the plaintiff. Soon after this, in 1866–67, a saw-mill was built at Marshfield, and people commenced to occupy the place as a town; and at the commencement of these actions at law there were from fifty to seventy-five houses on the portion included in Warwick's donation. On October 24, 1874, the town of Marshfield was duly incorporated, with the following boundaries: "Commencing at a point on the ship channel of Isthmus slough, ten chains north of the south-east corner of lot 2 in section 26 of township 25 south of range 13 west; thence west to the east line of section 27 of said township; thence north along said line forty chains; thence east to the inside channel of Coos bay; and thence southerly along said channel to the place of beginning." Sess. Laws, 162. These boundaries include the lots involved in this litigation. In November, 1873, and before the incorporation of said town, an application was made by G. Webster, acting on behalf of the inhabitants of the place, to enter land as a town site, including a portion of the Warwick donation. The contest to cancel Warwick's entry being then pending in the land department at Washington, the application and money were merely received by the officers as a deposit to await the result of such contest, and were returned to Webster in the same month. On February 19, 1877, the trustee of the town of Marshfield applied at the land office to make the same entry, but the application was rejected on the ground that it was not open to entry.

Upon this state of facts this suit can not be maintained. The place called Marshfield was not, as a matter of fact, occupied as a town site, or settled upon for the purpose of business or trade, prior to the survey of the same into lots and blocks in the fall of 1856, and probably not until 1866, and never within the meaning of the town-site act of May 23, 1844, (5 Stat. 657,) and section 1 of the act of July 17, 1854, (10 Stat. 305.) The act of July 17, 1854, supra, first extended the town-site act of May 23, 1844, over Oregon, and they are so far in pari materia, and therefore should be construed as one. Taken together, they provide that thereafter a donation claim shall not be surveyed so as to include lands settled upon and occupied as a town site. But this settlement and occupation must have taken place before the settlement under the donation act, and not been given up or abandoned. If any number of people had settled upon the Marshfield claim in 1854, as a town site, for the purposes of business or trade, and thereafter, and before the entry of the same, had left the place—abandoned it—the land would not thereby have had the character or quality of a town site indelibly impressed upon it, so that it could not afterwards be taken and held under the donation act. On the contrary, so soon as it was not occupied as a town site it was abandoned, and was open to settlement under the donation act as though it had never been occupied for any purpose. Lownsdale v. Portland, [Case No. 8,578.] Mr. Tolman's interest in the land as a town site, or otherwise, ceased with his occupation of it on August 1, 1854, and the next comer took it unaffected by the fact or purpose of such occupation. The agreements by which it was attempted to prolong his interest in the claim after he ceased to occupy it through the occupancy of others were clearly illegal, and could not affect the rights of any one. Donation Act, § 12. When Warwick's settlement commenced upon the Marshfield claim August 4, 1854, it was vacant land. There was no one else living upon or claiming it, and it was clearly open to settlement under the donation act; and, if any number of people settled on it thereafter for the purposes of business or trade, that did not make the place a town site, within the meaning of the statute, but such persons were either trespassers or occupants under the owner, Warwick. A settler under the donation act has the legal estate in his donation from the date of his settlement, and no number of people can deprive him of it by occupying it as a town site or otherwise. Chapman v. School Dist. [Case No. 2,607;] Fields v. Squires, [Id. 4,776;] Mizner v. Vaughn, [Id. 9,678;] Adams v. Burke, [Id. 49.] But it is alleged, and there

is evidence tending to prove the allegation, that Warwick's settlement under the donation act was fraudulent and void because not made for himself, but for Davis or Tolman. But the plaintiff is not in a condition to question the legality of Warwick's settlement and occupation and the patent to him thereon. Equity does not have jurisdiction to affect or set aside a patent, or to hold the patentee as a trustee for another, except upon the ground of an antecedent equity in the plaintiff, which was disregarded or overlooked in the issuing of such patent. Stark v. Starr, 6 Wall. [73 U. S.] 410; Frisbie v. Whitney, 9 Wall. [76 U. S.] 196.

The interest of the plaintiff, if any, is subsequent to the settlement, occupation, proof, and entry of Warwick. Prima facie, the premises had become the property of Warwick before the plaintiff's occupation began. The legality of Warwick's settlement and occupation was then exclusively a question between him and the United States; and, until such entry was canceled by the latter, neither the inhabitants of Marshfield, nor any one for them, was entitled to enter the land as a town site. Rightfully or wrongfully, the land had been granted to another before there were any occupants of lots in Marshfield other than the donee thereof. The plaintiff is, therefore, without any established interest in or right to the premises, and therefore has no standing in a court of equity to question the legality of the patent to Warwick or the sufficiency of the grounds upon which it issued. But a contest was had in the land department between the inhabitants of Marshfield and Warwick upon the question of the validity of this entry, which was decided in favor of the latter. In the contest the only objection made to the donation entry was that, being upon unsurveyed lands, the settler was not entitled to commute the required residence thereon by paying for the land at the end of one year's residence, at the rate of one dollar and twenty-five cents per acre. And that question being one of law merely, depending for its solution upon the proper construction of section 1, of the act of February 14, 1853, which provides that settlers under the donation act, "who have located or may hereafter locate" public land, "of which survey shall have been made or may hereafter be had," shall, after one year's occupation, in lieu of the residence required by that act, be permitted to pay "one dollar and twenty-five cents per acre for the lands so claimed, located, and surveyed as aforesaid," this court might now, if the plaintiff had any interest in or right to the premises, review the action of the land department thereon and annul it, if erroneous. But, as it is, that action can only be reviewed in a suit by the United States to cancel and set aside the patent on the ground that it was illegally issued. But, even if the plaintiff could maintain a suit to affect this patent, yet no mere question of fact decided by the land department in the progress of the matter, or which might have been made therein, can now be reviewed by this court except for fraud or mistake other than an error in judgment in estimating the value or effect of evidence. Johnson v. Towsley, 13 Wall. [80 U. S.] 83; Shepley v. Cowan, 91 U. S. 340; Aiken v. Ferry, [Case No. 112;] Stevens v. Sharp, [Id. 13,410.] Therefore the question whether Warwick's settlement, occupation, and entry were in fact for himself or for Davis or Tolman, or whether the Marshfield claim was occupied as a town site or settled upon for the purposes of business or trade at or prior to Warwick's settlement thereon, can not be inquired of in this suit. For, although these questions were not specifically made in the contest in the land department, they were plainly within the scope of the inquiry, and might have been raised and decided if the contestants had desired. Impliedly, the decision of the secretary of the interior—that the Warwick entry was valid and lawful—included every question of fact that might properly have been raised and decided in the progress of the contest concerning it. If the rule were otherwise, this case is a good illustration of the intolerable vexation and delay which would attend the procuring of titles by settlers on public lands. As has been stated, the contest in the land department was made upon the single proposition that the Warwick donation, being unsurveyed, could not be purchased, and that Warwick's removal from it after a residence thereon of less than two years, and the payment of one dollar and twenty-five cents therefor, was, in effect, an abandonment of his settlement—a failure to perform the conditions subsequent of the grant, whereby the premises reverted to the United States and were open to settlement under the town-site law. The proposition that Warwick's settlement was for the benefit of another, or that the place was occupied as a town at and before Warwick's settlement, does not then seem to have been thought of, but they are brought forward at this late day and in this form to defeat and nullify the action of the land department in that contest. But it appears that even these questions were brought before the department prior to the issue of the patent, and considered by it as upon a motion for a new trial. On May, 11, 1875, the register and receiver forwarded the principal evidence relied on by the plaintiff upon these points to the commissioner, who, on May 29, 1875, submitted the same to the secretary, with a recommendation that the case be opened, which, on September 30, 1875, was refused by the acting secretary. Upon the whole, there is no equity in the bill, or any ground upon which it can be maintained. It is therefore dismissed, with costs. The same decree will be entered in the cases of the following-named plaintiffs against the same defendants: W. F. Deubmer, Nos. 489, 490; John

Bear, No. 491; George Wolf, No. 492; Frederick Timmerman, No. 493; William G. Webster, No. 494; A. Lobree, No. 495; C. B. Golden, No. 496; William Temple, No. 497.

Case No. 1,180.

BEARD v. BOWLER.

[2 Bond, 13.] [1]

Circuit Court, S. D. Ohio. Feb. Term, 1866.

EQUITY PLEADING—PLEA—DEMURRER—SUFFICIENCY OF BILL—DEFECTIVE PARTIES—AMENDMENTS.

1. A demurrer to a plea presents the question of the sufficiency of the bill as well as of the plea.

2. Where a defendant is sued as the sole owner of a railroad, and the proof is that he is jointly concerned with others as a stockholder, the allegation of ownership is material, and unless the bill is amended no decree can be entered against defendant.

3. An objection to a plea that it is defective in not responding to all the allegations of a bill is not sustainable, for a plea may be either to the whole bill, or to a part only.

[In equity. Bill by Gabriel H. Beard against Robert B. Bowler for discovery, an account of profits, and an injunction, for the alleged infringement of a patent. Heard on demurrer to the plea. Demurrer overruled.]

George M. Lee, for plaintiff.

King & Thompson, for defendant.

LEAVITT, District Judge. The question before the court arises on a demurrer to the defendant's plea in bar to the plaintiff's bill in equity. The bill alleges that the plaintiff is the owner of the exclusive right to an improved claw-bar for drawing spikes from the rails of a railroad, and other like purposes, by a patent issued in June, 1861, and that the defendant has infringed the patent by its use on the Kentucky Central Railroad. The bill prays for a discovery, an account of profits, and an injunction restraining the defendant from the further use of said improved claw-bar. The bill avers that the defendant is the owner of said railroad, and as such is, at the time of filing the bill, in the unlawful use of said improvement. The defendant pleads in bar, that since January 1, 1861, the Kentucky Central Railroad has been owned by a joint stock company, the stock of which is divided into shares, held by individual shareholders, and that said company is under the control and management of five directors, of whom the plea admits the defendant is one. The grounds of the demurrer to the plea are in substance: 1. That there is no denial of the defendant's sole ownership of the road prior to January 1, 1861. 2. That the defendant, on his admission that he is a shareholder in the joint stock company, is liable individually to respond to the plaintiff for the alleged infringement.

Upon a familiar principle of pleading, the demurrer to the plea presents the question of the sufficiency of the bill, as well as of the plea itself. Is the bill sustainable on the facts as admitted by the pleadings? If this question is answered in the negative, it is clear that the demurrer to the plea must be overruled.

Without adverting to all the points brought to the notice of the court, there is one consideration that is decisive as to the bill as framed. The bill, as before noticed, avers that the defendant "owns and is the proprietor of the Central Kentucky Railroad, and as such proprietor has infringed the plaintiff's patent." The plea explicitly denies the averment of ownership, asserting that the road, since January 1, 1861, has been held and owned by a joint stock company. But the plea does not directly respond to the allegation of an infringement between June 12, 1861—the date of the patent—and the formation of the joint stock company. The demurrer to the plea admits all the facts set forth in it. And one of these facts is, that the defendant was not, at the filing of the bill, and has not been since January 1, 1861, the proprietor of the road. It is clear, therefore, that the plaintiff can have no claim against the defendant individually, for any infringement of the plaintiff's patent occurring after the joint stock company was formed. This proposition needs no argument or authorities to support it. It results, therefore, that the defendant is sued in a wrong capacity, namely, as the sole owner of the road, whereas he is jointly concerned with others, as a stockholder. No principle in equity practice is more indisputably settled, than that a plaintiff can obtain a decree only on the case made in the bill. The allegata and the probata must correspond. The allegation, therefore, of the defendant's ownership of the road, is material and must be sustained. It is explicitly averred that the defendant, at the time the bill was filed, was the sole owner. As before stated, on the pleadings this allegation is in direct contradiction of the fact. And it follows that unless the bill is amended to meet the fact, no decree can be entered against the defendant.

The objection that the plea is defective, in not responding to all the allegations of the bill, is not sustainable. Judge Story says (Eq. Pl. 537, 538:) "A plea may be bad in part and not in the whole;" and it "may be either to the whole bill, or to a part only." But "if the plea is to the whole bill, but does not extend to or cover the whole of the bill, it is bad." But if there is any doubt as to the sufficiency of the plea in the particular rererred to, the court, if requested, will grant leave to the defendant to amend his plea to meet all the allegations of the bill.

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

BEARD, (JOHNSON v.) See Case No. 7,371.

BEARD, (McCOMB v.) See Case No. 8,706.

Case No. 1,181.

BEARD et al. v. ROWAN.

[1 McLean, 135.] [1]

Circuit Court, D. Kentucky. Nov. Term, 1831.[2]

ALIENS—CAPACITY TO HOLD AND TRANSMIT LAND—RETROSPECTIVE LEGISLATION—POWER OF STATE—EXECUTORY DEVISE—POWER OF EXECUTOR—LAND HELD IN TRUST.

1. An executor in a will has no power to convey lands. The lands had been devised to executors in trust.

2. An executory devise good, and takes effect on the happening of the contingency.

3. A state has power to give a capacity to aliens to hold lands within it.

4. An act which declares an alien, "which shall have resided in the state two years," shall be capable of holding and transmitting lands, the same as a citizen, applies as well to future as to past residence.

[See note at end of case.]

[At law. Writ of right by Henry Beard, William A. Beard, Lewis Hawkins, and Mary, his wife, demandants, against John Rowan, tenant, for 100 acres of land. Tried by jury. Verdict for the tenant.

[The case was afterwards taken to the supreme court, on writ of error, by the demandants, and the judgment of this court was affirmed. Beard v. Rowan, 9 Pet. (34 U. S.) 301.]

Mr. Pirtle, for plaintiffs.

Mr. Harden, for defendant.

OPINION OF THE COURT. The plaintiffs have brought a writ of right for one hundred acres of land, near to or adjoining the city of Louisville. The defendant in his plea sets up a claim to ninety-five acres of the premises, and disclaims as to the residue. And he puts himself on the assize and prays recognition to be made as to the better right. The parties both claim under the will of John Campbell. The demandants claim under a deed from Taylor, the surviving executor of John Campbell, dated the 21st of April, 1826. The tenant claims under a devise in the will of John Campbell.

The following facts are agreed to by the parties. 1. That John Campbell was born in the kingdom of Ireland; that he came to the United States of America prior to the Revolutionary War; that he continued to reside in the said United States, from the time of his migration thereto, until he departed this life, in October, 1799, in Fayette county, in the state of Kentucky, where he then resided; that the 25th July, 1786, he made and duly published his last will and testament, of that date, with an endorsement thereon, dated the 5th April, 1791; that said will and endorsement were duly proved and recorded the 13th January, 1800, in the county court of Fayette county; and that the said John Campbell was seised in fee simple at the time of his death of the premises in controversy, and that he was never married.

2. That Robert Campbell was born in the kingdom of Ireland; that he migrated to the United States of America before the Revolutionary War; that he continued to reside therein until his death, in August, 1805, near Louisville, Kentucky; that he had resided in Kentucky many years before his death; that he died intestate, was never married, and was a brother of the whole blood of John Campbell.

3. That Allen Campbell was born in the kingdom of Ireland, and was about twenty-five or six years of age when he died; that he migrated to the United States in 1796, and resided in the city of Philadelphia until he came to the state of Kentucky, in December, 1799; that he resided in Kentucky from that time until the 16th September, 1804, when he died, never having been married. He was a half brother on the father's side to John and Robert Campbell and Sarah Beard.

4. That the said Sarah Beard was born in the kingdom of Ireland, and migrated to Kentucky in 1800, where she resided until her decease, in October, 1806; that she was a sister of the whole blood to John and Robert Campbell, and sister of the half blood to Allen Campbell on the side of the father; that she was a widow when she came to Kentucky, and so continued until her death; that at her death she had three surviving children, to wit, William Beard, Joseph Beard, and Elizabeth McGowan, all of whom were born in Ireland; that William Beard came to the United States in 1790, was never naturalized, and died in 1813; that he was married, and had two children, issue of said marriage, at the death of the said John Campbell, to wit, Nancy C. Beard and Sarah Beard, who were his only children at that time; that the said Nancy C. Beard intermarried with Robert Byewaters, and is still living; and Sarah Beard intermarried with Hankerson Byewaters, and is still living; that the mother of the said Nancy and Sarah departed this life, and the said William Beard married a second time, and had the following issue of said marriage, William A. Beard, Catherine Beard, Mary Beard, John Beard, Charles Beard, and Joseph Beard, all of whom were born since the death of the said John Campbell; that the said Catherine Beard has intermarried with, and is now the wife of Henry H. Shepard; that the said Mary Beard has intermarried with, and is now the wife of Lewis Hawkins; that the said Charles Beard died in March, 1831, an infant, and without a child; that the said John, Charles, and Joseph Beard were born since the death of the said Sarah Beard; that the said Joseph Beard and Elizabeth McGowan,

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

[2] [Affirmed in 9 Pet. (34 U. S.) 301.]

children of the said Sarah Beard, came with her to Kentucky, and are still living; that the following are the children of the said last named Joseph Beard, to wit, Henry Beard, Ann Daley, wife of Lawrence Daley, Isabella McLear, wife of Charles McLear, Sarah McLear, wife of Francis McLear, and Joseph Beard, Jun.

5. That the said Campbell, Robert Campbell, Allen Campbell, and Sarah Beard, were the only surviving children of Allen Campbell the elder, who departed this life in Ireland, before the said John Campbell.

6. That Charles Simms and Richard Taylor survived the other trustees and executors of John Campbell; that said Simms departed this life in the District of Columbia about the year 1825 or 6, never having been in the state of Kentucky; that neither of the other trustees, except Taylor and Sullivan, were ever in the state of Kentucky after the decease of the said John Campbell; that said Taylor resided therein at the death of John Campbell, and so continued until his death in 1828; and that said Taylor alone qualified as executor of the said John Campbell in Kentucky.

7. That the said defendants were possessed of the premises in contest in this action at the time of the service of the process, and were in possession in April, 1826, and prior to that time.

The will of John Campbell contains the following devise—

"I do further direct that after the decease of my said father, all the profits of my lands within five miles of the mouth of Bear Grass, shall be annually paid to the guardian of my said half brother, Allen Campbell, during his minority, to be applied to his education and maintenance, if so much be required therefor; if not, then the surplus to be laid out on interest by my said trustees, till my said half brother shall arrive at the age of twenty-one years or marry; but upon either of the said contingencies happening, the aforesaid profits shall then and thenceforth be paid to my said half brother for and during the term of ——; and if within that time my said half brother shall become a citizen of the United States, or be otherwise qualified by law to take and hold real estate within the same, I then direct that my said trustees, or the survivors or survivor of them, shall convey to him, my said half brother Allen Campbell, his heirs or assigns, in fee simple, all the lands herein before described in this devise; but if my said half brother shall not within the time aforesaid become a citizen as aforesaid, I then direct that my said trustees or the survivors or survivor of them shall sell and dispose of the aforesaid lands hereby directed to be conveyed to him on two years' credit, with interest from the date, to be paid annually, and the money and interest arising from such sale to be transmitted to my said half brother, to whom I give and bequeath the same."

"It is my further will and devise that, in case my said half brother shall die before the expiration of the aforesaid term of five years, after his arrival at the age of twenty-one years, the land intended by the next preceding clause to be devised to him, shall be sold by said trustees on two years' credit, and the money arising from such sale, when received, shall be transmitted to the guardians of the children which my said half brother may leave, to be by the said guardians lent out on interest, and equal division shall be made thereof amongst them; but should my said half brother become a citizen of the United States of America, or be otherwise qualified to hold real estate within the same before his death, it is then my will and devise that he shall have the sole and absolute disposal of all the estate hereinbefore devised and bequeathed to him notwithstanding he may not have obtained deeds therefor, from my said trustees."

"It is my further will and devise that in case my said half brother shall die before he shall become qualified to hold real estate as aforesaid, and without child or children, my said trustees shall make sale of the lands hereby directed to be conveyed to him, as is before directed, on two years' credit, and that the money arising by sale be appropriated to the use of my said sister, Sarah Beard, and all the children which she hath," &c.

The demandants to sustain their right exhibited in evidence a deed executed the 21st April, 1826, by Richard Taylor, as executor of John Campbell, to Joseph Beard, Elizabeth McGowan, and the heirs of William Beard. This deed after reciting the devise to Allen Campbell with the conditions as above stated, declares, that "whereas the said Allen Campbell died in 1804 without having disposed of certain parts of said real estate, by which it again reverted to the estate of said Campbell, and became subject to the devises in his will, or so much thereof as was undisposed of by said Campbell during his life time." A deed was also given in evidence by the demandants from Joseph Beard to Henry Beard, Lawrence Daley and others, conveying all his interest in the estate of John Campbell, deceased.

On the part of the tenant a deed was given in evidence from Sarah Beard, sister of John Campbell the testator, to Fortunatus Cosby, dated 7th July, 1806, and other mesne conveyances, the last of which was from William Lytle to the tenant, dated the 17th February, 1822. In 1800 Allen Campbell was put into possession of the whole landed estate devised to him in the will, by the executor Richard Taylor, as the owner thereof in fee. He occupied the same as his own, selling a part of the land, until his decease. On the death of Allen Campbell the estate undisposed of by him, was claimed by his half brother and sister, Robert Campbell and Sarah Beard, and on the death of Robert Campbell, Sarah Beard claimed as heir to the whole estate. Being thus seised of the estate

she conveyed the land in controversy with other tracts to Cosby in 1806, as above stated.

The counsel for the demandants contends that under the will the fee of the land was vested in Richard Taylor as trustee, and continued so vested until the conveyance was made by him to Beard and others, by the deed in evidence. That Allen Campbell could not take the fee in the land except by conveyance from the trustee. In answer to this it may be said, that Richard Taylor though named in the codicil to the will as one of the executors, is no where named as one of the trustees. These are James Milligan, Charles Simms, William Elliot, and Philip Ross, who are also named as executors. Now as an executor, Taylor had no power to convey the estate, as the fee was not vested in him. This defect of power in the executor is fatal to the plaintiffs' right, as their claim is founded on the deed of Taylor. But another view of the case is equally fatal to their right. It is clear from the will that Allen Campbell took the estate in fee simple, if by the laws of the state he was capable of holding real estate. That this was the intention of the testator, is as clearly expressed, as that Allen Campbell was, in any form, his devisee. And the testator used great caution in the will to secure the land devised to Allen Campbell, or its proceeds. And the great question in the case is, and on the decision of which, a very large amount of property in the city of Louisville, or adjoining to it, is understood to depend, whether Allen Campbell could take the land devised by the will, he never having been naturalized. Being an alien, it is not pretended that he was capable of holding and transmitting real estate, in Kentucky, unless he comes within the provisions of the statute of the 18th December, 1800. This statute provides, that "whereas, by the laws now in force in this commonwealth, aliens cannot hold lands therein; and whereas, it is considered the true interest of this state, that such prohibition be done away. Be it therefore enacted, &c. that any alien, other than alien enemies, who shall have actually resided within this commonwealth two years, shall, during the continuance of his residence herein, after the said period, be enabled to hold, receive, and pass any right, title, or interest, to any lands or other estate known within the commonwealth, in the same manner, and under the same regulations, as the citizens of this state may lawfully do."

Allen Campbell came to Kentucky in December, 1799, and continued to reside in the state, until his decease in September, 1804. Does this residence bring him within the provisions of the act? It is contended that it does not, as by the act a residence of two years, prior to its passage, is indispensable to claim a right under it; and the residence of Campbell did not exceed a year. The words of the act are "Be it enacted, &c. that any alien, &c. who shall have actually resided within this commonwealth two years," &c. Now, do these words refer as well to the future, as the past? We think they do. The act was designed to remove the prohibition from aliens, so as to enable them to hold and transmit lands within the state, while residing therein, the same as citizens. This being the policy of the state, as declared in the preamble, no reason is perceived why it should not operate in time to come, as well as in past time. Indeed, such is the inference to be drawn from the policy of the law, and a fair construction of its language will give this effect to it. "Shall have resided," embraces the future, unless there are words connected with these which show a different application of them was designed. We are clearly of opinion that the law gives the right to aliens, on two years' residence subsequent to the law, as well as prior to it, and that Allen Campbell under this law, after two years' residence in Kentucky, had the same capacity, though an alien, to receive and transmit the land devised to him, as a citizen.

An executory devise is good, to take effect in future, without any particular estate to support it. This was good, therefore, as an executory devise, and the title vested under the will so soon as the devisee, by the statute became capable of taking the estate. Or if the title vested in the trustees named in the will, it is equally clear, that it became divested on the happening of the above contingency. Allen Campbell, before his decease, became vested with the land in dispute, in fee simple, and on his decease, it descended to his heirs at law. The right, then, of the demandants fails on both grounds. First, the deed of the executor is inoperative and void; he not having authority to make it. And secondly, Allen Campbell took the land as devisee in the will, and on his decease it descended to his heirs at law. And the court so instructed the jury, the facts being admitted on the record. The jury on this instruction found "that the tenant has more right to hold the tenement as he now holds it, in the written count mentioned, than the demandants to have it as they now demand it."

Exceptions were taken to the charge of the court, and the cause was removed to the supreme court, by writ of error, where the judgment of the circuit court was affirmed. [Beard v. Rowan,] 9 Pet. [34 U. S.] 301.

[NOTE. In delivering the opinion of the supreme court, Mr. Justice Thompson said: "The preamble in the act may be resorted to, to aid in the construction of the enacting clause, when any ambiguity exists. That preamble evidently shows that the intention of the legislature was to make a general provision for removing the disability of aliens to hold real estate, and this, founded upon state policy, is doubtless for the purpose of encouraging the settlement of the country; and this object would be in a great measure defeated by restricting the act to aliens who shall have resided two years in the state before the passing of the act. The

condition upon which aliens are placed on the same footing with citizens with respect to the right of holding and disposing of land is a two years' residence within the state; and the full effect and benefit of the act, and the clear intention of the legislature, require a construction which gives to it a prospective, as well as retrospective, application: and, under this construction, Allen Campbell became qualified to take and hold the title to the land in question, and pass the same, in the same manner as if he had been a citizen of the state. No constitutional objection can be made to this act. It does not profess to naturalize aliens. It is not necessary that they should be made citizens in order to hold and pass real estate, and the condition upon which this may be done is a matter resting entirely with the state legislature. We are, accordingly, unanimously of opinion that the judgment of the circuit court is correct, and it is accordingly affirmed." Beard v. Rowan, 9 Pet. (34 U. S.) 301.]

Case No. 1,182.

BEARD v. TALBOT.

[Brunner, Col. Cas. 201;[1] Cooke, 142.]

Circuit Court, D. Tennessee. 1812.

EVIDENCE—HEARSAY ADMISSIBLE TO PROVE BOUNDARIES.

Hearsay evidence is admissible for the purpose of proving boundaries, ancient land marks, pedigree, and prescription.

In the course of the trial of this cause it became necessary for the defendant to show where Julias Sanders and others crossed Elk river in 1781, it being the place of beginning called for both in the entry and grant of the defendant. The defendant introduced a witness, Joseph Greer, to prove what Alexander Greer told him had been said by Julias Sanders upon that subject. Both Sanders and Alexander Greer were dead. It also appeared that, at the time the statement was made by Sanders to Alexander Greer, another person was present, to wit, a man by the name of Waldin. It did not appear that Waldin was dead, or that the defendant could not get his testimony.

Haywood & Whiteside, for plaintiff.
Hayes & Cooke, for defendant.

BY THE COURT. It was determined in the case of Athol v. Ashburnham that, for the purpose of proving a pedigree, a witness might detail what another had told him he heard a third person say on the subject, both these persons being dead. Bull. N. P. 295. If that determination be law, and the court have no reason to doubt it, the evidence now offered is admissible. We admit that every remove which is made from Julias Sanders renders the testimony weaker, but it is still competent. The object is to prove where Sanders crossed Elk river. No doubt exists but that this may be done from evidence of what persons now dead have been heard to say. The same rule applies to all cases of pedigree, prescription, or ancient land marks. If Alexander Greer were living and present it would be competent for him to prove what Sanders had said; and he being dead, Joseph Greer may be permitted to prove what Alexander told him had been said by Sanders. It is equally competent, though weaker, testimony. The reason why, in cases of pedigree, prescription, and ancient boundary, the party may prove what persons, then dead, have been heard to say when living, is, that in such cases the party claiming the benefit of the evidence shall not be deprived of it by the death of the witness if he can in anywise show what knowledge the witness had on the subject. What he has been heard to say is pretty strong evidence of what he knew. But it has been objected that the defendant ought to produce Waldin, as he is now living. Perhaps Waldin's statement would be more satisfactory, but that does not render the evidence offered inadmissible. It might be contended, with the same propriety, that evidence direct of what Sanders has said would not be admissible testimony, because other persons were along with him when he crossed Elk river, who are now living, and capable of being produced. Let the witness be examined.

NOTE, [from original report.] Ancient boundaries may be proved by reputation, and hearsay evidence is admissible for that purpose. See Lamar v. Minter, 13 Ala. 39; Riley v. Griffin, 16 Ga. 149; McCloud v. Mynatt, 2 Cold. 165; citing above case.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

BEARD, (UNITED STATES v.) See Case No. 14,551.

Case No. 1,183.

In re BEARDSLEY.

[1 N. B. R. 304, (Quarto, 52;) 1 Am. Law T. Rep. Bankr. 46.][1]

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

BANKRUPTCY—DISCHARGE—OPPOSITION — SPECIFICATIONS.

[1. Upon an opposition by creditors to the discharge of a bankrupt, specifications, as grounds thereof, that the debtor falsely set forth in his petition and schedules that he had no property, and that he has concealed his property with intent to defraud his creditors, are too vague and general to be triable, where they do not specify what other property he had and what property he concealed.]

[2. Such specifications are open to an additional objection where they do not state, as required by section 29 of the bankruptcy act of 1867, (14 Stat. 531,) that the omissions of property from the schedules were willful, fraudulent, or negligent.]

[In bankruptcy. Application by Alfred Beardsley for a discharge in bankruptcy, which was opposed by his creditor. Reference to the register to take testimony as to the ground of opposition specified.]

[1] [1 Am. Law T. Rep. Bankr. 46, contains only a partial report.]

BLATCHFORD, District Judge. The first, second, fourth, sixth, and seventh specifications filed as grounds of opposition to the discharge of the bankrupt, in this case, are altogether too vague and general to be triable. The first is, that the bankrupt has falsely set forth in his petition and schedules that he had no property. It ought to specify what property he had. The second is, that he had property rights and choses in action at the time of filing his petition. It should specify the property. The fourth is, that he has concealed and covered up his property, for the purpose of defrauding his creditors existing at the time of filing his petition. Unless it means all his property, it should specify what property: and if it means all his property, the time, place, manner, and circumstances of the concealing and covering up should be specified. The sixth is, that he has not set forth all his property in the schedules filed with his petition, and that the schedules are false in that particular, and that he had divers kinds of personal property, besides that at the place named in the third and fifth specifications. This is too general. It should specify what the omitted property was. The seventh is, that he has omitted to set forth all the debts owing by him in the schedules filed with his petition. It should specify the debts omitted. The first, second, sixth, and seventh are all of them open to the further objection, that they do not allege that the omissions referred to in them were wilful, fraudulent, or negligent. This is necessary under section 29 of the act. The eighth is, that the bankrupt omitted to set forth a debt owing by him to Hervey G. Law, of about $2,000, resting in account, and which was not outlawed. This specification is bad, for the reason that it does not aver that the omission was wilful, fraudulent, or negligent.

The third is, that "said Beardsley had an interest in the property in, and the business conducted at, the saloon at 36 Liberty street, city of New York, at the time of making and filing said petition, of the value of $3,000, and the said business was and is carried on for his sole benefit. The fifth is, that "the business at said saloon is pretended to be conducted in the name of one Pope, but really for the benefit of said Beardsley, with intent to defraud said creditors," that is, creditors existing at the time of filing his petition. Although the third, standing by itself, might be open to the objection that it does not aver any wilful, fraudulent, or negligent omission by the bankrupt, in respect to the property referred to, yet I think the third and fifth, taken in connection with each other and with the petition and schedules, present triable matters. The third must be read in connection with the fifth, and the omissions and acts referred to in them must be regarded as being averred to have been made and done with intent to defraud creditors existing at the time of filing the petition, and therefore fraudulently, within the provisions of section 29.

A reference is ordered to Register Allen, the register who has had charge of the case, in case either party desires to take any testimony in addition to what has already been taken, to take such testimony in respect solely to the matters set forth in the third and fifth specifications, and report it to the court. On the coming in of his report, the case can be brought on for hearing before the court.

[NOTE. Subsequently the discharge was granted. See Case No. 1,184.]

Case No. 1,184.

In re BEARDSLEY.

[1 N. B. R. 457. (Quarto, 121;) 1 Am. Law T. Rep. Bankr. 94.]

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

BANKRUPTCY—ASSETS—INTEREST IN PROFITS—DISCHARGE.

[1. The owner of a saloon entered into an arrangement with one B., by which the latter was to conduct the business in his own name, and receive one-half of the net profits as his compensation therefor. *Held*, that B.'s interest in the business was not property that he was bound to set out in his inventory as a bankrupt.]

[2. Before B. became a bankrupt, one of the purchase-money notes given by the owner for the saloon was, by his direction, paid out of the proceeds of the business. *Held* that, in order to claim an indebtedness on this account to B., who denied that any such indebtedness existed, the burden is on his creditors to show that the note was paid out of net profits in which B. had an interest.]

[3. Even if the note was paid out of net profits, and B.'s share thereby reduced, this would not give him any interest in the property itself with which the business was carried on.]

[In bankruptcy. On application of Alfred Beardsley for a discharge in bankruptcy, which is opposed by a creditor. Reference was made to the register to take testimony as to the ground of opposition specified. See Case No. 1,183. Opposition overruled, and discharge granted.]

Edward James, for bankrupt.
S. F. Higgins, for creditor.

BLATCHFORD, District Judge. The petitioner set forth in his petition that he had no assets or property. His discharge is opposed by a creditor, who has filed eight specifications of the grounds of his opposition. Six of these have been heretofore held by this court not to be in proper form to be triable. The third and fifth alone are in issue. The third is that "said Beardsley had an interest in the property in, and the business conducted at the saloon at Liberty street, city of New York, at the time of making and filing said petition, of the value of three thousand dollars, and the said business was and is carried on for his sole benefit." The fifth is, that "the business at said saloon is pretended to be conducted in the

name of one Pope, but really for the benefit of said Beardsley, with intent to defraud said creditors." These specifications are quite loosely drawn, but taken together and in connection with the allegation in the petition that the bankrupt has no assets, they may be regarded as averring that the bankrupt has concealed his interest in the property at the saloon, with a view to defraud his creditors, and has been guilty of fraud in not delivering such property to his assignee, it having belonged to him at the time he presented his petition and inventory. The evidence, however, falls entirely short of showing that the bankrupt had any interest in the property at the saloon, either the furniture or the lease of the premises. On the contrary the proof is satisfactory, that the lease and the furniture were bought from one Taylor by Pope on his own account and as his own property exclusively, under an arrangement whereby the bankrupt was to take charge of the business of the establishment and give it the use of his name, taking one half of the net profits as his compensation. This arrangement was made early in March, 1867. Pope paid $3,000 for the lease and furniture, giving $2,000 in cash and his three notes amounting to $1,000 in the aggregate. The notes were of two, four, and six months. Their several amounts are not stated, but it is assumed that each was for $333.33. The name of the bankrupt was used over the saloon. The petition was filed June 12, 1867. Only one of these notes fell due before the petition was filed. That note and the two notes which fell due after the petition was filed, were paid out of the receipts of the saloon by the direction of Pope. It is claimed by the creditor that the payment, out of such receipts, of the note which fell due before the petition was filed, had the effect, inasmuch as the one half of the money (it being assumed that such money was net profits of the establishment) belonged to the bankrupt, to constitute the bankrupt, to the extent of the one half of the amount of such note, an owner in the property of the saloon. But this is not so. If the $333.33 used to pay the note was net profits of the business, and if the one half of it, that is, $166.66, belonged to the bankrupt, and was thus used to discharge a debt of Pope's with the knowledge and consent of Pope, the effect of the transaction would merely be to make Pope debtor to the bankrupt for the amount. It would not give to the bankrupt any ownership in the property for the purchase of which the note was given.

The allegation that the bankrupt had an interest in the business carried on at the saloon is true, although it is not true that it was carried on for his sole benefit. But that interest was not property which he was bound to set forth in his inventory, unless it had resulted at the time in money or something tangible which he then possessed. The right to his share of the net profits was not property, any more than the right of a clerk who has a stated salary, to continue to receive such salary, is property, which he is bound to set forth in his inventory as a bankrupt. As to the allegation that the business at the saloon was pretended to be conducted in the name of Pope, but really for the benefit of the bankrupt with intent to defraud his creditors, the business seems to have been conducted, so far as the public could see, in the name of the bankrupt, his name being over the saloon. This would have led rather to the belief by the public and the creditors of the bankrupt, that the property at the saloon belonged to the bankrupt, when in fact it did not; and there was nothing in it calculated to defraud or showing any intent to defraud his creditors.

This disposes of the specifications. I have assumed that the note referred to was paid out of the net profits of the business. Unless it was, then no part of the property of the bankrupt went towards paying it, and Pope did not become thereby a debtor to the bankrupt, so as to be his debtor at the time the petition was filed, and make it incumbent on the bankrupt to set out such debt due from Pope as an asset in his inventory. But the only evidence is that the note was paid out of the receipts of the saloon. The creditor does not show that it was paid out of the net profits. It does not appear what was the state of the accounts between the bankrupt and Pope when the petition was filed. It is incumbent on the creditor to show that such debt from Pope existed as an asset. The bankrupt swears that he had no claims due him, that he knows of, at the time when he filed his petition. It is for the creditor to show that he had. These remarks are made as if there was an allegation in the specifications that the bankrupt had wilfully sworn falsely in the oath to his inventory, in omitting his debt from Pope. But there is no such allegation. The case is not a proper one for withholding a discharge, and one will be granted whenever the register shall certify that the bankrupt has in all things conformed to his duty under the act, and has conformed to all the requirements of the act, except as in the particulars embraced in such specifications.

BEARDSLEY, (GODFREY v.) See Case No. 5,497.

BEARDSLEY, (GRANNIS v.) See Case No. 5,688.

BEARDSLEY, (KIRBY v.) See Case No. 7,837.

Case No. 1,185.

BEARDSLEY v. LITTELL et al.

[14 Blatchf. 102;[1] 2 Ban. & A. 501; 23 Int. Rev. Rec. 226; 4 Cent. Law J. 270.]

Circuit Court, S. D. New York. Jan. 25, 1877.

WITNESS—ORAL EXAMINATION OUT OF COURT—FEDERAL PRACTICE.

1. In an action at law in a federal court in New York, a defendant cannot, before the trial, be examined as a witness for the plaintiff out of court, although such examination is provided for by the statute of New York, in suits in the courts of New York.

2. The whole subject of oral testimony in actions at common law in the courts of the United States is regulated by the statutes of the United States. Under the provisions of those statutes, the examination of an adverse party, as a witness, before trial, in a common law suit, cannot be had; and there is nothing in section 914 of the Revised Statutes of the United States, which provides for the conformity of the practice of the federal courts, in common law suits, to that of the state courts, that supersedes those provisions.

[Cited in Re Hawkins, 147 U. S. 486, 13 Sup. Ct. 516. See, also, Easton v. Hodges, Case No. 4,258.]

[At law. Action by James H. Beardsley against John M. Littell and Russell W. Chace for damages for infringement of letters patent. Plaintiff applies for an order for defendant Littell to be examined as a witness before trial. Denied.]

Walter S. Logan, for application.

BLATCHFORD, District Judge. This is an action at law to recover damages for the infringement of letters patent. It is at issue and ready for trial. The plaintiff now presents to the court his affidavit, setting forth that the testimony of the defendant Littell is material and necessary for the plaintiff upon the questions of the kind and description of the machine used by the defendants, and claimed to be an infringement of the plaintiff's patent, "the amount which he has used the same," and the profits resulting from such use; that these matters are peculiarly with the knowledge of said defendant, and cannot well be proved except by his testimony; and that it is necessary to take his examination before the trial, in order that the plaintiff may properly prepare for the trial. On this affidavit an application is made for an order that the defendant appear for examination as a witness before the trial.

Section 389 of chapter 6 of the Code of Procedure of the state of New York, provides as follows: "No action to obtain discovery under oath, in aid of the prosecution or defence of another action, shall be allowed, nor shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed by this chapter." Section 390 provides as follows: "A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner, and subject to the same rules of examination, as any other witness, to testify, either at the trial, or conditionally, or upon commission." Section 391 provides as follows: "The examination, instead of being had at the trial, as provided in the last section, may be had at any time before the trial, at the option of the party claiming it, before a judge of the court, or a county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise. But the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance." It is provided by section 914 of the Revised Statutes of the United States, that "the practice, pleadings and forms and modes of proceeding in civil actions, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

The application now made is founded on the view that the practice of examining an adverse party before the trial, as a witness, in a suit at law, has become the practice of this court by virtue of the above section 914. This is not a correct view. Section 861 of the Revised Statutes provides that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided." There is nothing in the constitution or statutes of the United States which sanctions any other mode of trial, in a common law action, than a trial by a jury, in the presence of the court, unless such a trial is waived. Therefore, when the statute speaks of the examination of witnesses in open court, in the trial of an action at common law, it means the examination of witnesses in the presence of the court and the jury, at the trial, and not before the trial. But, as some witnesses might be out of the jurisdiction of the court, or would probably be absent from such jurisdiction at the time of trial, provision was to be made for such cases. Hence the words, in section 861, "except as hereinafter provided." In pursuance of this view, section 863 makes provision for taking by deposition, de bene esse, before trial, by certain specified officers, out of court, the testimony of witnesses who, though within the United States, are beyond the reach of a subpoena, or who are bound on a voyage to sea, or who are about to go, before the trial, out of the

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 2 Ban. & A. 501; and here republished by permission.]

United States, or who are about to go, before the trial, to some place within the United States which is beyond the reach of a subpoena, or who are ancient and infirm. Section 866 makes provision for taking depositions under a dedimus potestatem, "according to common usage," that is, by commission, and for taking depositions in perpetuam rei memoriam. Sections 882 and following sections provide for documentary evidence. These are all the statutory provisions enacted by the United States on the subject; and it is quite clear that they cover the whole subject of oral testimony, in actions at common law, in the courts of the United States. There is nothing in section 914 which supersedes them; and, under them, the examination of an adverse party as a witness, before trial, in a common law suit, cannot be had. It may well be doubted whether there is anything in section 914 which applies to the subject of the evidence of witnesses, either as to its character or competency, or the mode of taking it. The expression "practice, pleadings, and forms and modes of proceeding," is well satisfied without including in it the subject of evidence. At all events, it cannot be regarded as covering matters connected with the subject of the evidence of witnesses, which are regulated by specific provisions of law found in the same title of the same statute.

In the case of Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, the supreme court of the United States, in commenting on section 914, say that the language of that section, that the conformity mentioned in it is to be "as near as may be," means, "not as near as may be possible, or as near as may be practicable;" that the indefiniteness of the expression devolves upon the federal court the duty of construing and applying the provision in each case, and gives to the court the power to reject any subordinate provision in a state statute, which, in its judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in the federal court; and that, while section 914 is, to a large extent, mandatory, it is also, to some extent, only directory and advisory. In the spirit of that language, it may be observed, that section 389 of the Code of Procedure of New York abolishes an action to obtain discovery under oath, in aid of the prosecution or defence of another action, and then section 391 allows an examination of an adverse party as a witness before trial, evidently as a substitute for a discovery before trial, in an ancillary action. But, a suit in equity, to obtain a discovery under oath, in aid of the prosecution or defence of a suit at law, is not abolished in the courts of the United States. The distinction between suits in equity and actions at common law exists in the courts of the United States. Such distinction is recognized by the constitution, and cannot be abolished by congress. It is also recognized in section 914. Therefore, one of the reasons for the practice, in the courts of the state of New York, of examining an adverse party as a witness before trial, in a suit at law, does not exist in respect to the federal courts.

It is also worthy of consideration, that section 391 of the Code of Procedure of New York provides that the party to be examined shall be examined before a judge of the court or a county judge, and shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance. The examination, if allowed in the federal court, must take place before a judge of the court. There is no alternative officer, to take the place of the county judge. If the party cannot be compelled to go out of the county where he resides, the benefit of the provision would practically be confined to suits pending in the counties where the federal judges should happen to reside or to be present, unless the party to be examined could incidentally be found in such county. There would be no uniformity in such a provision, and such a practice could hardly be said, as a general practice, to conform "as near as may be" to the state practice.

Moreover, in view of the limited judicial force in the courts of this district in comparison with the amount of the business pending in those courts, and of the fact that the examination, if had, must take place before a judge of the court, it is quite clear that an allowance of the practice would "unwisely encumber the administration of the law," especially in view of the fact that a party may, at the trial, be called as a witness by the adverse party, in a suit at law, and may, if a case exists under section 863, be examined as a witness, before trial, on behalf of the adverse party, by deposition de bene esse. The application is refused; and I am authorized to say that the circuit judge concurs in the foregoing views.

Case No. 1,186.

BEARDSLEY et al. v. The METAMORA.

[N. Y. Times, April 16, 1864.]

District Court, S. D. New York. 1864.

COLLISION—STEAM AND SAIL—BURDEN OF PROOF.

[1. Where a steamer collides with a sailboat, and injures her, and, on libel for damages, fails to show that the sailboat was in fault, the steamer is liable, especially where there is no evidence that the steamer had a lookout forward.]

[2. It is immaterial that the steamer reversed her engines, or even that she had a backward motion, before the collision took place, where she wrongfully came so near the sailboat that the latter must inevitably have come against her by the current, suction, or other force beyond her control.]

In admiralty.

Mr. Frisbie and Mr. Donohue, for libelants.
Mr. Haskett, for claimant.

Before BETTS, District Judge.

This was a libel filed by [Charles G. Beardsley et al.] the owners of the sloop Catlin to recover the damages occasioned to her by a collision with the steamboat in the harbor of New York. The collision happened in full daylight. The sloop was going on a southwesterly course across the East river from South ferry toward Bedloes' island, the wind being light from the southwest by west. The steamboat was coming out of the North river into the East river, thus crossing the general line of direction which the sloop was pursuing. There was the usual conflict of testimony as to the circumstances of the collision.

Held BY THE COURT: That as there was nothing in the way to prevent either from seeing the other, it is a legal presumption that they, in the exercise of their nautical obligations, had knowledge of the facts respecting their relative positions, which were necessary to the fulfillment of their several duties.

That the sloop was the privileged vessel under such circumstances, and the responsibility was cast upon the steamer to be so guided herself as that no injury should be inflicted by her on the sloop which was not caused essentially by culpable acts of omission or commission on the part of the latter.

That the sloop had little, if any, more than drifting way on her, and there is nothing in the evidence favoring the notion that she was placed before the wind in a way to intercept or embarrass the steamer in her true direction up the East river. It was accordingly at the peril of the steamer to avoid her.

That it is neither averred in the answer nor proved that the steamboat had any lookout stationed forward.

That the question is of minor importance whether the headway of the steamer had been completely checked by the reversal of her engine, or even whether she had received a backward motion before the actual collision took place. The result was injurious to the sloop, and the consequences are as chargeable to the steamer, if derived from her wrongful act in being placed so near the sloop as that the latter must inevitably come against her by force of the tide, or current, or suction, or other propelling forces out of her control, as if the injuries came from the direct and aggressive act and movement of the steamer.

That in cases of collision between vessels meeting each other, the one under canvas and the other under steam, the prima facie obligation lies with the steamer to prove that the fault of the collision is attributable to the sailing vessel, if she would free herself from liability.

That there is nothing in the proofs relieving the steamer from this well-established and most serviceable doctrine of the law, and that she fails to prove that the fault was attributable to the sloop.

Decree for libelants, with a reference to compute their damages.

Case No. 1,187.

BEARDSLEY v. SWANN.

[4 McLean, 333.] [1]

Circuit Court, D. Ohio. Nov. Term, 1847.

NEGLIGENCE—DANGEROUS PREMISES—EXCAVATION IN SIDEWALK—DAMAGES.

1. In the use of his own property, a man must be careful not to injure his neighbor.

2. An excavation of the sidewalk, opposite his own house, for a vault, being authorized, provided he kept it covered, but being left uncovered, the plaintiff at night fell into it, and was injured—*held*, that the defendant was responsible.

3. To sustain the action, the plaintiff must show that he used ordinary caution, and that the defendant was negligent.

4. In estimating the damages, the jury will consider the injury done, the pain endured, the time lost, and the expense incurred.

At law.

Ewing & Stanbery, for plaintiff.
Swayne & Andrews, for defendant.

OPINION OF THE COURT. This action was brought to recover damages from the defendant, for an injury suffered by the plaintiff, in falling into the defendant's cellar, which had been opened on a part of the sidewalk, and left carelessly, etc. It seems that A. Westwater, in April last, lived in Columbus, and about a quarter before nine o'clock in the evening, was walking along the street, and found the plaintiff down in the vault, which extended into the street from the defendant's house the width of the sidewalk. The depth was six or eight feet. Witness and another person helped him out. He complained that one of his arms was injured. There were no guards constructed around the excavation. A boy fell into it the evening after the plaintiff fell in. It was a moonlight night, but any person walking on the sidewalk was liable to fall into the vault. It had not remained open long. There was timber on the street, from three to five feet from the curb stone. The vault extended to the curb stone. The plaintiff wore glasses, his sight being somewhat impaired by age. There was no danger of falling into the vault in the day time. Mr. Sparrow, a witness, says there was no protection to the side of the vault. Witness fell into it the evening before the plaintiff's accident. The plaintiff's left arm was injured; six months afterward it was deformed, and he could use it but little. An objection was made to any evidence

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

as to the suffering of the plaintiff from the injury. That it should be confined to time lost, expense incurred, and permanent disability. But the court overruled the objection, and said, that the bodily suffering was a part of the injury received, and should be considered by the jury in making up their verdict. The Doctors Thompson attended the plaintiff as his physicians more than a month. The radius, or large bone, of the plaintiff's left arm was fractured, and the smaller bone dislocated. Several of the witnesses stated that the arm of the plaintiff is somewhat deformed, and that his wrist is enlarged and remains stiff.

By an ordinance of the city, dated July 25th, 1839, it is provided that one-third of the street may be occupied with building materials, provided, that the gutter and one-half of the pavement or side walk, be left free and clear of all incumbrance. And by an ordinance of the 30th of June, 1834, it is declared that vaults may be dug under the side walk, but they must be covered.

This action, gentlemen, is founded upon the principle that no one shall use his own property in such a way as to injure his neighbor. The owner of a carriage must so drive it as not to come in contact with his neighbor's carriage or person. And there must be negligence on the part of the person of whom damages are claimed, and the plaintiff must not himself be in fault. If he contributed to the accident, from which the injury resulted, the law will give him no compensation. For where two individuals are equally in fault, or even where the defendant may be more in fault than the plaintiff, yet if the acts of the plaintiff influenced the injury, there can be no recovery. It seems that in the present case, the defendant had a right to extend his vault to the curb stone as he did, but he does not appear to have regarded that part of the ordinance which required him to keep it covered. And if, from this negligence, any one was injured, who used ordinary care in walking on the side walk or street, the defendant is responsible. The vault, it seems, was in no way protected, and that passers by in the night, were liable to fall into it. Several, it appears from the evidence, actually fell into the vault, but it is not known that any were injured except the plaintiff. The counsel in the defense charge carelessness on the plaintiff, and say, had he used the ordinary caution of persons walking at night, he could not have fallen into the vault. There is no particular evidence showing the carelessness of the plaintiff, unless it be inferable, from the fact that he did fall into it. And this inference, it would seem, from the evidence, can not be drawn in the present case. Other persons had the same misfortune to fall into the vault. And the witnesses say, that any one passing on the sidewalk at all, would be liable to the accident. The inquiry is not whether the plaintiff, by the use of extreme caution, might not have avoided the vault. Who could presume that he threw himself into it, in order to sue the defendant and recover damages? This would be so strange a course of action, as not to be a matter of presumption, unless the evidence prove facts which render it probable. The amount of damages must depend upon the exercise of your judgments, on the facts. Neither this nor any other case of contract or of tort, is a matter for the exercise of the mere discretion of the jury. The amount of the injury received, the pain endured, the expense incurred, and the negligence of the defendant, are matters for your deliberation and decision. And every one of the items named will increase or reduce the damages, as you may believe to be just and proper under the circumstances.

The jury found for the plaintiff —— damages. Judgment.

Case No. 1,188.

BEARDSLEY et al. v. TAPPAN.

[1 Blatchf. 588.][1]

Circuit Court, S. D. New York. Oct. Term, 1850.

MERCANTILE AGENCIES—SLANDER—INUENDO.

1. The office of the inuendo in a declaration for slander is to explain the words spoken and annex to them their proper meaning. It cannot extend their sense beyond their usual and natural import, unless something is put upon the record by way of introductory matter, with which they can be connected; then, words which are equivocal or ambiguous, or fall short, in their natural sense, of importing any libellous charge, may have fixed to them a meaning certain and defamatory, extending beyond their ordinary import.

[Cited in Pollard v. Lyon, 91 U. S. 233. See, also, Trussell v. Scarlett, 18 Fed. 214.]

2. Words spoken of a party, which do not necessarily import any thing injurious, may, when taken in connection with other charges made against the party at the same time, and if the whole be published of and concerning the party as a merchant, and with intent to affect his credit and standing as such, have a very different meaning attached to them; and a jury may so find, if they believe the words to have been spoken with such intent.

[See Trussell v. Scarlett, 18 Fed. 214.]

[At law. Suit for libel by Horace Beardsley and John Beardsley against Lewis Tappan, proprietor of a mercantile agency. Heard on demurrer to the declaration. Demurrer overruled, with leave to the defendant to amend.

[Subsequently, the case was tried by a jury. The charge was delivered by Betts, District Judge, (Case No. 1,188a,) and verdict given for plaintiffs for $10,000 damages. A new trial was refused,—Id. 1,189,—and defendant, by writ of error, took the case to the supreme court, where the final judgment was reversed, and a new trial awarded,—Tappan v. Beardsley, 10 Wall. (77 U. S.) 427.]

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

The first count recited, that the plaintiffs, before the committing of the grievances complained of, were engaged in business as traders and merchants, under the firm of H. Beardsley & Co., at Norwalk, Huron Co., Ohio, and had occasion to visit the city of New-York, for the purpose of purchasing and obtaining goods in the way of their trade and business, and had acquired the good opinion of the persons with whom their house was in the habit of dealing, &c., but that the defendant, contriving and maliciously intending to injure the good name, credit and mercantile standing of the plaintiffs and of the said firm in their trade and business as such merchants, &c., did publish of and concerning the said firm, and of and concerning them in their said trade and business, and as such merchants, the following false, scandalous and defamatory words, that is to say: "H. Beardsley & Co., Norwalk, Huron Co., Ohio," (meaning the said firm,) "July, 1848, have been sued; report says, J. Beardsley's wife," (meaning thereby the wife of the plaintiff John Beardsley,) "is about to apply for divorce and alimony; has put his property out of his hands; if so, their store will be closed soon;" (meaning thereby that the store of the said firm would be closed soon, and meaning and intending to have it suspected and believed, that the plaintiffs and the said firm were no longer worthy of credit, and that one of the partners of the said firm had put his property beyond the reach of the creditors of said firm, and that said firm would soon close their business, and not pay their debts.)

The second count, after referring to the prefatory matter in the first count, alleged a republication of the slander set forth in that count, and that, in addition thereto and together therewith, the defendant published of and concerning the said firm, and of and concerning them in their said trade and business, the following words: "August, 1848, confirms prior report to July," (meaning thereby that the words above set forth respecting the firm were confirmed,) "and say in addition, two more suits in court of common pleas, besides those commenced by Judge Baker," (meaning that two more suits had been commenced against the firm;) "Mrs. Beardsley's petition for divorce will soon be filed;" (meaning thereby the petition of the wife of John Beardsley, one of the plaintiffs, and a member of the firm;) "J. Beardsley," (meaning thereby the said John Beardsley,) "is putting his real estate out of his hands; I," (meaning thereby the defendant,) "do not doubt the firm," (meaning the firm of H. Beardsley & Co.,) "have the ability to do a prosperous business, so long as they are honest, which will be as long as suits their interest;" (meaning and intending to have it suspected and believed, that the plaintiffs and the said firm of H. Beardsley & Co. were no longer worthy of credit, and that the plaintiff John Beardsley, one of the members of the firm, had refused to pay his debts, and had put his property beyond the reach of his creditors, and that, although the members of the firm were able to pay their debts, they were dishonest, and would not do so, unless they deemed it suited their interest.)

The defendant demurred to both the counts, alleging that the inuendo subjoined in the first count to the words: "has put his property out of his hands; if so, their store will be closed soon;" and the inuendo subjoined in the second count to the words: "I do not doubt the firm have the ability to do a prosperous business, so long as they are honest, which will be as long as suits their interest;" materially varied, changed, enlarged and extended the sense of the words, and were not warranted by them or by anything before averred in the counts.

Ogden Hoffman, for plaintiffs.
William Allen Butler, for defendant.

NELSON, Circuit Justice. It is objected that the inuendo subjoined to the words in the first count: "has put his property out of his hands; if so, their store will be closed soon;" enlarges and extends the said words, and contains matters or charges not warranted by them, or by any of the words embraced in the count.

The office of the inuendo is to explain the words contained in the libel, and annex to them their proper meaning. It cannot enlarge or extend the sense of the expressions beyond their usual and natural import, unless something is put upon the record by way of introductory matter, with which they can be connected. Then, words which are equivocal or ambiguous, or fall short in their natural sense of importing any libellous charge, may have fixed to them a meaning certain and defamatory, extending beyond their ordinary import. Rex v. Horne, Cowp. 682; Hall v. Blandy, 1 Younge & J. 480; Van Vechten v. Hopkins, 5 Johns. 211; Miller v. Maxwell, 16 Wend. 9.

In this case, the only introductory matter set out, besides the usual recitals in an action of slander, is, that the plaintiffs are merchants, engaged in trade and business under the firm of H. Beardsley & Co., with the usual colloquium; and the inuendo, in giving explanation and meaning to the words, connects them with the business character and relations of the plaintiffs.

We must, therefore, take the words set forth in the first count in the declaration as published of and concerning the plaintiffs in their character as merchants, and enquire whether, in that connection and under the circumstances stated, the inuendo has carried the meaning imputed beyond that warranted by the libellous charge. And, in doing so, we must look to the whole and every part of the libel, in order to ascertain the full extent of the injurious imputations, and to see how they would naturally be understood by the neighbors and acquaintances of the plaintiffs,

and especially by those with whom they were connected in business transactions. Looking at the libel, and the several injurious charges therein contained, with these considerations in view, we cannot say, as matter of law, that the words do not convey or could not have been intended to convey to those in whose presence they were published the meaning imputed to them. On the contrary, they may have been published under circumstances and in a way that would naturally convey to the hearer that meaning, especially if published with an intent to affect the credit of the plaintiffs as merchants, as charged in the declaration.

The counsel for the defendant selects a part of the words of the libel, and insists that they do not convey the meaning imputed. This might be admitted, and still the demurrer not be well taken. When the words are taken detached from the context, their meaning may be different from what it is when they are taken in connection with the text and the subject matter. The charge "has put his property out of his hands," and nothing else, might be very innocent; and the words "if so, their store will be closed soon" might not necessarily import anything wrong or injurious. But, when those words are taken in connection with the charge that the plaintiffs had been sued, and that the wife of one of them was proceeding against him for a divorce and alimony, and the whole is published of and concerning them as merchants, and with the intent to affect their credit and standing in the community, a very different meaning attaches; and, for aught that we can see, to the full extent charged. That is, the jury may so find, if they believe the publication to have been made with a view to affect injuriously the credit and standing of the plaintiffs as traders and merchants. The same view, we think, applies to the second count, which need not be more particularly referred to.

There must be judgment for the plaintiffs, with leave to the defendant to amend.

Case No. 1,188a.

BEARDSLEY et al. v. TAPPAN.

[Betts. Scr. Bk. 247.]

Circuit Court, S. D. New York. Dec. 17, 1851.

LIBEL — MERCANTILE AGENCIES — PUBLICATION — PRIVILEGE — MALICE — EVIDENCE — DAMAGES.

[1. In an action at law for libel, while plaintiff is not required to prove the exact words used in the alleged slander, he must show them in substance and effect, and whether he has done so is a question for the jury.]

[2. Although words injurious to a man in his trade are slanderous and actionable per se, the plaintiff must prove the special damages claimed.]

[3. In an action against the manager of a mercantile agency for libel in making a false report of plaintiff's business standing, publication of the libel is sufficiently shown by proof that the books in which it is contained were not in defendant's exclusive possession, but that others in his office had access thereto, and that they and a merchant in the city heard or read the alleged slander.]

[See Trussell v. Scarlett, 18 Fed. 214; Cossette v. Dun, 18 Can. Sup. Ct. 222.]

[4. Where plaintiffs in such case sue as a partnership, for injuries to their business, no damages can be allowed for individual slander, unless the jury find that injury to individual character affected the business of the firm.]

[5. Even if defendant, as manager of the agency, can claim a privilege as to the matter complained of, when communicated by himself to persons in good faith seeking information as to plaintiffs' business standing, the privilege fails to shield him when the alleged slanderous matter was placed upon his books, and within reach of the clerks employed by him in the general conduct of his business.]

[Contra, see Trussell v. Scarlett, 18 Fed. 214.]

[6. Furthermore, if the matter were privileged, but defendant was guilty of malice in connection with it, plaintiffs would be entitled to damages for any special injury suffered; and malice may be inferred from the fact that, after plaintiffs complained of the falsity of the matter, defendant persisted in keeping it on his books, on the strength of a confirmation by the same authority upon which it was originally entered, and, when notified that he would be sued for libel, transferred his business, including these books, to other persons.]

[See Trussell v. Scarlett, 18 Fed. 214; Cossette v. Dun, 18 Can. Sup. Ct. 222.]

[7. Where defendant, in taking depositions in support of his plea of justification, has asked questions tending to show whether or not the matter was true, and at the trial refuses to read the answers, this suppression will warrant the jury in inferring that the answers were to his prejudice.]

[8. Though defendant fails to show that the alleged slander was true, the fact that reports to the same effect were generally current in plaintiffs' place of residence before defendant published them may, under the laws of New York, be considered in mitigation of damages.]

[At law. Suit for libel by Horace Beardsley and John Beardsley against Lewis Tappan, proprietor of a mercantile agency. A demurrer to the declaration was overruled, (Case No. 1,188,) and the case tried by jury. Verdict for plaintiffs.

[Subsequently, a motion for a new trial was refused,—Case No. 1,189,—and defendant, by writ of error, took the case to the supreme court, where the final judgment was reversed, and a new trial awarded,—Tappan v. Beardsley, 10 Wall. (77 U. S.) 427.]

A number of witnesses were examined in open court, and the written testimony of more than sixty witnesses, residents of the same town with the plaintiffs, was offered in evidence; upon the admission of which evidence, a number of questions of law were argued by the counsel. The defence urged that the plaintiffs had failed to prove malice; that Mr. Tappan had received the alleged scandalous matter in good faith, and given it to subscribers of his agency applying for it, in confidence; that it was given in a lawful manner for lawful purposes; and that the defendant stood in a very different manner from one who would voluntarily pro-

claim it in a thoroughfare. They urged that a portion of the libel referring to J. Beardsley should have no weight, as the action was brought by H. Beardsley & Co., as a firm; that all they stated about the firm as fact was true, and the inferences drawn in the libel were the natural inferences from those facts; that Mr. Tappan had never seen the plaintiffs at the time of the libel, and could not have been actuated by malice. The defendant further urged that the plaintiffs had no claim for damages, because their credit at home was proved not to have been impaired by the libel, and in New York they were only refused a small amount of goods; that the report of suits being instituted against the firm was true, from the plaintiffs' own testimony, and that it was also true that Mrs. Beardsley was about to file a bill for divorce. It was also true that Mr. Beardsley had thought of putting his property out of his hands. The defendant urged that there was no publication, as only the clerks and subscribers to the agency had use of the alleged libel. On the other hand, the plaintiffs asked the jury to consider what inferences they could have drawn had they read the report in the books of Mr. Tappan; that it all tended to injure the firm; that, after stating a slander against Mr. Beardsley, they affirmed that their store would soon close. The attack was against them in their business capacity. The natural inference was that the house was embarrassed, which was entirely false. That Mr. Tappan persisted in keeping it on the books, after he was apprised of its falsity, and reiterated the libel by a subsequent slander. The publication was perfect, because, not only Mr. Tappan and his clerks read it, but all the subscribers and their clerks could have it. He received pay for this information, and he ought to be held responsible when it is slanderous. The plaintiffs said that it was most probable that $5,000 would not reimburse them before all the expenses of the suit were paid, and the jury ought to add enough to hold Mr. Tappan as an example to the community, as well as remunerate the plaintiffs for loss of business and injury to their feelings.

Ogden Hoffman and F. B. Cutting, for plaintiffs.

Mr. O'Connor and B. F. Butler, for defendant.

BETTS, District Judge, (charging jury.) The time occupied by this trial may seem disproportionate to the question in discussion. An apology can be found in the nature of the controversy. It is a question of importance to the commercial community, and new questions of law were to be decided. The care bestowed by eminent counsel shows their estimation of its importance. The whole case must be decided upon principles of law well established, and facts not novel in their nature. The action is for libel, for written slanderous words. Some time in July, 1848, the plaintiffs, represented by one of the partners, came to New York; there was an agency kept by defendant; that agency kept books, on which were entered these remarks:—"July 1848—Has been sued. Report says that J. Beardsley's wife has filed a bill of divorce, &c., &c." These plaintiffs were residents of Norwalk, Huron county, Ohio. On arriving here John Beardsley tried to discover whence these reports arose, and traced them to the books of Tappan. Suffice it to say, that an action for libel was instituted in this court. It gave the names, position of plaintiffs, and then the slander. The reading of the declaration as to the slander, and the report in books are not the same. The question arose from this—whether declaration was sufficient. The declaration was gathered from oral sources, and was sufficiently stated to be a foundation of a suit. Whether it was reported in substance and effect is for you to decide. In law, the plaintiff is not required to prove the identical words used by defendant in the slander. After alleging composition and publication, plaintiff sets his damages for the injury,—not only injured in law, but in special damages; that there were persons who refused to trust them. In words actionable of themselves, if plaintiff claim special damages, it is necessary to set forth how he has received injury. Those damages are in no way marked or defined. He must set forth the damages in declaration, and the averment must be followed by proof. The shape of the declaration is good, and entitles the party to answer. The plea was "Not guilty." In law a slander is a wrong. and the plea must be "Not guilty." If he shows that the words are used in such a way as justify him in the use, he may say, "Not guilty," or, if he shows that they are truth, he must so state specifically. The defendant pleads "General issue." He attaches to that a notice that the reports were circulated at Norwalk, and that they were true. Then he attaches another, that they were reports that he had received in good faith, and was privileged to give them to the community. Plaintiffs have shown, after proving the words were prima facie actionable, that they were published. It does not signify that they were in general circulation; but in law they are published if intentionally passed from the composer to any other person not entitled to them. The plaintiffs must show publication. One of the witnesses took it down verbatim, as it was read to him. They show that this writing was not in possession exclusively of the defendant; that it was not copied by him; that there were others in the office who had access to the book; that these either saw the report or heard it read. This is sufficient publication in law. If Mr. Douglas alone saw it, there is publication. Defendant is bound to lay anything before you to qualify this fact. Suppose this a naked slander,

without justification; then, was it published? It need not be published by the defendant himself; if it was published by a person under him, it is enough; or, if he sanctioned the promulgation after it is done, it is enough. Here, then, is no fair question of doubt. The words are slanderous themselves—as the law says, "Words injurious to a man in his trade are slanderous, and actionable." The law protects the pursuits of men against imputation or statements injurious to those pursuits. It has been contended that if defendant prove there were reports circulated in their place of residence, it is a good defence; but the law requires more. A person who repeats these slanders must prove their truth. Upon principle it is not permitted to a man to be the medium of a slander. If he takes upon himself to repeat it, he must also take the responsibility. The fact that this report was in Norwalk is no defence; but can he give it to you in mitigation of damages is the only question?

The character of plaintiffs. They sue as a co-partnership, and for injuries to their business, and not injuries to them individually; and you cannot give damages for individual slander, unless you find that the injuries to the individual character affected the interests of the firm. If you find the charge against any one of them injured the credit of the business of the firm, then you must give damages for that. Is the defendant clothed with a privilege, and does that privilege embrace this particular act? This agency was established since twelve years ago. It is possible that this agency has done good, and has perhaps, so far, been conducted with propriety. The court has already said that it was commendable, and one for which defendant ought to receive a reward for services. The ordinary method in Europe was to obtain information from correspondents, or to send special messengers to the towns of their customers. This agency saves expense, and tends to promote the business of the country. Instead of waiting for a letter to be sent and replied to, this agency is supplied already with the information by correspondents, who keep them posted up with information as to traders. This is one feature of the plan. In the management of it, difficulties will occur like the present; and is the defendant shielded? All persons who subscribe to the agency can obtain information in respect to their customers. It is said that defendant cannot be protected, because he receives compensation. This does not seem a sound and fair view. It would not make a difference if a person was sent specially who received a compensation; nor would it matter if two merchants or more associated, and agreed to send one agent. The protection would be the same in both cases. So far as the plan of business is concerned, it matters not whether there was one, fifty or a hundred. The question is not, however, as to the plan, but as to whether this particular transaction is protected.

It is said that defendant stands as the agent selected by the merchant, who had been sent to Norwalk, and found these reports rife there,, and therefore he is privileged. The court must administer the law as it exists. The general agency may be as a particular agent in the application. One may make inquiries himself, or by his agent; and while the agent is executing that mission, he is protected, because the communication is confidential; and because, when the occasion is proper, it is given in such a way that no one is harmed by it. It is not published, although it may be in writing. The agencies must prove fully that they have not communicated the information to any other than those to be benefited by it. They have no right to give it to others. It seems to the court that the agency comes within general principles, and that the head stands as a special agent; but do the necessities of the business require that the principal and subagents should be protected? If the business itself, or its consequences tend to unlawful results, which the principal is not empowered to inflict, it ought not to be maintained. If it is necessary that the head must employ a number of clerks to carry on the business, it is no argument if it tramples on the law. The same ingenuity that invented the system may devise means to carry it on within the law; if not, it cannot be carried on without legislation. It has not been shown that it cannot be carried on without infringing a law. The principal, on receiving information, can decide, after deliberation, whether it will hurt any individual, and whether he will give it out. He might, on the receipt, send back for further information as to facts; if it is confirmed, he might fortify himself by statements of others. He could send to supervisors of the town, or men of standing. Ought he not to take pains to inquire? He might do more; the merchant is waiting for information, he may give it to him from his desk, as to be between them alone; but the law will not extend this privilege, and allow him to give it to others. When he handles dangerous material, he must see that it does not explode so as to injure any one. There is no case which tends in the slightest degree to extend the privilege. If one inquires of another the standing of a person, the other may answer with protection; but, if, answering by letter, he knows the letter will be opened by a clerk of the principal, it is a slander. The confidential clerk is entirely out of the range of protection. Has defendant limited himself to communicating this report to the merchant alone? Not at all. It was put on the book. Mr. Douglas saw it, and one clerk is proved to have commenced reading it. The law does not protect Mr. Douglas. It is a proved fact that this report was made known to

one or more, if not all the clerks of the office, by the consent of defendant. If man and wife converse together, and speak slanderously of another, in presence of a third person, or where it is probable there is a third person, they are liable to an action. The legislature now protects the physician in some cases. Previously he was liable. The priest and laymen receive no greater privilege. All these secret establishments are invidious in their nature. These agencies are increasing. They may soon be conducted by men of no responsibility, and unable to respond to damages. The feature of secrecy must be so guarded as not to infringe on the rights of others.

In this discussion, has not the convenience of the principal been consulted, without sufficient regard to the rights of others? Are not the latter protected by the law as well as the former? My purpose is to lay before you the principles of law, and not discuss the evidence. The evidence is placed before you in an embarrassing manner, being for the most part in depositions taken under commissions. When thus taken, the party is privileged to use his legal rights, in withholding what he deems illegal or irrelevant. It ought not, therefore, to prejudice him generally. If he put questions, however, calculated to prove the truth, and then refuses to read the answer, it is a strong point against him. When he had got the proof in his hand, and refused to read it, it is a proper inference to submit to the jury as being against him. In this view only the suppression of evidence is against a party. If you find the defendant has communicated this information to the clerk,—that he honestly believed the report was true, and not for malicious motives,—there would seem no essential question but that of damages. Still, you have a right, and ought, to pass upon the first question.

The main question is one of damages. If this employment is not privileged, the plaintiffs are entitled to damages. Did the publication prevent their obtaining credit with the same facility as before? Did it effect any serious injury? If the publication can be regarded as a privileged one, but is false, they are entitled to the special damages. You must see that they are fully made good what they lose. Has this statement been reiterated by him after having been apprised of its untruth? Did he put himself on the inquiry or not? or did he persist in not giving redress? If he did, it is evidence of malice. If plaintiff gave defendant notice of the wrong, and he became thoroughly apprised of the want of truth, it is strong evidence of malice, and the jury are bound to take notice of it. The defendant put in his defence and notice of truth of the libel before this action was brought. We find that defendant was informed of the want of truth of the report of 7th July, and promised to write and ascertain more particularly. 'Afterwards, on 7th August, we find the report confirmed, and, in addition, states other reports. Was the defendant justified to rely on the authority of the author of the first reports, as to their truth, and then enter another statement confirming the first? This is an aggravation of the offence. When he takes this written communication, and makes it known, he becomes the author of it, although he does not exonerate the author. The defendant had notice that, if he persisted in keeping the matter on the books, he would be prosecuted. It is proved that he transferred his concern and all the evidence in the books to Mr. Douglas and another Mr. Tappan. This is re-publication to them and their clerks; the same as if he had written it all out again. It is evidence of unwillingness to do right towards the plaintiff, and is considered in law as proof of malice,—of doing what in law is inflicting injury to plaintiffs. You must find such a verdict for plaintiffs, with damages, as become upright men, not swayed by passion; nor allowing any man to deal with the character of others, and publish slander against them, unless they are prepare to prove the truth.

Assuming the defendant had proved these reports were in circulation throughout Norwalk, in respect of one or both of plaintiffs, can this be considered in mitigation of damages? The court has said this fact does not exculpate defendant; but does it affect the damages? There is some difficulty in this respect. When a party puts in his pleadings that the reports are true, but does not so prove it, can he put things tending to prove the truth, but not proving the truth, in mitigation of damages? In courts of this state the defendant has no such right. This, I apprehend, is a distinct rule of law. It first came up in a case of Cowen; it was afterwards confirmed in a case in Wendell.[1] According to the Code in an action of libel, the the defendant may allege the truth; and whether he proves the truth or not, he may give in evidence those circumstances which tend to prove the truth, to mitigate the damages. If he cannot prove the fact to be true, he may now prove facts which gave him ground to suppose the reports to be true. If he can show that there was reasonable ground for him to suspect that the plaintiffs were not in good standing, the jury must consider those grounds.

This publication was made early in July. A witness saw it on the 15th July. The defendant could have shown when he received it if he had chosen; he did not, and you have a right to infer it was seen before the 15th July. It should be evident to you that these reports were in circulation before they were concocted or sent from Norwalk, and not after they were returned from here. If they rely on those rumors as mitigation, they ought to satisfy you that they were really

[1] [See Cooper v. Barber, 24 Wend. 105; Follett v. Jewitt, 11 N. Y. Leg. Obs. 193.]

in circulation before they were known here. If they were in circulation, they must be more than merely whispered about or hinted at. To be rumors and reports, they must have reached the whole community,—they must be the neighborhood talk. For defendant to avail himself of this rumor, it must be a matter of public notoriety; then it will be no justification, but only go to mitigate damages.

The defendant excepted to several points in this charge. Sealed verdict. $10,000.

Case No. 1,189.

BEARDSLEY et al. v. TAPPAN.

[5 Blatchf. 497.] [1]

Circuit Court, S. D. New York. Oct. 10, 1867.[2]

MERCANTILE AGENCIES — LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — EMPLOYES OF PRINCIPALS.

1. The defendant conducted a mercantile agency in the city of New York, the object of which was to procure information of the pecuniary ability and standing of merchants in the country for merchants in the city, to be communicated to the latter in a confidential manner. He had some twenty clerks to whom the information obtained, and which was recorded in a book, was communicated, and who participated in communicating it to the customers of the agency or to their clerks. The defendant communicated, through his clerks, to several customers and to their clerks, facts seriously affecting the credit of the plaintiff, as a merchant: *Held*, that the communication was not of a privileged character.

[Questioned in Erber v. Dun, 12 Fed. 535; Trussell v. Scarlett, 18 Fed. 216.]

2. The principle upon which privileged communications rest, which, of themselves, would otherwise be libellous, imports confidence and secrecy between individuals, and is inconsistent with the idea of a communication made by a society or congregation of persons, or by a private company or a corporate body.

[Contra, see Trussell v. Scarlett, 18 Fed. 214; Cossette v. Dun, 18 Can. Sup. Ct. 222; Locke v. Bradstreet, 22 Fed. 771.]

At law. This was a suit [by Horace Beardsley and John Beardsley against Lewis Tappan, proprietor of a mercantile agency] to recover damages from the defendant for having libelled and slandered the plaintiffs in respect of their credit as a mercantile firm, carrying on business at Norwalk, Ohio. [Demurrer to the declaration was overruled, —Case No. 1,188,—and the case was tried by jury,—Id. 1,188a.] The jury found a verdict for the plaintiffs for $10,000, and the plaintiffs now moved for a new trial. [Refused.]

[Subsequently the defendant took the case to the supreme court by writ of error, where the final judgment was reversed and a new trial awarded. Tappan v. Beardsley, 10 Wall. (77 U. S.) 427.]

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

[2] [Reversed in 10 Wall. (77 U. S.) 427.]

Daniel D. Lord, for plaintiffs.
Charles O'Conor, for defendant.

NELSON, Circuit Justice. The defendant resided in New York, and had established in that city a mercantile agency, the object of which was to procure information of the pecuniary ability and standing of merchants in the country for merchants in the city, to be communicated to the latter in a confidential manner. The defendant had some twenty clerks who participated in the business of the establishment, and were, of course, privy to the information obtained, whether favorable or unfavorable to the character and credit of the country merchant, and who participated in the communication of the information to their customers or customers' clerks. The defendant communicated, through his clerks, to several customers and to their clerks facts seriously affecting the credit of the plaintiffs' house; and the main question in the case, on the merits, is, whether or not he is exempt from the consequences of the publication, on the ground of its privileged character. The court charged the jury, that, if the defendant himself had communicated the information to a person applying to him for the purpose, in good faith, the communication might have been a privileged one; but that the publicity given to it by recording the libellous words in a book, to which others had access, and to whom they were communicated, though standing in the relation of clerks, deprived the communication of its otherwise privileged character. This is no doubt a very important question, and one involving, in its practical operation, whichever way it may be decided, interests of very great magnitude. On the one hand, to legalize these establishments in the manner and to the extent used by the defendant, is placing one portion of the mercantile community under an organized system of espionage and inquisition for the benefit of the other, exposed, from the very nature of the organization, to perversion and abuse; and, on the other, to refuse to legalize them, may be restricting injuriously the right of inquiring into the character and standing of the customer asking for credit in his business transactions. I am strongly inclined to think, that, if the establishments are to be upheld at all, the limitation attached to them by the court below is not unreasonable, to wit, that it must be an individual transaction, and not an establishment conducted by an unlimited number of partners and clerks. The principle upon which privileged communications rest, which, of themselves, would otherwise be libellous, imports confidence and secrecy between individuals, and is inconsistent with the idea of a communication made by a society or congregation of persons, or by a private company or a corporate body.

The other objections in the case are technical in their character, not involving the

merits. I have looked into them, and am of the opinion that they are not available to the defendant. New trial denied.

[NOTE. On writ of error, the supreme court reversed this judgment, and awarded a new trial, upon the ground that the whole record in the divorce proceedings pending between John Beardsley and his wife was improperly introduced in evidence and read to the jury. Mr. Justice Miller, in delivering the opinion of the court, did not touch upon the points considered by the circuit court in the reported opinions. Tappan v. Beardsley, 10 Wall. (77 U. S.) 427.]

Case No. 1,190.

BEARDSLEY v. TORREY.

[4 Wash. C. C. 286.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1822.

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—LANDLORD AND TENANT—EJECTMENT.

1. In an ejectment instituted in a state court of Pennsylvania by A, a citizen of Pennsylvania, against B, also a citizen of that state, tenant in possession, C, a citizen of Maryland, after a judgment by default against B, was upon his petition admitted as defendant in the suit, the petition stating that B was his tenant. The petition of the plaintiff further stated, that the land in dispute was worth more than $500; and it prayed that the cause might be removed into the circuit court, which was granted. This court remanded the cause to the state court, on the ground of want of jurisdiction; C being only a co-defendant with B, who, as well as the plaintiff, is a citizen of Pennsylvania.

2. In Pennsylvania the landlord cannot be permitted to defend alone in ejectment in the room of the tenant, without the consent of the plaintiff.

[Cited in Ex parte Turner, Case No. 14,245; Ex parte Girard, Id. 5,457.]

3. If there be two defendants in the state court, the cause cannot be removed into the circuit court upon the petition of one of the defendants.

[Cited in Smith v. Rines, Case No. 13,100; Ex parte Turner, Id. 14,245; Ex parte Girard, Id. 5,457; Sands v. Smith, Id. 12,305; Florence Sewing-Mach. Co. v. Grover & Baker Sewing-Mach. Co., Id. 4,883; Grover & Baker Sewing-Mach. Co. v. Florence Sewing-Mach. Co., 18 Wall. (85 U. S.) 580; Smith v. McKay, 4 Fed. 354; Fisk v. Henarie, 32 Fed. 422.]

[At law. Ejectment by Beardsley against Seymour Spafford and David Torrey.]

Rule obtained by the plaintiff to show cause why the record in this suit should not be remanded to the state court, from which it was sent to this. This was a writ of ejectment, brought under the act of assembly of this state, passed the 21st of March, 1806, (4 Smith, Laws, 332,) and the supplement thereto, ([13 April, 1807,] Id. 476,) by the plaintiff, against Seymour Spafford, the tenant in possession, for a tract of land in the county of Wayne. David Torrey, styling himself a citizen of Massachusetts, filed a petition in that court, stating that the land in dispute is his property, and that Spafford has no title thereto but as his tenant, and praying to be admitted a defendant in the action. The petitioner further states, that the land exceeds the value of $500, and prays that the cause may be removed for trial into the next circuit court of the United States for this district. The prayers of the petition being granted, Torrey entered into a recognizance to enter in the circuit court of the United States for the district of Pennsylvania copies of the process against him in the above action.

Rawle, for the plaintiff, in support of the rule, contended, that Torrey, having been admitted in the state court as a defendant with Spafford, a citizen of Pennsylvania, this court has not jurisdiction of the cause, the plaintiff being also a citizen of the same state. If it should be contended that, by admitting Torrey as a defendant, this court ought to consider him as the sole defendant, in the room of the tenant in possession, it is answered, that this is not the language of the record, and that the court had no power to order the substitution without the consent of the plaintiff. Emlen v. Hoops, 3 Serg. & R. 130. Another objection is, that the recognizance given by Torrey is only to enter in the circuit court, on the first day of the session, copies of the process, and does not bind him to enter also his appearance, as required by the twelfth section of the judiciary law.

Tilghman and Binney, for the defendant, insisted, that the only question in the cause being the title of the landlord, and Torrey having been admitted a defendant, and not a co-defendant with his tenant, this court ought to consider him as substituted for the tenant, who is in fact only a man of straw, after the landlord is admitted to defend. Runn. Ej. 168, 185. The courts of the United States have even taken jurisdiction in cases between citizens of the same state, where it appeared that the plaintiffs were only nominal parties. Browne v. Strode, 5 Cranch, [9 U. S.] 303. If, in a case like this, the jurisdiction of the courts of the United States is excluded, the privilege of removal provided by the twelfth section of the judiciary law may, and in almost every instance, in Pennsylvania at least, will, be rendered ineffectual in cases of ejectments, as the tenant in possession must necessarily be a citizen of the same state with the plaintiff. As to the other objection, the security for the defendant's appearance in the circuit court is required only in cases where special bail is demandable.

WASHINGTON, Circuit Justice. The principal question which arises in this case is,

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

whether this court has jurisdiction of the cause? And to enable us to decide this point, it is material to inquire who are the parties to the suit? Originally, they were Beardsley plaintiff, and Spafford the tenant in possession, defendant. After a judgment by default against that defendant; Torrey was, upon his petition, admitted a defendant, the judgment by default was set aside, and the suit was ordered to be removed into this court, where it has been docketed as a suit between Beardsley plaintiff, and Torrey defendant. It is contended by the defendant's counsel, that Torrey was the only defendant in the state court at the period of the removal; because, upon a correct construction of the record, he ought to be considered as having been admitted by that court to defend the action in the room of his tenant; and because he is in fact the only real defendant, his title alone constituting the subject of controversy.

The court cannot yield its assent to either of these reasons. Not to the first, because it receives no countenance from the language of the record, which merely states that he was admitted a defendant, and because to have substituted him as the only defendant would have been inconsistent with the laws of this state, and with the decision of the supreme court of the state in the case of Emlen v. Hoops, [supra.] By the act of [March 21] 1772, (1 Smith, Laws, 372,) in cases of ejectments, as then in use, the courts were directed to suffer the landlord to enter himself a defendant, by joining with the tenant in possession in case he should appear; if he did not, whereby judgment was rendered against the casual ejector, execution was to be stayed upon such judgment, and the landlord to be permitted to defend alone. Under the act of 1806, (4 Smith, Laws, 326,) which substitutes the writ of ejectment for the ancient form of proceeding, and the supplement passed in 1807, (4 Smith, Laws, 476,) the landlord is admitted as theretofore to enter himself a defendant. The construction given to these laws by the supreme court of this state, in the case before mentioned is, that the landlord cannot be admitted to defend the suit in the room of the tenant, without the consent of the plaintiff; and this decision I consider as conclusive upon the state courts, and is to be received with the highest respect by this. This then being the law of the state, it forbids the construction put upon this record by the defendant's counsel, the language of which seems to be in strict conformity with the law.

The second reason is equally unfounded, since the tenant in possession has an interest in defending his possession of the subject in controversy, (which in cases of long leases, may frequently be of more value than the interest of the landlord), notwithstanding his defence may rest solely upon the title of the landlord. If then Torrey was merely a co-defendant with Spafford in the state court, it is perfectly clear that this court has not jurisdiction of the cause, and consequently that the record could not legally be removed from the state court to this. It has been decided by the supreme and inferior courts of the United States, and the law is considered to be perfectly settled; that where there are more than one plaintiff or defendant, each of them must be competent to sue or be sued in the court of the United States where the suit is brought. It is equally clear, that if this suit could not have been maintained against Spafford under the eleventh section of the judiciary law, [Act 1789; 1 Stat. 78,] if it had originated in this court; it cannot be removed into this court under the twelfth section, so as to subject that party to the jurisdiction of this court. If this be so, then the cause cannot be removed at all, because it is most obvious that it cannot be severed, and a part only be removed. Not only would such a doctrine be attended with absurdity and inconvenience, but it would be repugnant to the language, and to the clear meaning of the twelfth section; which provides that "where the suit is against a citizen of another state than that in which it is brought, and the matter in dispute exceeds $500, the state court shall proceed no further in the cause, but the same is to be proceeded in in the circuit court, in the same manner as if it had been brought there by original process." There is then an end of the cause in the state court; it being transferred, in the state in which it was there, to another tribunal. Spafford then is either a party defendant in this court, or he is not. If the former, then this court has not jurisdiction of the cause; if the latter, then the cause has not been removed, since the record shows that Spafford was a co-defendant with Torrey, in the state court. There is, indeed, another reason why this court can not take cognizance of this as a removed cause; which is, that Spafford did not join in the petition for the removal, and it is not competent to one defendant to remove the cause without the consent of his co-defendants.

We freely admit that the doctrine which this court finds itself compelled to sanction, may be attended by all the inconveniences pointed out by the defendant's counsel, and that it may be so used, in a great measure, to defeat the provisions of the twelfth section of the judiciary law. But the remedy, if indeed the subject be remediable, must be provided by congress. The judiciary cannot proceed upon grounds of expediency, but must execute the laws as they are found written. It is unnecessary to give any opinion on the other point made by the plaintiff's counsel. The record must be remanded.

BEARDSLEY, (TORREY v.) See Case No. 14,104.

Case No. 1,191.

In re BEARNS.

[18 N. B. R. 500.]

District Court, S. D. New York. Dec. 16, 1878.

SALE—STOPPAGE IN TRANSITU — GOODS IN BOND.

[Imported goods sold "to arrive" were entered at the custom-house in the name of the seller, and were stored in a bonded warehouse selected by the purchaser. He withdrew a portion of them upon an order signed by the seller, under the treasury regulation which requires such an order where goods in bond are drawn by any person other than the one in whose name they are entered; and he afterwards became bankrupt. *Held* that, as to the rest of the goods, the right of stoppage in transitu existed in favor of the seller; and his seizure of them would not affect his right to prove his debt on account of the purchase money of those withdrawn.]

[In the matter of the bankruptcy of William F. Bearns.]

A. J. Perry, for assignee.

H. Q. Wing, for creditor.

CHOATE, District Judge. This is a motion to expunge the proof of debt made by the firm of G. Lamothe & Co. for nine hundred cases of wine sold and delivered to the bankrupt. Lamothe & Co. contracted to sell to the bankrupt one thousand five hundred cases of wine, "to arrive," at a fixed price per case, less duties, and upon a credit of sixty days, for which the bankrupt was to give his promissory note. On the 2d of July, 1870, the ship having arrived, the wine was entered at the custom-house by Lamothe & Co. for warehouse. The bonded warehouse in which it was stored was selected by the bankrupt, but it was stored in the name of Lamothe & Co. The duties were liquidated at one thousand four hundred and thirty-three dollars and eighty-five cents, and the bankrupt gave his note for the amount of the purchase, and thereafter and before the failure of the bankrupt nine hundred cases were withdrawn from warehouse by the bankrupt in several parcels, Lamothe & Co. signing on the withdrawal entry an authorization to the bankrupt to withdraw the goods described in such withdrawal entry. This authorization is required by the regulations of the treasury department before any person except the party entering the goods can withdraw them. Afterwards the bankrupt filed his voluntary petition, and an assignee was appointed. In December, 1870, Lamothe & Co. withdrew the six hundred cases still remaining in warehouse, paying the warehouse charges on the whole one thousand five hundred cases, which remained till then unpaid. The note fell due after the failure of the bankrupt, and was not paid. It is still in the hands of Lamothe & Co. Lamothe & Co. have proved their claim for the nine hundred cases which were received by the bankrupt. This motion to expunge is made on the ground that they had no right to take the remaining six hundred cases from the warehouse; that the title and constructive possession had become vested in the bankrupt; and that the assignee can set off the value of the six hundred cases tortiously taken by Lamothe & Co.

The question is, whether, as to the six hundred cases, the right of stoppage in transitu still existed; and I am of opinion that it did. The goods never came into the actual possession of the bankrupt. His selection of the warehouse in which they were stored did not alter the facts that they were stored in the name of the consignee, Lamothe & Co., and that the only way in which the bankrupt could obtain actual possession was by means of an order signed by Lamothe & Co., upon making a withdrawal entry and paying the duties. It is true that, if insolvency had not intervened, Lamothe & Co. would have been bound to give this authority, and that nothing else remained to be done between buyer and seller with reference to the goods, and that the buyer had fully complied with his contract of purchase. It is insisted that this impediment to the complete control and possession of the buyer being imposed or reserved, not by the seller for his own security and benefit, but by the regulations of the secretary of the treasury, which are subject to alteration or repeal by him at any moment, and waived, dispensed with, or insisted upon by him or by congress, the vendor cannot take advantage of it to take back the goods. But the authorities do not sustain this claim.

The right of stoppage in transitu depends upon the fact that the goods have not come to the actual or constructive possession of the vendee, and it is not necessary that the obstacle which has prevented this, should be one that was purposely interposed by the vendor for this purpose, nor that it was one created by him directly or indirectly. If the existing regulation of the treasury department has prevented that possession being consummated, the nature of that regulation is of no more consequence on this question than the nature of any other fact or accident that may have led to the same result. It cannot be said that the goods were constructively in the possession of the buyer, when stored under a warehouse contract with the seller and in his name and under regulations having the force of law, which made it impossible for the buyer to get them without the written consent of the seller. Even where the seller has ceased to have any control of the goods, and they are in the custody of the government, awaiting the payment of duties, the right of stoppage in transitu remains. Northey v. Field, 2 Esp. 613; Burnham v. Winsor, [Case No. 2,180;] Mottram v. Heyer, 5 Denio, 629. In the case last cited, Chancellor Walworth indeed says that he thought that, if the goods had been placed in the public store under the revenue warehousing system, the right of the vendor would be gone. But in that case the goods

were consigned to the vendee, and the case supposed by the learned judge is that of their being warehoused by the vendee, not, as in this case, by the vendor.

It is clear also that the giving of the authorization by the vendor to withdraw a part of the goods was such a separation by the consent of the parties of that part from the rest that the delivery of that part is not to be considered as a constructive delivery of the whole, or as affecting the right of stoppage in transitu as to the part remaining in warehouse. Tanner v. Scovell, 14 Mees. & W. 28. In fact, this right of stoppage in transitu is based on an equitable principle, and is highly favored; and the present case is clearly one where the right could be properly exercised. Motion to expunge denied.

Case No. 1,192.

BEARSE v. ROPES et al.

[1 Spr. 331;[1] 19 Law Rep. 548.]

District Court, D. Massachusetts. Nov. Term, 1856.

SHIPPING—CARRIAGE OF GOODS—DANGERS OF THE SEAS — LIABILITY FOR DAMAGE — BURDEN OF PROOF—RECOUPMENT FROM FREIGHT MONEY.

1. Under the common bill of lading, the carrier is not necessarily exonerated from liability for damage, although he take the usual care and precautions, and convey the goods in the usual manner.

2. Where goods shipped under such bill of lading, are damaged on the voyage, and the carrier claims to be exonerated, on the ground that the damage was caused by the danger of the seas, the burden of proof is upon him.

[Cited in The Wilhelmina, Case No. 17,658; Richards v. Hansen, 1 Fed. 61. See, also, Hunt v. The Cleveland, Case No. 6,885; Turner v. The Black Warrior, Id. 14,253; The Zone, Id. 18,220.]

3. Where damage to hemp was occasioned by oil, which had escaped from casks in the hold, and the escaping of the oil was not caused by the danger of the seas: *Held*, that the carrier was liable for such damage to the hemp. Semble.—Where hemp is damaged by water's "blowing" in the hold, the weather being good during the voyage, and there being no extraordinary occurrence, and no unusual quantity or motion of water in the hold, the carrier is liable.

[Cited in The Wilhelmina, Case No. 17,658; Richards v. Hansen, 1 Fed. 61. See, also, The Sabioncello, Case No. 12,198; The Sloga, Id. 12,955; Crosby v. Grinnell, Id. 3,422.]

4. The carrier ought to take adequate measures to protect the cargo against a common and ordinary occurrence, which might and ought to have been foreseen.

[Cited in The Antoinetta C., Case No. 491; Richards v. Hansen, 1 Fed. 61.]

5. In a suit by a carrier for freight, the respondent set up, in defence, damage to the goods. The court being of opinion, that the carrier was liable for such damage, and that it exceeded the amount of the freight, dismissed the libel.

[Cited in Kennedy v. Dodge, Case No. 7,701; Ebert v. The Reuben Doud, 3 Fed. 522; The Two Brothers, 4 Fed. 159. See, also, Snow v. Carruth, Case No. 13,144; Thatcher v. McCulloh, Id. 13,862.]

In admiralty.

S. J. Thomas, for libellants.

J. Codman, for respondents.

SPRAGUE, District Judge. This is a libel for freight of a quantity of hemp and iron, from New York to Boston, in the schooner Granite State. There is no question, that the freight was earned. The defence is, that the hemp was damaged on the voyage, by oil and sea-water. Of the fact of such damage there is no doubt, and that it exceeded the amount of the freight; the only question is, whether the carrier ought to be held liable therefor. The master of the schooner signed a bill of lading in New York, in the usual form, acknowledging the receipt of the goods on board, in good order, and promising to deliver them in like good order, to the consignees in Boston, danger of the seas only excepted. It is not contended, that the deterioration of the hemp, in this case, arose from the nature or character of the article itself, that is, from any inherent quality or principle, but the damage arose entirely from its coming in contact with oil and sea-water, in the hold of the vessel. The bill of lading contains a contract in writing. There being no doubt that the hemp was received on board in good order, and no suggestion of any inherent defect or decay, the only question is, whether the damage was occasioned by the danger of the seas. It is insisted, indeed, on behalf of the carrier, that if he took the usual care and precautions, and conveyed these goods in the usual manner, he is not responsible for damage, whether arising from the danger of the seas or otherwise. To this I cannot accede. In order to exonerate himself from liability, he must bring himself within the exceptions of the bill of lading, and show that the damage arose from the danger of the seas. It appears that part of the hemp was stowed in the after-part of the vessel, upon other cargo, and this received no injury. The hemp which suffered was in the forward part of the vessel. On the one hand, it is insisted that the damage to this arose from the perils of the sea; on the other, that it was occasioned by improper stowage, or some want of reasonable care or skill on the part of the carrier. The schooner was put up in New York for freight for Boston, and after filling up, she sailed during the latter part of June, and arrived in Boston early in July. Nothing unusual occurred on the passage; she met with no accident, no bad weather, and encountered no unusual wind or waves. The ship's company consisted of seven persons, and of these, the testimony only of one sea-

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

man is produced. He says, that in coming round the cape the vessel careened, and the master, for that reason, took in sail, but he does not say to what extent; and taking in sail is one of the ordinary occurrences of a sea voyage. And he says, in express terms, there was nothing extraordinary or unusual in the passage from New York. In such a passage, in summer, with no bad weather and no bad sea, and with only so much wind as to cause them once to shorten sail, it would seem that such an article as hemp ought not to have suffered damage, on board of a seaworthy vessel, if properly cared for.

As to that part of the damage which was occasioned by oil, a considerable quantity of oil, in forty-gallon casks, was in the hold of this vessel, but not within twenty feet of the hemp; about 120 gallons leaked out, and with the water in the hold, came in contact with the hemp. There is nothing, whatever, to show that this leakage was occasioned by danger of the seas. The cooper at Boston testified, that the hoops were loose on two-thirds or three-fourths of the casks, and he is of opinion, that they could not have been in good order when taken on board. From one of the casks all the oil had escaped, except five gallons. How this oil was stowed on board, and whether properly secured or not, there is absolutely no testimony, the evidence as to stowage being confined to the hemp. The decision of Judge Story, in the case of The Reeside, [Case No. 11,657,] has a forcible application to this part of the case. Then as to the damage by water, it is suggested that this was occasioned by "blowing," as it is called, that is, by the water in the hold of the vessel being forced up through the seams of the ceiling, and thus thrown upon the hemp. It is not shown or contended, that there was any unusual quantity of water in the vessel, at any time, or any unusual motion. Indeed, the whole evidence is to the contrary; and it is said, that this blowing, when the ceiling is not caulked, is a common occurrence. Now, it would seem, that the carrier ought to take adequate measures to protect the cargo against a common and ordinary occurrence, which might and ought to have been foreseen. As to the stowage of the hemp, the evidence is not satisfactory. Of all the persons engaged in loading and unloading this vessel, the testimony of one only is produced, and he a common sailor, and he speaks only of what took place in New York. He says that he assisted in stowing, that the hemp forward was placed on a platform, with dunnage under it. When asked his opinion, whether it was properly stowed or not, he replied that he never stowed any better, but nowhere says that he had ever stowed hemp before, and on cross-examination says, that he never stowed any in the forward part of the vessel. Neither the mate, nor any other person engaged in unlading the vessel, is produced as a witness. The only evidence of the stowage, in Boston, comes from one of the port wardens, who expressed the opinion that the hemp was properly stowed. But he testified that he was not called upon to make any examination, until after a part of the cargo had been discharged, and that when he first went to the vessel, a part of the damaged hemp was on the wharf, and of that which remained in the hold, some appeared to have been moved, after the arrival of the vessel. Of course, he could not know from his own inspection, where it was during the passage, and must have relied for that fact upon the information of others, and they are not called as witnesses. He further says, that he saw no indications of there having been any unusual quantity, or uncommon motion of water in the vessel. On the whole, I am not satisfied that the damage to the hemp, either from the oil or the water, was occasioned by the danger of the seas, within the true meaning of the bill of lading, and as the amount exceeds the sum claimed as freight, the libel must be dismissed with costs.

NOTE, [from original report.] See The Martha, [Case No. 9,145;] Lamb v. Parkman, [Id. 8,020.]

Case No. 1,193.

BEARSE et al. v. THREE HUNDRED AND FORTY PIGS OF COPPER.

[1 Story, 314.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1840.

SALVAGE—ACTION—GROUNDS OF APPEAL—BURDEN OF PROOF — COMPENSATION — ADOPTING CONTRACT.

1. Courts of admiralty will not encourage appeals in salvage upon slight or frivolous grounds, or, indeed, in any cases, except upon some plain, clear, and determinate mistake of law or fact in the court below, which is manifestly not justified by the circumstances; and the onus probandi of such mistake is upon the appellant.

[Cited in U. S. v. Juniata, 93 U. S. 339. See, also, Cushman v. Ryan, Case No. 3,515; Taylor v. Harwood, Id. 13,794.]

2. In salvage cases, where a contract is made between the parties under circumstances, where there is no such necessity, as to require immediate relief, at any expense or hazard, on the one side, and on the other there is no obligation to lend the required assistance, and no motive to take advantage of the urgency of the peril in driving an unconscionable bargain, the court will adopt and enforce the contract as just and conscientious.

[Cited in The A. D. Patchin, Case No. 87; The H. D. Bacon, Id. 4,232; The Independence, Id. 7,014; Pope v. The Sapphire, Id. 11,276; Harley v. Four Hundred and and Sixty-Seven Bars Railroad Iron, Id. 6,068; The Silver Spray, Id. 12,857; The Williams, Id. 17,710; The Dolphin, Id. 3,973.]

3. The maritime policy is to make a liberal allowance in salvage cases. The highest compensation, which is ordinarily allowed in the most meritorious cases, is one moiety, and that is rarely given. There are some exceptions, as where the property saved is very considerable,

[1] [Reported by William W. Story, Esq.]

and the danger and difficulty of the service are so great as to require an extraordinary compensation.

[Cited in the Narrangansett, Cases Nos. 10,017, 10,020.]

4. Where several contracts for salvage services were made at various successive times, and a subsequent salvage service was performed, under no definite contract, the rule (of salvage) fixed in the prior contracts was held not to be imperative, but only to be an auxiliary circumstance in determining what was a fair allowance for such subsequent salvage service.

[Cited in The A. D. Patchin, Case No. 87.]

[Appeal from the district court of the United States for the district of Massachusetts.]

In admiralty. Libel for salvage [by Joshua L. Bearse and others against 340 pigs of copper, of the cargo of the ship Mercury, (the Washington Insurance Company and others, claimants.) Decree for libellants, (unreported.) Claimants appeal. Modified.] The libel in substance stated as follows: That in February, 1837, the ship Mercury, owned in Boston, struck upon a reef, called Pollock Rip, near Monomoy Point, with a large and valuable cargo of wool and copper, and was totally lost, and abandoned to the underwriters. That the wreck went to pieces, and among other things, 4600 pigs of copper became imbedded in the sand, and so remained, and became derelict. That the libellant, by authority given by Thomas Lamb and Caleb Curtis, agents for the owners of the ship and cargo, recovered a large quantity of merchandise before the ship sunk, and received a salvage of 27½ per cent. on the net proceeds of some of the property, and 19 per cent. on the residue. That in August, 1828, the ship having sunk, the libellants and agents entered into a contract, by which 50 per cent. was allowed them, on all the copper they should recover; in pursuance of which, they did recover 108 pigs of copper, and delivered them to Lamb and Curtis, at Boston, and were paid one half the net proceeds. That they were afterwards authorized to watch for a favorable opportunity to recover more, which they did, during the whole of the last winter; and such favorable opportunity having presented itself, the libellants diverted their schooner Pearl from her occupation, as a fishing vessel, hired suitable persons, and procured machinery and apparatus at great expense, and proceeded to fish up pigs of copper from the sand. That through fear of forfeiture of the schooner, they surrendered the former license, and took out a coasting license, and devoted the vessel wholly to the business of getting up this copper. That, between the 1st of May and the 9th of June, they recovered, with great labor, 340 pigs of copper, laboring, on an average, 20 out of the 24 hours; and that the average depth of water was 11 feet, and at high tide, 16 feet. That the libellants could not get their vessel insured, while thus engaged; that the weather was rough, and Pollock Rip a dangerous place. That the vessel received great damage, and was much exposed, and that the labor was far greater than in recovering the former portion of the cargo. That the libellants supposed, that the former contract, allowing them one moiety of the proceeds, still subsisted, or if it did not, that the agent would carry out the spirit of that contract; without which belief, they would not have undertaken the labor. That these services were worth more than 50 per cent. of the property recovered. That, while thus employed, on or about the 20th of May, 1837, the said Lamb wrote to the libellants, that the owners would allow only one third of the proceeds as salvage, which letter was received while the libellants were employed, and had recovered considerable copper; and that they immediately wrote and refused to agree to take less than one moiety, and continued, by suitable apparatus, to fish up the copper, intending to claim such compensation as the court of admiralty should decree. That on the 9th day of June, the said Lamb ordered them not to recover any more, unless they were willing to accept one third of the net amount, which they refused. That the libellants alone have performed this service; and, in consideration of its danger and risk, that they are entitled to meet and competent salvage. That in consideration of the risk and danger, the respondents entered into a contract with one or more persons, to recover what portion of the copper they were able, for which they were to pay over to the said claimants, 25 per cent., and no more; and the libellants pray, that a true copy of such contract may be annexed to the answer.

The answer in substance stated the circumstances of the wreck and the cargo, and admitted, that on June 3d, the respondents made a contract with the libellants, allowing them 27½ per cent. for the merchandise recovered; and further stated, that in consideration of the greater difficulty of obtaining the copper during the winter season, and upon the representation of one Amariah Harnden, an agent of the respondents, that he had constructed certain machines, peculiarly well adapted for the recovery of the cargo, they entered into another contract on August 4th, 1838, allowing one moiety of the proceeds, for the ensuing three months, as recompense for salvage services, and that it was only for these reasons, and for this limited space of time, that the respondents would make such a contract. That the respondents paid the libellants, on September 1st, 1838, $1656, being the half of the proceeds of 108 pigs of copper, taken up in those three months, and that part of these pigs had been recovered before making this contract, and fraudulently concealed for some unlawful purpose. That 40 pigs only had been recovered during the month of August, and that the court should decree the whole $1656, to be paid to these respondents. That, on

the 10th of November, 1838, the same contract was renewed, to run to March 1st, and that there were no other contracts. That the machinery, or apparatus used, was a pair of tongs, not exceeding six dollars in value, which was devised by A. Harnden, an agent of these respondents, and that the other apparatus consisted of a common coal-hod and a common scoop, of the cost of about two dollars. That the libellants made false and fraudulent representations, to induce these respondents to grant them a higher compensation, which ought not to be decreed. That the injury to the schooner Pearl arose from the eagerness and hurry of competition with other vessels, and not from the hazard and exposure; and that there could have been no difficulty in effecting an insurance; and that there was no exposure of life or property. That the libellants never had cause to believe, that any contract existed after March 1st, 1839. That by a letter of May 25th, 1839, these respondents offered the libellants one third of the proceeds as salvage money, which offer they refused; and that their continuance in their labors was a violation of the rights of these respondents; and they are, therefore, not entitled to compensation; and the respondents pray, that if the court decree any compensation, it shall not exceed one third of the last sum offered. That all the letters, show, that the libellants intended to act under the offer of the letter of May 25th, 1839. That a contract dated April 23d, 1839, and renewed for the term of a year, on March 5th, 1840, has been entered into between these respondents and James Davis, whereby the said Davis is, at his own expense, to recover as much of the cargo as he can; and the proceeds of the property recovered are to be divided in the proportion of one fourth to the respondents and three fourths to Davis. That the copper is less exposed and more embedded in sand; and that the said Davis has been at great expense. The answer prayed, that there should be a restitution of the copper, and that the libellants should be decreed to pay costs.

The case was argued in the district court by William Gray and C. G. Loring, for respondents, and B. R. Curtis and George T. Curtis, for libellants.

The district judge at the hearing, decreed to the libellants the sum of one moiety of the net proceeds of the copper.[2]

The points made and argued by the counsel for the respondents, and decided by the learned district judge, were, in substance as follows:

(1.) It was denied, that the property was derelict. The judge, declining to settle the question for any of the other cases, held it not to be a derelict as to these libellants, on account of the numerous acts of ownership exercised by the claimants, and known to the libellants.

(2.) It was denied, that the services had been of any great benefit to the claimants, but on the contrary, that the libellants were intruders, who had no right to intermeddle with the property. The judge cited the discussion by Domat of the general principle, that no person can intermeddle with the affairs of another, without some request; but said, that salvage services were an exception to this rule, and that our own law had its rules for governing cases of such service. He also held, that the evidence clearly showed, that when the libellants first began their enterprise, it was approved by the owners, and that this approbation was afterwards repeated, until the agent of the owners forbade them to proceed farther, unless they would agree to work for one third of the proceeds.

(3.) It was denied, that the libel could be maintained at all in rem, admitting that it might be in personam, because, as the respondents contended, where a service, which would otherwise be a salvage service, is performed by contract, the salvor has no right to retain the property, and so cannot proceed against it. But the judge held, that as the respondents had denied in their answer, that any contract subsisted between them and the libellants, at the time the property was recovered, which also appeared upon the evidence, the libel was rightly brought against the property, whether the principle contended for by the respondents was correct or not.

(4.) Certain charges of fraud were made by the respondents against some of the libellants, the principal one, noticed by the court, being, that Bearse and his brothers (the four principal libellants), who, with one Amariah Harnden, had, in 1838, made a contract with the owners, by which they were to have fifty per cent. of all that should be recovered of the Mercury's cargo, had, before the making of the contract, recovered a lot of copper, which they fraudulently brought into the settlement, and upon which they claimed and received fifty per cent. under said contract. But the judge refused to deduct any thing from the salvage compensation on account of this alleged fraud, being of opinion, that the evidence did not sustain it.

(5.) The case, then, not being one of derelict, the learned judge said, that the amount rested wholly in the discretion of the court. Although not derelict, yet the property was lost, in the sense of the distinction taken by some writers. It was in a hopeless condition, as appeared from the amount, which the owners had repeatedly been willing to give, and had once actually given. The court must have some guide to its judgment; and, upon the whole, no better rule could be assumed, than that proportion, which the owners by their own estimate had fixed and formerly paid; and he, therefore, decreed one moiety of the net proceeds of the property.

From that decree the claimants appealed to the circuit court, and filed the following causes of appeal.

[2] [Decree of district court unreported.]

(1.) Because the court erred in ruling, that the services of the libellants, alleged and attempted to be proved, were of the nature of a salvage service, entitling them to relief as salvors.

(2d.) Because the court erred in referring to the former contract, between the owners and some of the libellants, made in August and November, 1838, and the owners and certain other persons made in April, 1839, and renewed in March, 1840; and in assuming them to be a proper standard and criterion, by which to award compensation to the libellants; the court having stated, in the announcement of the decree, that these contracts were considered by the court, as a standard, furnished by the parties; and without which, the court would have been inclined to award a much lower compensation.

(3d.) Because, if the libellants were entitled to any thing, the court erred in decreeing, that they were entitled to more than one third part of the net proceeds of the copper recovered, because it was proved, that prior to the recovery of any, excepting one pig, the owners offered to them such one third, as a full compensation, and that the libellants proceeded to obtain all, which is libelled in this suit, after such offer, and without any refusal to accept the same.

(4th.) Because the court erred in allowing to the libellants any compensation, inasmuch as by the allowance of one half part of the net proceeds, the court must have found, that the libellants refused to proceed under the said offer of 27th of May; and if such refusal took place, the libellants, in proceeding thereafter to meddle with the copper, were unlawful intruders, or at most rendered a voluntary and gratuitous service, for which they have no legal claim for pecuniary reward.

(5th.) Because the amount decreed to be allowed to the libellants is disproportionate to the services actually rendered, and manifestly excessive.

(6th.) Because the decree of the court is otherwise erroneous, as appears by the pleadings and proofs.

The first, fourth, and sixth reasons of appeal were waived by the appellants.

George T. Curtis and B. R. Curtis, for libellants.

William Gray and Charles G. Loring, for appellants.

STORY, Circuit Justice. This is the case of a libel in rem for salvage of a part of the cargo of the ship Mercury of Boston, which was sunk on a reef called Pollock Rip, near Monomoy Point, at the extreme of Cape Cod, in February, 1837. The libel asserts the salvage service to have been performed by the libellants, in recovering the copper now in controversy, under the express or implied sanction of the claimants, between the 24th of May, 1840, and the 9th of June following. The general outline of the leading facts is accurately stated by the learned district judge in his opinion in the case; and to that I gladly refer. The cause has been very ably and elaborately argued in this court, both upon the general topics of law and fact, and the more exact and minute details of fact belonging to the salvage service. In the view, which I take of the matter, it becomes unnecessary for me to advert to many, and indeed to most of these topics and details, because it seems to me, that the merits of the case, so far as the same are now proper for the consideration of this court, lie in a narrow compass, and, although very properly examined and considered by the learned district judge, are not necessary to be here reviewed.

It is well known, that in salvage cases the appellate courts of the United States, sitting in admiralty, are not disposed to encourage appeals upon light or frivolous grounds, nor, indeed, in any case, except where there has been some plain, clear, and determinate mistake of law or fact, which has led to an erroneous and extravagant diminution or increase of salvage, beyond what the circumstances manifestly justify. The allowance of salvage rests in the exercise of the sound discretion of the court; and it would be most mischievous to the interests of all concerned, and would encourage protracted litigation, and in some cases ruinous expenses to the parties, if, where that discretion is fairly and reasonably exercised, the appellate court should entertain jurisdiction; and because it might not originally have arrived at exactly the same conclusion, as to the rate of salvage, in the exercise of its own discretion, therefore it should reverse the decree of the inferior court. If there ever can be any class of cases, to which the doctrine most emphatically applies, interest reipublicae, ut finis sit litium, that of salvage constitutes the class. The merits of such services rarely admit of any definite and exact computation; and it would be delivering over the whole subject to interminable doubts, to encourage the efforts of the parties to gauge the discretion of different courts, and to run a race for victory upon the chances of the possible differences of judicial opinion, necessarily connected with the accidental views, or the complexional habits of thought of different minds. In matters of mere discretion, the mind of man must ever be varium et mutabile. It is on this account, that it has become a general rule, I had almost said a fixed law, of our appellate courts, sitting in admiralty, not to change the decree of the court below, unless there is an exceedingly strong case made out of an abuse or palpable mistake in the exercise of its discretion in the decree of salvage.

Having made these preliminary remarks,

my duty then is to ascertain, whether there has been, in the salvage awarded by the present decree, any such palpable mistake; for there is no pretence to suggest, that there has been any abuse in the exercise of the discretion of the court. And here the case, in the aspect, which it has assumed at the argument in this court, is reduced to the narrower consideration, whether the salvage ought to be one moiety, or one third of the net proceeds. The learned counsel for the appellants have not contended against the allowance of one third, but have candidly admitted, that they shall make no struggle in opposition to it. In looking at the facts of the present case, we at once see, that it is one of the few and excepted cases, in which there may be a private contract, fixing the rate of salvage, which will be, and ought to be, obligatory between the parties. The situation of the parties, the nature of the service, and the absence of all controlling necessities, requiring immediate relief, on one side, at any expense and hazard, in order to escape from impending perils and calamities; and on the other side, the absence of any duty to lend the required assistance, or any motive to take advantage of the necessities and urgencies of those perils and calamities, to drive a hard and unconscionable bargain; these circumstances make it a case, where the court not only looks with indulgence upon such a contract, but endeavours to fortify itself against the exercise of mere discretion, by adopting and enforcing such a contract, as equally just, moral, and conscientious.

Now, in respect to the salvage service, here in controversy, there is not, in my judgment, any ground to assert, that any fixed or definite contract for the service existed between the parties, as did exist in relation to other similar salvage services about the same property at prior periods between these salvors and other independent salvors. These latter contracts cannot, then, furnish a positive rule for the exercise of the discretion of the court upon the present occasion. They may furnish auxiliary grounds to assist the judgment of the court, as to what the parties thought, at different periods, was a fair allowance for services of the like sort; but they cannot properly control or direct its judgment, since the circumstances might not, in all respects, be the same; or the parties may, upon a more exact review, have changed their opinion as to the relative value and difficulty of the service.

The present salvage was begun about the 24th of May, 1840, (the particular day is not very material,) under the sanction of the claimants. As soon as it was made known to the latter, they at once promptly replied, and informed the salvors, that they should be willing to give one third of the value of all the property saved. This offer was not (as I think the fair result of the evidence shows) accepted; but it was deemed by the salvors too low. Still the salvors went on with their service, with the acquiescence of the agent of the claimants, expecting, without doubt, that subsequent negotiations would lead to an ultimate increase of the salvage. On the 7th of June following, the salvors were definitely informed, that no more than one third would be allowed, and that if they did not accede to the proposal, they might quit the service, and the enterprise would be carried on by others. The salvors refused to accept the proposal, and left the employment, and never afterwards resumed it. Their present claim is, therefore, limited to the mere question of a quantum meruit; there being no specific contract to regulate it. They certainly had a right to decline the offer of one third; and, on the other hand, the claimants had an equal right to refuse any increase thereof. The court is driven to the necessity of deciding, what is the proper allowance; not, indeed, upon the footing of a mere quantum meruit for labor and services, upon the dry principles of the common law, but upon the footing of a quantum meruit, upon the enlarged principles and policy of maritime jurisprudence in salvage causes, where many other ingredients enter into the question. Many of these ingredients were adverted to by this court, in the case of The Emulous, [Case No. 4,480.] To which ought to be added, the maritime policy of making the allowance liberal, in order to secure fidelity, honesty, and activity in the service, and to cut off the strong temptations to private plunder and embezzlement, in order to make up any supposed deficiency of compensation under the ordinary principles of the common law.

In a general sense, the highest compensation, which courts of admiralty are in the habit of awarding, in the most meritorious cases, is one moiety. There are exceptions, indeed; but they are, where the property saved is very inconsiderable, and the gallantry, and danger, and difficulty of the service have been so great, as seemed to require an extraordinary compensation, hardly to be measured in value. But except in such peculiar cases, a moiety has rarely been exceeded. See The Jonge Bastiaan, 5 C. Rob. Adm. 322, where two thirds of the value was given. But there it was a case of derelict, and of great peril and extraordinary merit in performing the service, and the property saved was not large. And, indeed, even a moiety has rarely been given, except in cases of derelict. See The Aquila, 1 C. Rob. Adm. 37, 43–46. The present case, certainly, does not fall within that predicament. The property has never been treated either by the owners or by the salvors as derelict; but all operations respecting it have been constantly under the advice, sanction, and superintendence of the owners, who have in the strictest sense asserted, as they had a right to assert, a continual claim over it. We may, therefore, at once dismiss all considera-

tion of it either as a case of derelict or of quasi derelict.

I agree, that in the present case, the onus probandi is on the appellants to displace the allowance of the moiety by the district court, by some clear and important grounds of mistake in the application of the facts or principles of law. But when the allowance is the highest rate, which is usually allowed in the most favored cases, it seems to me, that the facts ought to show, that the case in judgment belongs to that category. If the case were one standing upon a fixed private contract, it would be wholly unnecessary to look to such considerations. But if the highest reward in ordinary cases is given, the court ought to see, that that reward was fairly earned by services, to which it is properly and usually applied; that is, to cases of extraordinary peril, or suffering, or gallantry, or long and continued services of an excessively exhausting and pressing nature. It is not enough to say, that the parties contracted at another period, and then estimated the value of the like services at the same high rate. If it were admitted, (and it has been denied at the argument,) that the circumstances were essentially the same, that fact would not govern the present case; because, the parties in matters of contract may agree according to their pleasure, and afterwards vary the same at their pleasure. If, in dealing with the same or with different salvors at one time, they estimate the value of the salvage services to be rendered at 27½ per cent. of the value of the property, at another time at 50 per cent., and at another time at 75 per cent.; and at the time, when other and new salvage services are required, at 33 per cent., it is not necessary or a natural inference, that the higher sums approach more nearly to a just equivalent for them, than the intermediate sums. And, if the local position of the property is such, that it is liable to be buried up in the shifting sands of a reef, exposed to the whole storms of the ocean, which sands are several feet deeper at some times than at others, it is very obvious, that a sensible change of circumstances, as to the depth of the sands, might induce the belief, that the enterprise of rescuing the property would be far more laborious and uncertain, and worth far more at the unfavorable, than at the favorable periods. There is, also, great difficulty in affirming in cases of this sort, that, at distant intervals of time, all the circumstances are treated by both parties, as precisely in their substance similar, throughout. Many ingredients of despondency or hope, of active preparation, or languid effort, may vary the judgment of the owners at different times, even if there be no essential change in the local state of the property. There was much ground for fluctuation of opinion on this point, on the part of the owners, since the property was, as has been forcibly stated by the district judge, adopting the language of Loccenius, always treated by them, not as derelict, but as submerged, non in derelicto, sed in deperdito.

It appears to me, then, that the court is not at liberty to adopt the rate of salvage, fixed in the prior contracts, as a positive or controlling rule, but merely to examine them as adminicular circumstances, to assist its own judgment. With the greatest deference for the learning and ability of the district judge, I cannot but think, that these prior contracts had too controlling an influence over his judgment. As I understand his opinion, but for these prior contracts, he would have been satisfied with awarding the sum of two fifths of the value of the copper to the salvors, not, indeed, as an exercise of what Cleirac denominates judicium rusticum (although I am far from thinking that such a rule may not in some cases be properly resorted to); but as an apportionment, just and equitable, under the circumstances of the present case, and not unfrequently awarded in admiralty suits for salvage. If he had done so, I confess, that I should have seen no reason to complain of his decree, and should have declined to interfere with it.

But the allowance of a moiety certainly stands upon a different footing; and, as has been already stated, is rarely awarded, except in cases of extraordinary peril, difficulty, and distress. Do any circumstances of that sort constitute ingredients in the present cause? It appears to me, that they do not. There was, in fact, no uncommon peril, or exposure, or difficulty in this salvage service. There was no hazard of life; no storms were encountered; and no excessive and exhausting labors, which either endangered health, or required unceasing nocturnal vigilance, and abstinence from rest. The season was mild; and if the weather became boisterous, there was a safe and easy retreat to the main shore, within three or four miles. I do not mean to say, that the labor and services bestowed were of an ordinary sort, and merely such as might be commanded by the common daily pay in nautical business. Far from it. They were of a much higher character, and are entitled to a more ample reward. The owners offered one third; the salvors demanded at least a moiety. It was clearly not a very tempting employment; for the salvors rejected the one third, and quitted it. The salvors, who succeeded them in the enterprise, under the auspices of the owners, were in effect paid one third; the crew of one of the salvor's vessels receiving that rate from the beginning, by contract; and the crew of the other salvor's vessel being at first hired upon daily wages, but, becoming dissatisfied with that compensation, they were afterwards allowed at the same rate. So, that I think, that I am at liberty to presume, that this was the lowest rate, at which any suitable persons could be hired to perform the like service. Indeed, I understand, from the argument, that under the contract of Davis

and others with the owners, for which they were to receive 75 per cent., in consequence of the greater depth, at which the other copper lay in and about the bottom of the vessel, these latter salvors did not, in fact, taking into consideration the length of time, which they were employed, and the quantity of copper, which they saved, receive a proportionate compensation approaching to that, which the libellants would receive, by a salvage of one third. I do not, however, dwell on this; because, being performed under a special contract for a more protracted service, Davis and others must take it for better or for worse. The events might have turned up in their favor; and then they would have received a much larger compensation. It is said, that, when the owners offered the one third, they did so, because they expected, that the libellants, if they accepted it, would continue in the service, as long as it could be useful, or should be required. But no such terms were contained in the stipulation; and, indeed, the offer was manifestly of one third, so long as they should choose to remain in the employment. It was one third of what they should save, without any condition as to the length of time, or the extent of labor, or the amount of the property saved. In this respect all the other contracts with the libellants, (as well as this offer,) may perhaps be properly distinguishable from the contract with Davis and others, who certainly engaged for some positive efforts, and incurred some expenses, to accomplish the object, although they were not bound to continue those efforts for any certain length of time. But the contract of Davis and others cannot, as has been already suggested, govern the present claim, even though it may have turned out to be a losing or inadequate bargain; since we are not to judge of this salvage service by after events, in which other salvors were concerned.

The view, then, that I take of the case is this, that the former contracts may, in a great measure, be laid out of the case, at least, so far as they are supposed to furnish any positive rule for decision. In this respect I am compelled to come to a different conclusion from the district judge; and, as this seems to have formed the very foundation of his decree, I feel myself, with whatever reluctance, bound to state, that it is not maintainable. I cannot think, that the facts of the present case, calling for the exercise of the sound discretion of the court, would justify me in the allowance of one moiety; since that would be to award the highest compensation, given only under extraordinary circumstances, to a case, where no such circumstances are presented. On the other hand the proffered allowance of one third was in the present case treated as a suitable, but at the same time, as a strict measure of compensation by the owners, and does not exceed, what they gave to others, and, indeed, to strangers. Now, it seems to me, that the libellants are entitled to a more favorable consideration, because they were employed, from time to time, during a considerable portion of two years, to watch the shifting state of the property, and to communicate to the owners whatever favorable changes might take place. They undertook, and they performed this duty; and, in my judgment, with entire fidelity to the interests of the owners; and they have received no distinct compensation therefor. They were the first to ascertain, and to communicate to the owners, the favorable change of the state of the property in May, 1840; and they promptly availed themselves of the opportunity of engaging in the service, without waiting for the results of a tardy negotiation for compensation. Under such circumstances, it appears to me, that they are fairly entitled to a more favorable consideration from the owners than others, who came in at a later hour, and had bestowed no like watchfulness and effort. It is somewhat of a stern and harsh exercise of right by the owners, to put aside the claims of persons, who have been prompt to communicate intelligence, and to act with spirit for their interests, and to deal with them with the cold and reluctant caution of a bargain with mere strangers. I think, that the owners were bound to make a more liberal allowance, than one third, on account of these peculiar merits of the libellants. The sum of two fifths, which the district judge thought reasonable, independent of any contract, appears to me to reach the true equities of the case, not as a judicium rusticum, but as a just estimate of the aggregate merits of the libellants in the present case, under all the circumstances. I shall, therefore, reverse the decree of the district court, as to the allowance of a moiety, and shall allow two fifths of the net proceeds, as salvage to the libellants. The costs of the appeal ought, in my judgment, to be borne as a common charge on the whole property saved.

BEARSE, (UNITED STATES v.) See Case No. 14,552.

BEATAUGA v. NICHOLSON. See Case No. 1,194.

Case No. 1,194.

BEATAUGH v. NICHOLSON.

[19 Betts, D. C. MS. 215.]

District Court, S. D. New York. April 30, 1851.

SEAMEN—PILOTS—TRESPASS—DAMAGES—WAGES.

[1. A licensed pilot, employed to take a ship out of port, and remain with her, and bring her in on the return voyage for an agreed compensation, is as much subject to the authority of the master as to discipline as any member of the ship's company, though he is not liable to do ship's duty except when in charge of her as pilot.]

[2. Where such pilot was ordered by the master to leave the quarter deck, and refused to do

so, and the master undertook to put him off, but used force enough to throw him on the deck, this is a trespass, for which the master is liable to the pilot in damages.]

[3. The master is not justified in ordering the pilot ashore thereupon, and leaving him; and he is entitled to recover his full agreed wages.]

[At law. Libel by Samuel Beataugh against John T. Nicholson for wages and damages for assault. Decree for libelant.]

[Before BETTS, District Judge.]

A licensed pilot, when on board a sea-going steamer, to take her out of this harbor, and go the voyage, remaining with her for the purpose of bringing her into port, for a compensation in gross of $80, is not liable to do ship's duty, except when in charge of her officially as pilot. Any command or request in respect to his services on board may be communicated to him through the mate or other subalterns of the ship, and need not be delivered him personally by the master; and accordingly a request to him, through the chief mate or carpenter, to stand a night watch, in a case of urgency, affords him no grounds for complaint or reproach to the master. If he goes on the quarter deck to make complaint therefor to the captain, and is ordered off the deck by the captain, he is bound to obey the order, and must take his place in such part of the ship as the master shall direct. The authority of the master in respect to the discipline and rules of the ship are the same over such pilot as over any other person on board. If he refuses to leave the quarter deck, or neglects to do so on the express order of the master, the latter is justified in applying so much force as may be necessary to compel obedience, but no more. The result of the conflicting evidence on this point shows that the master employed more violence than was necessary in removing the pilot from the quarter deck; and he is therefore guilty of a trespass. This violence consisted only in pushing the pilot forward, (in doing which both tripped, and the pilot fell on the deck, and the master partly so); and being accompanied with no other force or injury, the damages should be scarcely more than nominal. Decreed $10 damages for the trespass.

Held, that the master was not justified in thereupon ordering the pilot ashore, and leaving him at Chagres, and that he is entitled to recover his full agreed wages, and also the expenses to which he was necessarily subjected whilst at Chagres, and in returning home. Ordered, a reference to ascertain those expenses, and that a decree for the amount, with costs, be entered in his favor against the defendant.

*

END OF CASES IN BOOK 2.

INDEX.

[The references are to pages. The asterisk (*) indicates that the case has been reversed.]

ABATEMENT AND REVIVAL.

Page

The expiration of the charter of a corporation abates all suits then pending in its name 722

Suit is not abated by sole complainant parting with his interest pendente lite, but no further proceedings can be had until his assignee is made a party..... 832

Pendency of suit between same parties respecting the same subject-matter in a federal court in another state may be pleaded in abatement..... 503

But such plea must show that the court has jurisdiction..... 790

Where proceedings in bankruptcy are pleaded in abatement, all matters required to give jurisdiction must be averred..... 503

Action for infringement of patent survives 193

Case is not revived on death of party without order to that effect..... 193

The state statute limiting the time for the allowance of a continuance by an administrator (Civil Code Or. § 34) applies to actions in the federal courts..... 815

Where an executor voluntarily appears in the action, judgment may be given for or against him with the same effect as if brought in by sci. fa..... 815

ACCOUNT.

In an action upon an open account, plaintiff may give evidence of any item of which defendant has had reasonable notice..... 945

An account rendered is proper evidence before an auditor to whom a cause is referred to state the account..... 701

ACCOUNTING.

Bill to account does not lie on an executory contract where compensation for the breach can be had in damages..... 439

Equity will not sustain suit to compel settlement of partnership accounts under a government contract participated in by government agent..... 964

On a bill against a partner who has fraudulently suppressed books and falsified accounts, complainant will not be held to strict proof—Sufficiency of proof..... 31

ACCOUNTS STATED.

An account retained an unreasonable time without objection becomes an account stated, and bars a bill to account..... 439

An account current, received and not objected to within a reasonable time, will bear interest..... 407

An account current, received and kept without objection, except as to particular items, may still be surcharged and falsified as to other items..... 945

An account stated cannot be opened because an item of interest not illegal, which went into it, could not have been recovered by suit..... 407

ACTION.

Page

Consolidation of actions on notes, though parties are the same in all, not ordered.. 619

ACKNOWLEDGMENT.

The presumption is that the person examined was of full age, until the contrary is shown.....1032

ADMIRALTY.

Jurisdiction—In general.

Extends to actions ex contractu, quasi ex contractu, ex delicto, and quasi ex delicto 1161

Suits upon contracts regulated by the common law are "suits at common law," within Const. Amend. art. 7, and not cognizable in admiralty..... 410

Admiralty jurisdiction is referred to in the constitution as it was restricted in England at time of revolution, and as exercised by state courts before adoption of constitution 410

A judgment against the master of a vessel, recovered in an action for wages in a common-law court, cannot be enforced in admiralty 68

—— Persons and property.

Contracts of seamen for maritime services are governed by the maritime law, and enforceable in admiralty, (Act 1790).. 410

Accounts for traffic and dealings between master and mate not subjects of admiralty jurisdiction 115

—— Waters and places.

Has jurisdiction over navigable waters, irrespective of the fact of a tide..... 255

The waters of the Welland canal, being used for international commerce, are within American admiralty jurisdiction..... 255

—— Affreightments; charter parties, etc.

Has jurisdiction of matters leading to a charter party or stipulations and representations not embraced therein..... 506

—— Pilotage.

Has jurisdiction over action to recover half pilotage under state laws for services tendered and refused..... 764

—— Repairs and supplies to vessel.

An account for provisions furnished the owner or commander of a vessel, or for articles for her use when not on a voyage or in a foreign port, is not within the admiralty jurisdiction either as a substantive claim or set-off..... 410

—— Torts.

Admiralty will not entertain suits for merely nominal damages in cases of personal torts, not involving any other subject-matter 879

—— Wharfage.

The liability for wharfage of an agent to whom a vessel is consigned, created by a

Page

state law, (Laws N. Y. 1873, p. 430,) is maritime in its character, and enforceable in admiralty..... 135

Procedure.

The proceeding in rem to enforce a lien for damages caused by a collision is not process, or a part of the lex fori..... 255

There is no maritime lien created by a general average loss, and admiralty has not jurisdiction in rem.....1161

AFFIDAVITS.

May be sworn to before affiant's counsel, though wholly in his handwriting..... 101

In a suit in equity, sworn to before bill filed, must not be entitled in the suit..... 510

AFFREIGHTMENT.

See, also, "Admiralty;" "Bills of Lading;" "Charter-Parties;" "Shipping."

"Going rate," as to freight, means the last actual contract, or, where the rate varies, the average of the day..... 928

Damage to goods may be set up in defense to suit for freight.....1191

Burden of proof as to damage to goods.. 86

The value of goods at place of delivery, with interest from the day when they should have arrived, is the measure of damages for their loss. Anticipated business profits are not allowed.....1097

ALIENS.

Ownership of real estate.

A state has power to give capacity to aliens to hold lands within it.....1172

An act giving capacity to aliens "which shall have resided in the state two years" applies as well to future as to past residence 1172

Naturalization.

The word "armies," as used in acts admitting enlisted aliens to citizenship, does not include "marines"..... 360

AMENDMENT.

A clerical error in the record may be amended after the term..... 868

Bill in equity amended to conform to proofs and admissions in answer, where subject-matter not changed.....1033

The record of a cause, when made out and written in the record book, cannot be altered, except by order of the court..... 866

ANIMALS.

A whale killed and taken into complete possession is the property of the taker, who may maintain an action against one who subsequently finds it adrift, and, without knowledge of the title, appropriates it.... 966

APPEAL.

Jurisdiction on appeal.

Appeals are allowed to circuit court from decrees in admiralty in all cases where sum in dispute exceeds $50. (Act March 3, 1803)..... 266

Taking and perfecting.

Circuit court obtains jurisdiction on appeal by filing and serving notice of appeal, and not by filing of transcript..... 526

Time for filing transcript on appeal in the circuit court may be extended by consent of parties beyond statutory time..... 526

Hearing and determination. Page

The appellee may continue the cause where the record is filed only a short time before the term..... 324

The hearing on appeal from the district court in admiralty is de novo, but, on questions of fact, burden is on appellant..... 266

Mere technical objections taken for first time in appellate court are unavailing..... 280

A decision on a question of fact, established with reasonable satisfaction, will not be disturbed..... 475

A decree of the district court, based wholly upon a question of fact, will not be reversed where the evidence raises only a doubt as to the fact..... 476

Circuit court, on appeal, cannot rehear a cause or admit a claim at a term subsequent to that in which the cause was finally decided..... 242

Bonds on appeal.

Sureties will be protected by the court when they have acted in good faith.....1080

Appellant not absolutely bound by condition of bond on appeal to supreme court to pay amount of original judgment..... 682

In an action on appeal bond to supreme court, plaintiff must aver damages sustained by defendant's not making his plea good 682

ARBITRATION.

Where a reference in a pending suit is made without order of court, it can only be enforced by separate action..... 584

ARMY.

An enlisted minor, who has not been mustered into the service, nor received any rations or clothing, cannot be held in custody as a volunteer, either under the United States or Massachusetts statutes..... 577

ARREST.

A person arrested in one district for an offense committed in another, if not indicted nor committed by a commissioner, is entitled to an examination in the district in which he is arrested..... 363

The power to remove an accused from the district of his arrest to the one of trial is in the district judge, and not the circuit judge 363

A commitment for further examination is valid, as well as a commitment for trial..1015

A commitment in South Carolina may be valid without any examination of prisoner or state witnesses.....1015

The constitutional rights of the prisoner to be confronted by witnesses, and to be represented by counsel, have reference to the trial only, and not to proceedings on commitment 1015

ASSIGNMENT FOR CREDITORS.

An assignment is void as to the firm property, as well as to the individual estate of the nonsigning members of the firm.....1164

Creditors levying after, but not those levying before, expiration of time to file inventory and schedule, under the New York insolvent law, acquire a lien where the inventory, etc., is not filed within the time..1164

Sufficiency of inventory and schedule by assignors for benefit of creditors, under Laws N. Y. 1877, c. 466, and Laws 1878, c. 318.....1164

ASSUMPSIT.

Trustee appropriating proceeds of trust property is liable in assumpsit..... 476

Page

Where deed is without covenants, assumpsit will not lie for failure of consideration on complete failure of grantor's title 518
An agreement to release a debtor upon his executing a deed is a good defense in assumpsit, the deed being executed..... 965

ATTACHMENT: GARNISHMENT, ETC.

To constitute attachment of personalty as against assignee in bankruptcy, officer must take actual possession..... 25
Assignment of the debt by defendant, with notice to garnishee before service of attachment, cannot be given in evidence on trial of issue of nulla bona. It must be specially pleaded 471
Government agent for payment of salaries and treasurer of the United States are public agents, and not liable as garnishees for employee's salary..... 239

ATTORNEY AND CLIENT.

Warrant of attorney to appear is not necessary 728
A proctor in admiralty cannot release or compromise his client's debt without special authority, and an insufficient amount paid in settlement is a discharge pro tanto.1025

BAIL.

Not required in debt on bond with collateral condition..... 769
Cannot surrender their principal before a judge at chambers.....1048

BANKRUPTCY.

Operation and effect of bankrupt laws: State laws.

A judgment confessed in contravention of the bankrupt act is void, though valid by the state laws..... 112
The assignee is not bound by proceedings against bankrupt to which he was not a party 100
A decree of foreclosure against one adjudicated a bankrupt, where his assignee was not made a party, will not extinguish the right of redemption, and a purchaser under sale by order of the bankruptcy court is entitled to redeem, notwithstanding title by possession and payment of taxes under state law..... 937
Assignee cannot have injunction against foreclosure in state court of mortgage against bankrupt where he appeared, and permitted the proceedings to final adjudication, and no injury is done thereby..... 212

Jurisdiction of courts.

The jurisdiction of federal courts in bankruptcy is exclusive in all matters arising under the bankrupt act..... 941
Nonresident, who has for six months preceding petition carried on business as agent and attorney for another within a certain district, may file his petition in such district 392
Where the allegation of residence within the district as the ground of jurisdiction is false as to one of the petitioning partners, the court is without any jurisdiction.....1119

Register—Powers and duties.

The register's power is limited only by express exception in the bankruptcy act..... 668
He has power to direct a sale of debts and choses in action belonging to the estate if creditors do not object..... 668
He may, of his own motion, inquire into delays, and indicate steps for a speedy settlement 668
He may, at first meeting of creditors before election of assignee, postpone proof of any claim which he regards as doubtful... 986
But, where claims objected to are clearly valid, he must apply to court..... 986
He has no power, against objection of parties, to require issues framed as to the re-examination of a claim until it appears that the claim ought to be expunged or diminished 63
Order made without objection cannot be revoked 63
On trial of charges against a register, the creditor may offer evidence to contradict the register as to facts called out by his examination 668

Commencement of proceedings—Voluntary bankruptcy.

The policy holders in a mutual life insurance company are "corporators," within Rev. St. § 5122, requiring them to be notified of the meeting called to authorize proceedings 168
A receiver of a mutual insurance company, appointed by a state court, may move the bankruptcy court to set aside bankruptcy proceedings as unauthorized by the members, but cannot show that the company was solvent..... 168
To defeat a voluntary petition, (Act 1841,) creditors must show concealment of property. Proof of ownership in past years, or dissipation or dishonest squandering of property, is not sufficient..... 358
Purchases of bankrupt's property by members of his family at judicial sales do not raise a presumption of ownership, requiring the bankrupt to account therefor.. 358

—— Schedule.

May be verified before a notary..... 359
Cannot be corrected on motion to record a resolution of composition, so as to show that the requisite number of creditors joined, but confirmation will be denied, with leave to renew motion..... 69

—— Involuntary bankruptcy.

Owners of a planing mill contracted debts as traders, but discontinued that branch of the business a few months before committing an act of bankruptcy. *Held*, that they must be considered merchants as to such debts..... 527
It is not a valid objection to petition in invitum by creditor that his claim is not yet due 984
Act June 22, 1874, requiring petition to show certain number and amount of creditors joining, how far retroactive..... 848
A general unsecured creditor has a right to intervene and contest an adjudication in bankruptcy 231

—— Acts of bankruptcy.

A preference in contemplation of bankruptcy, though coerced by creditor..... 100
A general mortgage to one creditor to hinder and delay others..... 527
A general assignment by a trader for the benefit of his creditors equally.....868, 984
A suspension of payment of commercial paper for 14 days, if availed of within six months of its continuance.....537, 558
Effect of act of July 14, 1870..... 558
A fraudulent conveyance subsequent to a judgment lien on the property is no cause of bankruptcy. The remedy is in equity to set aside the conveyance..... 250
Concealment of debtor from creditors does not constitute an act of bankruptcy unless service of process is thereby prevented 858
A bond with warrant to confess judgment upon the eve and in contemplation of

Page

bankruptcy does not constitute an act of bankruptcy; unless the judgment and execution thereon were at the instance of the debtor 858

Adjudication.

Relates back to the filing of the original petition, and not to the time of an ancillary petition filed to correct an irregularity..1164

Objections not taken before adjudication considered waived..... 755

A decree declaring a corporation bankrupt cannot be impeached, after the lapse of a year, by a stockholder who had full knowledge of all the facts..... 572

Assignee—Appointment and removal.

An attorney for a creditor may be assignee of the bankrupt's estate..... 909

One member of a firm, on behalf of the firm, may execute a power of attorney authorizing him to vote for the firm in the choice of assignees..... 909

Property of bankrupt—What constitutes.

Crops planted by bankrupt after filing petition do not pass to the assignee..... 879

Bankrupt husband, who has insured his life for benefit of his wife, need not list the policy as assets.....1166

Interest in the business of another, which the bankrupt conducts in his own name, receiving half of profits as compensation, is not property to be set out in the inventory..1176

Proof of indebtedness arising out of disposal of proceeds of such business.....1176

A conveyance on condition of the payment of an annual sum to the grantor during life gives the grantee a title which will pass to his assignee..... 199

—— Exemptions.

Under the provision permitting the exemption allowed by the state law "existing in the year 1871," where there was a change in the law during the year the statute existing at the close of the year will control 351

The filing of a petition is an election to take the exemption allowed by the state law in force at the passage of the bankruptcy law..... 29

The homestead secured to the head of a family by the state law, though not ascertained and set out, does not pass to the assignee, and is not subject to the jurisdiction of the bankrupt court.....1004

Right to homestead exemption is not lost by delay to claim it until assignee applies for order to sell..... 963

—— Custody.

In the separate bankruptcy of one member of a solvent firm, an account will be ordered, and the joint property left with the solvent partners; but otherwise where the firm is insolvent..... 263

—— Liens.

Property held by purchasers from a bankrupt in fraud of the bankrupt act is subject to the lien of a judgment against the bankrupt 325

Property held by the bankrupt after the rendition of a judgment against him, but before commencement of bankruptcy proceedings, is subject to the lien of the judgment 325

An execution levied previous to an act of bankruptcy, if real and bona fide, gives a lien 858

Assignee taking property from trustee, who held under a void assignment for creditors, takes subject to the liens of judgment creditors accruing subsequently to the assignment, and before the commencement of bankruptcy proceedings.....1106

Page

The question as to the validity of an execution lien on bankrupt's property attacked as a preference cannot be settled by petition and answer, but only by bill in equity or suit at law..... 559

The remedy to have an unrecorded mortgage of the bankrupt's property declared and enforced as a prior lien is by action or suit, and not by petition..... 951

—— Sale by assignee.

The district court for Louisiana can authorize the sale of real estate surrendered by bankrupts, free and discharged of all mortgage debts..... 941

A claim against the wife of a bankrupt for payments made by him when insolvent, on a policy for the benefit of his wife, may be sold by the assignee, and will pass to the purchaser a contingent right in the proceeds of the policy.....1166

Proof of debts.

Damages for a tort are not provable until they have been assessed..... 362

A note given before the bankruptcy of the maker, but maturing after, and taken up by the indorser before, final certificate, may be proved..... 480

Rent for that portion of a term under a lease not expired before the adjudication not provable..... 376

Holder of a bill of exchange may prove his debt against all the parties, or against one, and proceed at law against the others.. 289

Attaching creditor who pays liens upon the attached goods, to save his attachment, must be repaid the same by the assignee of the debtor..... 433

Where a member of a firm, which is general agent of a corporation, misappropriates funds thereof to the uses of the firm, which is known by the firm, both are liable, and proof may be made against both estates 1044

Creditor holding security from a third person may prove his debt without surrendering it, but otherwise with security from the bankrupt..... 289

Holder of a draft may prove for whole amount against drawer's estates, though he has been paid in part by acceptor whom he has released, and who in turn released drawer 1045

Surety paying debt of bankrupt principal can only prove the difference between the debt and the amount realized on securities held by him as indemnity..... 508

Pledgee of notes, held to secure a debt in a smaller amount, may prove them against the maker's estate to their full amount, and receive dividends to the extent of his debt, though they are invalid in the hands of the pledgor..... 381

Recovery by assignee against a holder of the bankrupt's note, who has taken a preference, does not revive his right to prove the note..... 270

Where the holder of a note has forfeited his claim against the estate of the bankrupt maker, the guarantors have no right to prove it..... 270

Seizure of part of shipment of goods under right of stoppage in transitu does not prevent proof of claim as to those delivered.1191

Power of attorney to prove debt in bankruptcy need not be acknowledged..... 854

Creditor cannot prove by an attorney testifying upon information and belief, unless he is prevented from giving the affidavit, as provided by Act March 2, 1867, § 22... 854

Deposition by officer of creditor corporation, made after proof of claim, allowed to be filed.....1046

A bankrupt may testify to support a claim by his wife against the estate. (Act Pa. April 15, 1869).....1120

Page

Where, on a reference to take proof of a claim, it appears that the claim has already been proven, and not objected to, the reference should not proceed..... 507

Payment of debts: Priority: Dividends.

Creditors holding bank bills of a state bank adjudged a bankrupt are entitled to interest from the date of adjudication. (Reversing 666)..... 667

A creditor collecting money for his debtor, and failing to pay it over, has no priority over other creditors..... 647

The fact that the drawee had funds of the drawer when he refused to accept the draft will not give the holder priority over other creditors of bankrupt drawer..... 647

Senior mortgagee on sale of property in bankruptcy is entitled to payment of his mortgage in full, together with costs and expenses 956

Money paid to procure release of dower in mortgaged premises should be apportioned between the mortgagees..... 956

Landlord has no lien in Alabama for rent accruing after bankruptcy of tenant..... 376

The right to distrain for rent is a "lien," within the bankrupt act; and in Mississippi the landlord is entitled to a preference for rent out of proceeds of sale of property on demised premises, subject to his attachment. (Reversing 233)..... 234

Assignee may withhold dividend to creditor who is also debtor to a member of the bankrupt firm until determination of suit to recover the debt..... 104

Examination of bankrupt.

The filing of specifications in opposition to a discharge is not necessary prerequisite to making of order for examination of bankrupt or other persons.....1042

A bankrupt may be compelled to appear with his books before the register for examination as to a composition..... 6

Costs: Fees: Disbursements.

Registers' fees—Taxation and allowance.. 208

Where a petition to establish a right to payment in full has assumed the form of a regular suit, costs and a docket fee will be taxed 657

Bookkeeper of bankrupt not entitled to compensation for making schedules while in employ of marshal, and in receipt of his usual salary..... 855

Claim of bankrupt for extraordinary services cannot be allowed by the court, but may be allowed by creditors..... 855

Discharge—Proceedings to obtain.

Where there are no assets, bankrupt cannot be discharged, unless he applies after the expiration of sixty days and within one year from the adjudication..... 910

A creditor may consent to a discharge by his attorney in fact or counsel in open court 560

—— Opposition: Acts barring.

Creditor who has proved his claim may, except as limited by rule 24, file specifications of the grounds of his opposition.....1042

Creditors who have not proved their claims until after the day fixed for showing cause against a discharge can then object to the discharge only on the ground of fraud 560

Creditors executing releases under terms of voluntary assignment are to be considered as preferred over other creditors, within meaning of provision denying discharge 65

Discharge not refused unless fraud, willful concealment of property, etc., or facts from which they are plainly deduced, clearly appear..... 755

Specifications alleging concealment of property should specify the property, and

Page

that the omissions from the schedules were willful, fraudulent, or negligent.....1175

It is no answer to a charge of concealment that the property belonged of right to assignees under an earlier assignment, under the state insolvent laws.....1107

A bankrupt having actual possession of joint estate and joint books of account must disclose them to his separate assignees....1107

Discharge not refused for failure to keep proper books of account, unless the fact is clearly shown.....1012

Bankrupt need not affirmatively show that he has kept proper books of account, etc. 755

Books from which a competent acountant could ascertain the bankrupt's condition are sufficient..... 956

—— Scope and effect.

A discharge does not operate on debts created by fraud, and an objection to a discharge on the ground that the debt was so created is not valid.....1004

Prohibited and fraudulent transfers.

Section 35 of act of 1867 applies both to transactions with a creditor or one under liability for the bankrupt, and with a purchaser not a creditor or under such liability 1127

"Contemplation of bankruptcy" means insolvency 15

"Contemplation of bankruptcy" means contemplation of inability to continue business, not of applying for benefit of bankrupt law 100

A preference is not a payment of creditor in the ordinary course of business, or under threats of suit..... 15

If the necessary effect of an act is to prefer one creditor, the intent to prefer is presumed, though other motives co-operated to induce the act.....1012

A sale by the bankrupt not in the ordinary and usual course of business is only presumptively fraudulent, and the presumption may be rebutted..... 283

Transfer of whole stock and book accounts to one creditor, three weeks before filing petition, *held* a preference, though made under threat of legal process.....1012

A sale out of the usual course of business of all one's stock in trade to a person with knowledge of the seller's insolvency is prima facie void, and a second purchaser with knowledge has no better title..... 285

Purchase by second vendee not fraudulent unless he knew or had reasonable cause to know of facts rendering the first sale fraudulent. Knowledge that the sale to the first vendee was of the entire stock of the seller not sufficient 283

An assignment in trust, by an insolvent, for creditors who will accept 60 per cent. of their claims, is void at common law and under the bankruptcy act 1106

A general assignment for distribution among all creditors equally is not void, but voidable only at the suit of the assignee.... 868

Confession of judgment is not fraudulent unless intended as a preference, and given in contemplation of bankruptcy..... 100

Where the debtor, in order to give a preference, allows his property to be taken on execution issued on a judgment against him, the transaction is void..... 559

The allowance of a judgment in favor of a brother by an insolvent debtor, to the exclusion of all other creditors, *held* a preference 437

The taking of sawed lumber, in settlement of a claim on a conditional sale of logs to an insolvent mill owner, in excess of the claim, creates a fraudulent preference.. 373

Payments made mala fide to a debtor after petition in bankruptcy filed against him are void as against assignee..... 280

Page

Payments, etc., by one knowing himself to be insolvent, are not in contemplation of bankruptcy if he fully expected to continue business and retrieve his losses..... 100

Payments by husband on policy on his life for benefit of wife after he becomes insolvent are fraudulent, and may be recovered from wife out of proceeds of policy, when paid, with interest.....1166

A secret arrangement by one of the creditors, entering into a composition for an advantage over other creditors, is fraudulent, and a payment made thereunder may be recovered by the assignee subsequently appointed, though the composition never became binding 1120

Transfer by brother to sister, whose money he had taken and invested without any account, *held* fraudulent..... 976

A sale to a creditor 13 months before filing petition, if bona fide and without knowledge of contemplated bankruptcy, though it may prevent discharge, is valid as to the creditor 15

An attachment by a creditor of the property of his insolvent debtor is not a fraud upon the bankrupt act 433

Chattel mortgage for a present consideration, made more than 60 days prior to bankruptcy, but not filed for record until within that time, is valid 830

Payment of note at maturity by insolvent maker, without knowledge or procurement of accommodation indorsers, is not fraudulent 1139

An indorsement upon a chattel mortgage, extending its lien to other chattels, made in fraud of the bankrupt act, is ineffectual for any purpose 433

After payment on account of one item of a claim proved, creditor cannot divide his claim so as to avoid in part the assignee's claim of preference by such payment..... 855

Prohibited and fraudulent transfers—Suit by assignee.

Assignee of one partner can, in the interest of firm creditors, recover sums paid out of the firm's funds in fraud of their rights.*1120

An assignment by one member of firm of individual property for benefit of individual creditors, with directions to distribute the balance among partnership creditors, may be set aside at the suit of the assignee of the firm 882

Assignee may proceed to impeach bankrupt's conveyance as fraudulent, irrespective of condition of creditors' claims..... 807

The rights of the assignee to sue to set aside conveyance by bankrupt are not affected by Act June 22, 1874, when the adjudication of bankruptcy was passed theretofore 882

Secret preferences paid as inducements to signing composition deeds may be recovered either at law or in equity.....1130, 1132

Such preferences can be recovered by the debtor or by injured creditors, or by the assignee 1132

It is no defense to the action that the composition deed was invalid, because not signed by all the creditors, pursuant to its terms 1120, 1132

The four-months limitation governs a transaction with a creditor, and the six-months limitation that with a general purchaser 283, 1127

An action by the assignee of a firm to set aside an assignment by a member for the benefit of his individual creditors is not limited to four months..... 882

A declaration in an action by the assignee must state that the transaction was had within the prohibited time.....1127

All transactions illegal or fraudulent by the common law, the statute law, or by rules of law, other than the special limitations in section 35. are governed by the limitation of two years.....1127

Where assignee continues defense of suit, the estate is liable to expense thereof, if the creditors impliedly consented..... 292

The bankruptcy proceedings are admissible to show appointment as assignee... 285

To annul a sale, the vendee must be shown to have had good reason to believe that the insolvent's intent was to evade the bankruptcy act 283

Arrangement with creditors: Composition.

Committee appointed to assist trustee in management of estate may act by majority vote 1047

Amount of payment to counsel for services is discretionary with committee.....1047

The trustees have no power to admit claims against the estate; such power is vested in the register..... 500

The approval of the committee cannot affect or cure positively unlawful applications of the fund, nor inequality of distribution..1047

Damages for a tort not assessed cannot be considered in ascertaining proportion of creditors voting for composition..... 362

Affidavit of husband that he had given his wife authority to vote in favor of a composition is a ratification and estoppel, validating the wife's act..... 362

Wards whose money has been loaned to a firm, from which their guardian, a member, took notes to himself as guardian, on coming of age, are entitled to vote in favor of a composition by the bankrupt firm.... 362

The confirmation of a composition, and the bankrupt's compliance therewith, suspend functions of assignee..... 208

A composition arranged and confirmed does not take the case out of the jurisdiction of the court.....1085

The amount due from the assignee to the bankrupt after composition should be determined on special order..... 208

Debtor's default under composition does not entitle creditor to dissolution of injunction against his judgment, obtained pending bankruptcy proceedings.....1085

BANKS.

Payment of check is prima facie evidence of funds.....607, 741, 742

A note deposited for collection and credited to depositor, is property of bank; and, on its bankruptcy, proceeds go to general creditors 657

The relation between a bank and its customer is not of a fiduciary character..... 657

The teller is not liable for losses during his absence..... 701

On the failure of a bank to pay specie, it may be forced into liquidation..... 624

Liability of stockholders of national bank is several, and a suit at law is the proper remedy to enforce a specific assessment ordered by the comptroller..... 382

Comptroller of currency, in winding up insolvent national bank, has authority to finally determine when a deficiency of assets exists 382

Special charter powers.

Congress has power to authorize the Bank of the United States to sue in the federal courts 728

The act incorporating the Bank of the United States confers the right to sue in the circuit courts, irrespective of their jurisdiction. .....726; contra, *692

Where the Bank of the United States recovers less than $500 in a suit in the circuit court, it cannot recover costs, and may be adjudged to pay all costs..... 728

Page

The relation of a branch of the Bank of the United States to another branch or to the parent bank which has forwarded paper for collection is simply that of principal and agent 694
Affidavit of president of Bank of Columbia on an order for an execution—Form and contents 629
An order for an execution by the president of the Bank of Columbia is not a judgment 628
Execution issued on order of the president of the Bank of Columbia—Form and contents 628
The issuing of an execution by the Bank of Columbia is the commencement of the action in regard to the statute of limitations 643
The suit is discontinued by failure to prosecute the execution..... 628
The court will permit defendant upon return of execution to plead the statute of limitations 629, 645
Bank of Alexandria may have its causes tried at the first term to which the writ was returnable 606, 619
The Bank of Alexandria may, upon discounting notes, deduct the whole interest to become due..... 607

BILLS, NOTES, AND CHECKS.

What law governs.

Where bills are accepted, payable in London, on a promise to provide funds to meet them, the contract is governed by the law of England..... 407
A bill drawn and indorsed in one state, but payable in another, is governed by the law of the former as to the liability of the indorser, but by the place of payment as to the amount of interest..... 649

Nature and requisites.

Warrant issued by controller of city, whose payment is restricted to a particular fund, not regarded as bill of exchange....1075
Cashier's certificate of deposit for a sum named, payable at a certain time, to the order of the depositary, is a promissory note 229

Validity.

Trading corporations may, independently of statute, issue negotiable paper in the course of their business.....1075
"Confederate Treasury Notes" are illegal because issued by organization of subjects in rebellion..... 378
A promissory note given in consideration of Confederate notes is void..... 378
The stipulation in a note for the payment of a reasonable attorney's fee on collection by action is valid, and binding on all indorsers 622

Acceptance.

A letter written within a reasonable time before or after the date of a bill of exchange, describing it, and promising to accept it, is a virtual acceptance.....1064
Authority to draw, with an assurance of payment, is an acceptance to one who takes bill on the credit of such authority.....1064
An accommodation acceptor of a bill of exchange is a surety as to the drawer, but a principal as to the holder, although he knew the facts..... 289
A letter of credit *held* to be used within the terms of the agreement giving right to commissions, though bill issued thereunder was never presented..... 794

Indorsement and transfer.

The possessor of a negotiable instrument is prima facie a bona fide holder for value in the usual course of business, without notice of facts impugning its validity..... 622

Page

Want of consideration in the making and indorsing of a note can be shown, against a remote party, only where he took with knowledge of such want between nearer parties 622
An accommodation indorser can show a want of consideration only as against the accommodated party.....622, 631
An indorsement, though for accommodation, is evidence of money had and received by the indorser..... 618
But otherwise where the indorser writes on the face of the bill, "credit the drawer." 621
An accommodation indorsement in blank may be filled up at the trial by plaintiff's counsel 745
Plaintiff, who is not an indorsee, has no right at the trial to strike out the words of a special indorsement..... 726

Rights of indorsers, generally.

A parol agreement, made at the time a note is indorsed, cannot affect the indorser's rights under the law merchant..... 601
One discounting a note for the joint benefit of the maker and indorsers, though in unequal amounts, need not make demand and give notice to recover against indorsers 754
Holder of bill of exchange, after demand and notice, is not bound to active diligence 874
An indorser is bound by the usage of the local banks as to demand, notice, and protest, known to him at the time of indorsing 639, 642
But not otherwise except upon his agreement 601
A blank indorsement does not discharge subsequent indorsers as such..... 622
Bank of Alexandria bound to make demand and give notice to charge indorser.. 621

Demand.

Where note is payable at a certain bank, need not be personal.....679, 727
At bank where payable, and which was holder, must be made, though maker had no funds to his credit.....*733
Must be made on the last day of grace.. 216
On the day after the expiration of the days of grace is in time, in the District of Columbia 618
But on last day of grace, after banking hours, is not too soon..... 684
Where maker of notes dies before maturity 750
May be made by notary's clerk..... 618

Notice.

An accommodation indorser is not entitled to notice unless he has actually sustained damages by its want.....*631
Agent to present a note for payment is not bound to give notice of dishonor to the indorser, but only to his principal, who in turn gives such notice..... 694
Due notice, as between any indorsers, is sufficient to charge such indorser in favor of all subsequent indorsers..... 694
The delivery of a note to a deputy notary is not per se notice to the notary who was indorser thereon..... 641
On the third day of grace, though after bank hours, *held* too soon..... 216
The next mail after protest *held* sufficient 229
If by mail, must be given on the last day of grace, where the mail does not close until six hours after the close of the bank..*615
Mailed after closing of mail on day after last day of grace *held* too late..... 737
On day following last day of grace *held* in time 684
Where indorser dies intestate, notice left with his son at intestate's place of business, before appointment of administrator, *held* sufficient 638

Page

By mail *held* not sufficient as to an indorser residing in the country where he had a house in town usually resorted to by him for business.....*639

Left in indorser's separate room, in a business house where he is a clerk, *held* sufficient 717

Left with a boarder at the same house with the indorser, with the request to hand it to him, *held* sufficient..... 699

Left at shop of indorser's son, though connected with his dwelling house, *held* not sufficient 690

Wrongly stating amount of note *held* ineffectual 615

A mistake in the recital of the date of the note will not invalidate..... 741

A verbal notice, on the day following the last day of grace, that payment had been demanded, and that the note would be protested if not paid, is not sufficient..... 686

The waiver of objection as to want of may be after, as well as before, the laches 641

The receipt of cannot be inferred from an agreement by the indorser not to take advantage of the statute of limitations, and to authorize an attorney to docket a suit.. 690

Protest.

Where the drawer has no funds in the hands of the drawee, no protest or notice is necessary. 461

Justice of peace in Mississippi is ex officio notary public for purpose of protest and notice 229

A protest which does not state that the notary informed the indorser of demand and refusal is insufficient..... 618

Payment.

The rate of exchange is not exclusively regulated by the expense of transporting specie from one place to the other, but rather by the current rates for drafts in specie 504

A landlord who also holds a note of his tenant with a deed of trust of personalty as security must apply the proceeds of such property distrained for rent to the note, as against an indorser..... 736

Discharge or release of indorser.

Indorser is discharged by holder's taking new security, and giving time to maker, without his consent..... 702

Agreement between the holder and drawer, which suspends the right of the holder to enforce payment, will discharge the indorser, for it suspends his rights..... 699

A contract to give time to the maker does not discharge the indorser unless it is valid and enforceable..... 501

After demand and notice, holder may give time to the maker, or take time note of indorser, without releasing subsequent indorser 685, 717

After demand and notice, a neglect to enforce security until it becomes inadequate by depreciation will not discharge the indorser 618

Maker, acting as agent for other parties to note in discounting it, may change date of maturity if agreed to by them..... 754

A representation by the holder of a note to the indorser that it has been paid will not discharge the indorser if he has not been injured thereby..... 501

Action—Right of.

Bank of Alexandria could sue indorser without first bringing suit against maker.. 617

Where the drawer has no funds in the hands of the drawee, and the bill is not accepted, action may be brought before it is payable 461

A note may be surrendered and canceled, and a recovery had on the original consideration, if the declaration contains a count founded thereon..... 709

—— Pleading.

In an action against the maker, it is not necessary to show a demand at the bank where the note is payable..... 690

Otherwise where action is against indorser 733

An indorsement to the cashier of a bank may be declared on as an indorsement to the bank..... 692

A note payable to a certain person, "cashier, or order," may be declared on by the bank of which he was agent without an indorsement *709

The omission of the payee to show protest, or that it was not required, can only be taken advantage of by special demurrer 461

—— Evidence.

Where the plaintiff bank's notary was the indorser, declarations of his son and deputy as to the giving of notice are inadmissible.. 641

The testimony of a notary that he demanded payment of a note on the third day of grace, and gave notice of nonpayment on the following day, is competent, although he cannot recollect the day of the month.. 685

BILLS OF LADING.

Act Pa. Sept. 24, 1866, making bills of lading negotiable, does not enable a wrongful taker to pass a good title..... 597

One who acquires bill of lading from rightful holder, though through his negligence, can pass good title to innocent purchaser 597

Purchasers of a bill of lading, who have reason to believe that the seller held it as security merely, acquire no better title.... 597

Lay days do not begin to run until the vessel has arrived at her place of discharge, and is ready to be unloaded..... 274

Running in a fog, in calm weather, upon a well-known cape, is proof of unseaworthiness, not rebutted by fact that vessel was new, and well built, rigged and manned, and in charge of a captain of reputed skill and experience.....1097

Injury to millstones properly stowed, where cargo shifted on voyage through vessel being thrown on beam ends, is within exception of dangers of navigation..... 954

Dampness or sweating of hold, the ordinary accompaniment of the voyage, resulting not from tempestuous weather, but from occult atmospheric causes, is not a "peril of the seas."..... 1048

"Dangers of the seas," "dangers of navigation," and "perils of the seas," are convertible terms.....1048

A carrier, shipping goods by a different vessel and at an earlier date than that specified, is liable for loss by shipwreck, notwithstanding exception of "accidents of the seas," etc.....1097

Failure of master to deliver cargo in accordance with terms of bill of lading renders vessel liable for agreed value less freight and charges..... 170

A provision that any extra expense of discharging is to be paid by the consignee makes him liable for such extra expenses as are necessarily incurred..... 954

A custom founded upon a constant departure from the terms of bills of lading used in the trade is not available to control such a bill of lading.....1097

Custom of trade will control where it is doubtful whether injury is caused by excusable perils of seas, or by dangers for which carriers are responsible.....1048

As between original parties, it is competent to show actual condition of goods at time of shipment.....1048

Page

A bill of lading is conclusive to establish the articles shipped unless fraud or mistake is shown..... 323
Burden is on carrier to show that the damage was caused by the danger of the seas 1097, 1191

BONDS.

A penal bond is not enforceable beyond the indemnity..... 660
Recovery on bond with penalty for performance of covenants must be limited to the penalty..... 722

BOTTOMRY: RESPONDENTIA.

Respondentia.

A bond to secure a pre-existing debt is valid 159
No fraud not participated in by the lender can affect the bond..... 159
The delivery to the lender of a bill of lading on the arrival of the vessel is equivalent to a direct consignment to him..... 159
The bond is not void because it was given and the loan made after the vessel sailed on the voyage risked..... 159
Rights of lender as to homeward cargo, how secured—Preference in United States. 159
The words "lost or not lost," omitted, may be supplied by equivalent expressions 159
All the papers connected with the bond and shipment will be construed together...159

CARRIERS.

See. also, "Affreightment;" "Bill of Lading;" "Shipping."

May grant exclusive privilege for transaction of business on its vehicles, and eject a person transacting business without its consent 892
Must take adequate measures to protect cargo against a common and ordinary occurrence, which might have been foreseen.1191
Liable for damage to hemp from oil escaping from casks, not caused by dangers of sea.....1191
Has burden of showing how loss occurred 1091, 1097
Not necessarily exonerated by the taking of the usual care and precautions, and the conveyance of goods in the usual manner..1191
Liable for loss of coin in a trunk with wearing apparel, though it had no notice, where the passenger pays for excess baggage 507
The liability as carrier continues after arrival of goods, notwithstanding restrictions in bill of lading, if the carrier fails to give notice of arrival..... 275
An express company which has limited its responsibility to ordinary care is not liable for a loss caused by the negligence of a railroad which carried its freight.....*650

CHAMPERTY: MAINTENANCE.

A cestui que trust may lawfully dispose of his trust estate, though his title is contested by the trustee..... 495

CHARITABLE USES.

The statutes of mortmain are in force in Maryland, but the statute of charitable uses is not..... 855
Devise in trust, to lay out $200 a year in wood, meal, and clothing, to be distributed among the poor and necessitous widows and orphans within the corporation of Georgetown, is void for uncertainty..... 855

CHARTER PARTIES.

Page

A charter party to load at a certain place is, in contemplation of law, made at such place 539
All representations as to carrying capacity are merged in a charter party stating the vessel to be of certain tons burden.... 483
No action will lie for breach of verbal agreements occurring between the date of a charter party and its signing..... 770
A failure to proceed "with all possible dispatch" from a certain port to the port of loading gives claim for damages, but no right to avoid contract, where object of voyage not wholly frustrated.....*590
Vessel owners not bound to sign unqualified bills of lading for cargo until lawful claim of demurrage, which is a lien thereon, is satisfied; and for delays caused thereby charterer is liable..... 539
Under a guaranty on an assignment of a charter party that the vessel is first class, it is necessary that she be actually classified 351
A delay to classify such vessel, where no damage is set up when she is tendered as ready, for want of a classification, will not excuse performance by the transferee..... 351
"Rainy days," as excepted from lay days for loading a cargo of grain, mean such rainy days as will prevent loading with safety and convenience in the particular port 539
Where master fails to object to port as a "safe port," owners cannot recover for injuries arising from its unsafeness..... 78
A vessel chartered "to load with a full cargo" of bamboo of certain size bundles, at a certain freight per bundle, may recover for a full load of the agreed size where those loaded were much larger..... 78
Where charterer absolutely refuses to accept vessel, owner need not keep her in readiness for delivery during all the lay days 351
Demurrage allowed where shipper caused his own vessel to be loaded before a chartered vessel which was first ready..... 170
A suit on a charter party, signed by the master, to whom the charter money is to be paid, is properly brought in his name alone 483
A suit is properly brought in the name of the managing owners, who signed the charter party in good faith as owners..... 590
Computation of damages on breach of contract by transferee of charter party to perform its conditions..... 351

CHATTEL MORTGAGES.

Unrecorded chattel mortgage valid, as between the parties, although possession not taken 830

CHINESE.

State statute prohibiting employment of Chinese by contractors upon public works *held* in conflict with the treaty with China, and void..... 472

CLERK OF COURT.

Entitled to commissions upon proceeds of interlocutory sales of prize paid into court.. 241

CLOUD ON TITLE.

Circuit court will entertain bill by one in prior possession, accompanied by title, to remove cloud upon title.....1069
Bill alleging seisin under state grant, and possession thereunder for seven years, is sufficient 1069

Page

A suit brought under the Iowa statute to quiet title is an equity suit..... 560

COLLISION.

Nature of the liability.

Exertions to avoid a collision will not relieve a vessel whose original wrongful maneuver made it inevitable.....1179

"Inevitable accident" means one happening after due care and caution and a proper display of nautical skill..... 564

Rules of navigation.

Steamer departing from statutory regulations assumes all risks of misunderstandings 177

Pilot rules of supervising inspectors are controlled by Act 1864..... 177

The law of the river is established by usage to which navigators must conform.. 930

Navigators on the Ohio river must conform to usage that descending boat must keep in the current, and ascending boat to the right shore..... 930

Descending boat in approaching ascending boat on Ohio river must stop her engines, and float, leaving other boat to choose her course..... 930

General rules of navigation of Mississippi river and the law of Louisiana require descending steamboat to keep the middle of the river, and to allow an ascending boat to choose her course.....1023

Sail vessels meeting.

A vessel sailing free, which mistakes the course of another closehauled, and causes a collision by luffing, will be held liable..... 227

A sail vessel is in fault for coming in stays across the bows of another sail vessel, which she has just passed..... 980

Steam vessel meeting sail vessel.

As between steamer and sail vessel, former is held to greater caution and vigilance, and must adopt necessary precautions to avoid collision..... 454

Sail vessel changing her course will be held in fault if steamer used all reasonable precaution to avoid collision..... 454

Sail vessel is justified in changing her tack when the circumstances render it expedient and proper..... 955

Burden of proof is on steamer to show fault in sail vessel.....1179

Vessels moored, etc.

Wrecking vessels anchored over a wreck, and fastened together, are substantially but one vessel, and should exhibit but one light 232

Steamer lying to or at anchor at night or in fog must take precautions to warn approaching vessels.....1091

Burden is on colliding vessel to show that vessel at anchor was at fault, or the collision inevitable..... 564

As against a vessel colliding with another moored at a pier, and unable to move, it is sufficient to aver that the former ran into the latter..... 4

River and harbor navigation.

Steamer running into harbor or through common thoroughfare must take extra precautions 1091

And in night, or in case of fog, must move with great circumspection, or lay to or anchor, according to danger.....1091

Steamer navigating near piers, in violation of harbor regulations, liable for collision with steamer in proper track, taking due precaution.....1094

Speed: Fogs.

Speed of 16 or 17 knots during dense fog, upon frequented track, grossly improper...1095

Where fog is so dense that vessel cannot avoid another at anchor, it should not proceed 563

Sail vessel becalmed in fog not culpable for omitting to use foghorns or other warnings, which would not have been of any avail. (Reversing 1091).....1095

Lights, signals, etc.

No maritime usage requires merchant vessels constantly to carry lights..... 454

Lookouts.

Want of a lookout will not be excused unless it is clear that it did not contribute to the collision..... 183

Steamer in backing out of slip in maneuvering for landing is negligent in not having a lookout on after deck..... 562

Particular instances of collision.

Between vessels at anchor in a storm...1161

Between steamer backing out of slip, swinging with tide, and ferryboat making adjoining slip..... 562

Between longboat hanging under bark's counter and barge breaking loose from pier by force of ice floe..... 253

Between vessel lying at end of pier, with stern projecting into ferry slip, and ferryboat making landing, carried by tide against it 564

Between ferryboat on foggy morning and brig anchored near track, in violation of ordinance 563

Between towboat and wrecking vessels anchored over wreck, and exhibiting wrong light 232

Between tow and tug of another tow, in the Kills..... 183

Between schooner and steam propeller in Long Island sound..... 266

Procedure.

Where a collision is joint act of two vessels, they may be joined as defendants; but otherwise where distinct acts of collision are charged, without privity..... 102

The appointment of nautical assessors, in collision cases, approved..... 875

Desertion without cause of vessel injured in collision may be considered as tending to show consciousness of fault..... 177

Where evidence leaves it open to reasonable doubt as to which party was in fault, the loss must be sustained by the one upon whom it has fallen.....1058

Rule of damages.

Personal liability of owners of vessel is measured by value of vessel immediately before collision and freight pending, and they are not exempted by its loss..... 875

Expenses of raising injured boat, of repairs, and for loss of time allowed..... 930

Jury not bound to give interest..... 930

Interest, at 6 per cent., on sum paid for repairs, allowed..... 565

To recover demurrage, loss of service and damages by such loss must be shown..... 565

Demurrage will be allowed where the vessel, while undergoing repairs by the owners of the colliding vessel, was offered a charter which the master in good faith refused to accept, because having no knowledge of when she would be ready, though he did not inform the claimants..... 567

Burden is on claimant to show that the making of repairs to the injured vessel was to be in full satisfaction of damages..... 567

Libelant entitled to full amount of damages, though he has received partial indemnity from underwriters..... 255

Owner of vessel sunk in middle of Long Island sound not bound to attempt to save property from the wreck..... 762

Division of damages.

Rule of equal contribution applied where vessels are mutually in fault.....1091, 1095

Page

Where both vessels are in fault, and only one injured, she may recover half damages and full costs 565

Where collision between two tows resulted from negligence of both tugs, and, on libel against one, opportunity given to make the other a party is not embraced, only half damages will be decreed 177, 183

A schooner admitting that she broke adrift from her tug because of her own defective hawser, is alone liable for collision with a vessel moored 4

The report of a commissioner in a case of mutual fault of a certain sum as "due to the libelant" will be amended so as to read "as the damages sustained by libelant." 565

Costs.

Libelant entitled to costs, though his vessel was equally in fault, and damages are apportioned 232, 565

Review.

A decree for damages for collision in favor of several libelants should be for the gross sum, so as to bring it within the jurisdictional amount for appeal 252

CONFISCATION.

Under Act N. Y. 1778, estates forfeited for treason are not sold free from incumbrances. But otherwise as to Act N. Y. 1783 1104

CONSTITUTIONAL LAW.

Act March 26, 1814, § 14, providing that a majority in value of creditors may discharge an insolvent debtor for seven years, is unconstitutional 744

The admission of an attorney to practice is not a contract, and an act declaring a forfeiture is not invalid as impairing the obligation of a contract 1043

The right of an attorney to practice his profession is his property, and an act (Jan. 24, 1865) declaring a forfeiture of such property for offenses not so punishable when committed is ex post facto and void. 1043

A statute of limitations, relating only to the remedy, and not to the obligation of contracts, though affecting existing rights, is not unconstitutional 811

A law regulating the issue of executions on judgments previously rendered, affects the remedy merely, and is not unconstitutional 707

Unconstitutional law no justification 71

CONTEMPT.

Creditor enforcing execution on state court judgment, in defiance of injunction of bankruptcy court, in which debtor has filed voluntary petition, is guilty of contempt 96

CONTRACTS.

A legislative act adopting certain school text-books, and providing that they shall be exclusively used by the schools, does not constitute a contract with the publishers, nor authorize state agents to contract with them 580

Note made on Sunday not void 911

Confederate treasury notes are unlawful currency, and cannot form a legal consideration to support a contract 678

The addition of the words "in gold," in a contract to pay a certain sum, will be treated as surplusage 483

Nonperformance of stipulation in mining lease to commence operations by a specified time does not work a forfeiture, but gives right of action 810

Page

Where covenants are mutually dependent, neither party can sue without having offered to perform or showing an excuse for for not doing so 768

In such case plaintiff cannot show partial performance under a general averment of performance 768

CONVERSION: TROVER.

Measure of damages for the conversion of a whale 966

COPYRIGHT.

An author is one who, by his own intellectual labor, produces an arrangement or compilation new in itself 195

A publication of revised rules of court is not a new edition of a previous publication of the rules before revision 759

Sale of book prior to deposit of copy of title-page will defeat copyright, as actual publication is presumed from a sale 478

Deposit of title-page, publication of notice, and delivery of copy of book, as provided by law, (Feb. 3, 1831,) are indispensable conditions 478

Where title-page was deposited in 1846, a notice stating entry as 1847 is fatal 478

A compiler of books must not copy results of another compiler's labor, but must resort to original sources of information 759

In printing court rules, it is an infringement to copy, from an annotated edition of such rules, citation of authorities contained in such annotations 759

Case, and not trespass, is the proper form of remedy to recover damages for violation of copyright 195

On motion for injunction, the affidavit of defendant is competent evidence against the oath of plaintiffs in the bill 478

Where an infringement is palpable, a provisional injunction will not be refused if not attended with serious injury 759

CORPORATIONS.

Due organization, in compliance with the statute, will be presumed 709

Where the charter reserves unconditional power to alter or repeal, the legislature may act arbitrarily; but otherwise where reservation is made for "misuse or abuse." 570

A contract entered into with the incorporators for the company before its incorporation, but not perfected until afterwards, is in effect a contract with the company 709

Change in charter, from "life and accident" insurance company to "fire, marine, and inland insurance," discharges nonassenting subscribers to stock 26

Forfeiture of stock for nonpayment of call defeats right to recover on note for previous unpaid assessment 26

A by-law prohibiting a transfer of stock by one indebted to the corporation is not in violation of the Missouri law 310

An unpaid subscription for which the subscriber's notes have been taken is a "debt," within the meaning of the by-law 310

The officers of a corporation cannot, as against creditors, relieve a subscriber from his unpaid subscription 310

Preferred stock certificates issued by a railroad company, construed as to the conflicting rights of holders of common and preferred stock to net earnings 371

Officer of corporation making transfer of stock, under authority of an assignment, acts as agent of assignor, and his laches are not chargeable to corporation 310

A decree against stockholders for a pro rata contribution to pay the debts of the company is several, and action will lie thereon against one stockholder 624

Page

Bill by stockholders to impeach judgment against corporation dismissed without prejudice 95
Stockholders may come in as parties to suit against company to be relieved from fraud perpetrated by officers of company in transaction in question.....1079
Individual bankruptcy of a stockholder and officer of a corporation does not incapacitate him to act as such, though by-laws require officers to be stockholders..... 187
Acceptance of an official bond of a bank officer can only be proven by the bank's record of the proceedings..... 691
Corporation may sue under its corporate name and style, and not necessarily by attorney 728

COSTS.

Where both parties except to commissioners' report in a collision case..... 565
Not allowed for illegible depositions..... 253
Not allowed if action is dismissed for want of jurisdiction..... 648
Not awarded on affirmance where both parties appeal..... 183

COURTS.

In general.

Government departments or agents, seeking to execute a law in an unconstitutional manner, as by taking private property for public use without making compensation as provided by law, may be restrained..... 245

Judicial power of United States.

A state legislature cannot suspend process in the federal courts as to its citizens.. 306
Jurisdiction of federal courts not derived from common law..... 410

Comparative authority of federal and state courts: Process.

There is no concurrent jurisdiction in rem in admiralty cases between the courts of the United States and of the several states 10
The admiralty and maritime jurisdiction of the federal courts is exclusive of the state courts save as to the common-law remedy, which is by action, and not by proceeding in rem..... 10
An execution issued out of a state court is a lien, from its delivery to the sheriff, on surplus proceeds in a marshal's hands under prior process from the federal court...1059

Federal courts—Jurisdiction in general.

Federal court will retain jurisdiction of action, once acquired, to give remedy to all intervening and conflicting rights..... 957

—— Grounds of jurisdiction.

Citizenship of one party in District of Columbia cannot create a case of diverse citizenship 886
A corporation is not within the meaning of the constitutional provision giving jurisdiction in cases of diversity of citizenship..*692
A corporation cannot sue in the circuit court on the ground of diversity of citizenship, if any member is a citizen of the state with defendant..... 648
The words "civil suit," as used in section 11 of the judiciary act, do not embrace admiralty proceedings, and a libel may be filed against a foreign corporation, and property within the district attached to compel appearance .....76; contra, 80
Conveyances made merely for the purpose of giving federal courts jurisdiction are ineffectual for that purpose..... 886
The rule that federal courts have no jurisdiction of controversies between citizens of the same states does not apply to a suit suit by an assignee in bankruptcy..... 112
A creditor's bill, filed to obtain satisfaction of a judgment at law rendered in the same court, is not an original action, irrespective of parties..... 298
A mere "declaration of intention" by an alien to become a citizen is not sufficient to prevent his being a "foreign citizen or subject" within the constitutional provision giving jurisdiction to the federal courts.. 423
The citizenship of a person not served with process, who is a joint promisor, must appear in the declaration..... 784
If a joint promisor, not served with process, be a citizen of the same state with plaintiff, the court has no jurisdiction..... 784
The circuit court has jurisdiction of an action of debt on a judgment obtained in a state court by a citizen of another state... 905
The circuit court has jurisdiction of a bill in equity by a judgment creditor against citizens of different states, to set aside conveyances by the judgment debtor as in fraud of creditors, although the ground of the judgment was a negotiable chose in action, on which a suit could not have been maintained in such court.....1143
Union Pacific Railroad Company, under its charter, may sue and be sued in the circuit court of the United States for the district of Nebraska, without reference to citizenship 1043
An averment of citizenship equivalent in import to a direct allegation is sufficient to give jurisdiction.....1071

—— Circuit courts.

Have no jurisdiction except such as is expressly granted by congress..... 728
Circuit court of district other than that of bankruptcy proceedings has jurisdiction of cross bill by assignee to redeem mortgage property of which it is not deprived by sale of interest by assignee pendente lite 832
The concurrent jurisdiction conferred on the circuit court by the bankrupt act (1867, § 2) does not include an action to collect a simple debt—Its scope..... 314

—— District courts.

Have original jurisdiction of all cases and controversies between third persons and an assignee in bankruptcy, as such..... 314

—— Administration of state laws and decisions.

Decision of state court as to character of negotiable paper does not constitute a rule of decision for federal courts..... 229
Circuit court, in aid of its general chancery powers, may enforce right given by state law.....1069
Such court may remove a cloud on title as defined by state laws.....1069
A state court's construction of a state statute forms a rule of decision for the federal court.....707, 811
State laws in force prior to Dec. 1, 1873, are rules of decision in federal courts as to the competency of witnesses. (Rev. St. § 858.) 1120

—— Procedure.

Where there are several defendants residing in different districts of same state. (Act May 4, 1858.)..... 280
Rule of state court requiring term notice, not adopted by federal court, is not obligatory on it.....1064
The examination of an adverse party as a witness, before trial, as provided by state law, not followed by federal court.....1178

Territorial courts.

Causes of a federal character pending in supreme court of territory of Colorado at time of admission as state may be heard and decided in federal courts.....1025

Local courts.

Levy of a foreign attachment (in Ohio) gives jurisdiction..... 739

Page

The court of common pleas in Ohio is a court of general jurisdiction..... 739
Suit for specific performance of contract for sale of land in District of Columbia, instituted in state court prior to Act Feb. 27, 1801, may thereafter proceed to final decree 737
If verdict reduced below $20 by account in bar in circuit court of District of Columbia, there must be judgment of non pros...1111

COVENANTS.

Of title, not implied in a deed without covenants 518
No action lies against grantor on a deed without covenants..... 518

CREDITOR'S SUIT.

Cannot be maintained by general creditor to set aside a conveyance, unless he has a lien on the property, or has reduced his claim to judgment..... 807
Will be dismissed if it is apparent that there was no bona fide attempt made by the officer to find property to satisfy the judgment 1010
Sustained though defendant had property subject to levy, where it was mortgaged and his affairs complicated.....1010
Marshal's return of execution nulla bona is a sufficient basis for a creditor's bill, the burden of showing it to be false being on defendant 1010
Such falsity may be shown by establishing that the debtor had property liable to execution, and which could have been levied on, though insufficient to pay the debt..1010
The presumption in favor of the truth of the marshal's return of nulla bona is not overcome by the fact that he returned the process on the day he received it.....1010
A court of equity may control the custody of notes assigned as security so as to prevent their being negotiated, to the detriment of the judgment debtor of the owner 298
On bill by judgment creditor to set aside conveyance as fraudulent, the court will look into the original consideration, and give the creditor only what appears due him 1143

CRIMES.

A person who encourages, countenances, and supports another in a murder is an accessary 465

CURTESY.

Seisin during coverture must be shown, to entitle husband to claim as tenant by curtesy. Exceptions..... 903
Entry on wild land not necessary, to enable the husband to claim as tenant by the curtesy 903

CUSTOMS-DUTIES.

Customs laws.

Terms of tariff act must be construed according to commercial usage and understanding, which is a question for the jury.. 325
Specific description in act of 1846 must prevail over commercial designation known at time of passage..... 382

Rates of duty.

Coral cut into form of a cameo, but not set. (Act 1846, amended 1857)..... 382
"A manufacture of hemp" does not include "hemp carpeting" so called in the trade, which, in fact, contains no hemp...1054

Invoice: Appraisal.

Act Aug. 30, 1842, § 17, authorizes penalty of 50 per cent. for undervaluation of any goods other than those purchased.... 763

Page

Secretary of the treasury has no power to fix a chemical analysis of Peruvian bark as the only test of dutiable value..... 971
Ad valorem duties are paid on the quantity actually imported, (Act 1846,) and, where such quantity is measured by weight, a loss in weight will proportionally diminish duties, though value is not diminished.... 235
Expense of salt sacks is embraced in "all costs," and is to be added to market value of salt 837
Market value of sugars transported from Cuba to Halifax, and thence imported, how ascertained 840
In arriving at market value at port of exportation, purchaser can only be required to adopt methods usually adopted by merchants in making purchases..... 971
Rule for ascertaining ad valorem dutiable value of merchandise procured by purchase prescribed by Act 1842, § 16, not repealed by Act 1846..... 837
Values of imported goods subject to specific duties are ascertained in the same manner as those subject to ad valorem duties. (Act 1820) 369
The determination of appraisers as to the market value in the foreign markets of an importation subject to ad valorem duties (Acts 1823, 1851) is conclusive..... 369
Otherwise as to goods subject to specific duties 369
The principal appraisers must act in person. An appraisal on certificate of a deputy is void. (Acts 1842, 1846)..... 816
Merchant appraisers need not act in presence of importer..... 595
Act March 3, 1851, § 3, in regard to reappraisals, applies to goods imported by their manufacturer..... 763

Bonding: Warehousing.

Right of collector to enforce payment of half fees on entry and appraisal of goods in bond and storage in private warehouses 87
On the warehousing and re-exporting of imported goods the importer is not entitled to recover back amount of the penalty paid because of an undervaluation..... 971

Payment: Protest: Appeal.

Protest alleging that appraisers were prejudiced and incompetent, but failing to particularize, is ineffectual..... 595
Protest claiming article as nonenumerated. when in fact it was enumerated, though wrongly classed, is insufficient.....1054
Specific protest, which does not refer. to or affirm a prior prospective protest, must be regarded as evidence of abandonment of all grounds of objection.....1054
Sufficiency of prospective protest.....1054
Addition at end of protest, "and hereby protest on all future entries of the same goods," is ineffectual as a prospective protest to aid an insufficient specific protest..1054
Official appraisers. even after appeal taken, have right to production of all documents connected with importation..... 971
Importers, by withdrawing their appeal to the merchant appraisers, and refusing to produce the documents connected with the importation as called for by the official appraisers, fix the correctness of the appraisement 971

Collection officers.

Jurisdiction of surveyor for port of Eastport includes district of Passamaquoddy... 269
Commissions of collector under Act 1820..1020

DAMAGES.

In estimating damages for personal injuries caused by negligence, injury done, pain endured, time lost, and expense incurred will be considered.....1180

Page

Suffering or wounded feelings of parent not considered in estimating damages for loss of child, but only actual pecuniary loss 827

Exemplary damages awarded against railway company for accident happening in consequence of gross negligence or drunkenness of its servants.....1110

Special damages, not specially pleaded, and not necessarily implied, cannot be recovered, although evidence thereof has been given without objection..... 988

If amount of damages warranted by evidence, court will not inquire how jury reached result.....1087

DEATH BY WRONGFUL ACT.

Under Ill. Act, Feb. 12, 1853, action can be maintained for benefit of next of kin, though they had no legal claim on deceased for support. It is not necessary to allege or prove actual pecuniary loss.....934, 935

In such cases there is no fixed measure of damages, but it is a question for the jury 934

What circumstances the jury may consider 935

A recovery in a former action for medical attendance, expenses, loss of service and time before the death of a child, does not affect the damages recoverable under the statute 827

DEBT (ACTION OF.)

Will not lie on a decree for an unascertained contribution from stockholders to pay the debts of the company..... 624

DEBTOR AND CREDITOR.

A debt is discharged by a tender and acceptance of a less sum in full satisfaction.. 670

A transfer of specific property to trustees for the use of creditors, under a mutual agreement that the property shall be received in full satisfaction and discharge of their several demands, constitutes a valid accord and satisfaction..... 977

Parties who sign composition deeds must do so in good faith.....1132

Purchaser of lands subject to judgment lien cannot require officer to marshal debtor's lands in order of attaching of the lien.. 957

DEDICATION.

Of street for public uses includes its use as a wharf, if running to or bounded on navigable water..... 886

Selling building lots by map defining abutting street, not opened, is a dedication of the street for public use, but the fee simple does not pass to the city..... 886

The public square in Council Bluffs *held* to be dedicated to the public by the platting and acknowledgment thereof, and acts in pais by the dedicator.....1082

A street dedicated to a city vests in the public, subject to its regulation and improvement by the corporation, and cannot be treated or used as private property by that body..... 771

DEEDS.

Of bargain and sale by a person not in possession is void..... 686

Of release, if it cannot take effect as a release, may be construed in furtherance of the intention of the parties as a bargain and sale..... 495

In construing, effect is to be given to every expression, if it can reasonably be done.. 771

Page

Ambiguity requires deed to be construed most strongly against grantor..... 771

Mortgagee in good faith from grantee in deed deposited in escrow, and recorded by depositary without notice to grantor, will be protected..... 368

Deed absolute may be shown to be a mortgage.. 660

DEPOSITIONS.

Notice at Washington on Dec. 31, of taking of deposition in Baltimore on Jan. 2, is not reasonable 908

Where all parties reside in the place, a notice to take depositions on following day is not too short..... 101

Notice of taking, directed to the party, may be served on his attorney..... 907

Residence of adverse party sufficiently averred by certificate of magistrate that it appears to him that he resides more than 100 miles from place of caption..... 763

Where an issue is joined between plaintiff and garnishee, depositions must be entitled in the garnishee's name..... 471

Depositions sworn to before justice of peace, if taken under rule of court, may be read..... 583

A deposition, though merely to prove a pedigree, if taken by others than those named in the commission, cannot be read.. 583

It must be shown that witness whose deposition was taken de bene esse was served with subpoena, and is unable to attend..... 583

The deposition of a deceased witness as to pedigree may be read, though taken in another cause between other parties, and on a different subject..... 583

A deposition, after having been read, may be waived and withdrawn by party offering it..... 753

When filed for three years, motion to suppress for irregularities is too late..... 649

A suppression of answers to questions in a deposition warrants finding that they were prejudicial.....1183

DESCENT: DISTRIBUTION.

Heirs of deceased debtor not permitted to have rents and profits of realty until the sale to pay debts..... 728

DISCONTINUANCE.

An attachment by way of execution is discontinued if there is no appearance at the return term..... 747

DISCOVERY: INSPECTION.

Discovery will not be granted in aid of a suit at law not in the proper form of remedy..... 195

On bill for infringement of copyright, waiving forfeiture, discovery may be compelled in aid of recovery of damages..... 195

Bill does not lie if plaintiff has knowledge or means of proof, or the same means as defendant..... 439

Defendant cannot be compelled to make discovery to a bill seeking to enforce penalties and forfeitures..... 195

If relief not incidental to discovery, bill does not give power to make final decree where answer discloses nothing, or denies all equity 439

DISMISSAL: NONSUIT.

Where plaintiff cannot sustain his bill, it must be dismissed at his costs, regardless of grounds of equity..... 902

Page

Want of proper averments in declaration cannot be made ground of nonsuit..... 987

EASEMENT.

In determining the right to an easement of way acquired by user, the fact of user and susceptibility to such use must appear..... 771

Presumption of grant to public by uninterrupted use of way for convenience requires much shorter time than in case of use by individual..... 771

Such presumption may be repelled by showing owner's assertion of right, and denial of use assumed by public..... 771

The right of city inhabitants to access to a river over town proprietors' lands is a mere right of way..... 771

By accepting conveyance without objection, and with knowledge that a street through the demised premises had been dedicated, grantee takes subject to the easement thereof..... 771

EJECTMENT.

Title acquired after date of demise cannot sustain the action.....1085

A lease for the sole purpose of mining vests a corporeal interest sufficient to sustain ejectment..... 810

Joinder of parties holding separate and distinct possessions.....1060

Landlord not permitted to defend alone in ejectment without consent of plaintiff in Pennsylvania 1188

No person can claim privileges of an occupant (Act Tenn. 1806) unless he has actually settled on land claimed.....1005

When defendant allowed to take possession of prior occupant to his own to bar action by length of possession..... 781

Possession held to pass under conveyance in like manner as if grantee had actually entered.....1060

A presumption of title may arise from long possession under circumstances favorable to such presumption, but may be rebutted by positive proof..... 429

An equitable claim, however strong, cannot be set up to defeat the legal title.... 429

One seeking to invalidate or avoid a deed for adverse possession must impeach it... 903

Defendant who has no title cannot question conduct of trustee in conveying to plaintiff.....1060

Death of plaintiff's lessor does not abate..1085

A demise in the name of one deceased will be stricken out on motion.....1085

It is sufficient to describe the locus in quo sufficiently to acquaint defendant with knowledge of what is claimed, and to enable him to prepare his defense..... 771

Municipal corporation must sustain its title by proof of as high an order as would be necessary by an individual..... 771

The truth of recitals in deeds, offered only to show the transmission of the legal title, need not be proved aliunde..... 686

Plaintiff may recover mesne profits, on giving notice that he means to proceed for them.....1032

Plaintiff must prove the length of defendant's enjoyment of the premises, and their value..... 771

EMINENT DOMAIN.

See, also, "Waters."

Land may be taken for a railroad, under legislative authority, upon just compensation being made..... 574

Private property cannot be taken for public use until compensation is actually made. A provision for ascertaining and making compensation afterwards is not sufficient..... 245

Congress has no power to authorize a telegraph company to construct its line over private property without making compensation..... 176

Act Md. 1785, c. 49, respecting taking of land for private ways, is valid..... 831

Such act is in force in the county of Washington, D. C..... 831

Authority to construct and repair railway, and take materials therefor, does not give right to divert waters for use of engines..... 784

Authority to take materials or divert water for use of railroad from lands contiguous to, adjoining, or near the railroad, is not limited to lands bounding the road.... 784

Four days' notice of meeting of jury to fix damages is sufficient..... 574

EQUITY.

Jurisdiction.

Will not entertain jurisdiction if plaintiff has a plain, adequate, and complete remedy at law..... 439

One threatened with proceedings under a void act has an adequate remedy at law.. 472

Has no cognizance of executed trusts enforceable at law..... 439

An executed trust cannot be revived by nonexecution of trust arising from subsequent agreement relating to same subject.. 439

Has power to enjoin state officers from acting under a law impairing the obligation of a contract made with the state.... 580

Will not interfere to restrain an act done under color of authority conferred by law, until the right is determined at law..... 105

Will not entertain jurisdiction of defenses available in another court in prior case..... 486

An impediment to navigation by a bridge, causing sail vessels to strike their masts, may be adequately compensated in damages, and equity will not interfere..... 105

A suit may be brought to give effect to a decree where the conditions of the original decree are not appropriate to the powers of a court at law..... 624

Has jurisdiction of suit to set aside fraudulent conveyances by a judgment debtor 1143

There cannot be concurrent jurisdiction at law and in equity where the right and remedy are the same, but equity may proceed in aid of the remedy at law..... 439

The judiciary act of 1798, § 16, settles the law as to cases of equity jurisdiction in the nature of an exception to its exercise..... 439

Jurisprudence.

The vendee, coming into equity to obtain the legal title of a lot upon which the purchase money has been fully paid, must pay the balance due the vendor upon other lots.. 630

Courts of equity act upon the analogy of the limitations at law, and will refuse to interfere where there has been gross laches, and in some cases even short of the statutory period..... 331

In the case of concealed fraud, complainant must set forth and prove the particularities of the discovery..... 331

Staleness of demand may be relied on at hearing, though not presented by pleadings..... 439

Bill will be dismissed where answer positively denying matters charged is not overcome by testimony of two opposing witnesses, or of one witness corroborated by facts and circumstances..... 331

Page

Rule that transfers between persons occupying fiduciary relations will be carefully scrutinized applied..... 193
Changes since the Revolution in rules and principles in English chancery not followed by federal courts..... 439

EVIDENCE.

Presumptions.

The grantor of land is presumed to be alive until the contrary appear.....1032

Best and secondary.

Parol evidence cannot be given of contents of letter without previous notice to produce 747
A note paid by a renewal note, and given up to the maker, may be proved by the former holder by parol..... 749
The record copies of deeds are admissible without proving execution or loss of originals 686

Documentary.

Signature and seal must be sufficiently legible and distinct to be read and distinguished to entitle paper to respect as official document..... 121
The record in other suits between defendant and other plaintiffs cannot be read in evidence by plaintiff..... 614
A demurrer whereby a certain fact is considered in law as admitted is not evidence of the fact in another cause between the same parties.....215, 216
A deed recorded under a decree in chancery may be adduced in a subsequent action and identified, though it did not remain on file in the suit..... 686
A genealogical table, certified under the seal of foreign office, is not evidence..... 583
The exemplification of the record of a mortgage is sufficient evidence of the existence of the mortgage and the debt due thereon 1118
Exemplification of record of copy of deed not evidence..... 781

Parol, etc., affecting writings.

Parol evidence not admissible to explain writing unless its expressions are shown to be equivocal..... 215
The meaning of "rainy day" in charter party may be shown by surrounding circumstances, including usage of port or trade 539
Evidence is admissible to show that a cashier, in taking a note running to himself as "cashier," was acting as an agent of a certain bank..... 663
Parol evidence is inadmissible to vary the obligation of the parties in a contract under seal..... 660
The official character of the certifying officer, not appearing on the deed, may be proved by parol..... 686
A father and son had the same name but different residences. A patent for land bought with the father's money named the son as grantee. *Held*, that parol evidence was inadmissible to show mistake..... 300

Declarations; admissions.

Declarations made by surveyor when laying off town are incompetent to impeach map of survey adopted by proprietors.... 771
Acts and admissions of one of several joint contractors or promisors are admissible against all..... 709

Hearsay.

Is admissible for the purpose of proving boundaries, ancient landmarks, pedigree, and prescription 1175

Competency: Relevancy: Materiality.

The belief of a witness, together with the facts upon which it is founded, is admissible 642

Page

A memorandum by a bank's note clerk, since deceased, that he had delivered a certain notice, is admissible in favor of the bank 692

Weight and sufficiency.

In case of conflicting testimony, the witnesses having best means of knowledge are to be credited..... 266

EXECUTION.

Court will not order it to be issued in other than the name appearing in the judgment, though through mistake of the clerk there is an obvious misnomer..... 718
Is a lien (in Colorado) on the debtor's property from the time it is delivered to the sheriff to be executed..... 978
Is not levied so as to give a lien against purchasers or creditors if the property is permitted to remain with the debtor..... 858
To make levy effectual, property seized should be specially designated in return or by reference to a schedule accompanying it 858
The effect of a seizure is to change the property in the goods, and vest it in the sheriff 858
Marshal is not bound to hold execution for full sixty days.....1010
Issued more than a year and a day after judgment not revived by sci. fa., *held* void.. 278
Motion allowed to take money out of court levied to satisfy a judgment, to pay a prior judgment..... 278
Parties claiming a superior lien on property levied upon by a marshal may proceed by intervention, and ask judgment against the debtor..... 596
The deed of the auditors (in Ohio) may be made to the purchaser at the sale, or to his order 739
The creditor has a remedy by action against the officer for irregularities in proceeding under the execution..... 278

EXECUTIVE DEPARTMENTS.

The executive power cannot be revised and corrected by the judicial..... 71

EXECUTORS AND ADMINISTRATORS.

An executor in a will not named as trustee therein with others to whom land is devised in trust has no power to convey the land 1172
Administrator is not bound to pay over money to creditor of deceased partner of his intestate, and cannot set up such payment in defense of action by representatives 874
Administrator de bonis non cannot be charged as such with property fraudulently conveyed to him by deceased..... 316
Administrator de bonis non is liable to banker for money credited by mistake to the intestate, and paid to the original administrator 804
Executor de son tort is liable for value of goods taken and used.....1091
The ascertainment of assets must precede a judgment against an executor or administrator for a debt of his decedent..... 748
The auditor's report as to the amount due from an intestate is prima facie correct, and admissible in evidence..... 742
Executors appointed in New York under probate of will there not authorized to maintain actions for collection of assets of estate of deceased in California..... 977
The objection that plaintiffs are foreign executors may be taken at the hearing,

Page

where it does not appear on the face of the complaint 977
Jurisdiction and procedure of orphans' court of Alexandria county in fixing compensation of executors..... 114
Accusations falsifying probate accounts for fraud must be specific, especially after parties implicated are dead..... 331
In a suit against an administrator for an account, the commissioner to whom it is referred cannot admit an administration account settled in another jurisdiction without knowledge of plaintiff.....316

FALSE IMPRISONMENT.

The detention of a person arrested in the Indian country beyond the time allowed by law for removal is a false imprisonment.... 770

Frauds (Statute of.)

See "Sales."

FRAUDULENT CONVEYANCES.

See, also, "Bankruptcy."

The joint possession by husband and wife of property conveyed to her separate use is no evidence of fraud..... 702
The right in a chattel under a contract which does not give a right to possession is no badge of fraud..... 159
Power reserved in trust deed to dispose of trust property with consent of trustee, upon substituting an equivalent, is not evidence of fraud..... 702
A voluntary conveyance to wife or children by solvent grantor, not impeachable by subsequent creditors, if not actually fraudulent 807
Such deed may become fraudulent by concealment from the public, and credit by reason of supposed ownership..... 986
Postnuptial deed founded on release of dower in husband's lands and mortgage to his creditors of lands held in trust for the wife's separate use, is not voluntary..... 702
Failure of a first incumbrancer to give notice after a second incumbrancer has advanced his money is no evidence of fraud.. 702
A bona fide purchaser without notice from a grantee, to whom property has been conveyed to defraud creditors, is entitled to hold against grantor's creditors.....1143
The donee of slaves is liable to the creditors of the insolvent donor only for the slaves and their issue living at the time of the demand therefor, and their hire from such time, and the proceeds of sales by him..... 316
A conveyance made with intent to defraud creditors, not permitted to stand as security for advances made to the grantor on account of such conveyance.....1143

GRANTS.

Law implies a grant of those things without which the principal subject cannot be enjoyed, as incident thereto..... 771
The oldest grant is conclusive evidence of title at law, except in the single case of an elder legal entry.....1005

GUARDIAN AND WARD.

The court, on motion, will appoint a guardian ad litem for infant defendant.... 770

HABEAS CORPUS.

A commissioner has no power, by habeas corpus, to bring before him a committed person, for the purpose of giving his deposition to be used in a pending cause..... 851

HOMESTEAD.

See, also, "Bankruptcy."

Head of family need not be sole owner of fee; it is sufficient that he has an interest subject to execution sale. (Neb. Code, § 525) 963
A widow having charge of household and domestic affairs in the home of her brother, and making it her home, is a part of his family 367
A family engaged to live in a farm house with the owner, and work the farm on shares, subject to his management and control, are not a part of his family..... 367
Occupation by wife and family is equivalent to occupation by husband..... 963
Right to homestead exemption, *held* not abandoned by three years' residence in another place..... 367

HOMICIDE.

A person under reasonable apprehension of danger of life or great bodily harm, not arising out of his own act, has the right, in self defense, to kill the aggressor..... 465

INJUNCTION.

Granted to stay execution upon a judgment obtained against a garnishee by surprise 462
Granted to restrain an entry on land without authority of law to divert a stream thereon 784
Granted to restrain action on negotiable instrument by payee where note was given under agreement that it should be paid in services which maker has always been ready to perform..... 28
Will not issue to restrain a completed act 784
Not granted to restrain patentee from bringing suits on his patent before the patent is adjudged invalid..... 5
Temporary injunction against collection of taxes under state authority, granted, with leave to bring question, before full bench 365
On motion for preliminary injunction, court will not decide fairly disputable questions of law and fact.....391, 784
Complainants who delay until the substance of an injury is completed forfeit right to preliminary injunction..... 784

INNKEEPERS.

Whether a house is an inn or a boarding house is determined by the right of the proprietor to select his guests.....1111

INSOLVENCY.

A discharge of a debt under the laws of the state where contracted is good everywhere 306
A discharge under a state insolvent law does not bar a debt contracted in another state with a citizen there..... 756

INSURANCE.

Marine insurance.

Master who, to prevent loss, buys in cargo at a public sale after abandonment, does not become owner so as to have an insurable interest..... 817
Under an order to insure a given sum, agent cannot insure to cover premium in same policy with that to cover value..... 984

Page

A misrepresentation as to time of sailing, if material to the risk, avoids the policy...1058

Traders in belligerent country cannot recover on policy made with warranty of neutrality, where belligerent character not disclosed 1039

Warranty of American property *held* to extend to all cargo put on board on which policy is to attach.....1065

In an action against insurers, invoice on board at time of capture as enemy's property, and deposition of mate, competent evidence for defendant.....279

Plaintiff, to recover under an open policy, must prove his interest and the value of the property 1109

Bill of lading of outward cargo no proof of interest in homeward cargo.....1109

Interest in a return cargo cannot be proved by the certificate of a supercargo, since deceased, or by his declarations.....1109

Fire insurance.

Trustee appointed in place of one named in will, who declines to serve, has insurable interest 306

There is no privity of contract between consignor of goods shipped to be sold on commission and an insurance company with which the consignees for their own benefit insure their interest to the full value of the goods *674

Charging insurance brokers with a premium due, though not paid, renders company liable, notwithstanding condition that policy shall not be in force until premium is actually paid..... 585

Keeping saltpetre on hand to cure meat is not within prohibition of storing or vending it 1087

The storing or selling of an inconsiderable quantity of saltpetre is not within prohibition of storing or vending. But a keg of saltpetre is a considerable quantity.....1087

The conditions annexed to the policy, in order to bind insured, must be brought to his attention at or before the time of the contract of insurance.....1007

The consent of the insurer to a change of ownership in the insured property must be evidenced in the manner provided in the contract 1021

A consent to an indorsement on a policy, "payable in the case of loss to" a third person, is not a consent to change of ownership to such person, where such change was not known at the time.....1021

Whether goods embraced in a stock insured as "dry goods" were or were not "dry goods" is for the jury.....1007

An instruction that the arson charged against owner in defense of action or policy need not be proved beyond a reasonable doubt is not necessary where court correctly charges as to measure of proof required..1087

Life insurance.

Legal title to policy obtained by husband on his life for benefit of his wife is in her..1166

Accident insurance.

Death from inadvertent taking of overdose of opium prescribed by physician is not caused by external, violent, and accidental means, but by medical treatment, within exception of accident policy.....1077

Insurance agents.

Where the insurer contracts by and through the solicitor of insurance, a clause in the policy declaring that persons acting as solicitors are agents of the insured and not of the insurer, is invalid.....1007

Local agent of foreign insurance company has power to bind company by parol contract to renew policy with one having no knowledge of restrictions on his authority 1038

INTEREST.

Page

An account made up of principal and interest, when settled, bears interest on the aggregate balance 407

Is recoverable on bond with penalty only from commencement of suit, where no demand or acknowledgment is made..... 722

A state statute allowing interest on unpaid installments of interest has reference to installments due by contract, and does not apply to interest accruing by operation of law..... 956

Accrues by operation of law after maturity of note providing only for semiannual installments of interest..... 956

INTERNAL REVENUE.

Assessor has power to make a supplementary assessment, increasing amount of distiller's tax..... 825

In a suit to recover back taxes paid on a reassessment, for error in the first assessment, the record of reassessment is not evidence of the error..... 825

JUDGMENT: DECREE.

Rendition and entry.

Bank of Alexandria is entitled to judgment at the first term..... 600

A defendant arrested to appear at next term cannot come in and confess judgment before such term..... 37

Where the record is destroyed after verdict, plaintiff after seven years allowed to file transcript of record in his possession, and enter judgment thereon..... 517

Where defendant dies after verdict and before judgment, his personal representative must be made a party by direct proceedings 517

Operation and effect.

The regularity of proceedings under which a vessel was sold cannot be inquired into in trover in another district court for her possession 818

A judgment of a court of general jurisdiction, having cognizance of the case, however erroneous, will protect purchasers thereunder 739

Where a bill is dismissed on motion of complainant before testimony taken is published, and without a hearing on the merits, the record is no bar to another suit..... 327

New parties to a second suit, not privy to the parties in the first suit, cannot introduce the former judgment in their favor, though seeking to enforce the same rights. Exceptions 791

A judgment against a bank in a suit upon its teller's bond, is no bar to an action for money had and received by him for its use 701

A judgment without process is not a lien on personalty 325

The lien on lands created by a judgment depends upon the right to sue out an elegit 743

A judgment lien operates only upon such property as is subject to levy and sale under legal process issued for its payment... 325

A judgment lien does not operate upon property at the time in possession of the sheriff under attachments..... 325

The lien of a judgment on which execution is stayed dates only from the time when execution may be sued out..... 743

A judgment rendered in a federal court is a lien from its date on all lands of defendant within the district, and (in Indiana) on those subsequently acquired from such time 957

A judgment lien takes effect from the first day of the term, and is prior to the lien of a mortgage executed before such

Page
day, and recorded on a later day, when the judgment was entered..... 626
A judgment upon a verdict, subject to the opinion of the court upon a case stated, does not relate back to the date of the verdict as against an intermediate judgment.. 684
If execution is not issued and levied within a year, the judgment is no lien as against a subsequent judgment, as to which execution was duly issued and levied..... 707

Relief against: Opening: Vacating.

A judgment or order finally disposing of a case cannot be reviewed at a subsequent term on motion, but errors therein may be corrected 596
On motion of special bail on return of sci. fa., court will set aside original judgment against the principal, for irregularity, and all subsequent proceedings..... 217
Money paid on an erroneous judgment, may after reversal be recovered back in an action for money had and received. Such recovery may be had though a venire de novo is awarded.....745, 747

Of different jurisdictions.

The federal court in a suit by an assignee in bankruptcy will not examine into the validity of a judgment confessed by the bankrupt in a state court whose jurisdiction is not denied..... 112

Actions on judgments.

Fraud in the recovery of a judgment in another state cannot be pleaded in an action thereon unless such defense could be made in the courts of such state..... 906

JUDICIAL SALE.

Court will set sale aside, if not fairly made 617

LANDLORD AND TENANT.

One holding over under a written lease is bound for the rent therein stipulated... 476
Landlord evicting tenant from part of premises cannot distrain for rent..... 465
Where rent is payable quarterly, plaintiff cannot recover for a quarter unexpired at the time of an eviction..... 637
The same principle applies where the rent is payable yearly..... 637
Slave of third person, hired to lodger, cannot be distrained for rent due by boarding-house keeper.....1111

LIBEL: SLANDER.

Words not in themselves importing anything injurious may be shown, by other matter alleged, to have been spoken with intent to affect plaintiff's credit and standing as a merchant.....1181
Access by the clerks generally of a mercantile agency to books of mercantile reports prevents them from being privileged..1183
Communications made by a mercantile agency, through its clerks and agents, to its customers as to the pecuniary ability and standing of merchants are not privileged.....1187
It is no justification, that defendant received his information from his slave, as no action will lie against a slave..... 105
Malice inferred from persistency in keeping libelous matter on defendant's mercantile books after notice of its falsity.....1183
An innuendo cannot extend the sense of the words spoken beyond their usual and natural import except by connecting them with other matter alleged.....1181
The truth of the publication, when relied on either in bar or mitigation, must be specially pleaded..... 943
Page
Plea in justification must state the substantial facts which constitute the elements of the charge, when it is general..... 943
Irrelevant matter in a plea of justification will not vitiate it, even on special demurrer 943
Plaintiff, while not required to prove the exact words used, must show them in substance and effect.....1183
Standing publication of a libel contained in book of mercantile reports is shown by proof that the books were not in defendant's exclusive possession, but accessible to his clerks.....1183
Degree of proof required where the truth is set up in justification of a charge of crime *465
Although words injurious to a man in his trade are actionable per se, plaintiff must prove the special damages claimed.....1183
Plaintiffs suing as a partnership, for injuries to their business by libelous mercantile reports, cannot have damages for individual libel unless it affected the business of the firm.....1183
General current reports as to the truth of libelous matter may be considered in mitigation of damages.....1183

LIMITATION OF ACTIONS.

Nature and operation of statutes.

A British subject who, before the treaty of 1794, took a bond in the name of a citizen of the United States, cannot avoid the statute of limitations by claiming the benefit of the clause which removed all legal impediments in the recovery of British debts 216
The statute does not run against an equitable title, nor in favor of one..... 429
The fact that the United States is a stockholder does not exempt a corporation from the operation of the statute..... 718
Virginia limitations act of 1819 applies to corporations 718

Time of limitation; how computed.

The statute begins to run from the date of a note payable on demand..... 977
Cause of action to recover back money paid on an erroneous judgment arises upon reversal, although a venire de novo is ordered, and the statute commences to run from such time..... 748
Time of accrual of right of action for money received..... 70

Exceptions; suspension.

The county of Alexandria is not "beyond seas" as to the county of Washington in the District of Columbia..... 605
Where a contract is made by a branch bank within the state of the plaintiff bank, the exception in favor of one "beyond the seas or out of the country" is not applicable 718

Acknowledgment or new promise.

The statement by the maker of a note that he will "attend" to it is sufficient to remove the bar..... 600
Casual acknowledgment of debt to a stranger may be sufficient to take it out of the statute.....*643
An offer to compromise a debt will not take the case out of the statute.....7, 647
Written acknowledgment required to remove the bar in Kansas..... 830

Pleading.

In an action on a time note, non assumpsit infra tres annos is bad on general demurrer; it ought to be actio non accrevit.. 644

LITERARY PROPERTY.

An author has a common-law right in his manuscript, and is entitled to an injunction to restrain its publication.....967, 981

Page

It is not an abandonment to the public to use one's manuscripts to instruct others who are permitted to take copies..... 981
Copies so taken for purposes of instruction cannot be applied to any other purpose 981
The copyright act (1831, § 9) protects the author's right to his manuscript, which includes private letters..... 967
The common law gives protection to the author for his manuscript only..... 967
Where an author's manuscript work has been published, he has not an exclusive right at common law to republish it, for the first publication is a dedication to the public 967

MALICIOUS PROSECUTION.

Declaration must allege termination of proceedings 907

MANDAMUS.

A judgment in a federal court on municipal bonds may be enforced by mandamus compelling a levy of taxes, provided by law for their payment 67
A peremptory, instead of an alternative, mandamus will be granted where defendant has had ample opportunity to set up all defenses 67

MARITIME LAW.

The exclusion of the maritime law will not be inferred. The mere absence of a tribunal to enforce it is not sufficient evidence of an intention to exclude it..... 255
Where obligations growing out of international commerce are to be adjudicated with reference to the maritime law, the lex loci contractus, the lex rei sitae, and the lex loci delicti are inapplicable..... 255

MARRIED WOMEN.

Bills of exchange and promissory notes constitute an exception to the rule that the wife's choses in action, other than chattels real, are assignable only in equity.....1071
Indorsement of note to wife, and assignment of mortgage securing it by husband alone, is sufficient at common law.....1071
Act Cal. April 17. 1850, inapplicable to husband and wife married out of state, and never having been within its limits.....1071
It seems that a married woman cannot hold, to the exclusion of her husband or his creditors, a stock of goods purchased on credit, nor the proceeds or profits. (Wis. Act Feb. 1, 1850)..... 243
A married woman, living with her husband and carrying on trade in her own name, cannot, in Wisconsin, become his debtor, nor be garnished in proceedings against him..... 243

MARSHAL.

Entitled to full commissions on interlocutory sales of prize..... 241
Cannot enforce payment of fees by an order and an attachment..... 169
Not responsible for act of deputy not in the line of his duty..... 357
The deputy is an officer of the court, and may be held responsible as such..... 357
The deputy may be attached for disobedience of an order to pay over money received on a judgment after return of execution 357

MASTER AND SERVANT.

A mother cannot bind out her child..... 558
Binding out of apprentice in Washington county, D. C., is of no effect, unless parents approve and indorse indentures within two months..... 928

MINES.

A lease of land for the sole purpose of mining, subject to the owner's use of the same for tillage, gives an exclusive right of mining 810

MISTAKE.

A father who takes no steps to have corrected a patent erroneously naming his son as grantee is guilty of laches as against a bona fide mortgagee from the son..... 300

MONEY RECEIVED.

Money paid on an erroneous judgment to the agent of the plaintiff may, on reversal, be recovered from him if yet in his hands, or if he was given notice at the time of payment that he would be required to refund it *745

MORTGAGE.

The fact that no bond was ever executed is not fatal to a mortgage purporting to be executed to secure payment of a certain sum, according to the conditions of a certain bond..... 521
A mortgage cannot be sustained as given for an actual debt other than that stated on its face, except on clear proof..... 521
An assignment of a mortgage, with all sums due or to become due thereon, will include the note secured as an incident of the debt 521
Persons consenting to change of bonds for stock in new company, formed on foreclosure of mortgage on first, cannot have new foreclosure on claim of coercion..... 862
Legal owner of equity of redemption and of mortgage paid by it *held* entitled to possession pending suit to declare title void.... 832

MUNICIPAL CORPORATIONS.

A warrant to recover the penalty of a by-law must name the corporate plaintiff, and describe the offense with reasonable certainty 901
The mayor of Washington cannot exercise jurisdiction in a case in which he is a party 901
Right to lay railroad tracks and build depot or pier buildings in city (Keokuk) streets without consent of abutting owner.. 898
Owner of lots in Keokuk, fronting on Water street, owns the fee in the street to the river, and the portions reclaimed from the river, subject to the public easement.. 898
Authority to issue town bonds in aid of railroad under Illinois acts..... 504
Town bonds issued after, but authorized by vote before, the adoption of a new constitution, are not affected by it..... 504
Town bonds and coupons not sealed, issued under a law providing that they should be under seal, though their wording showed they were intended to be sealed, are void..... 251
A certiorari to review the decision of a county judge, that railroad aid bonds be issued, suspends the operation of his judgment, and the railroad company acquires no title to the bonds issued thereunder enforceable against the town on reversal of the judgment 374
Such reversal cannot invalidate the title of a bona fide purchaser..... 374
The purchaser from a railroad company of railroad aid bonds issued in fraud of the

Page
rights of the town must show that he purchased in good faith and for value..... 374

NAVIGATION.

The right of the public for purposes of navigation is paramount to that of the riparian owner..... 245
Both federal and state governments may authorize alterations in navigable streams to afford greater facilities for navigation, and in so doing may take property of riparian owners, upon making compensation therefor 245
A law declaring a stream a public highway may be repealed or modified whenever the public convenience and common interests of the people require it..... 105
The construction of a railroad bridge across a navigable river, though authorized by state legislature, may be enjoined by federal court..... 427
But where congress subsequently gives authority to construct the bridge, the injunction will be dissolved..... 428
Where it appears that a proposed bridge across navigable inland waters is a common nuisance, the proper remedy is a prosecution by the state..... 105
The nation which constructs an artificial channel may annex such conditions to its use as it pleases..... 255

NEGLIGENCE.

An owner who leaves uncovered an excavation made by him in the adjoining sidewalk is liable to a pedestrian who, in the use of ordinary care, falls into it at night 1180

NEW TRIAL.

Not granted, where evidence conflicting, because court would have drawn different conclusion 1087

OFFICERS.

The bond of a teller of a branch Bank of the United States is not void because executed 14 days after he has entered upon his duties..... 688
The condition in a bond to well and faithfully behave and execute the office, does not render the surety liable for want of skill 688
The sureties on the bond of a cashier of a bank are liable for his acts pending the communication and carrying into effect of a resolution of suspension..... 722

PARTIES.

Having distinct claims against same defendant cannot maintain joint suit in equity 472
A corporation which has obtained the title of one of original defendants pendente lite, may become a defendant, and seek relief by cross bill, although it has also acquired the sole complainant's title pendente lite 832

PARTITION.

Bill will not be entertained unless claimant's title be clear to the portion to be received 886

PARTNERSHIP.

Any partner may be agent of third person in drawing bills in favor of the firm for advances made under express authority.... 794
Page
A firm may negotiate its own paper to one of its partners, or take his paper and and use it for the firm's purposes..... 794
A bill drawn by a partner in two firms, in the name of one, upon the other, payable to himself for his individual debt, and accepted, is enforceable in the hands of an indorsee without notice..... 302
In a suit for the settlement of partnership accounts, where one partner died insolvent, his next of kin or other personal representatives are necessary parties.... 964
Items of partnership account cannot be recovered in a suit at law between the partners if the joint concerns have not been settled 945
In an action at law between partners, accounts rendered are admissible to show that the items are not of partnership accounts 945
One who sells to a firm cannot maintain an action for the purchase price against a partner subsequently taken in..... 201
Debt may be maintained upon a firm note against a secret partner, who has not signed it, but he is not liable if the money obtained on its discount was not used for the firm 614

PATENTS.

Invention.

Combination of known tool with known machine, requiring only ordinary mechanical skill, not patentable..... 386
Features which a skilled mechanic would devise or apply in operating a machine not patentable 947

Novelty.

A machine is patentable only when substantially new.....1142
Application of old machine to new purpose is not patentable.....1142
There must be novelty, either of product or of process, to make combination patentable 1027
Patent for combination cannot be supported by evidence of novelty of one of its parts 1027

Who may obtain patent.

He who invents first, although his invention is imperfect and incomplete, has the prior right if he uses reasonable diligence in perfecting and adapting the same.. 960
A joint patent cannot be obtained for a sole invention of one..... 914

Prior public use or sale.

Use of an invention by public for 11 months will not bar right to patent..... 293
A prior use alone, in a foreign country, will not avoid the patent..... 960
Nor will such prior use in this country necessarily avoid the patent, unless with the patentee's consent or allowance..... 960
Devices employed in experiments will not, on their abandonment, defeat a patent to a new and independent inventor..... 217

Prior description.

Description, in printed publication, will not avoid patent, unless prior in point of time to the invention of the patentee..... 960
A prior description, to invalidate a patent, must be such as to show that the article described in the patent can be certainly arrived at.....141, 147

Abandonment: Laches.

Merely withholding an invention from the public does not amount to an abandonment 293
Concealment of invention, because of information that another had anticipated it, will not forfeit right to patent..... 271

Application and issue. Page

The embodiment of the principle into a machine as described, and not the abstract principle, is the patentable thing.....1142

A patent of one making an improvement on an existing machine, or a new machine, should not be for a method, but for his machine, or improved machine..... 914

Use of phrase "any suitable material," in patent for combination, shows claim to combination, limited to known materials, though not named..... 386

It is discretionary with patent office to determine whether specimens of the ingredients or of the compound in a patent product are necessary..... 339

Original model may be proved by specifications and drawings where certified model is broken, and parts lost..... 217

The essential features of the invention must be shown in the specification; their appearance in the patent office model is not sufficient 947

A patent cannot claim both the combination of machines and the machines themselves 914

A patent for an improved machine must specify in what the improvement precisely consists 914

A patentee making an improvement in a combination of machines should include in his patent only the improvement..... 914

There must be several patents for several improvements of distinct machines..... 914

Patents may be united if two or more, included in one set of letters, relate to a like subject, or are in their nature or operation connected together..... 914

The obtaining of a joint patent estops the patentees to claim under prior several patents for the same invention..... 914

Appeals from commissioner's decision.

A patentee may appeal from a decision against him on an interference declared between his patent and an application..293, 1102

The jurisdiction of the circuit court of the District of Columbia over the question of priority only arises where an interference is declared, and so determined..... 394

The interference coming up for review is only such as respects patentable matters 394

Objection to evidence waived where not distinctly made when taken..... 819

Sufficiency of evidence to show priority of invention.....1102

Suit to invalidate patent.

Parties in suit to invalidate patent granted by the commissioner after an interference not confined to evidence before commissioner, nor is such evidence in the case 97

Reissue: Disclaimer.

The act (July 4, 1836, § 13) authorizing reissues is to be construed liberally, and not literally, as restraining and limiting the right 550

A description claiming a combination. and not giving notice of a claim of any part, is a dedication of the parts to the public, which cannot be revoked by surrender and reissue 1031

Devices shown in the original drawings, but not specified, may be claimed in the reissue 766

The applicant has a right to restrict or enlarge his claim so as to give it operation, and effectuate his invention..... 550

A new function developed by combination of different elements is beyond the scope of a reissue..... 550

The right to reissue in two divisions, one for the process and the other for the product. illustrated..... 346

The model filed in compliance with the law is admissible as evidence of the scope of the invention and of the defects in the patent 554

The fact of reissue raises a presumption that the invention claimed in the original and the reissued patent are the same, and that the term has not been extended..... 766

Tests to be applied in considering whether a reissue is for the same invention as the original 217

Act 1839, §§ 7, 9, authorizing a disclaimer, do not apply where the patent is for combination of parts.....1027

Duration.

Act 1870, § 25, providing, in the case of foreign patents, that the United States patent shall expire at the same time with the foreign patent, is not retroactive, and does not apply to the reissue of a patent previously granted..... 346

Assignment.

A conveyance of an interest in a patent must be in writing, and a mere memorandum, in the hands of the patentee, is not sufficient 534

An assignment of all the grantor's right, title, and interest in and to a certain patent carries only the grantor's existing interest 24

An assignment made by the judge of probate under the Massachusetts insolvency law does not pass the insolvent's interest in letters patent..... 24

An unrecorded assignment of a patent is good as against subsequent recorded assignment to one with notice..... 24

Licenses.

To make and use a patented machine need not be in writing..... 534

To make and use a machine gives no power to authorize a third person to construct it..... 534

An agreement between owners of conflicting patents defining their rights, and providing for the purchase of outside patents for mutual protection, *held* to give only a license to use such purchased patents, and an action thereon is properly brought in the name of the purchaser alone..... 217

Sale of patented machine.

Deed construed as a conveyance of a single machine, without right to construct others 534

Infringement—What constitutes.

Subsequent discovery of peculiar value of material used by inventor does not give discoverer right to use it in the patented manner 386

A patent for a new product is infringed by its manufacture by any process whatever 346

A substitute for an ingredient in a patented combination does not cease to be an equivalent because it does something more and better.....135, 138

The substitution of known mechanical equivalents, or the changing of parts in a nonessential way, not producing a new result, is an infringement..... 391

The character of an infringement is not affected by a mere alteration in form and proportion, not affecting results, nor by the substitution of mechanical equivalents.... 914

It is no infringement of a patent for a combination of machines to use either of the machines separately..... 914

Rubber roller covered with cloth not an equivalent of a roller with an outer covering of rubber..... 386

—— Remedy, generally.

Circuit court may entertain a bill for an injunction and an account, or the repeal of an interfering patent..... 271

Infringement—Preliminary injunction. Page

Withheld on defendant's agreeing to accept a license..... 510
Not granted, where injury to defendant would be irreparable and profits to patentee are by licensing.....1028
Denied where affidavits contradictory, and question in doubt whether defendant had license 1163
Not refused where defendant has not been misled by plaintiff's conduct in allowing his suit to rest until a recovery in other suits by him, and then discontinuing, and bringing a new action..... 147
Pending suit in another circuit no ground of postponing, where patent has been declared valid..... 135
Where the evidence is the same as upon a prior case, the decision there will be followed 391
A decision in favor of the applicant on an interference declared between an application and a patent is sufficient ground for refusing injunction to senior patentee..... 5

—— Procedure.

It is discretionary with the court to order issues for a jury..... 271
To prevent multiplicity, suit between patentee and user of infringing machine suspended to await result of pending suit between patentee and principal infringer.... 902
The interpretation of the specification is for the court.....1027
On application for a provisional injunction, expert demonstration of the patents may be made..... 914

—— Evidence.

Burden of showing in defense that patentee was joint inventor is on defendant.. 22
A patent is itself prima facie evidence of novelty and usefulness. Plaintiff cannot give cumulative evidence on these points till they are controverted.....1027
The prima facie force of a patent as to priority of invention is absolutely destroyed by evidence of priority of invention by another 954
Mere applications for patents cannot be considered on the question of novelty..... 819
A patent will be sustained on testimony of patentee that he was sole inventor, corroborated by the circumstances, as against testimony of another claiming to be joint inventor 22
The applicant's oath, at the time of the application, that he believed that he was the first inventor, is sufficient evidence of that fact, where uncontradicted..... 960

—— Damages.

Plaintiff not entitled as damages to money paid counsel for services in the suit... 578

Decree—Construction.

A decision that a certain patent does not destroy the novelty of another is not necessarily a decision that the use of an arrangement in the latter is not an infringement of the former..... 307

Various inventions and patents.

Alizarine. No. 95,465, and reissue No. 4,321, for artificial alizarine, produced from anthracene, *held* valid and infringed by article produced under patent No. 153,536.... *339, 343, 346, 348
Boiler furnaces. No. 20,616, for improvement for burning wet fuel, *held* valid.... 766
Bracelets. Reissue No. 4,192, for improvement in plated metal bracelets, *held* valid 779
Cooking stoves. Barston's improvement *held* not anticipated..... 949
Corset springs. Reissue to Barnes, for improvement, construed, and *held* valid and infringed 876
Explosive compound. Reissue No. 5,799, for combination of nitroglycerine with an absorbent substance, *held* valid and infringed 135, 138, 141, 147
Harvesters. Reissues Nos. 2,608, 723, 724, 726, for improvements, *held* valid... 217
Hats. No. 33,978, for improvement in bonnets. Construed, and *held* valid, but not infringed 528
—— Such patent *held* infringed..... 510
Hats. Reissue to Modena Hat Company for an improved fabric for hats, bonnets, etc., *held* not infringed..... 528
Hats. Patent to Kendall and Trested, for compound for coating textile fabrics, *held* not infringed..... 528
Nonexplosive lamps. No. 57,245, to Beschke, *held* not infringed by Houchin's patent 23
Ovens. Reissue to Ball, for improvements, *held* invalid as broader than original 556
Printing presses. Award of priority for improvement 293
Pumps. Reissue to Barker, for improvements in buckets for chain pumps, *held* infringed by buckets made under Stowe's patent 819
Reaping machines. Ball *held* entitled to reissue of his reissue No. 832..... 554
Rocking-chair. No. 1,531, for improvement, *held* invalid.....1142
Rubber. Ayling's patent for improved treatment in caoutchouc *held* valid..... 271
Sewing machines. Reissue and extension of Bachelder, *held* infringed by machines constructed under reissues Nos. 346 and 414..... 307
Steam pumps. Patent awarded to Boardman for improvements..... 97
Steam safety valve. Reissue No. 58,962, as properly limited, *held* not infringed by patent No. 58,294..... 20
Telegraphy. Morse's claim (patent No. 6,420) for a new system construed, and *held* not to interfere with Bain's claim, (patent No. 6,328)..... 394
Tin cans. No. 71,680, for improvement in machine for manufacture, *held* void for want of novelty..... 947
Wringer rollers. Reissue of April 18, 1865, for improvement, *held* valid..... 386

PAYMENT.

Where, in the absence of fraud, etc., Confederate money has been received in exchange for property, the federal courts will not interfere..... 378
A payment by a bank to military authorities of funds belonging to the enemy, under coercion, discharges the bank..... 678
Where such funds are in Confederate notes, the payment may be made in Confederate notes 899
Goods consigned by an agent, with notice that they belong to his principal, are not paid for by the acceptance and payment of drafts drawn by the consignor on general account 1044
Purchase of notes by trustee for another *held* not to amount to a payment..... 501
The acceptance of new security without full knowledge of the facts, or induced by fraud or deceit, is not a discharge..... 458
At common law, a promissory note given for a simple contract debt is not payment unless so intended..... 458
In Massachusetts the presumption is that it was so intended..... 458
A bank must apply the proceeds of a note discounted by it as intended by the person offering it..... 615

PLEADING AT LAW.

Declaration. Page

In debt for "$103⅓, or 31 pounds Virginia," is not for a sum certain, and is bad on special demurrer 28

In trover for "a chest containing sundry tools," is sufficient to admit evidence of the value of the tools .....556; contra, 555

Allegation that plaintiff was owner of vessel laden with a cargo is sufficient allegation as to ownership of cargo 988

An affidavit charging defendant as follows: "1809, Oct. 5. To goods per bill, $19.89,"—is insufficient 965

Pleas.

Not guilty within three years is a good plea in trover 847

Nil debet is no plea to debt on a judgment of another state 1012

Plea of nul tiel record not allowed after plea of not guilty and issue, to debt on a judgment, suggesting a devastavit 1012

Defendant not permitted to plead the statute of limitations after the expiration of rule to plead 637

Where distinct defenses are pleaded, one one cannot be taken to help or destroy the other 313

Court will not order general issue to be stricken out to give defendant leave to plead in abatement 645

Replication.

Sufficiency to raise question of validity of contract set up in defense 121

Demurrer.

Defects in declaration in setting forth case may be availed of by demurrer 987

On demurrer to a plea, the court will consider defects in the complaint which otherwise would have been considered waived by the plea 649

A plea is not bad on special demurrer because misnaming plaintiff in marginal title. (Overruling 638) 644

Striking out pleas.

Plea not stricken out as frivolous if matter properly pleaded is included 313

Plea which expressly or in effect admits the cause of action cannot be stricken out as frivolous 313

Plea false on its face may be stricken out 313

Issues.

A subsequent amendment of the record does not affect the issue under the plea of nul tiel record 866

Upon an issue on plea of general performance, plaintiff is not bound to produce the original covenant sued upon 1119

PLEADING IN ADMIRALTY

Exceptions in an answer to a libel will be deemed waived if not determined before proof taken at the trial 227

PLEADING IN EQUITY.

Bill.

A bill is defective which does not give full names of all parties to whom it refers 957

Where all matters alleged in a bill are relevant to one defendant, he cannot object to it, as multifarious, because it is not relevant to the other defendants 195

A bill against infringers of a copyright, praying injunction and discovery in aid of a suit at law against one, though declared bad as a bill for discovery, is good on general demurrer, the remedy by injunction being independent 195

A bill seeking a discovery to enforce a forfeiture or penalty is bad on special demurrer 195

Page

Plaintiff can recover only upon the case made by his bill, and not upon that made in the evidence 1033

Where defendant is sued as sole owner of a railroad, and the proof is that he is jointly concerned with others as a stockholder, no decree can be entered against him unless the bill is amended 1171

An objection to jurisdiction for want of parties, of equity in the bill, or of there being a remedy at law, may be taken at any time 439

An exception (in Louisiana) that plaintiff, suing as administrator, is not administrator, must be pleaded in limine litis 906

Such an exception cannot be embodied in the answer, and it must be verified by affidavit 906

The same rules apply to the exception of lis pendens 906

Defects in pleadings not objected to at trial usually considered waived 486

Cross bill.

A decree dismissing the original bill does not dispose of cross bill, setting up additional facts, and praying affirmative relief 832

Demurrer.

A demurrer admits allegations of bill for purposes of motion on bill and demurrer..1069

A demurrer to a plea presents the question of the sufficiency of the bill, as well as of the plea 1171

A general demurrer to a bill will be overruled if any independent part of the bill is sufficient 195

Special demurrer to bill must specifically point out parts to which it applies 195

Inconsistencies of allegations as to authorship in bill for infringement of copyright no ground of objection on general demurrer, if other allegations are sufficient 195

The objection that a bill for infringement of copyright sets forth no title in plaintiff, and lays no legal foundation for a discovery, may be taken by general demurrer 195

Plea.

An objection that a plea is defective in not responding to all the allegations of a bill is not sustainable, for a plea may be to a part only 1171

Answer.

Answer in name of three defendants, but signed and sworn to by two only, will be stricken from files, but with leave to amend 390

Where bill sets up facts taking an oral agreement averred out of the statute of frauds, defendant will be required to respond by answer to such facts 385

Admissions in answer, not put in issue by some charge in the bill, are unavailing 1033

POWERS.

A deed of an attorney, executed in his own name, is not valid as the deed of his principal 781

Principal bound by act of his attorney in fact when he acts within scope of his authority 781

Under power of attorney from several persons to make a joint note in renewal of a joint and several note, a joint and several note made by the attorney, if beyond his power, is invalid only in part 679

A power to sign notes in renewal of existing notes gives authority to sign renewal notes given for renewal notes 749

PRACTICE AT LAW.

If books and papers are in court, they may be called for after jury is sworn 763

Defendant not required to produce an account rendered to him by plaintiff, except

Page

as accompanied by his affidavit as to the circumstances under which it was received. 742
Nonproduction of papers not available as ground of nonsuit or judgment by default, except after order to produce, made on motion 702, 988
Evidence may be received to disprove possession of or power to produce papers.... 988
A prior ruling stated by the judge out of court to have been made by him, when unreversed, must be considered as the law of the case, when coming before another judge 852
After rule to plead expired, plaintiff not compelled to produce his cause of action.. 385
Effect of minutes of court upon which no order is entered..... 852

PRACTICE IN ADMIRALTY.

An entry on the record that on the return day a certain person "appears, * * * and has a week to perfect an appearance," does not show a waiver of objection to jurisdiction 80
Claim, to be available, must be interposed on the return day of process, when proclamation is made..... 1048
A defense to libel for seamen's wages may be heard without an answer..... 937
Practice in examining parties in admiralty 236
State statute admitting parties as witnesses does not apply in admiralty..... 236
Act March 3, 1861, § 4, authorizing transfer of owner's interest in ship and freight to a trustee for claimants, does not apply to a loss to another vessel by collision, nor to injuries to cargo on board the vessel in fault 875
Foreign attachment in admiralty lies in cases of tort..... 875
The regular proceeding against a surety in a stipulation for costs is by petition after notice, and the decree may be final and peremptory. Upon proceeding by motion after personal demand, a conditional decree only is awarded 569

PRACTICE IN EQUITY.

Orders and final decree taken under stipulation in pending case, in vacation, without sanction of court, not set aside on summary motion 1073
The original papers, documents, etc., in an equity suit, may be used in court as the record, where the proceedings have not been recorded at length..... 686
Necessary averments in affidavits on motion for rehearing 823
Motion for rehearing in suit for infringement of patent cannot be made after term at which final decree entered..... 823
Proper practice in case of surprise in testimony not noticed by answer..... 823
Rehearing after interlocutory decree granted upon filing supplemental bill, for newly-discovered evidence, if of such nature as to entitle party to relief upon bill of review after final decree, but not otherwise 486
Error of judgment or mistake of counsel as to effect of evidence no ground for rehearing 486
Rehearing not granted on ground of newly-discovered evidence of which the party, by reasonable diligence, might have obtained knowledge..... 486
Rehearing not granted if newly-discovered evidence is merely cumulative..... 486

PRINCIPAL AND AGENT.

Page

Authority to indorse notes need not be under seal 749
An agent to sell on credit, taking a mortgage as security, is not thereby authorized to foreclose the mortgage..... 226
An agent authorized to foreclose a mortgage, and bid in the property, who does so in his own name, holds for the benefit of his principal 226
Authority to receive notices ceases with the principal's death 749
Agent is not liable to suit on a contract made in behalf of a disclosed principal.... 663
A collecting agent, receiving Confederate notes in payment, without authority, is liable 678
Agent will not be directed to deliver up papers in his possession if he has a lien thereon 804

PRINCIPAL AND SURETY.

The creditor is not bound to use active diligence to enforce his claim against the principal debtor unless requested by the surety 660
A surety can require the creditor to proceed first against the principal, only when his suretyship appears on the face of the instrument, or when he offers indemnity.. 289
An application of payments once made will not be varied so as to affect the liability of a surety..... 665
A surety holding collateral security for his indemnity is a trustee for the creditor, where the debtor is insolvent..... 508
A surety discharging the debt of his principal is subrogated to all the rights of the creditor 743
The assignee in bankruptcy, having paid a debt for which the bankrupt was surety, is subrogated to the rights of the creditor.. 289

PRIZE.

American ship trading, under enemy's pass, without permission from home government, is confiscable..... 227
Where, upon ship's papers, enemy ownership is doubtful, condemnation will be delayed, though no claim is interposed.... 242
After a year and a day without claim made, condemnation is of course..... 242
A war vessel within signal distance of another, making a prize, is entitled to share, but is not a part of the "capturing force," so as to make it superior, and cause the prize to be divided equally with the government 116
When the "capturing force" is superior, within the act providing that in such case the prize shall be divided with the government 116
On interlocutory sales of prize, marshal must bring proceeds of sale into court, with a regular account..... 241
Vessel and cargo condemned for attempt to violate blockade..... 763

PUBLIC LANDS.

The occupant law of Tennessee, so far as it violates the compact with other states by giving preference to its citizens over those of the other states, is void..... 1005
Actual settlement consists in clearing, fencing, and cultivating the land, and erecting a house fit for habitation and actual residence 543
Mere improvement, without occupancy and bona fide intention to reside, does not constitute a settlement..... 543
Title to lands by settlement, survey, etc., under Act. Pa. April 3, 1792..... 543
Land once occupied as a town site, but abandoned, may be taken up and held under the donation act as unoccupied public land. 1167

Page

A certificate of location does not convey the legal title until the segregation of land is completed 429
Equitable title passes on entry and payment, though patent is not issued, and such land is liable to taxation..... 71
Grantees pendente lite from the original grantee of public lands are entitled to contest a survey, though the majority owners approve it 432
A patent for lands paid for by the father, but delivered to his son of the same name, who was described, by his residence, as the grantee, is valid until vacated for the mistake of description..... 300
Equity has no jurisdiction to affect a patent except upon the ground of an antecedent equity in the plaintiff, disregarded in the issuing thereof.....1167
Questions of fact decided in the land department are not subject to review by the courts, except for fraud or mistake other than an error of judgment.....1167
Whether a settler under the donation act upon unsurveyed lands could commute his residence under Act Feb. 14, 1853, and Act July 17, 1854, is a question of law, and the decision of the land department thereon may be reviewed at the suit of a party having a prior equity.....1167

RAILROADS.

Statutes relating to the construction of the Baltimore & Ohio Railroad construed 574
A mortgage by a railroad of all property then in its possession or thereafter acquired includes railroad subsequently leased, and the title to such leased road is good in the hands of the mortgage trustees, as against assignees in bankruptcy of the mortgagor.. 841
A decree for plaintiff on a bill to set aside a railroad mortgage foreclosure, and subject the property to payment of their judgments, renders the foreclosure invalid only as to the creditors who filed the bill..... 862
Irrespective of city ordinances, speed of train across streets should be such as to permit stoppage within reasonable time... 827
When an engine is backing a train across city streets, there should be a lookout.... 827
Great care and vigilance is required where there is steam or smoke upon the track 827
A railroad company allowing trains of another to run over its track is responsible, as to its own passengers, in the same manner as if all the trains belonged to itself.. 935

REAL PROPERTY.

Act N. Y. March 24, 1797, to settle disputes as to titles to lands in Onondaga county, construed, and *held* valid..... 811
A perception of the esplees is evidence of seisin, but this is presumed under a deed... 903
Under statute of uses, entry not essential to complete title..... 903
A tenant in common cannot, without consent of his cotenants, grant permits to others to cut timber on the premises..... 495
A purchaser at a tax sale by a tenant in common in possession, who is an agent of the other cotenants, will be *held* to be in trust for them..... 495

RECEIVERS.

Counsel's services to receiver are included within decree giving priority to claims for "labor in operation of the road".....1080
Advances to pay wages of employes on condition of reimbursement out of first net earnings will be paid out of income in receiver's hands in preference to mortgage claims 90

REFERENCE.

Page

Evidence not laid before referees cannot be exhibited to the court on exceptions to the report 984
Effect of auditor's report on reference of accounts in an action at law..... 945

RELIGIOUS SOCIETIES.

A church conference may consent to division of church into two bodies, which will carry with it a division of the common property 994
Commissioners appointed by one of such divisions may maintain bill against trustees of common property for a division..... 994

REMOVAL OF CAUSES.

Right of removal.

In ejectment against a tenant. a nonresident owner, admitted as a defendant, is not entitled to a removal.....1188
A suit commenced against a foreign corporation in a state court by publication of summons as provided by law, followed by attachment of its property, may be removed, though the federal court could not originally have compelled submission to its jurisdiction 894
A suit against a bank to recover for neglecting to protest drafts forwarded by a correspondent bank, brought by an assignee of the right of action, is not a suit to recover the contents of a chose in action in favor of an assignee. (Act 1789, § 11)... 894
Act Feb 5, 1867, authorizing removal for local prejudice, overrides section 11 of judiciary act as to suits by assignee..... 778

Time for removal.

Petition filed before trial, and at first term after passage of act of March 3, 1875, is in time..... 472
Causes in Iowa being triable by law at the first term after service of process, such term limits the time for removal, though issue is not then formed..... 189

Proceedings to obtain.

A cause cannot be removed on petition of one of two defendants.....1188
Petition for removal may be amended in federal court to conform to facts..... 778
Cause will not be remanded because bond filed under Act 1875, and duly accepted by state court, was in terms as required by Act 1866 472

Effect of removal: Subsequent proceedings.

Filing of petition and bond, ipso facto, deprives state court of jurisdiction..... 1
Where removing party fails to file a copy of state court record, opponent may file it.. 1
An attachment of property made before the removal will continue to hold the property to answer the final judgment of the federal court..... 894

REVIEW.

Bill of review can only be sustained upon ground of error in the record, which does not include the evidence..... 809

SALES.

A contract to buy, made by a broker, on condition that the seller should get information as to the purchaser's financial standing, and, if unsatisfactory, accept security, is enforceable 103
Where the buyer does not accept a modification of terms of payment proposed by the seller after delivering the goods, the original terms remain in full force.....1040

Page

The right of stoppage in transitu exists in favor of the seller of imported goods "to arrive," entered in his name, and stored in a bonded warehouse.....1191

The indorsement and delivery by the consignee of a cargo of coal en route of a bill of lading to purchasers at a certain price per ton, and its acceptance by them, is a sufficient delivery to pass title.....201, 506

That goods sold on credit were allowed to remain in the seller's warehouse, at option of purchaser, does not prevent the delivery being complete, a note being given for the price..... 911

Goods were deposited in a warehouse in the name of one to whom they were afterwards sold. *Held*, that no further delivery was necessary, and the seller's lien was lost 1013

Held otherwise where goods deposited in the name of another were sold to a third person, and no notice given of that fact...1013

Seller of goods delivered, where sale not complete because payment not made as agreed, may maintain replevin under Connecticut statute.....1040

It is not necessary to the seller's right of reclamation that he should return the buyer's unaccepted promissory note.....1040

Seller may sue before expiration of credit where goods were procured by false representations, and sold in fraud of creditors.. 927

The presumption is that the goods were sold for cash, or that notes taken were negotiable 927

A purchaser from one who bought corporate stock on a sale under an invalid decree of confiscation, after notice of the corporation's claim of invalidity, is not a bona fide purchaser 254

Party paying money in advance, to save a stipulated forfeiture for failure to pay the residue by a certain day, must use his best efforts to tender the balance.....1079

Measure of damages for breach of contract to deliver goods is difference, if any, in price between the goods contracted for and the market price at the place of delivery 832

SALVAGE.

Right to salvage compensation.

Two vessels at anchor come in collision in a storm without fault. To prevent the destruction of both, one slipped the cable, and went ashore. *Held* not a salvage service 1161

Rescuing runaway slaves, destitute of food or water, adrift at sea, is a salvage service 1006

Regularly authorized and licensed pilots are entitled to salvage compensation where their services are extraordinary, and beyond the strict line of their professional duty 1136

Claim of one who floats and repairs abandoned stranded vessel is in the nature of salvage, and takes precedence of prior maritime liens, though such person held immature mortgage 885

Small tugs assisting, for less than an hour, a large tug in pulling off a steamship aground in a harbor, entitled to compensation as salvage service..... 463

Vessel is not liable for salvage services rendered under contract with a wrecking company in charge of the vessel..... 479

Forfeiture or reduction of salvage.

Wreckers who unnecessarily lighten a vessel, to magnify their services, forfeit all salvage 227

Salvage cannot be given by way of set-off when the finder of a whale adrift has throughout contested the title of the owner 966

Page

Negligence of salvors in failing to make sounding resulting in a vessel being heaved off one shoal, and onto another, will reduce salvage 14

Amount.

Moiety is usually the highest compensation allowed 1192

A contract in a salvage case, not made under pressing necessity, will be enforced..1192

Rule of salvage fixed by contract is not imperative as to subsequent services.....1192

Increased compensation will not be given on account of the employment of supernumeraries 14

Vessel is not derelict where master and crew voluntarily leave while in peril with bona fide intention of returning.....191, 1136

Moiety allowed where vessel abandoned and partly stripped was worked into port.. 9

Where vessel and cargo were of the gross value of $73,000, 15 per cent. of net value allowed 14

For saving cargo and material valued at $41,756, 30 and 50 per cent. allowed..... 75

For saving vessel and freight valued at $3,500, salvors allowed $1,200..... 191

For piloting into port brig found among dangerous shoals, worth, with cargo, $12,000, wrecking vessel allowed $900..... 209

Small tugs, assisting in pulling off steamship worth, with cargo, $500,000, aground in harbor, allowed $1,200..... 463

For bringing into port ship and cargo worth $38,000, left by master and crew in peril, with intention of returning, pilots awarded $2,400 1136

Costs.

The costs of the proceedings for salvage compensation in rescuing runaway slaves in a stolen canoe are not chargeable to owner of canoe, but to owner of slaves....1006

Appeal.

On appeals in salvage cases, onus to prove mistake of law or fact is on appellant.....1192

SCIRE FACIAS.

If some of the terre-tenants named in the sci. fa. are returned "nihil," an alias sci. fa. must issue..... 460

Material variance between record of recognizance and recital of it in sci, fa. is fatal 866

SEAMEN.

The contract of shipment.

Seamen are competent to bind themselves by contract as to rate of wages..... 121

Contract introducing unusual terms must be explained to seamen, or it will be set aside 236

The stipulation that compensation by share in earnings shall be proportioned to the time served in the voyage will be enforced 121

Contract of shipment not in writing is not binding, and seamen may quit at any time, and demand highest wages paid at port. (Act 1790) 236

Whaling voyage not within Rev. St. § 4520, requiring shipping articles to specify certain particulars 121

A hiring "for the season" of navigation is presumptively for the entire season..... 547

The "season of navigation" on the Great Lakes comprises the eight months commencing April 1st, and ending November 30th.. 547

A seaman receiving injury in performance of his duty is entitled to be treated and cured at expense of the ship, though compensation is by share in earnings..... 121

But such liability is usually limited to time necessary to enable him to return home 620

Page

Expenses of care and cure of seaman on shore chargeable to ship which has no means to care for him..... 303

Consul cannot order discharge of seamen in foreign port, except upon consent given, which consent must affirmatively appear when such discharge is set up in defense to suit for wages..... 121

Words which might imply a discharge, when spoken in anger, where seaman is ordered next day to do his duty, do not amount to a discharge..... 280

Where seaman proves unfit for service for which he was shipped, he may be degraded..... 236

Penalty on master for permitting use of spirits contrary to articles..... 303

Services required.

A mate whom the master refuses to allow to act in that capacity need not act in any other station..... 115

Licensed pilot, employed to remain on vessel to take her in and out of port, is subject to master's discipline, but not liable to ship's duty except when in charge as pilot 1198

Conduct of master or mate in respect to seamen.

Mate may be displaced by master for cause. Grounds..... 115

Master is not justified in ordering regularly employed pilot ashore, for failure to obey order to leave quarter deck.....1198

Use of force to compel obedience of pilot *held* a trespass.....1198

Master has authority to correct by corporal punishment the negligence or misconduct of any of the crew as such..... 587

Master has no authority to punish seamen creating ill feeling in another ship's crew, by false and malicious representations about their master..... 587

Mate is liable for striking in anger, and not as discipline, a boy, for using an opprobrious epithet in reply to a charge of theft 322

Wages—Right to.

A mate unlawfully or unjustifiably displaced by master may recover full wages for voyage..... 115

Commissions of 2½ per cent. for selling oil, and charges for fitting and discharging ship, disallowed in determining lay.....1025

Interest allowed from filing of libel for lay in whaling voyage.....1025

Seaman entitled to amount actually due at time of discharge where his assent was induced on payment of a nominal sum, from just apprehension of ill treatment.....1025

The amount he received by shipping in another vessel cannot be considered.....1025

A seaman wrongfully discharged is entitled to an indemnity, in ascertaining which subsequent expenses and earnings may be considered.....1025

Seamen, in whaling service, discharged abroad, are entitled to benefit of statute giving three months' extra wages.....1025

—— Remedies for recovery.

Seamen have lien on vessel, notwithstanding charter party bound charterers to pay crew..... 3

Lien will be held to have been waived by taking note from master, and nine months' delay..... 576

Lien lost by unexplained delay of four years, where rights of bona fide purchasers intervened..... 2

Incidental condition of contract to work on shore does not deprive seamen of lien.. 3

Mate may sue for wages the same as seaman..... 115

No set-off allowed on libel for wages, except a payment on account..... 410

Wages — Deductions: Extinguishment, etc.

Page

British seaman does not forfeit wages by coming on shore to legally demand payment 280

Leaving vessel before expiration of time of service, without consent of master, with intention not to return, constitutes desertion, and forfeits antecedent wages, unless reasonable excuse is shown..... 547

The fact that meat used on board was for a short time slightly tainted is no excuse for desertion..... 547

Sickness is an excuse for leaving vessel.. 937

Master of whaler has no right to charge commission on money paid to crew on voyage..... 303

SERVICES.

In the absence of any contract, between brother and sister living together, to pay her for domestic services, she has no claim on him for such services..... 976

Where value of extra work has not been fixed by arbitration, as agreed in building contract, evidence of such value may be given in action upon a quantum meruit... 464

SET-OFF: COUNTERCLAIM.

In an action by an insolvent for the use of his trustee, defendant may set off plaintiff's note to a third person, coming to his hands before the insolvency..... 759

It is a good ground of exception to a claim in reconvention that it has been substantially adjudicated between the same parties in another state, where it was pleaded as a counterclaim..... 906

A claim in reconvention should be pleaded with the same precision and detail as an original cause of action..... 906

SHIPPING.

Public regulation: Title to vessel.

Unless a proper manifest be tendered to the collector by the commander of the vessel, the collector is not bound to grant a clearance..... 987

Production of certificate of compliance with state inspection laws not necessary to entitle to clearance..... 988

Exportation of American produce in American vessels to British ports on the continent not enumerated as open ports not unlawful. (Act March 1, 1823)..... 132

It is not a foreign voyage if the delivery of the cargo is made within United States waters, though to a British subject residing on the British side of the stream..... 132

The register of a vessel is not, per se, evidence of ownership..... 988

Employment of vessels.

Vessel chartered by a person to carry out his agreement to transport cargo for a certain company is liable in admiralty for breach of the contract..... 170

Shippers must notify carriers of their wishes as to stowage where they consider the notorious custom of stowing such goods hazardous 1048, 1053

Passengers on steamship entitled to reasonable accommodations and conveniences, irrespective of the class in which they travel..... 383

Contract of carriage by second cabin, when considered broken by reason of overcrowding, and lack of reasonable accommodations, and damages therefor..... 383

The master.

Has no lien for wages..... 983

Remedy to enforce payment for services in performance of pilot's duties is in personam, and not in rem..... 983

Page

Remedy for advances for supplies and repairs is in personam..... 983
Cannot assert a lien for additional pay for standing on watch as pilot..... 983
Is liable for all injury caused by unlawful displacing of mate..... 115
Cannot buy cargo at his own sale as agent of owners..... 817
Cannot claim a lay in oil made by part of his crew, left behind after the ship is fully loaded, and brought home by another vessel 303
An agreement for a certain lay on securing a full cargo of oil is enforceable where a full cargo is secured, but not the number of barrels named 303
Master giving another ship-master, brought home by him, a receipt for passage money in a larger amount than actually received to enable the latter to charge the sum to his owners, liable for full amount of receipt 303
No account against a vessel is chargeable against a master unless presented within a reasonable time..... 410

Liens—Generally.

No court can by rule create maritime liens or change the order of existing liens.. 513
The general maritime law gives a lien for a maritime tort upon the offending vessel which travels with the vessel, into whosesoever hands she may go, and irrespective of the place of transfer..... 255

—— For repairs and supplies.

A vessel registered in New York was bought by a resident of Washington, D. C., for use on the Potomac river, and was repaired and supplied in Connecticut on the credit of the vessel. *Held*, that there was a lien as for repairs and supplies in a foreign port 515
Ships, whether domestic or foreign, liable for repairs, etc., furnished at express or implied request of owner or master, whether in home port or not. (Adm. Rule 12, as amended 1872.)..... *209
Ship carpenters employed by contractor have lien, unless there is express or implied notice that they must look only to the contractor 209
A libel by employes of a contractor, which fails to allege that the contractor had authority to make the repairs or to employ libelants, is insufficient..... 209
Mere proof that sails were furnished by written order of master, with directions to charge them to the vessel and her owners, is not sufficient to establish lien for supplies *1101

—— Priority and enforcement.

Mortgage lien (Rev. St. § 4192) is inferior to all strictly maritime liens, but is superior to subsequent liens given by state legislature for supplies in home port..... 513
Proceeds of sale of vessel may be applied in extinguishment of mortgage, though it cannot be foreclosed in equity..... 983
A remedy given by the general maritime law may be enforced against a vessel, although she was seized and sold under a state statute..... 10

—— Waiver, discharge, and extinguishment.

Notice to purchaser will keep lien alive if sufficient purchase money remains unpaid to meet it 73
Purchaser of vessel is bound to exercise reasonable diligence to ascertain nature and amount of existing liens..... 73
As against bona fide purchasers without notice, lien for repairs and supplies in foreign port, *held* not lost by eight months delay to enforce it..... 515

Liens—Under state statutes. Page

A state legislature cannot create a lien upon a vessel which shall have priority over one already existing under an act of congress 513
Sale of vessel under decree of state court, in satisfaction of lien under state law, extinguishes prior maritime liens, and is binding on courts of other states..... 238

SLAVES.

When deed of, not invalidated by removal 702
Importation from Virginia to District of Columbia *held* not contrary to law.....1037
Finding of 300 Africans on board a vessel *held* sufficient proof of probable cause for issuing warrant of arrest for engaging in slave trade 1015

SPECIFIC PERFORMANCE.

Sufficiency of execution of deed of infant by guardian under decree for specific performance 737

STATES.

A state may by contract give certain persons exclusive privileges..... 580

STATUTES.

Act not void because its title misrecites the date of the act to which it is supplementary 574
Act not void because its title purports it to be an act supplementary to an act which expired by its own limitation, where such act was subsequently revived..... 574
Implied repeal not inferred by omission of short expression in repetition in supplemental act of section of former statute.... 37
Relating to construction of state roads and canals construed according to their spirit, though seemingly contrary to their letter 784
An authority to appropriate private lands will be implied as necessary to effectuate the object of the statutes providing for the construction of state railroads and canal 784

TAXES.

Individual property held within the state may be taxed by the state. The property of the Bank of the United States is no exception 692
Land purchased from the United States, and paid for, is liable to taxation, though patent not issued..... 71
Exemption of Atlantic & Pacific Railroad Company from taxation under Mo. Act Dec. 25, 1852.....173, 365
Back taxes on realty (in Missouri) cannot be collected from the personal property of a subsequent purchaser..... 173
The corporation of Alexandria has a right to collect taxes by distress and sale and to raise taxes for purposes and works out of the town.....1108
Replevin lies for property seized by a tax collector under void assessment..... 173

TELEGRAPH COMPANIES.

Not authorized by acts establishing post roads, or Act July 24, 1866, to establish lines over right of way of railroad company without making compensation..... 176

TENDER.

A declaration by a person that he will not receive money about to be tendered excuses its production..... 818

Page

A tender to the pledgee of a vessel, who has bought her at an attachment sale, by another creditor, must include the expense of repairs made by him..... 818

TREATIES.

The right to reside in the United States, given by treaty, implies the right to labor there, which right the states have no power to restrict..... 472

TRESPASS.

In an action for a tort to personal property, possession, accompanied by an assertion of ownership, is prima facie evidence of property..... 988

TRIAL.

An action to recover for payments due under a railroad construction contract is not local 280

Plaintiff in an action at law cannot be ruled to trial without notice where defendant has filed a bill in equity on the ground that the remedy at law was not adequate.. 768

Where one of joint defendants offers ready for trial, plaintiff cannot continue until the other is taken, but may amend.... 637

Party holding affirmative of issue has right to open and close argument.....1119

On a plea of tender, etc., defendant has right to open and close..... 215

The court will not give an instruction unless justified by the evidence. Rules of determining such fact 601

Question of usury in written contract is for court 750

Court cannot, upon a special verdict, infer facts not actually found..... 615

Upon a demurrer to evidence, judgment not rendered for plaintiff if declaration substantially defective 733

TRUSTS.

Trustees under an assignment of assets for certain purposes cannot vary its terms and accept payment of debts in a manner not contemplated therein..... 687

The legal estate passes by a deed of bargain and sale made by a trustee, whether the terms of the trust are complied with or not 686

There can be no disseisin of a trust, though the exercise of an adverse possession for a great length of time may in equity bar it..... 495

Time begins to run against a trust only when its open disavowal is clearly and unequivocally made known to the cestui que trust 495

Jurisdiction of courts of equity over trusts, and of the appointment of agent... 804

Trustees are entitled to commissions of 5 per cent. on money passing through their hands 31

USURY.

Ill. Act 1857, in relation to interest and usury, construed 911

The statute of usury applies to contracts of corporations..... 607

The discount by a bank of a note made directly payable to itself is not usurious.. 679

Compound interest is not illegal, and may be recovered when a part of the contract.. 407

Charging interest on balances of running accounts, regularly transmitted according to custom of trade, is not usury..... 777

Taking 64 days' discount on a 60 days' note is not usury..... 691

Page

Treating a note as discounted on the day of its date, where proceeds were not carried to the credit of the party until later, is not usury where checks were previously drawn against it 750

Usury cannot be set up or bill to set aside mortgage unless it is alleged..... 521

Assignee in bankruptcy is not a "legal representative" within statute allowing recovery of penalty from national bank for usury 880, 901

Nor is an indorser of a bill of exchange such "legal representative"..... 880

WAR.

License from blockading squadron to neutral vessel carrying provisions will not authorize refusal of clearance unless illicit intercourse contemplated 988

Party failing to remove the suspicions by evidence in his power, is not entitled to damages for refusal of clearance..... 988

WATERS.

A riparian owner on navigable but nontidal stream is presumed to own the land to the center line of the stream..... 245

An alteration in the course of a navigable stream which deprives a riparian owner of its use as an incident to his land is a taking of private property for which compensation must be made..... 245

WILLS.

An executory devise *held* good, and to take effect on the happening of the contingency 1172

A general testamentary disposition of all one's "estate, real and personal," to his "heir at law," by one who has no realty, is not a disposition to the next of kin..... 37

"Heir at law," when used in context as a synonym with "lawful heir," does not create an ambiguity, and must be held to mean in Pennsylvania, where testator was technically domiciled, though resident most of his life in England, the person on whom the law of Pennsylvania casts an intestate's estate at the time of his death, though testator evidently meant otherwise 37

A bequest of slaves on condition that they be not carried out of the state or sold, in either of which events said slaves are to be free, is a conditional bequest of freedom, and valid as such..... 7

Upon a devise that a slave should be sold for eight years, after which he should be free, the term begins to run from testator's death, or within a reasonable time thereafter 1096

WITNESSES.

Maker of note cannot be compelled to testify for plaintiff in an action against the indorser, but his letter to plaintiff inclosing note for discount is admissible..... 754

When a certificated bankrupt who has released all future claims upon his estate is a competent witness..... 858

The assignor of the patent is not competent to prove priority upon an interference declared 954

Grantor in deed collaterally introduced, in cause inter alios, is competent to prove that the deed was fraudulently obtained.. 631

Maker of note is competent for indorser.. 631

A stockholder in a company which itself owns stock in plaintiff company is competent for plaintiff..... 614

Wife of one of defendants not competent for plaintiff, though husband has been discharged under insolvent act 614

	Page
A creditor of a firm is competent to prove its existence	614
The cashier of a bank is competent to prove that defendant has overdrawn his account	607
In an action by the indorsee against the maker of a note, the indorser is competent to prove an acknowledgment to remove the bar of the statute of limitations	600
One interested in result of suit is not competent	429
A witness may be competent to testify to general reputation of pedigree, though not one of the family or intimately acquainted with it	583
A bookkeeper of a bank is not obliged, in an action between the bank and a depositor, to answer a question, where the answer might charge him with a loss	741
Counsel may testify as to facts not communicated to them in confidence by their clients	631
Counsel for bankrupt cannot be required to disclose information as to affairs of bankrupt obtained from him or persons referred to by him	64
Witnesses can testify on affirmation only when members of a religious society professing to be conscientiously opposed to oath	647

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